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Lecture: “The International Criminal Court – Current Challenges and Future Prospects”

Co-hosted by the Department of Foreign Affairs and Trade and University College, Cork; chaired by Mrs Justice Susan Denham, Chief Justice of Ireland (President of the Supreme Court)

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Excellencies,
Ladies and Gentlemen,

Thank you for your presence here today. It is indeed an honour for me to address you and to share with you some of the challenges and prospects of the International Criminal Court.

My gratitude goes out to the Department of Foreign Affairs and Trade of Ireland and University College, Cork, for organising this lecture and for generously hosting me here in Dublin – my first visit to this picturesque town.

I thank Professor Mullally as well as Mrs Justice Denham for their introductory remarks.

We gather here today on the eve of the conclusion of yet another busy year for the International Criminal Court. The year 2013 has seen the Court firing on all cylinders, to speak with the words of President Song, during his statement to this year's Assembly of States Parties.

On 16 January, I opened an investigation into alleged crimes committed on the territory of Mali, following the referral of that situation to my Office by the Malian Government in July 2012.

From the 19th to the 28th of February, the confirmation of charges hearing in the case against the former President of Côte d'Ivoire, Laurent Gbagbo, took place.

As you may be aware, on 22 March, Bosco Ntaganda surrendered himself voluntarily to the custody of the Court; he is now awaiting the confirmation of charges hearing scheduled to start on 10 February 2014. Mr. Ntaganda is facing seven counts of war crimes and three counts of crimes against humanity allegedly committed in the Ituri region of the Democratic Republic of the Congo.

In the Libya situation, the Pre-Trial Chamber made important decisions, in May and in October respectively, regarding the admissibility of the cases against Saif al Islam Gaddafi and Abdullah al Senussi. In the Gaddafi case, the Chamber reminded the Government of Libya of its obligation to surrender him to the Court. In the case against former intelligence chief, Abdullah al Senussi, the Chamber was satisfied that the Government of Libya had met the legal criteria for rendering the case inadmissible before the ICC in accordance with the principle of complementarity. Pursuant to this principle, States have the primary responsibility to investigate and prosecute crimes and the Court can only intervene if States are unwilling or unable genuinely to do so. Based on the specific facts and circumstances of the case, the Chamber was of the view that Libya was both willing and able to prosecute al Senussi.

In the meantime, a number of important appeals are still pending before the Appeals Chamber of the Court. These include the appeal of Thomas Lubanga Dyilo, who was sentenced to 14 years imprisonment in July 2012 for enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities in the Democratic Republic of the Congo, as well as Mathieu Ngudjolo Chui, who was acquitted around this same time last year.

In the second half of this year, the ICC commenced trial proceedings, which has brought to the fore new questions and challenges for the Rome Statute system. The trial of Kenyan Deputy President William Ruto and Mr Joshua Sang began in September, while the trial of Kenyan President Uhuru Kenyatta is due to start on 5 February of next year.

You will be aware of the discussions these cases have triggered on the African continent, as well as in The Hague during the Assembly of States Parties, which concluded its work just over two weeks ago.

States Parties held a special segment at the aforementioned Assembly to discuss the “Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation.” The Assembly is a forum for all stakeholders of the Rome Statute to come together and engage in a process of open and frank dialogue and inclusive consultations to address issues of concern.

Relatedly, procedural amendments were adopted by the Assembly, *inter alia*, allowing the Judges of the ICC to consider alternative options to the presence of the accused at trial when appropriate and in exceptional circumstances, as well as allowing the use of pre-recorded testimony, under restricted conditions.

Another significant challenge facing my Office and the Court’s proceedings is the issue of witness interference and intimidation. This is a growing and major challenge, which needs to be addressed by the Court and its States Parties. To give just one example, on 23 and 24 November, police forces in Belgium, France, The Netherlands and the Democratic Republic of the Congo, at the request of the Court, arrested four individuals whom my Office alleges are responsible for offences against the administration of justice under Article 70 of the Rome Statute in connection with the proceedings against Jean-Pierre Bemba Gombo. A warrant of arrest was also notified to Mr. Bemba, himself whose on-going trial at the ICC in relation to crimes committed in the CAR is reaching its final phases, and whom my Office alleges has ordered, solicited and induced these attempts to pervert the course of justice in relation to his trial.

The individuals arrested include, amongst others, members of the defence team of Mr. Bemba. It is particularly disturbing that a member of the legal profession is alleged to have intentionally and systematically participated in criminal activities aimed at undermining the administration of justice before the Court.

Article 70 of the Rome Statute stipulates that it is a criminal offence for anyone to, *inter alia*, attempt to corruptly influence witnesses, tamper with evidence, or present evidence known to be false or forged. If convicted, those found responsible for these crimes may face up to five years imprisonment, or a fine, or both.

