SPEECH TO THE UNITED NATIONS GENERAL ASSEMBLY

by

Judge Chile Eboe-Osuji
President, International Criminal Court

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CHECK AGAINST DELIVERY

Mr Vice-President,

Excellencies,

Distinguished delegates,

Ladies and gentlemen,

I am honoured to address this august Assembly for the first time in my capacity as President of the International Criminal Court.

I assumed the position of President in March this year: at a time when the Court is busy at all phases in its work-a-day life – pre-trial, trial, reparations and appeals, and the Prosecutor's workload is likewise increasing.

My written report has been distributed to you, as document A/73/334. It contains a summary of the Court's activities, as well as updates relating to cooperation between the United Nations and the ICC, for which the Court is grateful. In these remarks, I shall not repeat the content of that report.

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But, Madam President, Ladies and Gentlemen, please allow me to return to a very important element of that report – an element that resonates particularly with a running theme of this year's session of the General Assembly.

Madam President, that is to recall that this year marks the 20th Anniversary of the adoption of the Statute of the International Criminal Court, fondly called the Rome Statute. As part of my written contribution to the Nelson Mandela Peace Summit held in September, I had recalled that the Rome Statute was adopted on the eve of Mandela's birthday 20 years ago – on 17 July 1998.

The occasion of the 20th Anniversary of the Rome Statute compels us to reflect on what the mere conclusion of that treaty, together with the Court

that it brought in, all under the aegis of this Organisation, mean for the world and its teeming humanity.

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The theme we chose for that reflection is **'BACK TO BASICS.'**

That theme requires us to return to two basic questions. The FIRST re-engages this query: Why was the Rome Statute adopted? The very preamble of the Rome Statute itself answers that question. The preamble recites the following apposite declarations, amongst others:

- [The] **Conscious**[ness] that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and [the] concern[*] that this delicate mosaic may be shattered at any time,
- [The] **Mindful**[ness] that during [the 20th] century [in which the Rome Statute was adopted] millions of children, women and men ha[d] been victims of unimaginable atrocities that deeply shock the conscience of humanity,
- [The] **Recogni**[tion] that such grave crimes threaten the peace, security and well-being of the world,

…

- [The] **Determin**[ation] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, …

The SECOND of the basic questions that the 20th Anniversary of the Rome Statute compels us to reflect upon is whether our world and civilisation have arrived at the stage where those legislative worries that gave impetus to the negotiation and adoption of the Rome Statute have now become a thing of the past: such that the World no longer needs the Rome Statute and the ICC.

One of the most highly respected African Statesmen of our time answered that question in a very straightforward way. As part of his own

reflections during the 20th Anniversary of the Rome Statute in July, Nigeria's President Muhammadu Buhari answered that question in these words:

'With the alarming proliferation of the most serious crimes around the world, the ICC, and all that it stands for, is now needed more than ever, in ways that were unforeseeable to its founders. The ICC may have been created at a time of optimism that it would not need to be utilized frequently, but, unfortunately, the increase in international crimes has only increased the Court's relevance.'

And if any one of those legislative worries that impelled the Court's creation stands out for a special focus, it is this. During the 20th century, ***'millions of children, women and men ha[d] been victims of unimaginable atrocities that deeply shock the conscience of humanity.'*** Can we be sure that at the close of the 21st Century, humanity will not be left singing the same sad song – in the absence of the Rome Statute and the ICC remaining in place and supported by all to serve, at least, as a whistle of caution (if not a real obstacle of conscience) to those inclined to commit such crimes?

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In her opening remarks a month ago, the President of this Assembly rightly reminded us that millions of people around the world are enduring war and violence. Indeed, important statistics even suggest an increase in the incidence of war and violence over the last 20 years since the adoption of the Rome Statute – possibly by as much as three times or more.

This must trouble us: given the phenomenon of armed conflicts as the most common vectors of atrocity crimes – typically those that come in the manner of ethnocentric mass violence, sexual violence and sundry war crimes.

There are many reasons to insist that the mere existence of this permanent judicial mechanism for accountability does truly serve as an inconvenient obstacle to the freewill of those inclined to engage – even unwittingly – in conducts that create the circumstances that conduce to

crimes of atrocity. That modest value alone is enough of a return on the ICC investment.

