PERMANENT MISSION
OF THE PRINCIPALITY OF LIECHTENSTEIN
TO THE UNITED NATIONS
NEW YORK

Lecture by H.E. Ambassador Christian Wenaweser
at Marrett McGill University in Montréal on 21 March 2012

"The International Criminal Court after Ten Years - Achievements and Challenges"

Distinguished members of the Faculty,
Ladies and Gentlemen

On 1 July, we will commemorate the 10th anniversary of the entry into force of the Rome Statute of the International Criminal Court – certainly a good moment to reflect on what we have achieved in the first decade of operational activities of the Court, but also on the challenges ahead. It is worth thinking back to the early days of the Court, in particular to the voices of skepticism: Before the Rome Conference, many thought that an independent International Criminal Court could never be established. The concept itself was too revolutionary, and old-fashioned, but firmly established notions of sovereignty would prevail. At the Conference itself, however, 120 States voted in favor of the Statute, with just 7 votes against. After the adoption of the Rome Statute, it was argued that the Statute would not enter into force, given the opposition of some of the major powers. Nevertheless, the required number of 60 ratifications was achieved with unprecedented speed, within less than four years, and led to the entry into force of the Statute on 1 July 2002. Once the Court became operational, in 2003, there were again loud voices of skepticism: It was argued in particular that the Court would never have a situation to investigate, but also that it would not survive the political campaign launched against it by the then US administration. And again, the skeptics were wrong: The Court today has active investigations in seven situation countries, in addition to a number of preliminary examinations, and since last week, its first verdict: the Congolese militia leader Thomas Lubanga Dyilo was found guilty of the war crime of recruitment of child soldiers.
On the political front, the Court has grown steadily in numbers and can now count on the support of 120 States Parties – precisely the number of yes votes at the Rome Conference. On the diplomatic side, the US is now trying to find ways of positive engagement with the Court, on an ad hoc-basis. Remarkably, the change of heart did not come just with the change of administration, but in fact began already during the second term of the George W. Bush Presidency. Then Secretary of State Condoleezza Rice famously described the US policy of forcing States into bilateral immunity agreements as counterproductive and self-defeating ("we shot ourselves in the foot"). The US has been part of two decisions of the Security Council to refer situations to the International Criminal Court and, since 2009, has actively participated in the work of the Assembly of States Parties. In short, the Court has shown a remarkable

resilience in the face of adversity and is today a firmly established part of the landscape of international institutions. More importantly, it is the epitome of the international commitment to fight impunity, to ensure accountability. An occasion which illustrated this very strongly is the Arab spring: At its very first session, the new Government of Tunisia decided to join the ICC – thus reaffirming the perception that of the Court as the pinnacle of accountability. Similar gestures were seen in Egypt, while they have not yet resulted in ratification.

Political Acceptance

I have already mentioned the number of States Parties – 120. At the beginning of my term as President of the Assembly of States Parties in November 2008, the number of States Parties was at 96. At that time, I set myself the very ambitious, but not entirely unrealistic goal of reaching precisely 120 States Parties for the time when I would hand over to my successor – a goal that was achieved when Vanuatu joined in late 2011. The steady increase in the membership of the Court is of paramount importance. The Rome Statute system is primarily consent-based. It is a treaty, after all, and the ICC can therefore only guarantee effective accountability around the globe if all States subscribe to the Rome Statute. Universality of membership must therefore remain a key goal – while of course we know that it is a distant one. The next step in the process will be to reach 129 States Parties, which would equal two-thirds of the membership of the United Nations – and thus send another strong signal about how far the ICC has come in achieving political acceptance.

But there are other ways of measuring the acceptance of the Court – this includes looking at the one element in the system that is not consent-based: referrals by the Security Council. This provision of the Rome Statute (Art. 13b) is based on the wide competence of the UN Security Council to take action under Chapter VII of the UN Charter, which includes the competence to establish international criminal justice mechanisms (such as the ICTY, ICTR, STL etc.). Therefore, the Security Council can refer situations to the ICC – also when the States in question have not accepted the Court's jurisdiction. Security Council referrals are an important expression of political acceptance on behalf of the international community as a whole – after all, the Council carries out its functions on behalf of all States that are members of the United Nations. It has done so twice in the history of the Court, first in the case of Darfur (resolution 1593), and last year when it referred the situation in Libya to the Court (resolution 1970). The latter was of particular significance, because it was done by unanimous decision. Traditional ICC skeptics such as China, the Russian Federation, the US and India voted in favor of this referral which thus significantly enhanced the standing and perception of the Court.

