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The International Criminal Court and International Peace and
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Ladies and Gentlemen,

Thank you for being here, and thank you to the *Netherlands Society for International Affairs* for inviting me to give this lecture.

Today I would like to share with you some reflections on issues relating to justice, peace and security, from the perspective of the International Criminal Court, a unique institution of which I have the privilege of being the Deputy Prosecutor since 2004, as well as the next Prosecutor starting 15 June 2012.

I would like to discuss how the work of the Court can contribute to the management of conflicts and the prevention of massive crimes.

The fact that we are debating peace and justice today shows in a way how primitive the world is. We hardly talk about peace and justice in domestic settings; we talk about justice, security, but not about peace. Peace is consolidated in most of the national settings. But in the global setting it is different; we have to discuss peace and justice. What I'd like to discuss with you is how innovative an idea it is to have international justice.

That is important to understand because peace has had more time. Westphalia in 1648 was a series of peace treaties that ended the 30 Years' War and the 80 Year's War; it was the first time humanity said "there will be a permanent peace"; before that peace was a time between war and war. Justice however is much newer.

In our countries, the Congress, the Police, the Prosecutors and the Courts are the basic institutions to establish and enforce law and order. The Rome Statute, which establishes the International Criminal Court, is building the

same idea internationally: judicial institutions are created to contribute to prevent and manage massive violence.

60 years ago, with the Nuremberg Trials, for the first time, those who committed massive crimes were held accountable before the international community. For the first time, the victors of a conflict chose the law to define responsibilities.

Nuremberg was a landmark. However, the world was not ready to transform such a landmark into a lasting institution. In the end, the world would wait for almost half a century after Nuremberg, and would witness again two genocides - first in the Former Yugoslavia, and then in Rwanda - before the UN Security Council decided to create the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, thus connecting peace and international justice again.

The *ad hoc* tribunals paved the way for the decision of the international community to establish a permanent criminal court, to avoid a repetition of its past experiences. A court built upon the lessons of decades when the world had failed to prevent massive crimes.

In 1998, the Rome Statute added an independent and permanent justice component to the world's efforts to achieve peace and security. The Rome Statute offers a solution, creating global governance without a global Government but with international law and courts. Accountability and the rule of law provide the framework to protect individuals and nations from massive atrocities and to manage conflicts.

In 1998, this was just an idea on paper. In 2012, we have put it in motion. The International Criminal Court has become a recognized institution that is part of the international landscape. The unanimous referral by the UN Security Council of the situation in Libya in 2011, which included the positive votes from 5 non States Parties, is a confirmation of that.

It makes clear that the Rome Statute consolidates a new trend: no more impunity for alleged perpetrators of massive crimes.

Ladies and Gentlemen,

All States Parties of the Rome Statute commit to investigate, prosecute and prevent massive crimes when perpetrated within their own jurisdiction. 120 States today have accepted that, should they fail in their primary responsibility to investigate and prosecute, the ICC can independently decide to step in.

Under the Rome Statute, States Parties also commit to cooperate with the Court whenever and wherever the Court decides to act. The Court can therefore rely on the cooperation of the police of all States Parties to implement its decisions. This is not just an abstraction. Cooperation with the Court is a fact. The DRC has already surrendered three of their nationals to the Court. The Belgian police implemented in one day an arrest warrant against Jean-Pierre Bemba. France, cooperating with Rwanda and the Court, did the same with regard to Callixte Mbarushimana. Naturally, challenges remain and further cooperation is necessary.

Fully respecting the legal requirements under the Rome Statute, the Office of the Prosecutor opened investigations and brought cases in Uganda,

Democratic Republic of Congo, Central African Republic, Darfur, Libya and Côte d'Ivoire.

The Office focuses its investigations on those who bear the greatest responsibility for the most serious crimes in accordance with the evidence collected. Focusing on those most responsible is the way to maximize the preventive impact of the Court's intervention. It is up to States to deal with other perpetrators.

All the cases presented by the Office so far have been against the top leaders of the organizations involved in the commission of the crimes, including three heads of state. Following its specific duty to focus on gender crimes and crimes against children, the Office's first case against Thomas Lubanga exposed how boys and girls were abused as child soldiers, how they were trained to kill and to rape, and how they were themselves raped. Thomas Lubanga was found guilty on 14 March and the Office is currently preparing for submission of its views on the sentencing and in relation to reparations for victims.

