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SUPPORTING THE INTERNATIONAL CRIMINAL COURT

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KEYNOTE SPEECH

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INTRODUCTION

[1] It is a great honour to be with you today, to share perspectives.

[2] Part of the work I had to do in preparing this speech involved needing to come up with a catchy phrase that captures the essence of our gathering. The best that I could do in that respect is this title: 'Errol Mendes & Friends around the World rooting for the ICC.' It may not be the catchiest of phrases, but it certainly captures the essence of the gathering. I will leave it to Professor Mendes to work out a catchier name, since he plans to make this a standing formation.

[3] I thank Prof Mendes for organising this event. And I thank all of you for warmly embracing the idea.

THE PURPOSE OF THE CONFERENCE

[4] Those of us who participated in the discussion about the appropriate date will recall the proposal to wait and see what happens tomorrow, 3 November 2020. Are we going to see the continuation of a regime that has launched these sustained attacks against the Court? Or will there be a new regime of a kinder bent?

[5] It is a perfectly legitimate proposal to make – and need not engage diplomatic sensitivities to discuss it. It is a query rooted in an objective reality: that there is an election taking place, in which an old government may continue or a new one may come in.

[6] But, Errol and I felt that the outcome of that situation should make no difference to the need for the conference. In fact, the real possibility that the old government may continue in office made it even more imperative to hold the conference ahead of the election. This has the advantage of locking in ahead of time the interest and commitment of those conference participants who may be overcome by the stupor of depression in the following months – should that possibility come to

pass. This, again, is a matter of objective reality that entails no diplomatic sensitivity because of an implied value preference. No such preference is implied, of course. Perish the thought!

[7] The hope, rather, is that if we held the conference before any eventual bite of that very possible reality, then we would have had a template of thought – through some brainstorming – on how to protect the ICC from further attacks. The need to protect the ICC from further attacks becomes particularly acute in that scenario, given the difficulty one has in conceiving how the Court can ‘change course’ without losing its soul as an instrument of accountability and justice for victims of atrocities all over the world.

[8] Here, let’s keep in mind that the Court considers that the ‘course’ that it is being coerced ‘to change’ is ‘the course of justice’. That course is inherent upon the Court to embark upon as a court of last resort, when there is nowhere else to turn to for justice in any meaningful way.

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[9] But, let us be clear. This is no gratuitous avowal of defiance. It is a mere statement of common sense. In that respect, please consider this. Afghanistan is a State Party to the Rome Statute. And it has a situation. With over 18 years of the current armed conflict and with well over 40,000 human beings – civilians – killed in that war, the situation in Afghanistan alone dwarfs the totality of all the situations in Africa that the Office of the Prosecutor has ever investigated and prosecuted.

[10] And even as we speak, innocent civilians in Afghanistan continue to be blown up in terrorist bombings and sundry acts of violence.

[11] As part of the media campaign employed to justify the political attacks against the ICC, the world was asked to believe that there was a peace agreement signed in February this year – with talks continuing in Doha - that would bring peace. This is something that we all want for the part of our humanity that also lives in the territory of Afghanistan. But the violence and the killings have continued without let.

[12] According to media reports, the latest reminder of that reality occurred just a week ago. A suicide bomber attacked an education centre in Kabul, killing 24 people. Many of them were teenage students. In addition to the dead, over 50 people were also wounded. [Further, it has been reported that on 2 November 2020, at least 22 persons, mainly young students – including 10 females – were killed in a terrorist attack on the Kabul University campus.]

[13] In May, we read news reports of an attack at a maternity hospital in western Kabul that left several mothers dead.

[14] Those stories are symbolic of what life has been like for the people of Afghanistan for the past 18 years.

[15] Notably, according to a recent report of the UN Assistance Mission in Afghanistan (UNAMA), nearly 6,000 Afghan civilians were killed or wounded in the first nine months of the year, as heavy fighting between government forces and Taliban fighters continues unabated, in spite of efforts to find peace. A closer look at the numbers shows that from January to September, there were 5,939 civilian casualties in the fighting – 2,117 people killed and 3,822 wounded.

[16] So, when the Prosecutor sought authorisation from ICC Judges to investigate the situation in Afghanistan, it would have jarred common sense to reject the request - or to grant it with carve-outs regarding what or who may not be investigated in Afghanistan. Judges did what they had to do. They granted the authorisation.

