Cour Pénale Internationale

International Criminal Court

Le Président
The President

Judge Chile Eboe-Osuji
President
International Criminal Court

Remarks at the opening of the
17th Session of the Assembly of States Parties to the Rome Statute

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5 December 2018
The Hague, The Netherlands

Monsieur le Président et Messieurs les Vice-présidents de l'Assemblée,
Messieurs les Vice-présidents de la Cour,
Honorables Ministres,
Honorables Délégués,
Madame la Procureur,
Monsieur le Greffier,
Monsieur le Président du Conseil de Direction du Fonds au profit des victimes,
Mesdames et Messieurs;

Je suis très honoré de prendre la parole devant cette Assemblée pour la première fois en tant que Président de la Cour pénale internationale.

Et je dois commencer par vous exprimer ma gratitude : pour la création de cette Cour, il y a 20 ans, et pour votre soutien sans faille.

C'est un privilège particulier que mon premier discours devant vous ait lieu l'année du vingtième anniversaire de l'adoption du Statut de Rome.

La commémoration de cet événement a été très réussie le 17 juillet dernier. Sous le titre de « Retour aux fondamentaux », ou « Back to Basics », nous avons saisi cette occasion pour encourager des réflexions sur ce que le Statut de Rome et la CPI signifient pour l'humanité, dont nous partageons tous les liens communs.

Au nom de la Cour, je remercie encore une fois les nombreux Représentants de haut-niveau des États et de la société civile qui ont participé à ces réflexions. Je suis certain que Son Excellence M. Kwon, qui a co-organisé l'événement (au nom de l'AEP), partage le même sentiment.

We are especially encouraged by the inspiring keynote address of Nigeria's Head of State, H E President Muhammadu Buhari, who attended the event as our guest of honour. In his own reflections, he said the following, among other things:

- He reminded everyone that the dangerous circumstances of our world today make the ICC an institution that is needed even in ways that its founders could not foresee;

- He called upon every State not yet party to the Rome Statute to make it a priority of State policy to ratify the treaty; and,

- He took the occasion to pledge to the world that the 2019 General Elections in Nigeria will be free and fair and, most of all, non-violent. That pledge alone remains a powerful testimony to the actual value of the ICC in inspiring correct conduct around the world.

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In the light of the 20th Anniversary Commemoration, I would be remiss to omit touching on the fact that in a little under two months later, there came a certain reproach deployed against the Court; generating a constant of wavelength, no doubt for its content, but more so for its source. Reproaches like that are not new. We have heard them before, from other sources, too.

But, I urge you to keep in mind that negative commentary, however severe and from whatever source, need not be taken as an alarming 'attack against the ICC' - as the temptation may press it upon us to see it. It is not necessary to demonise those who criticise the Court, merely because we see things differently.

The approach of the Court's leadership is, rather, to see these reproaches as part of the conversation or reflections that the whole world is entitled to have about the value of the Court to our collective humanity.

INDEED, beyond the need to address and correct the misunderstandings that such reproaches may reveal about the Court and its jurisdiction – always stressing, in particular, the principle of complementarity, as President Kwon has just done – the inspired reflections do much more.

They necessarily ask us what we can all do to make life a little more just for that unfortunate part of our humanity described in a moving sonnet at the foot of the Statue of Liberty in that great City of New York, as the 'tired', the 'poor', the 'huddled masses yearning to breathe free', and 'the wretched refuse of … teeming shore[s].'

Are global and national policies of our time doing all that can be done to improve their lot? Or will they be left avoidably still 'wretched' and still 'tired' and still 'poor', and still 'yearning' - in perpetuity - 'to breathe free'? Those are the defining questions of our own time on the stage of world affairs. It behoves us all to reflect on them.

And, we must do so, in order constantly to tune up our resolve against the repeat of events such as the reign of apartheid; such as the Srebrenica massacre of over 7,000 Bosnian Muslim men and boys, since judicially pronounced a genocide; such as the Rwandan Genocide that killed 800,000 Tutsis; and, such as the Holocaust that killed six million innocent people because they were Jews.

