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Plenary 2: "An International Criminal Code: The Rome Statute, the International Criminal Court and the *Ad Hoc* International Tribunals"

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The International Criminal Court 10 Years after the Rome Statute – Successes Achieved and Challenges Ahead

Reflecting on events since 1998, it seems in some respects disingenuous to argue that the creation of an International Criminal Court ten years ago has resulted in greater global security. As we know, rising oil prices and food shortages, coupled with ongoing conflicts in many parts of the world, mean that human security continues to be as elusive as ever. International law has been confronted by many new challenges and obstacles. Yet this same decade has brought important developments which place the individual in a new relationship with the international order. There is a stronger awareness of events beyond our own borders, and a greater recognition that State sovereignty does not place the individual beyond the protection of international law.

The creation of the International Criminal Court is a potential step towards a more just society, in giving real substance to the concept of ending impunity for the worst crimes against mankind. Building on the firm foundations laid by the practice and the jurisprudence of the ICTY and the ICTR, the long-held dream of establishing a permanent world criminal court finally became a reality in 1998, and 106 States now accept the exercise of the Court's complementary jurisdiction. It may be some time before we can truly speak of the Court having a deterrent effect. However, there is some evidence that the existence of the Court has already added a new element to negotiations and initiatives in the pursuit of peace, a matter which I will to return later in this speech.

Those who were present at the signing of the Rome Statute feel a particular sense of pride as the Court begins its work. The legal advisers of foreign ministries have participated in the Court's annual Assembly of States Parties and are preparing

for its Review Conference in 2010; we have agonised over problems in the dedicated EU Council Working Group in Brussels; we have set up cooperation agreements and made concerted efforts to encourage the universal ratification of the Rome Statute; we have even defended the Court from those who have sought to pre-emptively undermine its work.

Ireland, together with our partners in the European Union, can be justifiably proud of the strides taken by the ICC, particularly during its five operational years. The crimes within the remit of the Court are grave, namely: genocide; crimes against humanity; and war crimes. (The Court will also have jurisdiction over the crime of aggression once agreement is reached on a definition and on conditions for the exercise of jurisdiction.) The context within which these crimes occur is often complex. The Court has faced obstacles in the pursuit of its mandate but continues to make progress. It is on some of these notable successes and challenges that I would like to briefly touch upon today.

The Court has opened investigations into four situations – Uganda, the Democratic Republic of Congo, the Central African Republic and Darfur – and has issued arrest warrants in respect of each of these. Developments in each of these situations have posed difficulties as the Court establishes its working methods, and as States and other institutions adjust to the new reality of a permanent International Criminal Court.

While the Court is the judicial pillar of the system created by the Rome Statute, states and international organisations form its enforcement pillar. The Court is dependent on their support and co-operation to ensure its credibility and effective functioning. This encompasses financial and logistical assistance, the arrest and surrender of suspects and the protection of victims and witnesses. Considerable progress has been made in developing a permanent basis for constructive working relationships with two partners, the United Nations and the European Union. The Court has entered into co-operation and assistance agreements with both organisations. Having agreed procedures and points of contact in place will help to achieve the best possible co-operation, and should provide an exemplary model for States in their own dealings with the Court.

One of the most pressing issues is that of enforceability of arrest warrants. This has arisen particularly in respect of Darfur, a situation that was referred to the Court by the Security Council, marking harmonious co-operation in pursuit of the shared goals of the UN Charter and the Rome Statute. In April 2007 the Court's Pre-Trial Chamber issued arrest warrants against Ahmad Harun, former Minister of State for the Interior of the Sudan, and Ali Kushayb, a militia leader, for alleged crimes against humanity and war crimes. These warrants have not been executed, due to the failure of the Government of Sudan to co-operate. Despite international calls for his arrest, Harun continues to serve as Minister of State for Humanitarian Affairs. In his briefing to the Security Council in June, the ICC Prosecutor reiterated that Sudan is neither co-operating with the Court nor pursuing national prosecutions. He described Darfur as a "huge crime scene" involving the entire Sudanese state apparatus in systematic attacks against civilians. Opinion within the Security Council as to how to respond to this briefing was noticeably divided. Some States emphasised support for the ICC's efforts to break the cycle of impunity in Darfur. Others expressed fears that the already fragile peace process in Darfur could be completely derailed by pursuing senior government officials for war crimes. The Security Council eventually reached agreement on issuing a Presidential Statement calling on the Government of Sudan and all other parties to the Darfur conflict to co-operate fully with the Court, in order to put an end to impunity for the crimes committed there. Following on from this, EU Foreign Ministers meeting on 16 June deeply deplored the continued failure of the Government of Sudan to cooperate with the ICC and underlined that the Sudanese Government has an obligation, and the capacity, to cooperate. It called for Harun and Kushayb to be surrendered to the Court. The Council confirmed that it stands ready to consider measures against individuals responsible for not cooperating with the ICC.