Each subsequent case has highlighted a further aspect of gender crimes, from the command responsibility asserted for an organized campaign of rapes in the case against Jean-Pierre Bemba in the Central African Republic, to the charges of genocide through rape against President Al Bashir in Darfur. The gravity threshold in all these cases is very high. In each situation, there were hundreds or thousands of persons killed and raped, and in many, millions were displaced. The cases before the Court are indeed the most serious crimes of concern to the international community.

The Office is also engaged in preliminary examinations in various situations around the world. The Office is analyzing alleged crimes in Honduras, the Republic of Korea, Afghanistan and Nigeria; it is checking if genuine national proceedings are being carried out in Guinea, Colombia and Georgia; and recently it issued a decision in relation to the declaration accepting the jurisdiction of the Court by the Palestinian National Authority. During these preliminary examinations, the Office makes public announcements of the beginning of an activity and is able to send missions, and also request information from national governments. This information can be factored in by all States and relevant organizations, in order to promote timely accountability efforts at the national level.

Ladies and Gentlemen,

These activities of the Office show that the Court is in motion.

It is however only in the last ten years, following the entry into force of the Rome Statute, that this independent and permanent criminal justice component has been added to the toolbox of international policy options available to international policy makers as they work to achieve peace and security. It therefore makes sense that the relationship between peace and justice is complex, with international criminal justice mechanisms at a relatively early stage in the evolution.

Securing peace and securing justice are closely connected; but how much are these two dimensions actually affecting the work of the Office of the Prosecutor?

The international community has put in place some clear divisions of responsibility. The UN Security Council is in charge of peace and security. The ICC is doing justice.

With the creation of the ICC, as part of the UN Security Council's mandate to deal with peace and security, it now has the option of referring situations to the Office of the Prosecutor for investigations in particular concerning those States not Party to the Rome Statute where there are *prima facie* indications that widespread serious crimes are being committed with impunity.

By the same token, the Council also has the power under article 16 to request a temporary deferral of an investigation or prosecution undertaken by the Court.

The reasons for which these powers may be exercised are clearly a matter for Security Council members themselves and are not issues with which the Court and the Office of the Prosecutor can or should be involved. The Office's role under the Statute is a strictly legal and judicial one, designed to bring justice in cases of the most serious crimes of concern to the international community, putting an end to impunity for the perpetrators and contributing to the prevention of such crimes. Political considerations relating to peace and security are a matter for others to debate and decide.

What the Office can do, and does do, in those situations where it is invited to report to the Security Council is to place facts before the Council. But it is for the Council to decide whether the conditions for the exceptional step of deferring judicial proceedings should be exercised.

The world today is increasingly united by the conviction that no leader can be allowed to commit massive atrocities to gain or retain power. The responsibility to turn that conviction into reality, as in so many other areas of international life today, is shared. In those States which are Parties to the Rome Statute the system foresees that there will be investigations and prosecutions carried out by the State Party itself, or otherwise by the ICC. There will be legal consequences and accountability. However, in situations concerning States not party to the Rome Statute, if the State concerned takes no action, it is up to the Security Council to decide, on a case by case basis and without one particular standard, to refer the situation. To increase the prospects of changing behavior and preventing crimes or an escalation thereof, the Security Council could therefore warn States of the possibility of an ICC referral.

From the moment the Security Council does refer a situation, the judicial process will run its course should the necessary legal requirement be fulfilled. The Office of the Prosecutor will investigate according to the Statute and pursue cases wherever the evidence may lead and the judges will issue arrest warrants or summonses to appear. A judicial process will be underway, which can only be interrupted by a further decision by the Security Council acting under article 16.

It should nonetheless be recalled that an article 16 deferral does not divest the Court of jurisdiction – the Court has and continues to have jurisdiction with respect to the investigation or prosecution concerned. The exercise of that jurisdiction only will be halted, for a 12 month period. That deferral period can be renewed, but the Council will need to have majority with no veto to adopt the resolution under the same terms. In this regard, the Council would no doubt need to consider whether there has been a change of circumstances

within the situation that would support continuing to halt investigations and prosecutions or resuming them. A deferral is not an amnesty, nor an offer of immunity from prosecution – it buys time perhaps, but it does not buy a way out for alleged war criminals.

The drafting history of the Rome Statute indicates and practice suggests that any recourse to the deferral power would be highly exceptional. We have seen moves by some States to seek deferral of cases before the Court in two situations, Darfur and Kenya, but the Council has not been persuaded that the Court's work has impacted negatively on international peace and security – to the contrary, a number of Council members have recalled that the Court's intervention was sought as a contribution to international peace and security.

