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*"Gender Justice and the ICC: Progress and Reflections"*

*International Conference: 10 years review of the ICC. Justice for All? The International Criminal Court*

Statement

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Excellencies,

Ladies and Gentlemen,

Allow me to first thank the Faculty of Arts and Social Sciences and the Faculty of Law at the University of New South Wales in Sydney for this kind invitation and especially for convening this important conference.

As we will celebrate this year the 10<sup>th</sup> anniversary of the establishment of the International Criminal Court, this will be an opportunity to review and take stock of our achievements but also of and challenges. In this sense, I believe the way international criminal justice has evolved, especially in the recent decades, regarding the way it addresses sexual and gender violence is very reflective of how far we have actually gone. Remember that Robert Jackson, the Chief Prosecutor of the Nuremberg Tribunal, decided not to present sexual crimes in the cases against the Nazi leaders.

Indeed, the efforts that have been made since the mid-90s to obtain accountability for atrocities committed against women during the conflict in the former Yugoslavia helped establish how rape and other sexual violence could be instrumentalised in a campaign of genocide. This equally contributed to the expanded understanding of sexual or gender violence as war crimes and crimes against humanity.

But perhaps the most groundbreaking decision advancing gender jurisprudence worldwide is the *Akayesu* judgment delivered by the Trial Chamber of the International Criminal Tribunal for Rwanda on 2 September 1998. For the first time in history, rape was explicitly recognized as an instrument of genocide. As described by the ICTR in the *Akayesu* case, rape is used to “*kill the will, the spirit, and life itself*”. The decision by the ICTR Chamber provided a definition of rape – “*a physical invasion of a sexual nature under circumstances which are coercive*” – by so doing, placing gender crimes in a larger context. Moreover, the Special Court for Sierra Leone has addressed the issue of forced marriage as a crime against humanity.

The Rome Statute of the International Criminal Court is thus the result of a recent evolution in international law, recognizing gender violence and gender crimes. However, it is only in the Statute that a basis in gender first became an element of crime in positive law, specifically of persecution as a crime against humanity. Various provisions of the Statute also proscribe what can be characterised as gender crimes, such as rape, sexual slavery, enforced prostitution, forced pregnancy, as a war crime and/or crime against humanity.

Article 54 of the Rome Statute of the ICC specifically provides that the Prosecutor shall *“take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”*. Additionally, Article 42(9) of the Statute requires the Prosecutor to appoint advisers with legal expertise on specific sexual and gender violence. Let me stress that this is not only a statutory obligation, but also a requirement for effective investigations and prosecutions taking into account the interests of victims.

Accordingly, the Office has established a unit, the Gender and Children Unit (GCU), comprised of advisers with legal and psycho-social expertise to deal specifically with gender and children issues. The GCU advises the Prosecutor directly and provides support to the Office’s divisions, from pre-analysis through to prosecution phases. Furthermore, Professor Catharine A. MacKinnon was appointed as Special Gender Adviser to the Prosecutor of the ICC on 26 November 2008, and provides strategic advice to his Office on sexual and gender violence.

It is in this sense that the OTP has consistently endeavoured to ensure its staff receives the proper training to integrate a “gendered” perspective into its investigations and cases, whilst at the same time presenting gendered aspects of conflict in connection with the contextual elements of the crimes as defined by the Rome Statute.

As a lawyer, I have welcomed these important developments in international criminal law; as Deputy Prosecutor of the ICC for the past seven years, and as the OTP’s focal point for gender issues, I have endeavoured to ensure that the gender perspective is always taken into account in our investigations and prosecutions. These are crimes that have gone un-

reported and un-punished for so long, with so much shame and misconceptions involved. It is my belief that the law and judicial proceedings are a powerful tool to shed light on these crimes, give a voice to the victims and punish their perpetrators. The law will help to change behaviour.

Indeed, the most striking quality of the pursuit of gender crimes by the ICC to date has been that they are there: their centrality to every prosecution so far, in a way that clarifies how the sexual abuse becomes a specific instrumentality in each conflict.