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Excellencies, Ladies and Gentlemen, as we engage in these reflections, please consider this. You established this Court 20 years ago and decided to locate it in The Hague. You housed it in a magnificent edifice visibly designed of steel, glass and green wall creepers – not too far from the beautiful flower Gardens of Keukenhof. But, you were fully aware that you did not set out to build a greenhouse, where successive Judges and Prosecutors and their Registrars would grow pretty tulips to be oohed and cooed over in agreeable diplomatic ambiance.

You knew that you were creating a court of law. And you meant to do so. But, courts of law, by their very definition, exist to ensure checks and balances to power: the power of Governments and the power of pre-potent persons (corporate and human). To put it plainly, any court of law worth its name must be, in many instances, a **'pain in the necks'** of those who hold hegemonic power. Therefore, reproaches even severely delivered from powerful sources against courts of law should shock no one. It is part of what a court of law must be prepared to endure in any country in the world, where litigants may pursue unpopular causes and judges may deliver inconvenient judgments. So, too, it must be at the ICC.

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Excellencies, Ladies and Gentlemen, as you are aware, the new Presidency, as of 11 March this year, comprises Judge Fremr as First Vice-President, Judge Perrin de Brichambaut as Second Vice-President, and I.

The Vice-Presidents are outstanding in their dedication to helping this Court achieve its mandate. It has been a most rewarding experience working with them as my teammates in the Presidency.

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We have also established a truly magnificent working relationship with the new Registrar, Mr Peter Lewis, who was elected to his post by the Court's Judges in April. He quickly established himself to be exactly the experienced, skilled and sensible manager that the Court needs and deserves as its Registrar. Above all, he is a professional whose innate spirit of team inspires everyone around him.

He and the Presidency have seized every available opportunity to deepen integration and synergy between the Registry and the Judiciary including the Presidency; which are, as it were, closely connected to each other by virtue of article 43, paragraph 2 of the Statute.

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I am also happy to inform you that the wonderful spirit of cooperation described above extends, as well, to the relationship between Presidency and the Prosecutor, in the context of the Coordination Council.

Indeed, as a function of the 'One Court' principle of administration, there are many aspects of the Court's management that engage the need for synergies among the various organs – in order to avoid hitches and wastage that are bound to result from multiplication of administrative processes, structures and hardware.

But, beyond that, the members of the Presidency, the Prosecutor and the Registrar enjoy – at the personal level – immense mutual respect and camaraderie that feels <u>just</u> very natural. That is to say, without reservation, the Presidency have found Mrs Bensouda, a true delight to work with.

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It goes without saying, of course, that there will remain strict separation of judicial functions from those of prosecution. Outside of the exercise of their judicial functions,

Judges – including myself as President - enjoy no prerogative to direct the Prosecutor on how to manage her office and its people; or on how to prepare the cases she brings before the Judges.

Conversely, once she brings a case before the Judges, the strictures of judicial impartiality and independence must take over. For, in the exercise of the judicial function, an overriding consideration is the legal principle of equality of arms between the Defence and the Prosecution. This means that the Defence's claim to acquittal does not take a secondary place in a given case relative to the Prosecution's claim to a conviction. This principle cannot be compromised under any circumstance.

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Let us recall, in this connection, that a criticism that was recently levelled at the Court – specifically as part of the reproach that I mentioned earlier - is that the judicial branch and the Office of the Prosecutor are 'meld[ed] … together' in an arrangement in which the OTP is 'an organ of the Court' – an idea that would seem odd indeed in the common law world.

On the face of it, that concern is quite understandable. But it does not tell the whole story. The same arrangement – in which the OTP is an 'organ of the Court' – was borrowed from the design-template of other international criminal tribunals, specifically the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, which were created by the UN Security Council.

More importantly, perhaps, the criticism in question ignored the fact that just three or four months earlier, the ICC Appeals Chamber had reversed a conviction of a defendant in a judgment that generated very loud uproar in some quarters, including from victims of the concerned situation and from Civil Society groups that speak for them. I am in a position to say that the uproar was entirely foreseeable to the Judges who rendered that judgment; but they had considered it a matter of foremost judicial duty – above popularity – to render the judgment that was made.