Still, we must remain troubled by the unrelenting frequency of armed conflicts in the world.

It is in this respect that the objectives of the United Nations and the ICC remain unsurprisingly at one. They commonly involve the global project to protect peace and security and human rights, through multilateral cooperation and action – backed by the international rule of law.

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His Excellency Mr Guterres, the Secretary-General, was on point in calling for a ***'renewed commitment to a rules-based order'***, in his address to this Assembly a month ago.

On behalf of the interests that the ICC represents, it is truly encouraging to hear many of the delegates restate, during the general debate, that the ICC occupies a cardinal place in that **'rules-based order'**; and that every effort must be made to protect and support it as such.

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Excellencies, Ladies and Gentlemen: whenever a man champions an important idea to a successful outcome, we are always quick to engrave the man's name eternally onto that idea, by calling him 'the father' of the idea. We rarely do the same for the very many women who championed some of the ideas that have defined human history. This is perhaps a regrettable case of inordinate pre-occupation with dreams of fathers, the elusive men who are often absent from our lives for all kinds of reasons that seem important to them; and in the process we take our long-suffering mothers for granted.

Eleanor Roosevelt was a great champion of the history of human civilisation, no less so than any man ever was. We should all get used to calling her 'the mother of human rights.' And, here, I must quote her call for

united action to improve the world under the banner of the United Nations: ***'Our own land and our own flag cannot be replaced by any other land or any other flag'***, she said. ***'But, you can join other nations, under a joint flag, to accomplish something good for the world that you cannot accomplish alone.'***

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A product of such joint action among nations, the ICC was established as a court of last resort – a literal instrument of the rule of law. Its mandate is to try those who commit some of those ***'unimaginable atrocities that shock the conscience of humanity'***. For present purposes, let us call these crimes by their names. They are genocide, crimes against humanity, war crimes and the crime of aggression. These are crimes that have blighted humanity for long periods of time up until the negotiation and adoption of the Rome Statute – in 1998.

We can be even more specific in recalling the history of evil in the period leading up to 1998. And, in that regard, let us recall that no less than 7,000 Bosnian Muslim men and boys were massacred in Srebrenica in 1995. The International Criminal Tribunal for the former Yugoslavia has pronounced their killing as amounting to genocide. The year before – in 1994 – about 800,000 Tutsis were killed in the Rwandan Genocide. About 50 years before that, six million innocent human beings were killed in a genocide in East and Central Europe, because they were Jews.

Let us also recall that it was only in the early 1990s, shortly before the adoption of the Rome Statute that apartheid – a crime against humanity, over which the ICC now has jurisdiction – came to an end in South Africa. And let us recall that beginning in 1991, Sierra Leone was engulfed by a brutal civil war. In addition to the rapes, the sexual slavery, the murders and the conscription of children into military use, that civil war was also marked by a particular brand of cruelty and terror. It involved the heartless amputations of the arms of human beings by their fellow human beings: leaving the victims with disabling physical and mental scars that last a life-

time. It was a crime against humanity that left its very visible hallmark on that country and on our collective conscience as human beings – even today.

We must give due credit to the joint action of nations, for the adoption of the Rome Statute, in order to have in place a permanent mechanism to ensure eventual accountability for those who subject their fellow human beings to such cruelty in future. That is the point of the Rome Statute and the ICC. It is nothing else.

In that and other aspects of international law, what the international community has done through joint efforts has been to occupy the field with complementary legal structures of human rights and international criminal justice. By occupying the field in that way, there has been a correlative shrinking of the field of play for the malevolent forces that would commit genocide and other crimes against humanity without qualms. We can readily appreciate the certainty with which these malevolent forces WILL move in and occupy the ground that will be vacated upon any dismantling of these existing multilateral mechanisms of international law and justice.

Not only will the malevolent forces move in with certainty; they will move in with celerity.

