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10 years of International Criminal Court and the Fight Against Impunity

Ladies and Gentlemen,

It is a true honour to be able to address a few words to you here today about the birth, childhood and future of the International Criminal Court (ICC). I am happy to visit Egypt in a period of many changes and many expectations. I am glad to be able to address this forum of the future decision-makers of Egypt. This is also my first visit in my present capacity to the African continent. From Cairo I am on my way to Addis Ababa, the seat of the African Union, to talk and listen to States Parties and to see how we can work together. The ICC is perhaps the most important international organization to enter the stage of international affairs since the establishment of the United Nations itself. It investigates and prosecutes the three crimes that are considered by the international community to be the most heinous: genocide, crimes against humanity and war crimes.[1] It is a permanent Court and as such has jurisdiction over widespread or systematic commission of those three crimes starting 1 July 2002. It is also a treaty-based Court, which means it has jurisdiction only if such crimes are committed on the territory of a State that has joined the Rome Statute or if the alleged perpetrator is a national of such a State. We can therefore say the system created by the Rome Statute is a consent-based system, with one major exception: the UN Security Council has the power to refer

[1] It is also foreseen that it will gain jurisdiction over the Crime of Aggression, see more below.

situations which occur in non-States Parties to the ICC and has done so in two cases, Darfur and Libya.[2] It is also worth remembering that the ICC is a court of last resort. Only if the State with the primary jurisdiction over the crimes proves to be unable or unwilling genuinely to carry out the investigation or prosecution can the ICC take up the case.[3] This is known as the complementarity principle and forms the bedrock of the Rome Statute system.

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Seen in historical terms, the thought of applying judicial mechanisms to international relations is a relatively new idea. But whereas a permanent court for disputes between States has existed since the advent of the League of Nations in 1920,[4] the idea of an international court holding individuals accountable for international crimes is considerably newer stemming from the end of the Second World War, and the trials and Nuremberg and Tokyo. In the heady optimism that followed the end of the war and the establishment of the United Nations, the drafters of the Genocide Convention referred to a prospective "international penal tribunal,"[5] the establishment of which was never taken any further due to the onset of the Cold War. The 1990s and the end of the Cold War again ushered in a time of optimism. True, horrendous crimes were committed in the Balkans, in Rwanda, in Sierra Leone and elsewhere. But the international community, having been unable to stop the commission of these crimes, felt obliged to follow-up by creating the *ad hoc* International Criminal Tribunals for Rwanda and the Former Yugoslavia and the hybrid Special Court for Sierra Leone. At least the perpetrators of these crimes would be held accountable.

While there is no denying that this was a step in the right direction, the flaws in this system were palpable. The *ad hoc* tribunals were created by the Security Council

[2] Rome Statute, article 13, paragraph b.
[3] *Ibid,* article 17, paragraph 1 (a).
[4] It was then called the Permanent Court of International Justice and is now called the International Criminal Court.
[5] Genocide Convention, article VI.

utilising its powers under Chapter VII of the Charter and could thus be seen as being "imposed from above", decided by the "powerful 15" or indeed even only by the 5 permanent veto-wielding members of the Council. Also, nobody denied that grave crimes had been committed elsewhere – were victims of these not just as deserving of justice as those in the few countries that had caught the attention of the Council? On a more prosaic front, it is also horribly inefficient to build a new court from the ground up every time a spate of serious crime occurs: one has to find a new prosecutor, new judges, never mind a new building, new computers etc. It became clear to many that in the long run, a permanent international court to try individuals for the gravest crimes was needed.

What shape should this court take? If you asked the main sponsor of the initiative in the UN General Assembly, Trinidad and Tobago, the answer you would get would be that this court should deal with transnational crime, such as drug trafficking, that often tests the capacity of national judiciaries. Others insisted that the Court should only deal with crimes that were already prohibited under international law, and only the most serious ones.[6] While questions as to the scope of the Court certainly took time and effort to thrash out the more difficult question was how an ICC investigation and subsequent prosecution should be triggered. The United States and other permanent members of the Security Council were adamant that given the Security Council's primary responsibility for international peace and Security under the UN Charter,[7] only the Security Council could grant the authority to proceed with an investigation. Others argued that a referral by a State could also trigger an investigation. A Likeminded Group, finally, insisted that while those two triggers were well and good, the Prosecutor must also have the authority to open investigations on his own motion or, to use the language of the Statute, *proprio motu,* should the circumstances so demand.