In situations before the Court, conflict management and often specific peace negotiations have been underway while the investigations and prosecutions are proceeding. In none of the situations has the role of the ICC precluded or put an end to such processes. Quite the opposite I would say; in several instances, it has indeed proved a spur to action, for example, as in the case of the LRA, where ICC arrest warrants themselves were widely acknowledged to have played an important role in bringing the LRA to the negotiating table in the Juba Peace Process in the first instance, despite initial fears by some – emphasised and exploited by the LRA leadership themselves – that if the indictments were not lifted, they could threaten the peace talks. At the time the Prosecutor called such a position by its real name – blackmail.

As the example of Kony shows, there can be obvious perverse side-effects from deferring judicial proceedings in the name of peace and security. Succumbing to pressure to restrain justice may send out a message to perpetrators that arrest warrants can be stayed if only they commit more

crimes or threaten regional peace and security. Court proceedings or the possibility of Security Council deferrals should not be used by alleged war criminals as a tool to divide the international community.

Ladies and Gentlemen,

Allow me to conclude.

The interplay between conflict resolution initiatives and justice is a prominent feature of the Office's work in all the situations in which it works, with investigations and prosecutions carried out during or directly after a period of conflict with other actors concurrently working on conflict resolution, security, humanitarian relief and peace building, as well as justice initiatives. The mandate of the Office is to ensure accountability for those who bear the greatest responsibility for the commission of the most serious crimes. The policy of the Office is to pursue its independent mandate to investigate and prosecute those few most responsible, and to do so in a manner that respects the mandates of others and seeks to maximize the positive impact of the joint efforts of all. To preserve its impartiality, the Office cannot participate in peace initiatives, but it makes clear that any proposed solutions in peace talks have to be compatible with the Rome Statute. It will inform the political actors of its actions in advance, so they can factor the Court into their activities.

The Office of the Prosecutor's experience after almost 9 years in post, looking at various conflict resolution initiatives around the world, has reaffirmed his deep-seated belief that both peace and justice are necessary and integral elements in any sustainable route to lasting stability. UN Secretary-General Ban Ki-Moon speaking at the ICC Review Conference in 2010 emphasised much the same point – and I quote him here in full:

“Perhaps the most contentious challenge you face is the balance between peace and justice. Yet frankly, I see it as a false choice. In today’s conflicts, civilians have become the chief victims. Women, children and the elderly are deliberately targeted. Armies or militias rape, maim, kill and devastate towns, villages, crops, cattle and water sources — all as a strategy of war. The more shocking the crime, the more effective it is as a weapon. Any victim would understandably yearn to stop such horrors, even at the cost of granting immunity to those who have wronged them. But this is a false peace. This is a truce at gunpoint, without dignity, justice or hope for a better future. (...) [T]he time has passed when we might speak of peace versus justice, or think of them as somehow opposed to each other. (...) We have no choice but to pursue them both, hand in hand. (...) Now, we have the ICC. Permanent, increasingly powerful, casting a long shadow. There is no going back. In this new age of accountability, those who commit the worst of human crimes will be held responsible. Whether they are rank-and-file foot soldiers or military commanders; whether they are lowly civil servants following orders, or top political leaders, they will be held accountable.”

If perpetrators and potential perpetrators of war crimes, crimes against humanity and genocide are to be deterred from committing more crimes, a strong and consistent message is required from all quarters – whether from the Court, State Parties to the Rome Statute, the UN Security Council or others – that peace and justice can work together and that the era of impunity is over.

In Rome, in 1998, States made a conscious decision to create a justice system that could stop or prevent violence rather than an *ad hoc* creation acting after the fact. New rules were created that other actors must adjust to.

The Court is modifying the dynamics of the UN model, without actually changing the rules. The UN Charter envisaged a collective security system to maintain international peace and security. This was a huge advance, but it left all critical decisions in the hands of politics. With the adoption of the Rome Statute model, States Parties shifted the paradigm – from the Westphalia model of national self-regulation, to the UN model of international scrutiny under the UN Security Council supervision, to the Rome Statute model of the rule of law. Be it because of principles or self-interest, they adopted a rule of law paradigm; they agreed to respect the decisions of an independent and permanent International Criminal Court; they are determined to ensuring lasting respect for, and the enforcement of, international justice.

Step by step, the Rome Statute system is moving ahead and creating a new international dynamic, impacting other institutions and changing international relations forever.

As the next Prosecutor of the International Criminal Court, I will continue to contribute to solidifying this change.

Thank you