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Mr Vice-President, Excellencies, Ladies and Gentlemen, history shows the crimes in the Rome Statute as events that disturb international peace and security. Eventually, leaders of other nations would inevitably intervene with military force and halt the on-going atrocities: rightly compelled by the pangs of their own conscience, or of fear or concern as to the dangers posed by the events (somehow, somewhere) to their own national interests. It is difficult to put it more eloquently than Mr Justice Robert H Jackson of the US Supreme Court put it at the end of World War II. We will recall that he was both the Chief US Representative at the London Conference of 1945 and, later, the Chief US Prosecutor at Nuremberg. In a speech he gave to the American Society of International Law in April 1945, he said as follows:

'We have been a freedom-loving people. Our Constitution and our philosophy of law have been characterized by a regard for the broadest possible liberty of the individual. But the dullest mind must now see that our national society cannot be so self-sufficient and so isolated that freedom, security, and opportunity of our own citizens can be assured by good domestic laws alone. Forces originating outside of our borders and not subject to our laws have twice in my lifetime disrupted our way of living, demoralized our economy, and menaced the security of life, liberty, and property within our country.'

Justice Jackson was testifying from the perspective of a person who lived through two world wars, unlike any of us in this room. We must listen to him. In those very words, Justice Jackson was bearing living witness in 1945 to precisely the same phenomenon expressed in the preamble of the Rome Statute in 1998 that ***'all peoples are united by common bonds, their cultures pieced together in a shared heritage'*** and that ***'this delicate mosaic may be shattered at any time'***.

But, the way in which the man-made turmoil of a foreign land affects us at home need not involve the drama of our own military intervention that involves sacrificing the lives and limbs of the young men and women that are sent to engage in that military intervention as soldiers. It is enough that such turmoil would generate refugee crises, from which no nation can truly isolate itself as a physical or moral proposition.

It is for that reason that Justice Jackson rightly concluded as follows: ***'Awareness of the effect of war on our fundamental law should bring home to our people the imperative and practical nature of our striving for a rule of law among the nations.'*** This august body and the ICC, as multilateral institutions, stand precisely for such **'rule of law among nations.'**

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In many an international armed conflict involving interventions to halt 'mass atrocities that have already commenced, as was the case in World Wars I and II and many other international armed conflicts since, we are

bound to acknowledge the salutary role that military intervention can play – to the extent that it is consistent with accepted principles of international law, at least, if not structures of international security. But, it is a grave mistake to dismantle existing international structures of human rights and the rule of law, on the uncertain hope that military intervention alone is all that we must rely upon and nothing else.

Military intervention has limitations in obvious ways – even when it manages to stop aggression and atrocities already in progress.' As noted earlier, they cost human lives of the soldiers sent to stop them. Another obvious limitation is this: to the victims of all the episodes of genocides mentioned above – the millions of European Jews, the hundreds of thousands of Rwandan Tutsis, and thousands of Bosnian Muslim men – military intervention came far too late, where it came at all. That also is the case for the victims of the variegated episodes of crimes against humanity too numerous to mention – from Sierra Leone to South Africa and in a great many places between and beyond.

It is also axiomatic that the administration of post-conflict justice is not quite the bailiwick of military intervention. After the guns have gone silent, the victims' cries for justice and reparation will still fill the air to vex our conscience. For that, we need a strong international structure of justice to ensure that justice is administered according to law.

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The subject of administration of post-conflict justice brings me to the matter of a certain misunderstanding that is often expressed as a worry in relation to the jurisdiction of the ICC. That worry takes the shape of the mistaken claim that the ICC is a usurper of national sovereignty. Justice Jackson spoke about this sort of worry in 1945. In his words:

'Governments in emotional times are particularly susceptible to passionate attack in which this emotion is appealed to, sometimes crudely and sometimes by more sophisticated formulae such as "impairment of sovereignty," "submission to foreign control," and like shibboleths.'

But, Excellencies, Ladies and Gentlemen: any fear that the ICC is a usurper of national sovereignty proceeds from a clear misunderstanding of the nature of the ICC's jurisdiction. That fear may indeed be implicated in the reluctance of some States to ratify the Rome Statute, as has been expressed around the world, where ratification has not yet taken hold.