[17] It is up to the Office of the Prosecutor later to decide whom they would charge, following the results of their investigation – or what understandings they may have with other authorities who would do their part in investigating and prosecuting any of the cases, in keeping with the primary obligation of States to investigate and prosecute at the anterior end of the doctrine of complementarity. Any indictment that the Prosecutor proposes would, of course, be subject to confirmation by judges of the ICC.

[18] Still on why it was felt necessary to proceed with this conference notwithstanding tomorrow's election results.

[19] Part of the consideration is that we should not overrate the benefits of a new government emerging from tomorrow's election.

[20] The reasons include these. First, if tomorrow produces a change in government, there surely will ensue much scrambling to rebuild and renovate the post-WW2 edifice of multilateralism that has been rattled to its foundations in the past four years, with so much rubble left on the floor. The ICC is not the only victim of that experience. *Les Misérables* at the receiving end of that treatment include the Human Rights Council, the Intermediate Range Nuclear Forces Treaty, the Open Skies Treaty, Paris Accord, the UNICEF, the WTO and even the WHO, etc.

[21] We want to be sure that the enormity of this project of rebuilding or renovating the multilateral international order does not leave the ICC low on the scale of preference and priority – while gross human rights violations continue to be committed as they often are, including by those who might now have derived new impetus from the political attacks against the ICC and the efforts made to delegitimise it.

[22] Another reason that we do not overrate the benefits of a change in government is that the genie of the so-called 'sanctions' directed at the ICC has already been let out of the bottle.

[23] That development continues as a source of great worry. There are at least two reasons for this. First, there are many Americans who staunchly support the ICC in insisting that questions of accountability must be asked when they arise in the territory of a State Party to the Rome Statute, notwithstanding whose conduct might have triggered that question in the territory of a State Party.

[24] Those who share this view are no doubt borne out by the uncompromising position of the United States during the London Conference of 1945, where Robert H Jackson insisted that the character of a conduct as criminal in international law '*could not depend on who committed them.*'

[25] But, we also know that there are many Americans who, while supportive of the ICC, also have some visceral pragmatic sympathy for the political motivations for these attacks; and, therefore, will not lose sleep worrying about how to stop these attacks or reverse their effects. And, there are others who have a knee-jerk hostility towards the ICC, because of perceived 'significant flaws' in the Rome Statute.

[26] Within the last two categories come those who subscribe to the political argument that the Court must entertain no question at all that arises from the Israeli-Palestinian conflict – a matter now before the Court. From what we are repeatedly told, there is some bi-partisan sympathy for that sentiment in Washington. We are not confident that any new administration in Washington DC will be able to easily override – as a matter of politics – the interests that drive that sympathy.

THE ENDURING VALUE OF THE ICC

[27] The purpose of this gathering takes us to the fundamental question: 'Why bother?' That is to say, why bother defending the ICC against these attacks?

[28] There is a sense in which speaking to that question in this forum feels very much like singing to a choir that already knows the hymn.

[29] If so, I crave your indulgence. There may be nothing wrong with singing an old song with a different inflection for renewed emphasis to the message. Nor should we be shy to call up a plain old song for an old fashioned sing-along, when the mood and the circumstances truly urge it.

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[30] But, here is another story of songs. More than 20 years after the adoption of the Rome Statute, the story of the relationship between the ICC and even its lovers may be all too familiar.

[31] A stranger covets a heart-throb that seems a distant – possibly unrealistic – prospect. There is aching heart inducing loss of sleep. All hoops are jumped to bring the relationship home – literally and figuratively. The chase is drawn out sometimes; and hope remains alive, as long as the prospect lingers for dreams of the relationship. In the end, with some luck, the dream does come true. The match is made. And the inevitable inebriation of love engulfs the couple. Pledges of eternal conjugal happiness fill the air. Promises of all kinds are made. All is given that is asked. When the one says ‘jump’, the response comes in the happy question ‘how high?’ There is overindulgence in mutual companionship.

[32] Then, eventually, six months slowly creep around. And, then, two years. By the 10 year mark, those sleepless nights of courting days may survive only as enfeebled filaments of distant memories that may even struggle as such to survive the burdens of insomnia of a different cause: which is now presented in the question ‘Should I stay or should I go?’ By the 20 year mark, one would be lucky if all that is left looping in the head at night is nothing as serious as the version of reality depressingly represented in the refrain to Roxette’s smouldering hit dirge: *‘It must have been love | But it’s over now | Lay a whisper on my pillow ...’*.