The "African dimension"

Much of the political controversy over the past few years has surrounded the political opposition to the Court that has emerged frequently from African Union summits. You all have heard the criticism that the ICC "targets Africa". Some clarification on this is probably in order: First, the African region has been instrumental in establishing the International Criminal Court. At the Rome Conference and before, it was African States that argued very forcefully that they needed this Court, after mass atrocities committed on the continent, in particular the genocide in Rwanda. This commitment was not mere rhetoric, as is reflected in the fact that the African region forms the biggest part of the ICC family to this day. Second, while the rhetoric coming

out of the African Union Headquarters in Addis Ababa has at times been very strong and threatening, not a single African State has left the Rome Statute system – which would be possible under the treaty. That political support is still strong is also evidenced in the very positive record of African States in cooperating with the Court on investigative issues. Third, it is worth underlining that the controversy was largely a result of the indictment issued by the ICC against the President of the Sudan, Omar al-Bashir. Prior to the efforts of the Prosecution to obtain an arrest warrant against President Bashir, there was little controversy – not even concerning the referral of the Darfur situation itself! On the contrary, it was widely seen as based on well-established evidence, as a result of the work of the Commission of Inquiry led by the late Antonio Cassese. It was only after the Court went after one of the most powerful men in Africa that other leaders started using the African Union as a forum to criticize the Court. In doing so, they took advantage of the procedural and political dynamics of African Union Summits, which produced consensual outcomes criticizing the Court in spite of the continuing support for the Court among the majority of African States.

On the other hand, the criticism against the ICC "targeting" Africa must be looked at in substance. In this regard it is worth recalling that it was only in two out of the seven investigations on the African continent that the Prosecutor himself took the initiative to investigate. In the other five cases, investigations were either triggered by the States themselves or by the Security Council – hardly a factual basis for the statement that "the Court targets Africa". This is not to belittle the political problems that these discussions have created – they were real, and they are to be taken seriously, as the African region is the heart and soul of the Rome Statute system. Nevertheless, it is important to put things into perspective, to underline the remarkable resilience that the Court has illustrated in the face of this adversity, and to remind ourselves that investigating people who commit atrocious crimes against African populations must never be portrayed as "anti-African", but as a way to assist African victims. And of course: The ICC will have a better claim to be a truly global Court once it is operational in more than one region of the world.

The Kampala Conference

The first Review Conference under the Rome Statute, held in June 2010 in Kampala, was successful in all three points on its agenda.

One of its big achievements lies in what it did not do: it did not re-negotiate the Rome Statute, even though the conference offered the first opportunity to open the treaty and make changes to it. Kampala thereby reaffirmed the validity and high quality of the Rome Statute. All the basic tenets of the treaty – complementarity, admissibility, conditions for exercise of jurisdiction, non-retroactivity – were not questioned by anyone.

Second, the conference established the basis for the future political work in support of the Court. The so-called stocktaking exercise identified four topics as the main challenges that States and the Court have to meet together in order to make the Rome Statute system more effective: complementarity, cooperation, victims issues and peace and justice. The discussions on all four of them have been moving forward since, albeit at different speeds. In my assessment, the complementarity agenda has been the one that received the strongest push from the Kampala conference. As a result, I think it is fair to say that we have significantly sharpened our tools to assist States in improving their domestic capacity to prosecute the most

serious crimes. We have also seen some progress in State cooperation, while some serious challenges remain as far cooperation in respect of high-profile fugitives is concerned. But the four topics together constitute the agenda to move the Court forward

Last but not least, the review conference completed the treaty: By adopting by unanimous decision the amendments on the crime of aggression, States Parties took care of the last unfinished business from the Rome Conference. As you know, the crime of aggression was included in the Rome Statute as a reflection of agreement of principle, but remained dormant and without a definition. Following several years of negotiations, States Parties were not only able to find agreement on the elusive question of the definition of the crime of aggression, but also on the even more controversial question of the conditions under which the Court can exercise its jurisdiction over the crime, including the role of the Security Council. The compromise on the crime of aggression is a highly complex package that I can describe only in broad strokes. It includes a definition of the crime of aggression that criminalizes only the most serious cases of illegal use of force between States, namely those that by their "character, gravity and scale" constitute "manifest" violations of the Charter of the United Nations. The Court's jurisdiction will be limited compared to the other three crimes, and only cover States Parties to the Rome Statute, but not non-States Parties – except in case of Security Council referrals. Furthermore, the Court will only be able to begin investigating crimes of aggression once States Parties decide to "activate" this system, which will be possible no earlier than 2017. In addition, thirty States will have to ratify the amendments in order for this to happen. The adoption of the provisions on the crime of aggression was a landmark in the history of international law: For the first time in history, it will be possible to bring international criminal accountability to the illegal use of force – which of course goes very much to the core of the mandate of the United Nations. In fact, the definition of aggression is in essence a reflection of the prohibition of the use of force under article 2(4) of the UN Charter. Since Kampala, we thus have a complete treaty. Over the next years, we should concentrate on achieving the entry into force of the aggression provisions, while refraining from further expanding the jurisdiction of the Court: A limitation to these four core crimes under international law will allow the Court to firmly establish its judicial record.

