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THE ICC AT THE CENTER OF A CHANGING INTERNATIONAL SYSTEM
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Thank you all for coming, it is great to be back to Princeton. The name of Princeton is inextricably linked to the International Criminal Court (ICC) through the Princeton process on the Crime of Aggression. There are also the Princeton principles on universal jurisdiction: everyone knows that Princeton is one of the great centres for the Rule of Law, and I am grateful to be back here. The ICC was a big visionary idea that took a long time to come to fruition. People began talking about an International Court after World War II and the Nuremberg and Tokyo trials. It was then that people thought how great it would be to have a permanent Court with a clear set of rules, a Court that exists before crimes are committed and a Court that also has a deterrent effect. That was one of the criticisms voiced against Nuremberg and Tokyo. The expression "victor's justice" was also very often used in that connection. The Cold War came, and that was the end of this idea, as it was of many other great ideas. After the Cold War, the effort was re-launched in the mid-1990s and in 1998 the Rome Statute was adopted at the Diplomatic Conference in Rome, on the 17th of July, which is now celebrated as the international day of justice.

That was in 1998. Today, we are 114 States that have signed and ratified that treaty: 114 States Parties. We have a court that is active in all the regions of the world. It has active investigations

in Africa, but also conducts preliminary examinations in places like Georgia, Afghanistan and Colombia. It is therefore a Court with universal reach. We have a budget of about €100 million. I want to illustrate where I believe the Court is today, with the help of three recent events from the recent past. This recent past has been rich in unexpected developments with lasting effect, which will bring permanent change and quite a bit of uncertainty, as we do not know where we will end up with many of these on-going developments. The three events I have in mind are the following: On 26 February 2011, the Security Council decided to refer the situation in Libya to the ICC for investigation of the commission of the most serious crimes under international law. In late March, the government of Kenya made a challenge before the ICC in The Hague and asserted jurisdiction for its own national system over the crimes that have allegedly been committed in Kenya and were previously investigated by the ICC. The third event is the set of decisions taken by the post-Ben Ali transitional government in Tunisia; it decided to become a party to the Rome Statute. This was one of the very first decisions it took, together with the ratification of a number of other international treaties. These three events do, I believe, illustrate the opportunities and challenges that we are facing.

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I am sure you have been following the situation in Libya very closely. This is a story marked by unexpected developments and turns. The whole history of the so-called Arab Spring is a humbling experience for many of us and many who like to think that they are experts on particular topics, and in particular areas. When the Security Council made this decision to refer the situation in Libya to the ICC on 26 February, it was a historic decision, as it was the first time that the Council unanimously decided to send a situation to the ICC. At the present, the Council has 15 members, ten of which are party to the Rome Statute, and five of which are not. Of those five, some are actually pretty openly opposed to the ICC. Among them are China and India – a government that has strong reservations about the ICC; Russia, which has not been friendly to the ICC ever since its inception; and the US, with a mixed history vis-à-vis the ICC. All those states voted in favour of referring the situation to the ICC and many of them did so actively by signing onto the text, notably the US. The US therefore not only voted in favour of the text, it was a co-sponsor. This happened on Saturday, the 26th of February.

On Friday evening, I got a call from one of the main proponents of this action in the Security Council, and this ambassador said to me, 'look I have instructions from my capital to ask for a referral to the ICC in this resolution. I think this is crazy and I think it will never happen, what do you think?' I said, 'well, it is unlikely that it will happen, but these are unusual times, so it is worth pushing for it.' 24 hours later, this decision was made by consensus. This illustrates not so much something about the ICC, but something about the times in which we are living, because this is a decision that nobody would have expected. And the reason, of course, is the prior history of the Council on the ICC.

