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Report of the International Criminal Court

Note by the President of the General Assembly

I have the honour to circulate the text of the pre-recorded statement delivered by the President of the International Criminal Court (see annex), which was played at the 18th plenary meeting of the seventy-fifth session of the General Assembly, held on 2 November 2020, pursuant to Assembly decision 75/506 of 13 October 2020.

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Annex

[Original: English/French]

Judge Eboe-Osuji (President of the International Criminal Court): As always, it is a great honour for me to address the General Assembly. This is the third time that I have addressed it as President of the International Criminal Court (ICC). Unfortunately, it will also be the last.

I regret that I am unable to appear in person owing to the coronavirus disease pandemic. But this in no way diminishes the importance of the occasion. The Court is particularly appreciative of the opportunity to inform the international community about its contribution to our shared humanity, and we cherish the valuable cooperative relationship between the United Nations and the ICC.

I will not repeat here the contents or substance of the Court's annual report to the United Nations (see A/75/324 and A/75/324/Corr.1). The report is already an official document of the United Nations and is publicly available.

This is a very unusual year, not only because it is one in which a pandemic brought the world to its knees, but also, and more positively, because it marks the seventy-fifth anniversary of the Organization's founding in the annals of the United Nations. In the statement I recorded to mark that occasion, I highlighted the commonalities between the United Nations and the ICC in terms of historical evolution and the spirit of commitment to a mission.

I recalled that although the ICC is separate from the United Nations, we are members of the same family. That close family relationship derives from our shared philosophy in the central creed of multilateralism expressed by Mrs. Eleanor Roosevelt – the First Lady of the United States during the Second World War and the mother of human rights – in words that tell us that while our own lands and our own flags cannot be replaced by any other land or any other flag, we can join with other nations under a joint flag to accomplish something good for humankind that we cannot accomplish alone.

I recalled that the need for both the ICC and the United Nations originated directly in the horrors of the Second World War. I recalled that although it took much longer for the ICC to materialize, the seeds of its birth were planted during the very first years of the United Nations and within that body. The early work of the International Law Commission, as directly commissioned by the General Assembly, was crucial in laying the foundation on which the Court would later be built, when the Cold War eased its chilling grip on world affairs. Once again, the United Nations served as both the sponsor and the global forum for the revival of the project of a permanent international criminal court, as well as for the formal negotiations that launched its creation in 1998. That is the story of the common thread of history, cast in the slimmest of outlines.

As for the shared spirit of mission, I recalled that in the well-known United Nations document entitled "The future we want", endorsed by the General Assembly in its resolution 66/288 of 27 July 2012, it is reported that people from all around the world do want international cooperation to achieve a world free of violence and conflict, with human rights for all. That is the future that the ICC strives to foster. It is a future that assures that there will be accountability through the rule of law and justice for victims when atrocities that shock the conscience of humankind have been committed, thereby contributing to the prevention of such atrocities. But how is the ICC doing in that respect?

I can assure the Assembly that the ICC has acquitted itself well. The story here goes beyond a mere tabulation of how many cases the court has tried or how many verdicts of conviction or acquittal it has pronounced. The story must engage a broader picture, and a correct view of that picture will truly tell us one thing, which is that the ICC has effectively served to loosen the ugly grip of tyranny on the spirit of our shared humanity. Since the creation of the ICC, a day has seldom gone by without someone at the Court receiving an email from someone, somewhere else in the world, complaining about an alleged situation of injustice that is afflicting them and that they hope the Court can help to put an end to. Sadly, some of these complaints may not constitute a crime under the ICC's jurisdiction or meet the requisite threshold of gravity before the Court can engage its processes. And some come from people who do not know that their country is not a State party to the ICC treaty and that therefore the ICC cannot intervene on its own in the particular situation without a Security Council referral.