Judicial Work

It was just a week ago that the ICC handed down its first verdict: Trial Chamber I, by unanimous decision, found Thomas Lubanga Dyilo guilty of the recruitment of child soldiers in the Democratic Republic of the Congo. Sentencing and possible appeal notwithstanding, this is a historic day in the annals of international criminal justice – and also the end of a long wait for many observers who had been looking forward to the conclusion of this first trial with growing impatience. It was to be expected that the first process would be fraught with technical and procedural problems that would lead to delays and also additional costs. This is also what the Lubanga trial has illustrated. For the future, there is the expectation that the relevant lessons will have been learned, that crucial provisions of the Rome Statute will have been clarified, and that work will be carried out more efficiently. The ongoing trials in connection with crimes committed in the Central African Republic and in the DR Congo are already indicating that there is hope that the Court will live up to this expectation. With seven active investigations and 8 additional preliminary examinations, the Court is a fully operational judicial institution that is

stretched to the limit of its resources. In order for the Court to reach maximum effectiveness, two things must be in place: Highly professional and expeditious judicial work by the Court itself. In this respect, the importance of having the best qualified judges cannot be overstated – the responsibility in this regard lies of course with the States who nominate and elect the judges. In addition, the Court must be able to rely on the cooperation from States – a topic to which I will revert later on.

.

Making the system work

Complementarity

One of our central tasks for the imminent future is to promote a holistic view of the Rome Statute system. Far too often, the Court is perceived as a judicial institution that does its work isolated in a bubble in The Hague. The vision of the drafters of the Statute was quite different. It was a vision of the International Criminal Court as the centerpiece of a larger common fight against impunity: the ICC as its central and most visible component and as the most powerful symbol of international criminal justice, but by far not its only component. The most important ingredient must always be effective investigations and prosecutions at the national level, in accordance with the principle of complementarity. Complementarity is the very basis of the Rome Statute system. States have the primary responsibility to investigate and prosecute the crimes covered in the Rome Statute, and the ICC is only the last resort if States do not live up to their responsibilities, due to inability or unwillingness. This is the core of the system that we must further develop for several reasons: Most importantly, it allows us to build on the international consensus to fight impunity. Not everybody has chosen to join the Rome Statute, but all States have an obligation to fight impunity and to ensure accountability for the most serious crimes under international law. The strengthening of national judiciaries and the willingness of States to investigate and prosecute at the national level is therefore crucially important to make the Rome Statute system work. This is essential for the acceptance of the system, but also the only way to cope with the sheer size of the task. The ICC will never be able to put all perpetrators on trial, in fact not even a small fraction of them. An indispensable element of such a comprehensive approach is a stronger engagement of States: It will be the task of State – not of the Court, which is not a development agency – to strengthen the capabilities of national judiciaries.

Cooperation

In addition, States will also have to extend their full cooperation. The ICC is a judicial institution without an enforcement branch. It has to rely on States to execute arrests on its behalf and to transfer indictees to The Hague. This is not an ICC-specific problem: Experience with the ad hoc tribunals illustrate that these processes can be and regularly have been slow. It took more than a decade to execute the arrest warrants against some of the most prominent indictees before the ICTY – Karadzic and Mladic. We are not quite in the same position yet with the ICC, but certainly the record is not stellar: The very first indictees, the members of the LRA leadership including Joseph Kony, have been at large for seven years now, in spite of an ICC indictment. As I mentioned before, overall States Parties are cooperating well with the Court in its day-to-day business. What is needed though is greater willingness to support the Court with more complex and challenging forms of cooperation, in particular with a view to executing the 11 outstanding