We have similar allegations of witness tempering in the situation of Kenya, where Chambers already issued an arrest warrant against Walter Barasa, a Kenyan national. His warrant is still pending execution. It has been served on the authorities of Kenya.

Interference with witnesses is particularly problematic, as it directly affects the integrity of proceedings and frustrates efforts to uncover the truth. Protection of witnesses is one of the Court's main priorities and in this regard the conclusion of witness relocation agreements with the Court is a practical way, through which States Parties can help the Court meet this challenge. I'm happy to note that Ireland is engaged in discussions with a view to concluding just such a witness relocation agreement with the Court.

My Office must not only strive, in often challenging conditions, to investigate and prosecute crimes alleged to have been committed by persons who for many reasons may prove difficult to apprehend and may, in any case, dispose of significant resources with which to defend themselves, but we must also endeavour in some cases to protect the very integrity of our proceedings against efforts to subvert them.

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The example I gave regarding the arrest of four individuals for allegedly interfering with evidence, however, also positively highlights another important aspect of the Court's needs today: cooperation.

Without the full and timely cooperation of States Parties to the Rome Statute, and, in cases arising out of situations referred to the Court by the UN Security Council, member States of the United Nations, the Court cannot succeed in the fight against impunity.

Where the jurisdictional criteria are satisfied and a proper basis is established for the Prosecutor to open an investigation leading possibly to prosecution, the Court relies on international cooperation and judicial assistance of States Parties, who have the duty under the Rome Statute to cooperate fully with the Court.

The Court requires support in many areas, not only regarding the protection of victims and witnesses, but also for the preservation of evidence, the identification, tracing and freezing of assets, and the enforcement of the orders and decisions of the judges to name just a few examples.

Perhaps the biggest challenge the Court faces is with regard to the execution of warrants of arrest. The Court does not have its own police force; it relies exclusively on the cooperation of states in the execution of such warrants. To date, there are five persons in custody (nine when including those recently arrested for offenses against the administration of justice) but there are still some 14 warrants of arrest that remain outstanding.

You will no doubt be familiar with the longstanding warrants of arrest for Joseph Kony and other leaders of the Lord's Resistance Army, as well as that for President Al Bashir of Sudan. It is ironic that these people continue to be implicated in the commission of crimes even though warrants of arrest have been issued against them. We should all realise that violence and commission of crimes will not stop unless those responsible for committing these crimes are arrested and prosecuted. Indeed, it is throwing good money after bad for the international community to invest in investigation of these persons and yet remain reticent to arrest them to face prosecution.

Failure to execute warrants of arrest is not always due to unwillingness to enforce the Court's orders, but sometimes due to a lack of capacity. Support for the development of viable and independent judicial institutions and law enforcement capacity in States in need of such support is vital to the overall strategy of combating impunity.

Whether due to incapacity or unwillingness, failure to execute warrants of arrest in a timely manner remains a serious problem: victims of appalling atrocities continue to suffer and fugitives from justice continue to evade an accounting for the crimes they are alleged to have committed.

Very helpfully, the Assembly of States Parties has adopted a roadmap for achieving an operational tool to enhance the prospect for a more expeditious arrest and surrender of fugitives from justice. It is hoped that this initiative on arrest strategies will help to resolve the vexing problem of achieving timely arrests. Surely, Ireland, who facilitated discussions amongst States Parties on cooperation in the past, will be able to positively contribute to realising tangible measures to ensure arrests.

Under the Rome Statute, as I've stated previously, it is the primary duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. It is only when national authorities are either unable or unwilling to act that the ICC's jurisdiction prevails.

Mindful of the jurisdictional primacy of national authorities, when examining situations that are either referred to the Court or come otherwise to my attention, my Office encourages national responses to the investigation and prosecution of international crimes in what is a positive approach to complementarity. In all situations that are currently under investigation, we had to first establish whether there were on-going

legal proceedings before initiating our own. The sad reality is that there were no such proceedings in any of the situations currently under investigation before the Court.

As our preliminary examination situations in Colombia and in Guinea demonstrate, our approach of positive complementarity can be particularly useful to promote national judicial processes.

Lack of capacity and credible national judicial institutions is a major challenge in this regard. The need to enhance the capacity of national judicial systems cannot be over-stated. It has to be recognised that the ICC alone cannot win the fight against impunity: complementary efforts and support, including capacity building at the national level for the investigation and prosecution of mass crimes, as well as transitional justice measures are of vital significance to the fight against impunity generally.

On another level, it must equally be recognised that whilst the focus of my Office's work is to bring those bearing the greatest responsibility for the most serious crimes to account, other, lower level perpetrators must also be held accountable in proceedings at the national level. The challenge is that in most conflict or post-conflict situations, judicial and law enforcement systems may either be non-existent or too fragile to handle cases.