The Council had made a similar decision at one point in the past, when it decided to refer the Darfur situation to the ICC. This was *not* a consensus decision, but nevertheless a valid decision of the Security Council. This referral, after some time, led to an indictment against President Omar Al Bashir of Sudan. This, as you know, led to enormous political tensions, and to action by the African Union perceived to be hostile to the ICC. This African Union decision not to cooperate with the ICC in this one particular case was made not so much out of a desire to protect the President of Sudan but rather out of a desire to protect an on-going peace process in the Sudan. This process has made major advances and will result in the admission of a new member of the United Nations in July, namely South Sudan. So this was a situation where the Council acted and sent a situation to the ICC. The ICC investigation came to the conclusion that one of the persons most responsible for the crimes committed there, ranging from war crimes to genocide was the President himself. Consequently, an indictment was issued that caused much discomfort and has not been implemented. President Al Bashir is still the sitting president of his country. He has even received some praise for his role in the process that eventually led to the referendum in the southern Sudan. But he has also largely been barred from travelling around the world because States Parties of the Court, of course, have a legal obligation to arrest him.

Now, what does that mean for the ICC today? I think the decision to refer the situation in Libya to the ICC was a landmark decision, But I also think that this is possibly a mixed blessing for the Court. What the Court has done is to act very quickly by opening an investigation. The

Prosecutor was at the Security Council last week and he made it clear that he would seek a warrant against three persons within the next week. Very shortly after the Security Council decision, however, people started saying 'maybe it's not that good an idea after all, to have people indicted with whom we have to have a political process.' At the time of the referral, as you remember, everyone had thought that the rebels would get rid of the regime in no time. Then, everyone thought that the rebels would be defeated within the next 48 hours, and probably would have been, had the Council not authorised the use of force. Then people thought the rebels and the intervention of the allies would *probably* lead to a defeat of the Gadhafi regime. Now we know we are facing a prolonged stalemate without a clear political course ahead of us. One option is, of course, to try to find a negotiated solution. But how do you do that if the leader of one of those parties is indicted by the Court? What do you offer that person? You cannot offer exile in many places, and you should probably not broker an exile at all if you do believe in international justice. As you can see, there are difficult choices to be made, but the Court is not the institution to make them. The Court is a judicial institution. The Court looks at evidence it is able to gather; the Court compares the evidence to the law and submits that for judgement and, in this case, for the issuance of an indictment.

I believe the problem of who makes such a determination is one of the major challenges we currently face. It is not enough to say we have the principle of peace and the principle of justice and we have to reconcile them. This is what everyone, including the Secretary-General of the United Nations, says. What is not clear is whose job it is. Who has the competence to do that? We have a vacuum there and a lack of conceptual thinking.

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You may recall that the last time Kenya had elections, there was a massive outbreak of violence after the elections in which about 1200-1500 people were killed. There was also a large-scale internal displacement of people, with systematic rapes and all kinds of crimes committed against the civilian population. With international involvement an agreement was then brokered between the partners that led to a coalition government between the PNU, the Party of National Unity, and the ODM, the Orange Democratic Movement. This coalition government

has been in office since. So, this is a coalition is made up of two groups that are radically opposed, to one another. As the next step in the process, the ICC very early on asserted its jurisdiction: Kenya is a State Party to the ICC. The Court also made it clear that it preferred Kenya to have a national process. This is the principle of complementarity upon which the Rome Statute is based. In every situation, if a national jurisdiction is able and willing to investigate and prosecute the crimes that have been committed, that national jurisdiction has the first competence to do so, leaving no role for the ICC. The ICC is merely a court of last resort if and when national judiciaries do not do their job. There was also the Waki Commission that came to the conclusion that very serious crimes have been committed. In the end, there was an agreement that the ICC would take charge of the investigations, because the government stated that it was not in a position to do so. The entire political leadership, including the parliament supported the International Criminal Court. The slogan then was 'don't be vague, go to The Hague.'