But the mere fact that these people look to the ICC to lift the weight of injustice that they feel tells their story of hope – hope that there is at last a place beyond their countries where they can seek the justice that is denied to them at home. And that says a great deal about the value of the ICC. It tells us that the ICC is effectively serving the collective purpose of the United Nations in firmly planting the flag of accountability through the rule of law and justice for victims of genocide, crimes against humanity, war crimes and the crime of aggression, and thereby contributing to their prevention. In defending that flag of accountability, the ICC has truly served to loosen tyranny's grip on humankind.

Many years ago, as a prosecuting lawyer at the International Criminal Tribunal for Rwanda (ICTR), the Rwanda genocide tribunal, I was prosecuting a former mayor of a village in a local Government area near Kigali. He was charged with genocide, crimes against humanity and war crimes. The defendant, Mr. Laurent Semanza, had been the mayor of the village for more than 29 years, until shortly before the Rwandan genocide in 1994. And when the genocide erupted, he rallied and led the Interahamwe militiamen, who were the infamous foot soldiers of the genocide against Tutsis. In a society with very weak or non-existent rule-of-law structures, an abusive, all-powerful mayor of a village meant that the local population was left helpless in the face of his whims and caprices. His 29 years as mayor of the locality meant that many of the young adults in his community had grown used to seeing him as the local strongman who dictated events in their lives.

Very quickly in the course of the trial, I could not help noticing the psychological hold that he still had on them. I had to work hard against a perceptible reflex on the part of some of the witnesses to freeze once they came into the courtroom and saw Mr. Semanza sitting there. Some of them even told me that they found it difficult to believe that he was actually standing trial and being required to account for his conduct, that he was no longer controlling their lives as he used to, and that his own fate was now truly in the objective hands of judges of an international criminal tribunal located in another country, where he had no way of asserting an overriding influence. Those witnesses represented the teeming denizens of the rural communities of the world, where the klieg light of global attention does not always shine fully to expose for all to see the weight of oppression under which they labour. It took the International Criminal Tribunal for Rwanda, a temporary international mechanism, to convince those witnesses that the hands of tyranny, which the former mayor had represented, had actually been loosened from their lives by an international instrument of accountability.

The purpose of the ICC is to permanently serve humankind everywhere in the world, which was the purpose that the ICTR served on a temporary basis for Rwanda.

As such, it embodies the pledge of “never again” for the atrocities and gross human rights violations that bear out the human capacity for evil.

But it would be a mistake to take this achievement of a permanent instrument of accountability for granted, or to rest on our laurels. We must not underestimate the enormity of the threats that the ICC faces. We may get a snapshot of their significance by asking ourselves this question: would it be possible to create the ICC today, when we consider the prevailing geopolitical circumstances of today’s world? And here we must keep in mind that armed conflicts are the most usual vectors of all the crimes over which the ICC has jurisdiction. Genocide, crimes against humanity and, of course, war crimes – and, naturally, the crime of aggression – are typically associated with armed conflicts.

Keeping that in mind, let us further consider the conflicts that we read about in the current news of the world – Syria, Afghanistan, Yemen, Libya, Armenia and Azerbaijan, the Democratic Republic of the Congo, Mali, Burkina Faso and the Boko Haram insurgency in the Lake Chad region, which includes Nigeria, Cameroon, Chad and the Niger. We can also think about the conflicts in Myanmar, South Sudan, Somalia, Israel and Palestine. And there are many others.

The point of that limited roll call of conflict zones in the world is that the Security Council has been dishearteningly unable to agree to subject even the most virulent of those conflicts to an independent international searchlight of accountability. The instinct of ward protection has not allowed such inquiries, as the ugly ghost of the old Cold War begins to stir again. Meanwhile, the African Union has insisted that the international searchlight of accountability is no longer to be trained only on situations in Africa if it cannot also be trained elsewhere.

Within the African Union’s objection resonates Dr. Martin Luther King, Jr.’s insistence that injustice anywhere is a threat to justice everywhere. That being so, humankind everywhere – not only among African victims of atrocities – deserves the active interest of the ICC. That is a very sensible argument. However, what I cannot support is the reductive version of that objection, which may have the effect of saying that even African victims of atrocities must be denied the benefit of the ICC until there is an assurance that the ICC is able to attend to the needs of victims of atrocities everywhere in the world. I do not accept that argument.

