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I wish to thank the organizers for getting us together in this format to reflect on the achievements and challenges of the work of the International Criminal Court. And I am grateful for the opportunity to offer my thoughts at the beginning of this conversation. When we gathered in Rome in 1998, we created a system of international criminal justice, with the ICC at its center, but rooted in the ongoing interplay and cooperation with States. It is therefore essential that our critical look at the Rome Statute system is comprehensive.

Independence was a key achievement at the Rome Conference – and it is worth remembering that it was a hard fought success. The *proprio motu* power of the Prosecutor, clearly an indispensable element of genuine independence, was met with strong opposition and only agreed to late in the negotiations. Some States even came into the Rome Conference with the position that the ICC should only be able to exercise its jurisdiction on the basis of a referral from the Security Council – sort of a generic ICTY and ICTR model. Let's think for a moment where we would be today had that position prevailed. We would have an ICC in name only – and a Court that would be pretty much guaranteed to undertake no investigations for a long time to come. But, fortunately, the Statute says what it says today – and the *proprio motu* power has been at

the origin of a number of investigations. On the other hand, that does not mean that independence is not an issue – far from it. There are issues of perception of independence that are just as important in light of decisions of the Prosecutor's office. The "de-prioritization" in Afghanistan stands out, in particular, but there have been others. For us, as supporters of the Court – and perhaps for those of us who represent States in particular – this poses a dilemma.

On the one hand, respect for the independence of the Court, of course, implies respect for strategic and judicial decisions. But that does not mean that we have to agree, nor does it mean that we cannot voice our opinions. In fact, in our outreach to those who have not yet joined the Rome Statute and also to those who are part of the system, but who are critical of it, we must engage on these questions, because they are burning issues to some of our counterparts. And we can only have credibility if we make it clear that all relevant decisions are with the Prosecutor, but also that we believe that all crimes must be looked at in light of the evidence, the gravity and the other criteria that guide criminal investigations, irrespective of factors such as political affiliation and, indeed, political position. The second aspect in the conversation about independence is our collective response when independence is clearly undermined – typically, though not always, by non-States Parties. There have been very blatant examples, most prominently the sanctioning of senior officials of the Court by the former US administration – an unprecedented and hopefully standalone example of abuse of power. And States Parties came together in support of the Court in this emergency situation. But there have been numerous others, less brazen certainly, more subtle perhaps, but not automatically less worrisome. And I believe we, as States, have repeatedly failed to stand up for the Court's independence in the manner that is necessary. And we are still lacking a robust mechanism that can be triggered to come in support of the Court.

Complementarity is an easy conversation only insofar as everybody thinks it is a key element of the Rome Statute. It certainly is. It places the primary responsibility for the investigation and prosecution of the most serious crimes on States themselves. This is both, a recognition of State

sovereignty, and a vehicle to ease the workload of the Court. Colombia is now regularly referred to as a successful model of complementarity because the preliminary examination activities helped catalyze positive steps in the peace negotiations. But perhaps we are too quick to forget that the preliminary examination phase, which lasted more than a decade, led to much criticism of the Court – and that the outcome was the result not of strategic brilliance, but rather of changed circumstances on the ground – to which, of course, we all believe the Court has contributed. But questions remain, in particular in light of the fact that the new approach of OTP to preliminary examinations would have led to a closure of this preliminary examination long before more positive turns of events in Colombia. But the key challenge to the complementarity dimension lies elsewhere: the Rome Statute has, in no uncertain terms, defined "unable or unwilling" as the complementarity test. Some State Parties now seem to want to reinterpret this standard and to limit it to the aspect of inability only. In other words, where a State Party has a functioning judicial system which concludes that a case does not need to be pursued, this is the final word. It is obvious what this would result in: The irreversible perception that the Court is to prosecute only crimes committed in countries that have capacity challenges, or are failed States, in the extreme. In order to defend the Court and to secure its success and support from all corners of the globe, we have to stand by one of its most basic premises, and to do so very firmly: Nobody is above the law.

And let me also offer some **reflections on the Rome Statute** itself. The first thing to say is that it is a very strong treaty. In hindsight, of course, we know that the moment to negotiate and adopt the Statute could not have been better, that today, we would likely have difficulty to even get a negotiation off the ground, let alone obtain the outcome that the Statute represents. The Rome Statute is without any doubt one of the – if not <u>the</u> – highlight of treaty-making in the last decades. That, in itself, is enough reason to stand up for it. That should be easy to agree on, at least for the people in this room. But there is also the question of where we should take the treaty: Must it be frozen in time, reflecting the status of international law almost 25 years ago? Or should it be a living document that reflects the progressive development of international law?

The expectations of the public *vis-à-vis* the International Criminal Court are high. Often, they are too high, and it is our job as public servants, and as civil society, to manage these expectations, to keep explaining the basics of the Rome Statute system to the wider public – including our own policy makers. But there is certainly a risk that the Court will be considered irrelevant by those who are placing hope in international criminal justice, if our attitude is to shut the door to changes and to insist that the Court's jurisdiction must, for all eternity, be limited to the four crimes currently contained in it. Defending the integrity of the Statute is certainly a collective obligation we have – especially with respect to the existing provisions. But it would also be a mistake to indicate rejection of all suggestions for change, in particular where they would increase the Court's relevance.

One glaring challenge the Rome Statute poses today is its limited jurisdictional reach with respect to the **crime of aggression.** Better than anyone, I know of course the history of the consensus reached in Kampala, and the discussions that took place in the aftermath, especially in the lead-up to the activation decision in 2017. When the Rome Statute was adopted, the inclusion of the crime of aggression was due to the insistence of some key figures at the conference. The argument that aggression was a thing of the past, that war was in essence an inter-State affair and the Court didn't need jurisdiction over it, was persuasive to many, and remained so during the Kampala negotiations and when States decided to activate jurisdiction.

Today, the world is a different place than we may have hoped in 1998. The term "aggression", shunned in the diplomatic vernacular consistently for so many years, is now part and parcel not just of briefing material and speeches, but of UN resolutions. It has been incredibly disappointing for so many people to find out that the ICC cannot prosecute the aggression committed against Ukraine, and that this is so, even though the ICC does technically have jurisdiction over the crime of aggression – except where it should. Given where we are today, we should take the obvious step to bring the Court's jurisdiction over this crime in line with that of the other core crimes. Aggression is not a hypothetical crime. Illegal use of force is the most fundamental attack on the

international order, as well as the source of so many other crimes the Court has jurisdiction over. And it is the crime of aggression alone that guarantees that the political and military leaders who bear the brunt of the responsibility are brought to justice. This alone fulfills the purposes of the Rome Statute, which "***Reaffirms*** *the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State"* and the goal to hold those accountable who bear the most serious responsibility for the crimes committed.

If the pursuit of international justice for the most serious crimes is to succeed, I strongly believe that we have to create an alternative avenue to ensure that the crime of aggression against Ukraine is prosecuted. This will, in fact, enhance the ICC's future work, far from taking anything away from its own investigations on Ukraine. If, on the other hand, this act of aggression, condemned with overwhelming numbers by the UN membership, goes unpunished, the message for the future will be devastatingly clear: there is no accountability for this crime – not at the ICC, not anywhere. Thus, it is in our hands to prevent this from happening. And I believe it is also our duty to do so.

Thank you for your attention.