[6] Leaving aside such crimes as slave trade and piracy, for which clear international prohibitions have existed in international law for at least a century.
[7] United Nations Charter, Article 24, paragraph 1.

The Statute that was adopted in Rome on 17 July 1998, in a non-recorded vote called by the United States reflected a compromise.[8] Regarding the scope, a decision was made to limit the Court to the most serious crimes already illegal under international law, namely genocide, war crimes and crimes against humanity. The definition of the elements of these crimes, however, was truly progressive, especially as concerns the inclusion of crimes of sexual violence in the definitions of war crimes and crimes against humanity. The crime of aggression was also included, but only as a placeholder, with agreement on the exact definition and the conditions for the exercise of the Court's jurisdiction over this crime postponed to a review conference. The Statute provided for situations to be brought before the Court either through referral by a State Party, referral by the Security Council or by the Prosecutor's own motion. In the case of a *proprio motu* investigation, however, the assent of a Pre-Trial Chamber was first required.

The Statute itself is a fairly balanced blend of the civil and common law tradition. The jury is still out, however on efficacy of the system the Statute created for trials. Besides a main Trial Chamber, which hears the case, and an Appeals Chamber, which deals with both interlocutory and final appeals, a Pre-Trial Chamber was introduced. This Pre-Trial Chamber checks the Prosecutor's *proprio motu* powers and also confirms the charges brought by the Prosecutor. Useful functions, to be sure, but the necessity for these fairly lengthy proceedings to be heard by a different panel of judges than the main trial has been questioned by some. Besides the Court itself, the Statute also created a (voluntary) Trust Fund for Victims and an Assembly of States Parties, which was to elect the Prosecutor and judges, to adopt amendments to the Statute and its Rules of Procedure and to oversee the Court's administration. The fact that the prosecutor and the judges are elected by the States (and not appointed by the UN Secretary General as was the case with ad hoc tribunals) puts a considerable responsibility on the States Parties to select the best of the best for this truly historic institution.

[8] Though officially non-recorded, we know that 120 States voted in favour, 7 against with 21 abstaining.

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The Statute was opened for signature on 17 July 1998. Many of those who signed the Statute on that sweltering day in Rome's *Capitolino* thought they might not live to see it enter into force. All but the most geriatric signatories were proven wrong when, less than four years later, on 1 July 2002 the Rome Statute entered into force. Now, nearly ten years later, is as good a time as any to reflect on the successes of the Court, and those of its Assembly of States Parties.

The ICC's first Prosecutor, Luis Moreno-Ocampo, likes to say that when he was elected as Prosecutor many of his colleagues at Harvard, where he had been teaching, thought he had taken leave of his senses: with the US actively working against the Court, surely, it was doomed to fail. Certainly, he should not expect to actually work on any real cases during his nine-year tenure. Reality, fortunately, has been somewhat kinder to the ICC than these nattering nabobs of negativism would have led us to believe. Nearly nine years after Ocampo took his solemn undertaking as the ICC's first Prosecutor, the Court has before it 15 cases in seven situations. This March, the Court rendered its first verdict, finding Thomas Lubanga Dyilo guilty of enlisting and conscripting child soldiers. This case will now enter the reparations phase, a mechanism unique among the international tribunals. Having found the defendant guilty, the Court can order reparations to be paid to his victims. Such reparations disperse, first and foremost, the assets of the convicted persons. These assets can also be complemented by funds from the Trust Fund for Victims, especially if, as in the case of Mr Lubanga, the convicted person is indigent.

One of the great successes of the Rome Statute system has been the implementation of the rights it grants to victims. Victims participate in all the trials currently before the Court, where their legal representatives are called upon to make observations as well as cross-examine prosecution and defence witnesses and to call witnesses of their own. Victims therefore no longer rely exclusively on the Prosecution to defend their interests, but are able to directly participate in the proceedings. Word about

this appears to have gotten out. Whereas in the Court's first case, the trial of Mr Lubanga, only 129 victims registered to participate, 560 victims were authorised to participate in the two Kenya cases, which are the latest cases to be committed to trial. Beyond the courtroom, the Trust Fund for Victims, through programmes targets the specific needs of the victims of the conflicts. The Trust Fund has reached out to 80,000 people in the Democratic Republic of Congo, in Uganda and in the Central African Republic. At times it is helping with prosthesis for the mutilated limbs, assisting the victims of mass rapes and children born from these rapes. To give you an example of its work, a project in the Ituri region of the Democratic Republic of the Congo provides education, day care and basic healthcare services to 67 girls who had been abducted by the armed forces and had borne children while in captivity. Given the financial situation of the Trust Fund, it has to focus on very specific projects, but it nevertheless does very important work.