Something else to be considered as part of the challenges against the ICC’s story of hope is the bellicose predisposition of some powerful global actors that rail against the Court, even threatening to destroy it, as they perceive it to be inimical to their political interests and aspirations. Ironically, the attacks on the ICC by powerful nations are also an emblematic demonstration of the Court’s value for humankind. Those attacks entail a resistance, which shows that the Court is making a difference. It shows that the Court cannot be ignored by those who may at the very least see some geopolitical interest in the preference for leaving innocent victims at the mercy of heinous crimes. Indeed, it is in the very nature of the ICC’s mandate to attract such resistance as inherent in the arduous struggle that was always contemplated in the post-Second World War pledge of “never again”.

The foregoing are some of the important global and geopolitical dynamics that some would reasonably see as creating great odds against the possibility that another ICC could be created in the current environment or in the future. In other words, just because the International Court of Justice, as an organ of the United Nations, was readily created upon the demise of the Permanent Court of International Justice, as an organ of the League of Nations, does not mean that a new international instrument would just as readily be created to replace the ICC if we allowed it to wind up or be destroyed by those who prefer a world without the Court. But the great odds against repeating the feat of the creation of the ICC, now or in the foreseeable future, also

invite us to consider how fortuitous it was that the feat was even achieved in the first place, in 1998, when the Rome Statute was adopted. The timing of that event is not always readily appreciated, but it is significant.

In the swirl of world affairs that accommodated the creation of the ICC in 1998 was a period that I often refer to as a lucid moment in time – the 1990s. It was a period of positivity and possibilities rarely witnessed in the often demoralizing circumstances of global geopolitics, which play out in the microclimate of the Security Council, whose work is defined infamously by the power of the veto and where some of its wielders, more often than others, seem ever ready and willing to use it, regardless of its consequences to our shared civilization and humanity.

Perhaps the greatest of the possibilities achieved within that lucid moment of the 1990s was the adoption of the Rome Statute that established the ICC. Notably, that was within a five-year band of time during which the Security Council had managed to create two ad hoc International Criminal Tribunals – one for the former Yugoslavia, in 1993, and the other for Rwanda, in 1994 – to bring accountability respectively for the violations, including ethnic cleansing, committed in the former Yugoslavia and the genocide against Tutsis in Rwanda. Some of the heady hallmarks of the immediately preceding period had been the policies of glasnost and perestroika and the demolition of the Berlin wall associated with them. That period also saw the abolition of the apartheid regime in South Africa and the associated release of Nelson Mandela from a lifetime of political imprisonment.

As fate would have it, that lucid moment of the 1990s lingered just long enough to permit the ICC to be finally created in 1998. That came after extended periods of moribund efforts that owing to the Cold War had long been dismissed in previous decades as wishful thinking. Perhaps the significance of that moment of the 1990s may be better appreciated if we consider that the other time, much to their credit, that France, Russia – then the Union of Soviet Socialist Republics – the United Kingdom and the United States, representing four of the five permanent members of the future Security Council, had agreed to create an international accountability mechanism was at the London Conference of 1945, regarding the Nuremberg proceedings that were to address the atrocities committed in Europe during the Second World War.

In the almost half century between the Nuremberg experiment of 1945 and the Security Council's creation of the ad hoc tribunals in 1993 and 1994 for the former Yugoslavia and Rwanda, pursuant to the Council's mandate for international peace and security, no accountability mechanism was created under the auspices of the United Nations before that time. Yet it could not be seriously supposed that during that intervening period, there had been no atrocities shocking the conscience of humankind committed in Africa, Latin America, Asia, Europe or elsewhere that engaged the need for such an accountability mechanism. All that gives special significance to the lucid moment of the 1990s that saw the creation of the ICC.

