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Open Debate of the United Nations Security Council on “Peace and Justice, with a special focus on the role of the International Criminal Court”

Address on behalf of the Prosecutor

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Mr. President,
Mr. Secretary-General,
Members of the Security Council,
Ladies and gentlemen,

Allow me to start by thanking the Guatemalan Presidency and the UN Security Council for convening this very important meeting, the first of its kind. This meeting comes at a very opportune time as the International Criminal Court celebrates ten years of existence. I would also like to convey Prosecutor Fatou Bensouda's greetings as well as her apologies for not being able to join you today for this debate. The Office of the Prosecutor considers today's exchange with the Council as crucial, given that both the Council and the Office of the Prosecutor are committed to preventing mass atrocities which can constitute a threat to international peace and security. Indeed, this debate offers an opportunity to reflect on issues of mutual interest between the two bodies.

At the outset, the Office of the Prosecutor would like to welcome the concept note circulated by the Guatemalan Presidency in preparation for this meeting. The note clearly articulates some of the key principles regarding the relationship between the UNSC and the Court and raises important points for discussion. The respective mandates of the two bodies - the pursuit of individual criminal accountability and the pursuit of international peace and security - are at the heart of this relationship.

The significance of today's debate can thus not be overstated. As President Song already mentioned it, the Office of the Prosecutor is currently working on two situations referred by the Security Council: Darfur and Libya. We investigate war crimes, crimes against humanity and genocide in a number of countries that also have the close attention of the Security Council. At the same time, the Security Council is working on many issues that also relate to the mandate of the Office of the Prosecutor. These include for instance efforts to end the use of child soldiers as recently demonstrated by the Security Council's open debate on children and armed conflict and the resolution that was subsequently adopted under the German Presidency. These efforts coincide with the completion of the first ICC trial and its verdict on the use of child soldiers. Furthermore, the Security Council discusses issues of peace and security and authorizes peacekeeping missions in situations where the Office of the Prosecutor is operating. The Council is also addressing the link between sexual violence and conflict, as well as monitoring new situations involving the alleged commission of massive crimes.

It is evident from the foregoing that the relationship between the Office of the Prosecutor and the UN Security Council could be nurtured and strengthened by extending our interaction

beyond specific situations referred by the Council to the Prosecutor, and by creating space for open discussions on thematic issues. Such dialogue is crucial, as both the Security Council and the Office of the Prosecutor are committed to preventing mass atrocities which constitute a threat to international peace and security.

Mr. President,

The evolving relationship between the Council and the Court is not without its complexities, given our different mandates and organizational structures. Allow me to highlight three areas – looking at them from the Office of the Prosecutor's perspective.

First, let me speak about a key difference between our two organs: the UN Security Council is a political body within the UN system; the Office of the Prosecutor is an independent organ within an independent, judicial institution, which has to adhere to clear legal criteria and jurisdictional boundaries at all times to maintain its legitimacy and credibility.

We are familiar with frequently raised concerns about the politics of case selection as a result of Security Council referrals. Incidentally, the same concerns can be raised with regard to State referrals. What may be forgotten or overlooked is that in regard to both types of referrals, the Rome Statute provides clear guidelines that protect the independence of the judicial process. The Rome Statute provides for a legal process for the preliminary examination, investigation and prosecution of situations referred by States or the Security Council, as well as for judicial review, during which situations may be rejected if they fail to satisfy statutory legal criteria for opening an investigation. Simply put, the Council may unilaterally trigger, but cannot impose acceptance of jurisdiction by the ICC. Perceived or real political selectivity by the Council is further constrained because referrals encompass a situation rather than one or several particular suspects or groups.

It is important to underscore the need to respect the Office of the Prosecutor's independence at all times. Once the Security Council decides to refer a situation to the Prosecutor, the judicial process has been triggered and the matter is fully in the hands of the Prosecutor and the Judges. The only way to stop the procedure is one of legal means, by invoking Article 16 of the Rome Statute. Efforts to interfere with the independent exercise of the Office's mandate would only serve to undermine the legitimacy and credibility of the judicial process, thus giving credence to allegations of politicization.