Ensuring that there is no impunity gap is very much a concern for States Parties to the Rome Statute. While my Office will continue to encourage national authorities to take effective action against perpetrators of international crimes and share its expertise, it falls on others including States and donors to shore up the capabilities of national judicial systems to a level where they can competently handle complex criminal matters.

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The States Parties to the Rome Statute have a significant role to play in protecting the integrity of the Court and its processes.

The fight against impunity in which the Court is engaged must be waged on the basis of an independent and impartial application of sound legal principles to facts established by cogent evidence.

This endeavour requires resources, skill, stamina – and perhaps some luck too. Bosco Ntaganda, for example, was seemingly beyond the reach of the ICC for some seven years. Our relentless efforts to isolate him paid off and his fortunes changed, forcing him to surrender himself to justice.

None of our cases are easy. Almost invariably, we have to investigate in context of on-going armed conflict where armed groups are determined to do everything to avoid justice including by pretending to seek peace. The question thus often arises how to resolve the tension that sometimes occurs between the desire to bring peace, on the one hand, and the need to do justice, on the other.

It is however clear that the drafters of the Rome Statute intended accountability for crimes to play an integral role in the restoration of peace and the process of reconciliation in situations of conflict. The Rome Statute in its Preamble recognises that the grave crimes within the jurisdiction of the ICC “threaten the peace, security and well-being of the world,” and affirms that they should not go unpunished. The States Parties to the Rome Statute therefore resolved to guarantee lasting respect for and the enforcement of international justice. The danger that may arise from failing to enforce international justice is that the unredressed injuries and suffering of victims and their communities may fester and ultimately blight the restoration of peace.

Despite these risks and the challenges faced by the Court, there are signs that we are embarking on a period of great promise and hope for international justice. As difficult as the road may be, I believe, we will eventually succeed with the support of the entire international community, in our mission to end impunity for the most serious crimes, and therewith contribute to more peaceful and secure societies.

On the basis of my Office’s early experience and the lessons we have learned from an evaluation of our early practices, my Office has revised its prosecutorial strategy and policies, where necessary, to meet today’s challenges.

In response to the expectations of the Judges and the standards we are setting for ourselves, we are endeavouring whenever circumstances permit, to be trial-ready by the time we bring cases before the Chambers. We are also seeking to bolster our collection of evidence from varied sources and to use enhanced state of the art methods of investigation.

We have moved to the concept of in-depth, open-ended investigations, while still maintaining a clear investigative focus. We will test our case hypotheses throughout investigations in order to strengthen decision-making in relation to prosecutions. In some situations, it may be necessary to build cases upward gradually by investigating and prosecuting a limited number of lower- or mid-level perpetrators, with a view to reaching those allegedly most responsible for the crimes.

We will pay special attention to our mandate of securing convictions while pursuing the truth, aiming for an increase of the percentage of charges confirmed and our rate of convictions.

Apart from improving the quality and efficiency of our investigations and prosecutions, and by extension, our effectiveness, my Office is endeavouring also to place greater emphasis on the impact of its preliminary examinations, to enable us to contribute to two overarching goals of the Rome Statute: the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes.

To enable my Office to improve the quality and efficiency of its preliminary examinations, investigations and prosecutions, I certainly welcome the adoption by the Assembly of States Parties of the programme budget for 2014, which will again be a very busy year for the Court. States have given the necessary funds for the implementation of our new Strategic Plan, as well as for the continuation of the restructuring exercise in the Registry at the moment. It's certainly my hope that this emerging trend will continue to enable the Office to execute its mandate as intended by the Rome Statute.

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Allow me to conclude by stating that as a Prosecutor, my job is to reverse the increasing tide of disproportionate impact that conflicts have on ordinary citizens and in particular vulnerable groups: women and children who suffer the brunt of these conflicts.

With the victims of mass atrocities as the real drivers behind the work of this Court, my mandate is to relentlessly pursue those responsible for committing crimes that fall under ICC jurisdiction - I cannot however do this alone. My Office can only succeed in delivering on this important mandate if it receives full, timely and tangible support and cooperation from the States Parties, inter-governmental organisations, and civil society.

The ICC is no longer an idea on paper; it is a functioning institution whose value is being slowly but increasingly appreciated.

It is here to stay and everyone must realise that they have to adjust to this new reality; politicians, lawmakers, mediators, as well as warlords, have to adapt their behaviour to the new Rome Statute framework.

Success in the endeavour to combat impunity for those most responsible for the worst crimes of concern to the international community will be built upon mutual trust, collaboration and assistance, and a genuine effort to achieve the objectives of the Rome Statute system.

Let me conclude by stating that the Court certainly faces its challenges, and as with all things, there's always room for improvement, but we must ask ourselves – notwithstanding the obstacles at hand – what

would the impunity gap and our world look today without an institution like the ICC? Our focus should be to work together to strengthen the promise of the international rule of law and accountability for mass crimes the Court has given to humanity.

I thank you for your attention.

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