Now, in 2011, the government has made what we call a complementarity challenge. The government is challenging the jurisdiction of the Court now, after the ICC has begun its investigations, after it has named six persons and issued summonses to appear. Six persons have been asked to come to The Hague, and they did. Most of these are very prominent names in Kenya. They include the son of the founder of the country, Mr Uhuru Kenyetta. They also include other people who are effectively candidates for the presidency of Kenya in elections to be held next year. At this time, the government is coming to the Court saying that that it would rather investigate and prosecute itself: this is the nature of a complementarity challenge. Whereas the government said in 2008 that it was unable to do this it now points to the new constitution, enacted in August 2010, its new judicial institutions, and asserts its will to take up the cases itself. The judges are now looking at that complementarity challenge and will have to make a decision, effectively, whether or not they believe the Kenyan government is able and willing to do what they are saying that they will do: to investigate and prosecute, including the six persons that have been mentioned. So, you would have a coalition government whose judiciary conducts a prosecution against six of the most prominent politicians of that country, three from each of the two parties. This is the claim on which the ICC has to pronounce itself.

What does this mean for the ICC? In practical terms, the ICC is further dragged into a domestic discussion in Kenya. In 2012, there will again be elections, and of course this case and this challenge has everything to do with those elections. So what we are doing now as States Parties, and what I am doing as President of the Assembly is to try to explain the role of the Court and the Rome Statute System. I think this example illustrates the enormous political challenges that the Court can find itself when carrying out its duties and its work, even when it enjoys full cooperation with the government. The case of Kenya is not one where the Prosecutor decided that there were serious crimes and to prosecute regardless of what the government says, but rather the opposite. There is a famous photograph of Luis Moreno Ocampo, the Prosecutor announcing his investigation in Kenya. To his right and left are the President of the country and its Prime Minister. The photo was taken when the Prosecutor made the statement that he is opening an investigation and the entire government stood behind him. This situation, then, presents one of the most complex challenges the Court has yet faced.

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The third event that I mentioned is the decision by the Tunisian government to accede to the Rome Statute. I think this illustrates something extremely important both about that region and the ICC. You may not know that tTunisia's region, Northern Africa and the Arab region in particular is the region that the Court has been largely unsuccessful in gaining signatures and ratifications. The Rome Statute has been ratified in pretty much all the regions of the world and sub-regions of the world, but by only a single Arab country, Jordan. Everybody else in that region is outside the Rome Statute system. It is very much an illustration of something deeper if the first decision that the transitional government takes is to join the Rome Statute.

There is a similar dynamic in Egypt, where the new Foreign Minister has made it one of his priorities to join the ICC, and said so publicly. Egypt is a country that did not vote in favour of the Rome Statute and that has always been opposed to or very critical of the ICC. To join the ICC signifies and symbolises the change that people are looking for, that symbolises the importance of rule of law. It also symbolises even the most powerful, those who hold the most

senior positions, are not above the law. Egyptians know what they are talking about because their leadership has, in the past, always been above the law. This is why the Tunisian decision is very encouraging. The ICC has come to symbolise a commitment to the rule of law; the ICC that inspires people and creates hope and momentum. To have these people, these new governments join the Court means also facing the challenge of not disappointing them and of showing them that the ICC that really does deliver justice

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What are the major challenges ahead for the ICC? This is a time of great opportunity, certainly, because of what is happening and because people are increasingly aware of the necessity of having the protection of the law, of having the rule of law prevail in every country. This is the message that we have to send out. The ICC is a court with a narrow and deep mandate, because it deals with the most serious crimes under international law: genocide, war crimes, and crimes against humanity. After the amendments adopted in Kampala, Uganda last year enter into force, the Court will also have jurisdiction over the crime of aggression, which means waging aggressive war against another country. So, the scope is limited, but these are the most serious crimes, which have often been accompanied by impunity, because they are usually committed by people in very powerful positions. The ending of this impunity is one cornerstone of the rule of law, but it is not the only one. So, if you have the message that there is no impunity for these crimes and that there is an international institution that sees to it that such impunity does not exist, then you also have a much better chance that other forms of impunity, which are extremely important for the of a country, such as corruption, do not prevail.