The second area I would like to address involves what we have in common.

First, our respective mandates. While the UN Security Council has been given the primary responsibility to maintain international peace and security, the mandate of the Office of the Prosecutor is to ensure accountability for the most serious crimes of concern to the international community as a whole. Some might construe this as a source of tension between the two organs. In our view, these respective mandates link us together, The fight against impunity, to which both organs are committed, is an essential contribution to the quest for world's peace and security. This is also recognized in the Rome Statute's Preamble, which notes "that such grave crimes threaten the peace, security and well-being of the world." Indeed, the Security Council was instrumental in ushering in what the UN Secretary-General has called "the age of accountability." Next year we will celebrate 20 years of the creation of the ICTY by the Council. It was in 1993 that this Council revived the notion of international criminal justice, after a long silence following the Nuremberg and Tokyo trials. The Council has thus also been a source of inspiration for the establishment of the ICC.

Second, both the Council and the Office of the Prosecutor have a role to play in strengthening the complementary relationship between peace and justice. From the Office of the Prosecutor's perspective, there is no dilemma or contradiction between peace and justice. In most situations before the Court, conflict management and often specific peace negotiations have been underway while investigations and prosecutions were proceeding. The role of the ICC has never precluded or put an end to such processes; in some cases, it has even encouraged them. 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 pursue its judicial mandate and preserve its impartiality, the Office cannot participate in peace initiatives, but it will inform the political actors of its actions in advance, so that they can factor investigations into their activities.

Finally, both the Security Council and the Office of the Prosecutor have a clear preventative mandate. Prevention is key to all our efforts. For the Office, this preventive role is foreseen in the Rome Statute Preamble and reinforced in the Office's prosecutorial strategies. In fact, the Preamble makes clear that prevention is a shared responsibility in writing that States Parties are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." The Office of the Prosecutor will make public statements referring to its mandate when violence escalates in situations under its jurisdiction; it will visit situation countries to remind leaders of the Court's jurisdiction; it will also use its preliminary examinations activities to encourage genuine national proceedings and thereby attempt to prevent the recurrence of violence. Given that the commission of massive crimes

can threaten international peace and security, the Security Council can complement the OTP's preventive efforts.

Mr. President,

Let me now briefly look forward to how the relationship between the UN Security Council and the Office of the Prosecutor can be strengthened.

The Council has already referred two situations involving the commission of massive crimes to the Prosecutor, and the Prosecutor regularly reports back to the Council on these matters. The Council and the Office should together seek more constructive strategies for attaining their mutual goals. We are encouraged by recent efforts of regional organisations and would like to particularly mention the multilateral efforts to bring to justice the leaders of the Lord's Resistance Army including Joseph Kony. These efforts must be replicated in other situations. The failure of States to implement ICC arrest warrants is reflected as well in the failure to implement Security Council resolutions relating to cessation of violence, disarming parties to the conflict, ensuring an end to impunity through local initiatives, and other relevant obligations.

The relationship between these obligations must be explored further. True peace and justice rely on the acceptance of Security Council resolutions as the binding legal obligations that they are. Increasing political and diplomatic support from the Council for the Court is essential, and the Council can do so through its own declaratory statements recalling the need to observe applicable norms of international law and stressing the importance of accountability for those most responsible for serious violations of these rules. Additionally, tools such as avoiding all non-essential contacts with ICC suspects, in order to achieve the arrest of these individuals, need to be further explored and deepened.

A new chapter should be added to our relationship. The Office of the Prosecutor can make a substantial contribution, in proactively collecting information and monitoring situations under preliminary examination, and in investigating and prosecuting those most responsible for the most serious crimes. But once its judicial process has resulted in requests for, and the issuance of, arrest warrants by the Court's Judges, it is up to the international community to act. We must find the necessary consensus to show that we are serious about the threat that these serious crimes pose to international peace and security, and that we have and will use the tools necessary to put these crimes to an end.

Mr. President,

Allow me to thank you again, on behalf of Prosecutor Bensouda, for this opportunity. I look forward to the open debate and future exchanges with the Council.