[33] We want to be sure that Roxette’s song does not become an anthem around the ICC, any time soon. For our shared humanity will be the wretched child of that broken relationship.

[34] And, so, I speak to the question ‘Why bother?’ That is to say, why bother defending the ICC against these political attacks.

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[35] That question entails, of course, the story of the value of the ICC to our shared humanity. I can touch upon just some of that story. Only some of it.

[36] That story of ICC’s value begins with those political attacks themselves. There is much irony in the fact that the political attacks against the ICC are emblematic of the Court’s value to our humanity. There is no escaping the conclusion that those who attack the ICC – even threatening to destroy it – do so

because they fear the Court. The question is: Why the fear? If they think the Court is a 'joke' – or something not to be taken seriously - they should then leave it alone to bungle along its merry way. So, the political attacks tell a success story for the ICC.

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[37] There is yet another kind of fear that speaks to the value of the ICC. It is the fear of political leaders inclined to cling to power because of the fear of possible prosecution at the ICC should they leave office.

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[38] As well, the fear of the ICC also has much to do with the reluctance of some States to subscribe to ICC membership. Their leaders worry that the ICC may start poking around for skeletons in their office bureaus. In reality, of course, ratification of the Rome Statute has no retroactive effect.

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[39] And, then, there are the elections. 2020 is a big election year around the world. Besides that very big one taking place tomorrow, which has gripped the world more so than usually the case every four years, there are also elections in many parts of the world – including in African countries. Amongst them are the following within present and former ICC States Parties:

The Comoros (legislative election): 19 January and 23 February 2020

Mali (parliamentary election): 29 March and 19 April 2020

Burundi (general election): 20 May 2020

Malawi (presidential election): 23 June 2020

Guinea (presidential election): 18 October 2020

The Seychelles (general election): 22-24 October 2020

Tanzania (general election): 28 October 2020

Côte d'Ivoire (presidential election): 31 October 2020

Burkina Faso (general election): 22 November 2020

Ghana (general election): 7 December 2020

Niger (general election): 27 December 2020

Central African Republic (general election): 27 December 2020.

[40] The work of the ICC has served to make elections less violent in States Parties. This is particularly so in African countries – where election periods were seen as periods of violent carnivals for those intent on winning political power at all cost.

[41] As the presiding judge in the trial of one of the cases that arose out of the 2007 and 2008 post-election violence in Kenya, we heard evidence to the following effect. Because of the ICC's legal proceedings, elections have become dramatically less violent in Kenya. I have also heard ordinary Kenyan citizens tell me that in private conversations.

[42] The ICC also took up post-election violence situations in Côte d'Ivoire and in Guinea.

[43] And every election season, Ms Fatou Bensouda the Prosecutor, issues statements to the countries concerned, urging them to refrain from violence, whenever she had reason to worry.

[44] All of these ICC interventions have had positive results.

[45] I have also met many Presidents and other leaders of West African countries – as well as citizens and leaders of civil society – who have told me directly that they are grateful for the ICC's existence and its work in these electoral violence situations, because it has made a huge difference in how politicians behaved during election times in their countries.

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[46] We all must hope that all the fear of post-election violence in the US Presidential Election tomorrow does not come to pass. That would truly set a harrowing example for the world. No one contests now the prescience of John Winthrop's description of the United States in 1630 as '*a city upon a hill*,' which has '*the eyes of all people upon*' it. People like to copy what America does. In the nature of things, it is always easier to copy bad examples than the good ones.

[47] The ICC will no doubt intervene in any Rome Statute State Party where electoral violence would occur at levels that cross the gravity threshold of ICC's jurisdiction. But, for the sake of humanity, we prefer not to have to do that work. It is better that victims are spared the horrors of these mass atrocities.

THE STORY OF IMPERFECTIONS

[48] In my earlier discussions with Errol, he correctly insisted that today's conference must remain firmly focussed on the political attacks against the Court. He is anxious to not have the focus distracted in the direction of extensive reflections on what the Court ITSELF must do better. He has promised to convene another conference amongst us, which shall focus on that very question – especially in view of the ICC review report that we received recently.