But, that judicial act has to serve as a most powerful reminder that the 'One Court' principle of administration does not – and will not – get in the way of justice as it should be done at the ICC. It is a reminder that Judges will enter a judgment of acquittal as readily as

they will enter a judgment of conviction – where such is the conclusion that the evidence reveals to the judicial view.

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And, excellencies, Ladies and Gentlemen, I should take this opportunity to call on members of Civil Society and everyone else to refrain from raising undue expectations in the minds of victims, in any way that encourages them to think that the mere commencement of prosecution should make conviction a foregone conclusion. It does not.

At the ICC, it is not the judicial function to convict people merely because they may have been roundly convicted in the court of public opinion as 'monsters', even before their appearance in the courtroom. Our task is to subject them to a fair and impartial judicial process – one in which the accused also stands a fair chance of acquittal.

The point on this is best made in the words of Robert H Jackson, the famous Nuremberg Prosecutor. In a speech he made in 1945, he said as follows:

- ***'We must not use the forms of judicial proceedings to carry out or rationalize previously settled political... policy. Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people.'***

- In that regard, he said: ***'[A]ll experience teaches that there are certain things you cannot do under the guise of judicial trial.'***

- And, he said: ***'The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty.'***

Jackson was speaking to an eternal principle of a credible judicial process, which he correctly summed up in this maxim: '***Courts try cases, but cases also try courts.***'

All that is to say that it is a very wholesome view of accountability if only an accused person has been put through a rigorous trial process that is fair in every way, and which

carries a credible risk of a conviction notwithstanding a fair outcome in the opposite direction.

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It is also imperative to uphold the necessary separation between the Court and the Assembly (and the States Parties); while fully respecting the important roles and functions rightly conceived for each, in the Rome Statute.

In this connection, we may recall a certain observation registered by the representative of the United States at the proceedings of the UN Preparatory Committee on the Establishment of the ICC, on 3 April 1996. While insisting on the important role that the ICC can play as a mechanism that the United Nations can use in containing threats to international peace and security, he also said that it is a ***'reality … that States parties to the ICC statute will always remain political entities.'***

NOW, if that be an appreciable view of States in their membership to the ICC, it requires then that much care must be taken in the practice as to how closely the ASP should engage in their task of oversight, as stipulated in article 112(2)(b) of the Rome Statute. That kind of oversight is the very equivalent of parliamentary or congressional oversight which is a wholly legitimate idea in every democracy. In principle, it is also a very good idea at the ICC. But, it must not be allowed to cross the line into routine, micro-management of a court of law by a political body; lest the suspicion is created that such close proximity and monitoring of a Court of law may result in improper influence on judicial independence – even without intending it. As Robert H Jackson aptly put it: ***'Of course we deal here with a difficult point because it is so little a matter of the statute creating the Court and so much a matter of the spirit of the judges and the foreign offices and of prevailing attitudes among peoples.'***

What am I saying, then? I am saying this. Because the Court operates in the turbulent sea of national and global politics, and cannot properly protect itself in those treacherous environments, it is right and necessary for States Parties acting alone and collectively to defend the Court at all times. In doing so, they create the space the Court needs to operate with independence. But, it does not help much if they fill that needed space themselves.

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Excellencies, Ladies and Gentlemen, that brings me to the subject of budgetary provisions for the Court.

I shall not enter the issue of actual discussion of the Court's budget proposal. It is the Registrar that will discuss that with you, later during this Session of the Assembly.

I do wish, however, to say the following as a general observation: as a matter of policy, justice is good investment. But even so, investment in justice is not too costly, in the general scheme of things. No less eminent a person than Adam Smith – the father of political economics – observed that the entire cost of the justice sector makes "a very inconsiderable part of the whole expense of government".

And, indeed, globally speaking, the investment in the ICC is negligible – in the broader scheme of things.