I also think we are facing very big challenges. One of those I alluded to before is the peace and justice issue. There is obviously no silver-bullet solution to this. We do not yet have the tools to deal with this problem properly. The Court has really been a game-changer in this respect. Mediators engaged in traditional peace-making efforts have been sceptical of this new dimension of justice, because they are used to saying “look, you leave power, we give you immunity, you keep your money, you shut up and this is the deal.” And that, in very simplistic terms, can be a peace deal. This is not possible anymore; it is not possible because immunity is

no longer an option. You simply cannot offer immunity for genocide. If someone has committed genocide, they are liable, and there can be no amnesty in this respect. This is something that we have to come to terms with. It is a difficult challenge, but we have to start talking about it in new and innovative ways.

Of course, we still have the traditional peace mediators, but who is dealing with the question of immunity? It's not the Court; the Court is not a political broker. The Court simply says 'here is the evidence, here is the indictment. If you think we're wrong, we want to have you arrested anyway, or you can come voluntarily and challenge our case, and then we go to trial.' This is what the Court does, so someone else must deal with the question of peace and justice. So far, only the Security Council that can do it and the only thing the Security Council can do is to suspend investigations for 12 months. They can simply kick the can down the road. Moreover, whether or not the Council does that has a lot to do with other considerations than peace. So, this continues to be a very big challenge.

Another challenge we are facing is that we need to explain the Court better, because there are not enough people who understand how it works. People often come to me and say 'why is the Court not investigating in Sri Lanka. Have you seen what happened there? It's really awful.' Or, 'This Court is not a balanced one; it's only looking at situations in Africa.' The answer really is a very simple one: the Court does not have jurisdiction. Sri Lanka is not a State Party. The ICC did not have jurisdiction in Libya either, because Libya is not a State Party. The Court could do nothing until the Security Council created jurisdiction everywhere. The Council could do the same thing tomorrow in Sri Lanka or in Gaza. These are the very basics of the law that are very often not understood and are often misrepresented, sometimes deliberately.

One of the things must emphasise in this respect is what I mentioned with respect to Kenya: the principle of complementarity. This is not a Court set up to investigate all of the acts that constitute the most serious crimes in the entire world. The concept of the ICC is to fight impunity worldwide, but the best way to do this is if you have national courts that investigate and prosecute people who have committed these crimes. Especially in a case like that of the Democratic Republic of the Congo, where many people have committed atrocious crimes, the

acts of the Court have to be limited to the most serious perpetrators. This sends the message that there is no impunity for these people so there is certainly no impunity for the lower-ranking perpetrators who have to be prosecuted in national courts. There is no other way, if simply for capacity reasons.

Finally, what about the US? The US, as you know, has a difficult history with the ICC, with the Clinton administration voting against the Rome Statute in 1998, then signing it at the last day of office of President Clinton, largely for tactical reasons. Then, under the subsequent presidency, the Statute was "unsigned" and there was a period of open hostility of the Bush administration to the ICC. That transformed into something else during the second term of George W Bush. People tend to overlook this, but during the last years of the Bush administration, especially the last two years, there was a pretty pragmatic approach taken by the administration vis-à-vis the ICC, and there was no more openly expressed hostility. But, there was still no engagement with the Court. There was no participation in the meetings of the Assembly and there was no change in the legislation. The US Congress has passed several pieces of legislation directed against the ICC that are still in place to this date, and this Congress does not look like the one that will change this. Under President Obama another step was taken, namely the active involvement in the work that we do as States Parties. So, when we had the Review Conference in Kampala a year ago, the US delegation was the biggest delegation of all, as an observer. So, there is a very strong engagement of the US, but I would still characterise the relationship, as largely pragmatic, but also very much as *ad hoc*. I think this US administration is looking at the ICC certainly not with ideological reservation – a lot of the old rhetoric on the ICC was driven by ideology – but from a perspective of self-interest. How is the ICC interesting for us? What is in it for us? This is certainly the case in Libya. Whether the US will join the ICC or not, is not a question you should ask me. You should ask your representative in Congress. I don't think that this is the most important thing. It is certainly very important to have a strong and positive engagement of the US with this Court and I am certainly doing my best in this respect.

Thank you very much for your attention.