There have been some recent successes in the Court's investigation into the conflict in the Central African Republic between 2002 and 2003. Following referral by the Central African Republic's government, the Prosecutor opened an investigation last year into the most serious crimes, including acts of rape and sexual violence committed on a devastating scale. The Prosecutor found that the alleged crimes were of sufficient gravity to warrant an investigation, the rape of civilians having been committed in numbers that could not be ignored under international law. As a result of

the Prosecutor's efforts, one of the leading figures in the conflict, Jean-Pierre Bemba was recently arrested in Belgium, following a warrant of arrest issued under seal by the Court the previous day. Mr Bemba, a former Vice-President of the Democratic Republic of the Congo, was transferred to The Hague last week to await trial for war crimes and crimes against humanity. This arrest and transfer illustrates the contribution that can be made by all States Parties to the Rome Statute, not just the "situation countries" themselves, in co-operating fully with the Court.

The Court's very first trial was intended to be that of the DRC militia leader, Thomas Lubanga. However, it has suffered a significant setback. The trial has been stayed on the basis that the Prosecutor made incorrect use of Article 54(3)(e) of the Rome Statute. This allows the Prosecutor, exceptionally, to receive information confidentially which is not for use at trial but solely as a "springboard" to generate new evidence. The Prosecutor was not always aware, prior to receiving the materials, whether their potential use was solely for the purpose of generating new evidence or other purposes; and had taken the view that items received under these confidentiality agreements could later be used as evidence at trial. This approach failed to take due account of the Prosecutor's obligations of disclosure under Article 67 of the Statute.

The Trial Chamber ruled on 13 June that the Prosecutor had failed to observe the restrictions of Article 54(3)(e), having used confidential agreements generally to gather information unconnected with its lead potential. This has resulted in exculpatory evidence being in the possession of the Prosecutor, which cannot be revealed to the defendant as due process demands, because of the confidentiality agreements, many of which were made with UN agencies. A "compromise" was suggested by the UN to allow the judges to merely see, but not to record, the documents concerned. They could then compare relevant documents with narrative summaries of the evidence provided by the Prosecutor, which could be released to the defendant. The ICC judges considered this proposal to be an inadequate solution, summaries of the evidence being unacceptable substitutes for the disclosure of the evidence itself.

The release of Lubanga as a result of the stay was ordered by the Trial Chamber ten days ago, though this decision will not be implemented pending any

appeals of both the substantive decision and the order for release. Continuing efforts are being made by the Court and the UN to resolve the issue of access to the disputed evidence in a manner that respects the requirements of due process. The stay on the Lubanga trial may have adversely affected how the Court is perceived, offering new ammunition to its opponents. However, the Trial Chamber's ruling legitimises the ICC in the long term by demonstrating that war crimes suspects can expect to receive a fair trial, with the full guarantees of due process, in The Hague.

The presence of the ICC on the international landscape has once again highlighted the difficulties in balancing considerations of peace and justice. While no-one would dispute that justice contributes fundamentally to the creation of lasting peace, tensions may occur between the pursuit of international justice and peace-building initiatives on the ground. This is illustrated by the situation in Uganda, where the peace agreement negotiated between the Government and the Lord's Resistance Army rebels earlier this year would, if it is eventually signed, place post-conflict justice and reconciliation at the national level above any international efforts. This would probably leave no place for the ICC process which had been initiated at the request of the Ugandan government. As I adverted to earlier, one of the more immediate impacts of the ICC's existence may be to introduce a new element to peace negotiations. Warring sides may feel more pressure to conclude an agreement in a bid to avoid the risk of prosecution by the Court.