[49] I am fully sympathetic to that approach. As the person who encouraged my colleagues at the Court that we needed to invite that review upon ourselves, I am not at all shy to discuss why we wanted it done – always insisting that its long term advantages for the Court would ultimately outweigh the disadvantages that would be perceived by those who might be unduly delighted or depressed by any critical observations or comments that the report may contain.

[50] But, I can briefly tell you now - without prejudice to Errol's concerns - that in encouraging my colleagues that we needed to have that review conducted, I was not overly troubled by the stories of imperfections – both accurate and inaccurate – that would always be dredged up for all the world to read.

[51] As Katherine Center insists, *'The human condition is imperfection. And that's how it's supposed to be.'*

[52] There is, of course, no judicial system in the world – both at the national and international levels – which would escape that very human attribute, if any such review were to be conducted upon it. It is for that reason that we considered at the ICC that we might as well confront ours head on – and learn from it – rather than shy away from it.

[53] Here, perhaps, we may recall the Hawking rule that underscores imperfection's silver lining. According to Stephen Hawking, *'One of the basic rules of the universe is that nothing is perfect. Perfection simply doesn't exist.'*

[54] And Professor Hawking didn't stop there. He added this: *'Without imperfection, neither you nor I would exist.'*

[55] Now, I have absolutely no idea of what he meant by that addendum. But, given his reputation as a genius scientist, I must trust that he was driving at something quite profound.

[56] I can say, however, that even for those of us mere mortals who fled intellectual torture in the land of hard sciences and found refuge in Jurisia, we can readily see the Hawking rule at work in the existence of the ICC itself. It is indeed the imperfections of the human condition – exhibited in the gross atrocities that human beings commit against one another – that is the very *raison d'être* of the ICC.

[57] But, imperfections in the workings of the ICC itself should not obscure the Court's enduring value – some of which I have outlined earlier – relative to the more malevolent manifestations of human imperfections that play out in the manner of genocides, crimes against humanity, war crimes and the crime of aggression, which comprise the subject-matter jurisdiction of the ICC as a court of last resort.

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[58] But, then again, we should not get carried away by the story of human imperfections. I recall here, the following rhapsody from Anatole France (the Nobel laureate): *'I cling to my imperfection as the very essence of my being.'* Or that from a certain Isaac Fowler to whom the following famous quote is attributed: *'Your imperfections are the marks of authenticity and that is the beauty of you.'*

[59] Well, those are, of course, an entirely sound attitude to be instilled in a young person who must learn to get on with life that will have be lived in an imperfect human body. But the same attitude would be quite disastrous even in a young institution that is sustained by public mandate and money. The better advice comes from George Soros: *'[T]here's no shame in being wrong, only in failing to correct our mistakes.'*

[60] And, that is why we embarked on the ICC review exercise. I am happy that Errol has agreed to convene another conference especially to discuss that matter.

THE US OBJECTIONS TO THE ICC

[61] But, I should like now to return to the matter of some of the generic American objections to the Rome Statute. And I should do so from the perspective of the middle of the road American citizens, who are both sympathetic to the ICC, while still hoping that the ICC should find a way to make their government's attacks go away.

[62] Many in this category will often see the point of America's refusal to join the Rome Statute, because of some perceived shortcomings in the Rome Statute. We see this in President Clinton's eventual effort in signing it on 31 December 2000. We will all recall his famous line: *'In signing, however, we are not abandoning our concerns about significant flaws in the treaty.'* And so he concluded: *'I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.'*

[63] But, with all due respect to those concerns, the hope that the US would have ratified any meaningful version of the Rome Statute that might have been drafted to America's liking was always a hope that lay at the end of the rainbow.

[64] Let us note here that it took the US 40 years to ratify the Convention against Genocide (1948). And this happened only after Senator William Proxmire took it upon himself to harangue his colleagues for the last 20 of those 40 years – from 1967 to 1986 – with daily speeches on the floor of the Senate (totalling 3,211 times), calling for the ratification of the treaty.

[65] The US played an active role in drafting the Convention on the Rights of the Child (1989). They signed it six years later in 1995, but have still not ratified it.

[66] I'm not aware of any multilateral international court or tribunal to whose binding jurisdiction the US has ever submitted as a member. It is not a member State to the Inter-American Court of Human Rights. Nor is it a member to the International Tribunal on the Law of the Sea, created under the Convention on the Law of the Sea (1982).