There is another important dimension that must be kept in mind with regard to the opportunity that was seized to create the permanent International Criminal Court directly in the wake of the creation of those two ad hoc tribunals for Rwanda and for the former Yugoslavia. That dimension is that the purpose or effect of creating the ICC, against the background of historical experience, was to avoid holding questions of accountability for gross atrocities hostage to the Security Council's ad hoc solutions, which may not materialize, owing to the vagaries of geopolitics that often stymie that body to the point of harrowing inertia.

We know that the lucid moment of the 1990s has now become a stationary object in the rear-view mirror, as the world drives down the lane of heartaches for many of the victims of apparent atrocities that shock the conscience. And it is for that reason that it should be difficult to reproach anyone who may worry that the politics of the

Security Council may not permit a new ad hoc tribunal to be created now, should grave violations be committed in ways that conjure up the ghosts of Srebrenica or Rwanda. Some may argue that certain situations that now confront the world already conjure up those ghosts. But the broader point is to underscore in a very particular way the enduring value of the ICC, which should not be taken for granted. That value must remain foremost on our minds. We should not be distracted by the fact that the Court is not a perfect instrument, even for its own purposes. That is because the human system that is perfect, even for its own purposes, has not yet been created. That is so not only in the design of the system but also in its actual operation.

Some States that are not yet party to the Rome Statute have expressed concerns about joining the ICC. They complain that there are aspects of the Court's design that do not please them. I urge them to reconsider that objection. In urging them to reconsider, I shall commend to them the words of an eminent historical figure – George Washington, the first President of the United States. On 1 July 1787, in the course of the Convention that was under way in Philadelphia to draft what is now the Constitution of the United States, General Washington wrote a letter to David Stuart, a family member, about the difficult differences of views in full display during the Convention. In his letter, Washington wrote, among other things,

> "To please all is impossible, and to attempt it would be vain; the only way therefore is ... to form such a Government as will bear the scrutinizing eye of criticism and trust it to the good sense and patriotism of the people to carry it into effect."

And on 24 September 1787, one week after both the conclusion of the Philadelphia Convention and the adoption of the United States Constitution, Washington wrote another letter, this time to three former Governors of his own State of Virginia, urging them to support Virginia's ratification of the new Constitution. In that letter, he wrote,

> "I wish the Constitution which is offered had been made more perfect, but I sincerely believe it is the best that could be obtained at this time – and as a constitutional door is opened for amendment hereafter, the adoption of it under present circumstances of the Union is in my opinion desirable."

Those two letters from General Washington himself tell the story of the stormy controversy that engulfed the new United States Constitution and the circumstances under which it was adopted in 1787. But that is also the story of the adoption of the ICC treaty, the Rome Statute, and the circumstances under which it was adopted in 1998. If the United States Constitution could provoke the dizzying controversy that greeted it among what were only 13 states of the American Union at the time, where many stiffly objected to it for not being a better document, it must come as no surprise that there would be some from among the 193 countries that make up the United Nations that would find the Rome Statute an imperfect document. But I would urge those States to reconsider their objections and join the Rome Statute, knowing that not even their own national Constitutions can lay claim to the perfect design that they wish for the Rome Statute.

Nor must we be distracted by questions of the undeniable need to improve the operation of a human system, the Rome Statute system. In that regard, I must emphasize that every legal or judicial system in the world, even those with the best of designs, is operated by human beings, and that necessarily entails a never-ending need to do better. At the ICC, we are keenly aware of that need. It is for that reason that we voluntarily invited a systems review earlier in the year. The exercise was not imposed on us from outside the Court itself. We, the leadership of the Court, asked for it. And we fully opened ourselves up to it. It was the first time that such an extensive review had been undertaken in the Court's 18-year operation. We have now

received the report. While the review exercise itself was not perfect – that, too, being a human exercise – we are confident that the observations and recommendations made in the report will go a long way towards driving us to make the improvements that we know will help the Court consolidate the positive values that the ICC holds for humankind.

In the end, the moral of the story is that we now have an instrument of hope for accountability that was improbably created when a rare opportunity presented itself to do so during a lucid moment in time in the 1990s. We must spare no effort both to hold on to it and to make it work better, because if we lose it, we may not get it back any time soon.