Situations can come before the ICC in one of three ways: through referral by a State Party, through referral by the Security Council and through the opening of an investigation under the Prosecutor's *propriu motu* powers. What had not really been anticipated at Rome is that States would refer the situations in their own countries to the Court. But on 29 January 2004, the government of Uganda referred the situation in its own country to the ICC. The governments of the Democratic Republic of the Congo and of the Central African Republic followed suit shortly thereafter. The referrals of these situations resulted in the first cases to be investigated and tried before the Court, including the recently-concluded trial of Mr Lubanga. A self-referral is a true act of political courage as it involves a public confession that one's own judiciary is not capable of investigating and prosecuting the perpetrators of a set of crimes in an adequate manner. By self-referring to the ICC, however, these States gave the victims of the heinous crimes that occurred there a chance at justice. They also expressed confidence in a Court that, in 2004, had only just arrived on the scene.

Two times has the Prosecutor successfully applied to open an investigation *proprio motu,* in Kenya and in Côte d'Ivoire. You will recall that any such own-motion investigation must first be approved by the Court's pre-trial chamber. It is also noteworthy that in both situations, the Prosecutor had the full support of the government of the territorial State when opening his investigation. The outbreak of violence after the 2008 presidential elections in Kenya shocked the world, and led to a number of national and African efforts to ensure justice for the victims. Only when all other avenues were exhausted and the establishment of a local tribunal had failed in the Kenyan parliament did the Prosecutor apply to open an investigation. In a memorable moment, he made his announcement in Nairobi, flanked by both the President and the Prime Minister. The message was clear: Kenya wants these trials. It is a similar story in Côte d'Ivoire. After having come to power, President Ouattara's government realised that for reasons of internal political stability it was simply impossible for them to try those responsible for the violence that occurred after the 2010 elections. So why did the government not self-refer? Côte d'Ivoire is not a State Party to the Rome Statute. It *did* accept the Court's jurisdiction under Article 12, paragraph 3 of the Statute but could not refer itself or any other State to the Court. So, once again with the full support of the government, the Prosecutor applied to open an investigation in Côte d'Ivoire.

Let us, briefly examine the two situations referred to the Court by the United Nations Security Council. The first referral came in 2005, when the Security Council, with eleven votes in favour and four abstentions, referred the situation in Darfur to the Court. The resolution[9] was the result of tedious month-long negotiations – some of you might recall the discussion about the exact definition of genocide. In the end, no consensus could be reached, so Algeria and Brazil joined China and the US in abstaining. Other African members Benin and Tanzania voted in favour. By way of contrast, when the Security Council referred the situation in Libya to the Court in February 2011, it did so unanimously, after only a few days of deliberations. It is true that the referrals reflected to a large extent the political

[9] S/RES/1593 (2005),

situation in the Security Council at the time, which at least partially explains the Security Council's unwillingness to follow up on them. The mere fact that they happened at all, however, shows the extent to which the international community – even the non-States Parties of the Court – trust the Court to properly investigate and prosecute the crimes they refer to it. It is noteworthy that there was no serious discussion in either case of setting up an *ad hoc* tribunal along the lines of the Yugoslavia and Rwanda tribunals. The Security Council has come to acknowledge that if it chooses to apply a justice mechanism to a situation under its consideration, the way to do so is by referring it to the International Criminal Court.

It is important to note that by making a referral the Security Council merely creates the jurisdiction of the Court in the situation concerned, it is up to the Court to examine if anyone should be prosecuted and if indeed Rome Statute crimes may have been committed.

Before turning to the future, allow me to briefly dwell upon a few more issues. The numbers of States Parties has grown significantly over the past few years. As I mentioned previously, it took 60 ratifications for the Rome Statute to enter into force on 1 July 2002. Since then, our membership has grown to 121 States Parties and has surpassed the number of States that voted in favour of the adoption of the Rome Statute in 1998. Still, there are 32 States that have signed the Statute but have not ratified. Egypt is one of them. The largest group of States Parties comes from Africa (33) followed by Latin America and Caribbean States (27) with Western Europe and Other States in third place (25).