[67] President Wilson was the champion of the creation of the League of Nations; but the US did not ratify its covenant. President Franklin D Roosevelt conceived of the United Nations, and when he died suddenly in 1945, his former Vice President and successor, President Harry Truman, oversaw its creation in 1945. The International Court of Justice is the principal judicial organ of the UN. After 75 years, 74 UN member States have acceded to the compulsory jurisdiction of the ICJ. The US is not one of them.

[68] The US is not a State Party to the 1st Optional Protocol to the International Covenant on Civil and Political Rights (1966), which created the UN Human Rights Committee – a human rights complaints mechanism. The US has only signed – but has not ratified – the Convention on the Elimination of All Forms of Discrimination against Women (1979). And they have neither signed nor ratified the Optional Protocol to that Convention (1999), which created the CEDAW Committee – a complaints mechanism.

[69] And the list goes on.

[70] The point here is not to list the treaties – many of them human rights treaties – that the US has been very slow to ratify. The point rather is that people need to be careful in pressing the suggestion that the US would have ratified the Rome Statute, had it been drafted in any meaningful way that did not entail ‘significant flaws’ in the American view.

‘SIGNIFICANT FLAWS’

[71] And, on the subject of the ‘significant flaws’ in the Rome Statute, which has been decried so much, perhaps, I should reprise here part of the message delivered in my speech to the UN General Assembly earlier today.

[72] To anyone around the world attracted to the objection that the Rome Statute contains ‘significant flaws’, the best that I could do in answer is to recall the words of an eminent historical figure: George Washington (the first President of the United States).

[73] On 1 July 1787, in the course of the Convention underway in Philadelphia to draft the Constitution of the United States, President Washington wrote a letter to David Stuart, a family member, about difficult differences of views in full display during the Convention. In his letter, Washington wrote as follows: *‘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.’*

[74] And, on 24 September 1787, one week after both the conclusion of the Philadelphia Convention and the adoption of the US Constitution, President Washington wrote yet another letter. This time to four former Governors of his own State of Virginia, urging them to support Virginia’s ratification of the new Constitution. In that letter, Washington wrote as follows: *‘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 the present circumstances of the union is, in my opinion desirable.'

[75] Those two letters, from President Washington himself, sum up the story of the stormy controversy that engulfed the new US constitution and the circumstances under which it was adopted in 1787.

[76] But, that also is the story of the adoption of the Rome Statute and the circumstances under which it was adopted, in 1998.

[77] If the US Constitution would provoke the caustic controversy that engulfed it at the time, where many Americans stiffly objected to it for being 'significantly flawed', it must come as no surprise that a similar attitude would greet the Rome Statute in its own time.

[78] And that invites back the story of imperfections as a permanent human condition. In that connection, let us recall Gerard Way's observation that '*[b]eing happy doesn't mean that everything is perfect. It means that you've decided to look beyond the imperfections.'*

[79] We should like to think that as the defining mind-set of the 123 States Parties to the Rome Statute, as well as the mind-set of its teeming supporters around the world. They are happy with the Rome Statute, not because it is perfect. They have just decided to look beyond its imperfections, accepting that its values for humanity far outweigh those imperfections.

CONCLUSION: A LUCID MOMENT

[80] The ICC was an improbable achievement that was created during the lucid moment of the 1990s, when the Cold War eased its chilling grip on world affairs: when the Berlin Wall fell on the heels of glasnost and perestroika; when the apartheid regime in South African was brought to an end, and Nelson Mandela was

released from prison; when the Security Council for a brief period in time allowed ad hoc tribunals to be created to ask questions of accountability for the atrocities that were committed in the former Yugoslavia and in Rwanda.

[81] That lucid moment in time lingered long enough for the UN General Assembly to midwife the delivery of the ICC in 1998 – after long decades of gestation.

[82] That lucid moment is now gone. And it will be a pipe dream to expect the Security Council to allow another ad hoc tribunal to be created. Nor would the international community manage to agree to create the ICC today had it not been created in 1998.

[83] It is for that reason that we must protect this Court with all our intellectual and physical resources – for the sake of our shared humanity: while still continuing to encourage and assist its improvement in every reasonable way.

[84] I thank all of you for subscribing to that commitment.