- o In our first trial, against Thomas Lubanga Dyilo, although it was not charged directly as additional crimes, but during the course of the trial, we explained the gender dimension of the crime of enlisting and conscripting children under the age of 15 years. We took note of the reactions of civil society and their preference for these aspects to be explicitly charged. Sexual and gender crimes were included directly in our charging in all our subsequent cases, such as the Katanga/Ngudjolo and the Mbarushimana cases.

- o Sexual violence is not only a major concern in the DRC; our decision to open an investigation into the situation in the Central African Republic represented the first time for the international criminal justice system to deal with a situation where the allegations of sexual crimes far outnumbered the allegations of killings.

- o This Office also charged the President of the Sudan, Omar Al-Bashir, of committing genocide *inter alia* through the fact that thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, were subjected to acts of rape by forces of the Government of the Sudan.

- o In some of our cases, not all of the charges of sexual and gender crimes we had requested for were confirmed by the Judges. Indeed, in the case against Jean-Pierre Bemba for instance, we had included sexual violence and rapes under the counts of torture and rape, as crimes against humanity and war crimes, as well as outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime. The Chamber

only confirmed the charges of rape as war crime and crime against humanity. The Office is working, including on our evidence, to ensure that in future cases, all charges of sexual and gender crimes are confirmed.

Indeed, gender crimes are prominent in our prosecutions because they are prominent in the contexts being prosecuted. This only becomes remarkable against the backdrop of the prior, and still prevalent, norm of denying their existence, ignoring them, shaming their victims, and or defining them in legally improvable ways. In other settings, it has been as if there was a tacit agreement to look the other way as women and children were sexually abused – minimizing, trivializing, denigrating, and silencing the victims, destroying their credibility and further violating their dignity, so that abusers can continue unimpeded. The body of the ICC's first cases, however, signals to the world that here, at least, this deal is off.

Addressing such crimes, truly, begins a new era. At the Office of the Prosecutor, in the next years building on the last nine, our hope, our vision, and actually our plan is to pursue the gender crimes the Rome Statute defines. In order to stop these crimes we will give victims a voice – their own.

By setting an example, together, through multi-levelled interface, understanding and cooperation, we can and we will transform the public response to sexual crimes worldwide, in and outside recognized zones of conflict.

I would like to take this opportunity to mention the crucial role civil society plays in this regard; I recognize here the important work of Women's Initiatives for Gender Justice, as well as that of local gender groups in situation countries, that provide sometimes the only form of support available for gender crimes victims, who often are excluded and shunned from their communities.

During my tenure, I will strengthen the cooperation between the OTP and these groups, in order to support their efforts and continue our efforts to reach out more to the victims.

We will also continue to periodically and consistently revisit our policies and practices regarding sexual and gender crimes, making sure they are effective and improving them if needed.

The Office will also continue to provide gender-related training to its staff, as I mentioned previously, from investigators to prosecutors, and as foreseen in our Court-wide revised strategy towards victims; training will be adjusted in accordance with new strategies and experiences.

Regarding our investigations, we have an obligation and a duty to focus our attention on sexual and gender violence. As it can be a challenge to gather evidence of these crimes in some contexts, we will continue to look for innovative methods for the collection of evidence to bring these crimes to Court in a way that will ensure their prosecution and will respect and protect their victims.

Finally, the finalization of our OTP's gender policy is a priority that I have for the Office. It is currently in an advanced stage of development. Once we have finalised the draft, it will be open for comment from external actors, as is the practise of the Office regarding our policies. It will also contribute to providing clarity, transparency and predictability on our work and our strategy.

In short, this Office will make sure that victims of sexual and gender crimes see the crimes they have suffered from being punished; their perpetrators being arrested and prevented from committing additional crimes. This is a commitment that I make as the new incoming Prosecutor of the ICC.

I hope to be able to count on the support of all those present here today to continue this work.

Thank you very much for your attention.