As I briefly mentioned before, the crime of aggression was initially included in the Rome Statute only as a placeholder. Much to the regret of many no agreement had been reached on the definition of the crime. Deliberations were taken up again in the Special Working Group on Aggression, but frankly, few people thought that the

Review would be in a position to adopt any amendments on aggression.[10]. However, in June 2010 in Kampala, Uganda, States Parties not only adopted the definition of the crimes and laid down the conditions for the exercise of the Court's jurisdiction over this crime, *they did so by consensus.* According to the amendments "crime of aggression" means the planning, preparation or execution, by a person in a position effectively to exercise control over or to direct he political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[11] Note that the ICC is not in the business of putting States on trial. What it will be able to do, however, is hold to account the *leaders* of countries that have committed acts of aggression. Though a number of particularities attach to exercise of jurisdiction with regards to aggression that do not attach to the other three crimes, there is one fundamental difference. The Court can only exercise jurisdiction if the underlying act of aggression is carried out by a State Party that has not opted out of this regime.[12] In other words, the ICC will never be able to hold accountable the leaders of non-States Parties for acts of aggression.

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Time does not suffice at this point to give an entirely comprehensive overview of the achievements of the Court's first ten years. I hope I was able to convey the sense, however, that the Court is now very much up and running. Yes, we have the Rome Statute, which was revolutionary in many ways, but we have moved far beyond that and now have a living, breathing international institution. This international institution, though, is still in its adolescence and the future will bring with it challenges as well as opportunities.

[10] When the time came to consider the logistics of the Review Conference, at least one delegation suggested a one-day event. Under this model, having listened to speeches by dignitaries, concluded that nothing could be done about the crime of aggression and noted the absence of other business, representatives of States Parties would be at the pub by 6pm at the latest.
[11] Rome Statute, article 8*bis*, paragraph 1.
[12] See *ibid,* article 15*bis.*

In the coming years, the Court will have to come to terms with the criticisms of being too Africa-centric. The basis for this claim is the inescapable fact that all seven situations before the Court today are in Africa and that every single person wanted by or on trial at the ICC is African. There are a number of ways to respond this argument, all of which have their merits. One would be to note, as many do, that had the Court been founded in the 1940s, it would have been concerned chiefly with Europe. Had it been founded in the 1970s, it would have been preoccupied with the crimes of the military dictatorships in South America and had it been founded in the early 1990s, it would have spent most of its time investigating the crimes committed in the Balkans. It just so happens that now, a majority of the worst crimes under international law is being committed in Africa. We should however also bear in mind that the prosecutor is undertaking a number of preliminary examinations in Latin America and in Asia.

There are other reasons as well why the court is mostly involved in Africa.. First of all, in each of those periods, there were Rome Statute-type crimes committed in other places as well, just as there have certainly been Rome Statute crimes committed outside of Africa since the Court's inception. The problem is, however, that crimes can be investigated by the Court only if they have been committed by nationals of States Parties or on the territory of States Parties or if they have been referred to the Court by the Security Council. If one is a leader of a country that is in the process of perpetrating crimes that fall under the Rome Statute, all it takes to immunise oneself is not to join the Rome Statute and to ensure that no referral by the Security Council will take place. So, for want of jurisdiction, the Court has been completely powerless to investigate the crimes committed in non-States Parties. Let us once more take a look at the situations currently before the Court: of the seven situations in Africa, two have been referred to the Court by the Security Council[13] and three have been referred by the States in question themselves.[14] Only in two

[13] Darfur and Libya.
[14] Central African Republic, Democratic Republic of the Congo and Uganda.

situations has the Prosecutor used his *proprio motu* powers,[15] in both cases with the express support of the government involved. With 33 States Parties, Africa is the best-represented region in the Assembly of States Parties so it would seem that African governments are just as hungry for justice as their peoples. Perhaps answer lies in a change of perspective: consider the situation from the viewpoint of the victims. Is it really such a bad thing for African victims that the crimes committed against them should be tried in The Hague, if their national judicial systems have proven to be unwilling or unable to give them justice?