Please, allow me to restate and emphasise here the message that the ICC does not usurp or undermine national sovereignty. Quite the contrary, the nature of the ICC's jurisdiction does the very opposite. It underscores national sovereignty. Yes, the ICC is unusually deferential to national sovereignty: far more so than any other known order of alternative jurisdiction for the administration of criminal justice.

And, here, I must underscore **the doctrine of complementarity** as the modulating feature of the ICC's jurisdiction. In substance, the idea of complementarity means what the word says. It means that the ICC is a court of last resort. As such, it only steps in to assist national jurisdictions in their needful role of making justice **as full as possible** for purposes of accountability, when serious atrocities have been committed in a way that concerns the ICC.

Notably, the jurisdictions of the other international criminal tribunals were or are **primary**, relative to national jurisdictions. The statutes of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Special Tribunal for Lebanon gave them all *primacy* of jurisdiction in relation to national courts. In contrast, the jurisdiction of the ICC is not primary in relation to national jurisdiction.

Indeed, it is important also to keep in mind that the ICC's jurisdiction is nowhere near as assertive as the ordinary jurisdiction of the courts of a foreign country in the territory of which a citizen of another State commits a crime. It may be noted, in this regard, that even in status of forces agreements (SOFAs) of all nations, it is a generally accepted norm – expressed in a standard clause – that the courts of the country where foreign troops are stationed enjoy primacy of general criminal jurisdiction when a

foreign soldier commits a crime within that territory. The ICC does not have that kind of primacy of claim to jurisdiction.

Quite the contrary, under the Rome Statute, the primary jurisdiction belongs to the State with the closest sovereign connection to the situation under consideration. It is only when that State proves unable or unwilling to do justice in the exercise of that primary jurisdiction that the ICC is legally entitled to intervene.

The essence of the doctrine of complementarity, then, is that justice must not suffer the fate of the neglected orphan in the province of sovereignty of nations.

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But, you may ask this: beyond the elegant terminology of 'complementarity', what is this thing really all about – in practical terms? That is an important question.

The answer is quite simple, really. First of all, we will all accept that anyone can violate human rights, but not everyone can do justice. That is to say, criminal justice systems are not all equally able everywhere in the world to administer justice for the purposes of accountability and reparation, according to the generally accepted international standards. Here, you may think of the average failed State where humanity is hostage to daily fear of rampant lawlessness and violent tyranny.

Here is a classic case. Somewhere in our world, an inferno of human-to-human violence engulfed a beautiful country in April 1994. But, it had not occurred without warning. Indeed, the internal circumstances of that country had been brooding toward the direction of that event long before April 1994. There had been prior series of episodic violence and other manner of systematic persecution, in which human beings were killed with impunity, on account of their ethnicity. Precisely one year before April 1994, the **UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions** conducted a mission to that country and duly submitted his

report to the Commission on Human Rights (as it was then called). Concerning that country's pre-conflict judicial system, he wrote as follows:

'It is the serious failings of [the judicial] system that have made possible the impunity enjoyed by the persons responsible for the killings. The system's failure to function has been noted on many occasions, notably by [a] national commission … which reached the conclusion that many courts were in a state of paralysis. This state of affairs is partly attributable to the lack of resources available for the administration of justice, but chiefly to the lack of political will shown by the authorities in bringing guilty parties to justice …'.

To varying degrees, that is the story of many countries with chronic histories of human rights violations. For States like those, the value of the ICC as a viable back-up system of justice is all too apparent. And, here, we need not also consider that in the country indicated above, the number of legal professionals – including judges and lawyers – was reduced to less than 300 in the killings of the many hundreds of thousands that occurred in 1994. Now, how could such a country be expected to administer justice meaningfully soon after the conflict?

The example of that country underscores the importance of ICC's complementary jurisdiction, in the most practical terms, in most cases. In that regard, we have in the ICC a permanent institution of its kind, which is in place and readily available to be engaged without delay: thus obviating the need for *ad hoc* solutions, which, for a great many reasons, may never materialise.