This year, with the signing of a peace agreement with the LRA apparently within grasp, it seemed as if both sides had come to wish the arrest warrants issued by the ICC against LRA leaders, including Joseph Kony, would simply disappear, in the interests of concluding a peace agreement. However, there is no clear mechanism for the Court to withdraw the warrants on its own initiative, and the Ugandan Government would be in breach of its obligations as a State Party to the Rome Statute if it refused to surrender the indictees in order to secure a peace agreement.

It has been suggested that the Security Council could use its powers under Article 16 of the Rome Statute to request a deferral of the investigation or prosecution for a period of 12 months, in the interests of peace and security. Even those members

of the Security Council which are strong supporters of the Court are said to be giving real consideration to this proposal.

An alternative possibility may be for the indictees to challenge the admissibility of ICC proceedings under Article 19 of the Statute, on the basis that the case is being prosecuted at national level. Given the importance of the precedents set in the early years of the Court's operation, any deference to national measures should only occur where they are capable of effectively bringing about peace and securing justice. The role of the Security Council is also a difficult issue in the ongoing attempts to define the crime of aggression and to decide upon the appropriate conditions under which the Court may exercise jurisdiction in respect of this crime. This contentious question was deferred by the Rome Statute, and will be examined again at the Review Conference in 2010.

The many challenges which must be addressed should not detract from the important achievements of the Court in its early years. One of the early, yet often overlooked, achievements of the Rome Statute is its contribution to the codification of international criminal law, through both the definitions within the Statute itself and the carefully crafted and detailed Elements of Crimes. As the Statute's principle of complementarity means that national authorities bear the primary responsibility to bring perpetrators of international crimes to justice, States Parties must ensure that they have the requisite national legislative and institutional frameworks in place. The definitions in the Rome Statute are thus disseminated into the domestic criminal law of the countries that have joined.

The challenge of national implementation is being successfully addressed by practical measures of co-operation. Model laws have been made available by the Commonwealth, the Arab League and the International Centre for Criminal Law Reform, amongst others, while the EU has established lists of national experts and contact points that are readily available to assist countries working towards implementation. In a very worthwhile venture, the Office of the Prosecutor has developed an innovative and comprehensive electronic ***Legal Tools*** resource to assist national actors in addressing core international crimes. These resources greatly contribute to demystifying international criminal law, and may improve cost-efficiency, legitimacy and the quality of justice at the national level, as well as toward

achieving the harmonious application and consistent development of international legal principles. The Legal Tools database may be accessed from the website of the ICC, and is to be recommended to all those interested in the reform of criminal law.

One of the most innovative features of the Rome Statute is in the area of victim assistance and participation, in particular the establishment of a trust fund for victims and the opportunity for victims to participate in trials. Victim participation may offer greater legitimacy to the process, bringing international justice closer to those affected by serious crimes. However, it also presents a challenge to the Court in balancing the rights of the defendant with those of the victims. The Court has sought to address this by setting general guidelines for the participation of victims (in the course of preparations for the Lubanga trial), addressing modalities of participation, legal representation, protection of victims, and the dual status of victims and witnesses. These guidelines should contribute both to due process and to ensuring that the right of victim participation under the Rome Statute can be fully realised.

These developments mark real progress towards realising the aims of the Rome Statute. A telling reflection of the Court's many successes is the vote of confidence recently expressed by a traditional opponent of the Court, the United States. My counterpart at the State Department, John Bellinger, has monitored developments in The Hague and has recently spoken of the United States' willingness to find constructive and practical ways to work with the International Criminal Court to advance the shared interest of promoting international criminal justice. The US accepted the decision of the UN Security Council to refer the Darfur situation to the ICC, and Mr Bellinger has indicated that the US would be prepared to consider an appropriate request from the ICC for assistance in its Darfur work consistent with applicable U.S. law. It is also noteworthy that the United States was President of the Security Council last month when the Presidential Statement on Darfur, which I referred to earlier, was agreed. Though the United States remains unwilling to ratify the Rome Statute for the foreseeable future, there has been a welcome shift in attitude towards facilitating the Court's work in pursuit of shared goals.

To conclude, the successes and challenges which have gone hand in hand for the Court may be the very essence of progressive development – the force that drives the constant effort to improve upon what others before us have achieved, and the

motivation for us to strive always to create a more just world, in which all are governed by the rule of law.

Thank you for your attention.