You will forgive me for dwelling on this point for quite some time, but the issue should not be downplayed. The Rome Statute does not leave States Parties a margin of appreciation in determining whether to arrest a person against whom warrants of arrest have been issued, even if that person happens to be the head of a friendly State. Indeed, the system is reliant on the execution of such arrest warrants by States Parties. This rigid disrespect for official positions and immunities has led to a deep-rooted frustration among some members of the African Union (AU), which has found expression in the AU Summit repeatedly taking a number of decisions, which might be described as being unhelpful to the proper functioning of the Court. I think we have to be blunt here and say that several African States, some of them States Parties to the Rome Statute, are deeply uncomfortable with the idea of a sitting head of State being indicted by any court, no matter what crimes he or she is alleged to have committed. . This has created an increasingly difficult atmosphere which is entirely at odds with the reality at the technical level, where African States receive a majority of the Court's cooperation requests and comply with 85% of them. Despite the hope of many ICC observers, the mere fact that an African will soon head the Office of the Prosecutor will not and cannot change the way the Rome Statute system is set up and works. There has to be a sustained effort by States Parties to address these most complicated and delicate issues. I hope to do my part and engage with the African States parties and the African Union officials during my tenure.

[15] Côte d'Ivoire and Kenya.

Through media and civil society campaigns such as Kony 2012 on Youtube, increasing attention has been given to the need for execution of arrest warrants issued by the International Criminal Court. It is true that the Court issues a large volume of cooperation requests on a daily basis, many of them, no doubt, very important. It must be said unequivocally, however, that the execution of arrest warrants is the most important manner of cooperation for States Parties. The ICC's 121 States Parties – as well as Sudan and Libya by virtue of the Security Council referrals – have a non-derogable, inescapable obligation to cooperate with the Court.

In the coming years, States Parties will be called upon to make their contribution to improving the Court. Item 1 on the agenda in this regard will be the effective follow-up to the decisions taken at the Review Conference at Kampala. Nearly two years have passed since the amendments reading the crime of aggression have been adopted and we have scheduled the first deposit of the instrument of ratification. It is true that the amendments cannot enter into force until 1 January 2017, but in order for this to happen, thirty States will need to have ratified the amendments by that time. We also send a clear message to those non-States Parties that are considering joining the Rome Statute. While we of course welcome all new ratifications, the state-of-the-art is the 2010 Rome Statute, including the crime of aggression amendments, not the 1998 version. This is important also insofar as there are a sizeable number of States that had previously declined to join the Rome Statute until the crime of aggression had been included.

You will know only too well that international organisations like to speak in euphemisms. The Assembly of States Parties is no different; we call the drive to get more States to join the statute the "universality campaign". I have already mentioned the considerable successes. More States are now party to the Rome Statute than voted in favour of this Statute in 1998. We focus on States that have no substantive opposition to joining the Rome Statute, but might have technical problems — that can be solved as they have been solved in the case of other States

Parties. We also continue our dialogue with those States that *do* have substantive problems with the Statute, to broaden awareness and appreciation of the work the Court is doing even if joining the Statute is not an option for the near future. Like my predecessors, I am doing my part, both in New York, in The Hague and elsewhere, to drive the universality and awareness campaign forward.

In the beginning of the year, I had the pleasure of giving a lecture at the University of New South Wales in Australia, where I posited that to a certain extent, the challenge of the Court is to become a boring international institution. Having had a ten-year long pioneering phase, where a number of things were tried out for the first time, the challenge now lies in standardising processes for important, yet boring matters such as requests to States Parties to seize assets of those persons indicted by the Court. Standard procedures for such matters must be worked out and implemented, because only when there is a high degree of certainty on the part of the States Parties will the timing and level of cooperation become predictable to the Court. And while it would behove the Court to inject a level of boring predictability into its daily interaction with States Parties, I think it is just as important for States Parties not to forget that the Court is a unique organisation. While an international court combines attributes of both a national court and a UN-system international organisation, the fact of the matter is that is unique, and as such has unique requirements.

The Court will have to continue to conduct investigations half a globe away, with all the attendant logistical and linguistic challenges. Unlike a national judiciary, which might reasonably expect its case load to remain relatively the same year on year, one simply cannot exclude the number of situations before the Court increasing by 75%, as happened last year.

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By way of conclusion, we can say that the International Criminal Court has certainly arrived on the scene. It is now a well-functioning international organisation with all

the inherent problems and benefits. The Court depends on the active support and cooperation of its States Parties to do its job and would greatly benefit from a solid understanding and appreciation from non States-Parties about its merits and ways of functioning. We want to engage with non-States Parties in a constructive and open dialogue about the role of the ICC in the fight against impunity for the gravest crimes under international law. I also hope that Egypt will take a fresh look at joining this important international instrument.

I thank you.