Consider this, for instance: at $1.7 trillion, the world's annual military spending is roughly ten thousand times larger than the budget of the ICC. But, here is another comparison. If you put together all the annual programme costs of the ICC from the Court's inception 16 years ago until today, their total sum is still less than the programme cost of $2.1 billion for a single B-2 Spirit military aircraft – known popularly as the 'Stealth Bomber'.

Indeed, whatever money is appropriated towards the administration of justice at the ICC does truly become negligible, when compared to the devastating effects of large-scale atrocities, and impunity for those who commit them.

We have witnessed time and time again the crippling effects that atrocities and impunity have on societies. From the staggering devastations that images on TV and newspapers convey to us of life in societies wracked by violent conflicts. Those effects continue in the post-conflict period – even decades later. These effects are not limited to economic devastation to societies and destruction of priceless monuments that have consecrated cultural identities of peoples for thousands of years. There is also the pain that the victims and their families will carry for decades, and even for generations to come. To put it simply: the cost of the crimes under the Rome Statute is incalculable. And that, it must be recalled, is why the ICC was created in the first place.

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And what other dividends beyond that, you may ask, is humanity reaping as actual return on this investment called the ICC? The answer is simple. Plenty. By now, no one should doubt that the ICC and its activities are having a profound impact on our world.

Yes, the presence of the ICC has contributed to reduction in the incidence of election violence in many countries that have experienced chronic cycles of serious violence at election time. This is not to say that such phenomenon has disappeared altogether. But there is a new kind of awareness that those who instigate mass violence for political purposes may be called eventually to account for their actions at the ICC. After all, there is no statute of limitations for international crimes.

This is reflected in the paradox of constant anxiety that is felt around the world about or against the ICC on the part of those who wish it to disappear.

BUT, there is also the more encouraging incidence, that the Rome Statute and the shadow of the Court have spurred the decisions of many States Parties to seek justice for international crimes through their domestic institutions, in accordance with the primacy of national jurisdictions as enshrined in the Statute through the principle of complementarity.

The Rome Statute has inspired important legal developments even in countries that are not party to the treaty, in advancing the incorporation of international crimes as well as key principles of international criminal law into domestic legal systems. All those are the complementarity dividends.

All this is to say that investment in justice, such as is administered in this Court, is an investment in the peaceful and stable future we want for our shared humanity.

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Excellencies, ladies and gentlemen:

It took a long time to coordinate multilateral efforts to create a permanent international criminal court. The Court is here now.

But, like any human institution, the Court is an imperfect project. Working together, States Parties from their angle and the Court from its own, we can together shore up, reform and refine the Court we want.

I appreciate the efforts of this Assembly to enhance cooperation of States Parties with the Court. This includes the execution of outstanding arrest warrants, so that the Court can execute its mandate. There is no point wondering why cases are not being tried in the numbers that they should, when the arrest warrants that remain outstanding are necessarily beyond the power of the Court to execute.

On their part, the Court's principals – including the Judges – are committed to working hard to improve its efficiencies, by building on what worked in the past, and finding new ways to improve even those.

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Finally, and most importantly, I must return to the subject of victims. In designing this Court, you took care to ensure that the manner of justice that it does is not limited to punitive justice – as important as that certainly is. You insisted also that reparative justice deserves a pride of place that is no less important than punitive justice. As part of that idea, you established the TRUST FUND FOR VICTIMS. It is a unique feature of this Court that adds immense value to its own brand of justice. I thank the States Parties who have been making voluntary contributions to the Trust Fund for Victims. I thank the Government of the Netherlands for announcing just last evening a donation of €1 million to the Fund. I should encourage every State, organisation or individual to join in making contributions to it, as much as they can. No amount is too large or too small. This time of the year, several holidays are being celebrated around the world. And *'tis the season to give*. Please give generously to the Trust Fund for Victims. It is the only way that the Court, through the Fund, can discharge its mandate of reparative justice to victims. And when I call upon even individuals to give what they can, I, too, must put my money where my mouth is: I now pledge also to contribute to the Fund.

Thank you.

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