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But, even for the more able States, the ICC remains valuable – not as a usurper of sovereignty – but as a mirror of conscience. Such is the case where political will appears a little shy to address the needs of justice, behind the veil of sovereignty. It is noted in this connection that war crimes do occur in almost every war. And the culprits can come from the rank and file of the most disciplined and professional armed forces in the world, in

spite of the best efforts of their commanders acting with unimpeachable good faith. In his war memoires, a famed American General of World War II stated that axiom in terms, in a conversation he had with the Grand Vizier of Morocco during World War II. ***'As I told him'***, recalled the General, ***'in spite of my most diligent efforts, there would unquestionably be some [soldiers who would commit rape], and I should like to have the details as early as possible so that the offenders could be properly hanged.'***

The Rome Statute does not require States to 'hang' their soldiers at all – let alone to do so 'properly' – when they commit rape or other war crimes during armed conflicts. The Rome Statute's requirements are more modest – and far more humane. It requires only that suspects of war crimes be prosecuted and punished – 'properly'. And the ICC would remind able States to do just that – because they can. Failing that, the ICC would exercise jurisdiction – as a matter of last resort. Here the ability of States engages their duty to do justice – not impunity/immunity for their citizens. There is no usurpation of sovereignty in that.

In this connection, I call in aid again the very thoughtful observations of Justice Jackson, in the following words:

'It is futile to think … that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.'

Those are wise words. The only revision that may be necessary is to say that when international law operates to make our world a better place for humanity in the long run, it would have worked to 'our national advantage'; though it may not seem like it in the short run.

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Excellencies, Ladies and Gentlemen

As I have dedicated these remarks to recalling fundamental questions that underlie the Court's mandate and existence, allow me to refer you once more to my written report of the Court's activities, which has been circulated in the six official languages of the United Nations.

Even that document only scratches the surface of the wealth of judicial and investigative activities of the Court in this period.

For instance, in addition to the many situations and cases at the phases of preliminary reviews, investigations, pre-trial, trial and appeal, the Court is now increasingly engaged in the reparations phase of proceedings, involving also the important role of the Court's Trust Fund for Victims. This additionally underlines the prominent position that victims hold in the system created by the Rome Statute.

As the report makes clear, the cooperation of States as well as the United Nations and other organisations remains of critical importance for the Court's ability to carry out its mandate effectively.

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Mr Vice-President,

Earlier on, I had recalled that a primary moral impetus to the Rome Statute's adoption 20 years ago was the horrifying history of the 20th century: during which ***'millions of children, women and men ha[d] been victims of unimaginable atrocities that deeply shock the conscience of humanity'***. The Holocaust, the Rwandan Genocide and the Srebrenica Massacre are examples of such 'unimaginable atrocities'. The ICC is one real structure that we now have to try those who would commit such crimes, in hopes of preventing their repeat in future. In this regard, I cannot but invoke the following words of Nigeria's President Buhari on the occasion of the 20th Anniversay of the Rome Statute:

'The Rome Statute created more than a court; it created the outline for a system of justice for horrific crimes rooted first in national courts doing their job, and where they fail to do so, the ICC stepping in only as the "court of the last resort".'

I urge you to make it stronger in every way that you can. DO NOT allow it to be weakened. Here, again, I quote President Buhari one more time:

'***I urge all States that have not yet done so to, as a matter of deliberate State policy, accede to the Rome Statute of the International Criminal Court so that it can become a universal treaty.'***

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Before concluding, I must recall the famous words of Edmund Burke: to the effect that ***'all that is necessary for evil to prevail is for good men to do nothing.'*** But, I must revise it to say this: **All that is necessary for evil to prevail is for good men and women to refrain from doing all that is possible and necessary for them to do to prevent such evil.** It is both necessary and possible to strengthen the ICC. For, that is to strengthen the wall of conscience and of international law against **'unimaginable atrocities that deeply shock the conscience of humanity'**.

And whenever we think of human history as being also a history of 'unimaginable atrocities that shock the conscience' of humankind, let us also always remember the following wise words of Eleanor Roosevelt: ***'It is better to light a single candle than to curse the darkness.'*** The ICC was such a candle, lit 20 years ago. It behoves all of us to keep it alight.

Thank you.

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