arrest warrants. The very first arrest warrants of the ICC, issued against the LRA leadership, have not been executed for seven years now. This is a poor record and calls for more serious efforts by all those States that are in a position to carry out arrest warrants. Arrests indeed are a crucial part of cooperation, but the Court needs more: We also need to increase our diplomatic support for the work of the Court, to show on a regular basis that we are willing to do our part to make the Court succeed, to make the system work. States Parties must not gather just once a year to discuss the budget, make other administrative decisions and elect the senior officials of the Court: They must intervene, individually and collectively, to do their part to make the fight against impunity effective and to strengthen the role of the ICC in that fight. In more general terms, States must strike the right balance in their relationship with the Court: While refraining from interference in its judicial independence, it must also not drift off into indifference or lack of engagement.

Relationship between the States and the Court

After the Kampala Conference, I identified the relationship between States Parties and the Court as the biggest challenge for the next phase in the work of the Assembly – and indeed, much remains to be done there. Some of the discussions on management and oversight issues between States and the Court have been difficult, and that is no surprise: The Court is guarding its independence with zeal and sometimes applying notions of independence that run counter to the principle of administrative accountability. States at times run the risk of getting too involved in the daily workings of the Court and have difficulty resisting the temptation to micromanage, not always respecting the lines of authority. This has on occasion led to confrontations – which is not a problem, as long as both parties learn their lessons from these incidents and do not forget that they have a common vision to implement and that no party can do it without the other.

The peak of this discussion is the increasingly ritualistic annual showdown on the budget of the Court. While the first years were relatively easy, with everybody understanding that the Court was a start-up project and in a process of growth, things present themselves a bit differently today: The large contributors to the budget in particular state that the growth period is over and that the Court should continue to exist at the current budget level (the approved budget for 2012 is 111 million Euro). That we are living in times of fiscal constraint is beyond question. We are all asked to carry out budget cuts in our Ministries, and there is therefore little sympathy for the position that institutions such as the Court should be exempted from what is simply a necessity in times of financial constraints. At the same time, it is counterintuitive to de-link the budget of the Court from its judicial activities: Investigations and trial activities are costly, indeed. So the more investigations there are, the higher the budget is likely to be. But it is also precisely these judicial activities that constitute the performance record of the Court. So giving a lump sum of money and seeing how much justice we can get in return does not seem the right way to go and would potentially lead to violations of due process rights – already now, there are defendants who have spent long periods of time in pre-trial detention. A balanced budget will be one that identifies and implements all cost saving measures possible for the Court – and at the same time one that takes into account the judicial workload – as far as it can be projected.

One cost driver that is increasingly discussed, of course, are the investigations mandated by the Security Council: In Darfur, but in particular also in Libya. The costs for these investigations have been significant – and so far, they have been borne by the parties to the Rome Statute. Many believe, though, that it should be the UN membership that picks up the bill for what is at its core an UN-mandated activity. Everybody knows that the practice cannot be changed instantly or without much difficulty – after all, the US still has legislation in place that bars it from financing any ICC-related activity. But at times when important States ask for a zero growth policy vis-à-vis the Court, it cannot be ignored that this is a fundamentally flawed approach that contradicts the letter and spirit of the Rome Statute.

More referrals by the Security Council?

Supporters of the Court have usually hailed Security Council referrals as important victories for the Court – and indeed, they have been instrumental in enhancing the Court's political acceptance. Nevertheless, when contemplating possible future referrals, States Parties should take a more measured approach and keep the best interest of the Court at the center of their considerations – in particular as investigations mandated by the Council are not usually backed up by the Council through the necessary diplomatic support. It was good for the Court to have the Darfur referral in resolution 1593, as the first ever referral of the Council. It was also very good to have the Libya referral in resolution 1970, as the first ever unanimous decision to refer a situation to the ICC. We have thus achieved the measure of political acceptance that is feasible by way of Security Council referrals. Future referral discussions should also look at the possible negatives: Referrals take the Court outside the system of the consent-based nature of the Rome Statute system and therefore expose it to political criticism: Of course, it is the Council that makes the relevant decision – but it is the Court that bears the political consequences. This is compounded by the fact that the Council has routinely failed to follow-up on referrals and to provide even basic diplomatic support: This has been the case for the Sudan investigation for a very long time – the Council has not only refrained from any action to enforce cooperation with the ICC, but even from discussing the matter with the Government of Sudan itself. But the same applies to the Libya investigation where the Council has not made any statement to ensure cooperation with the Court – in the course of the future investigation of the Court, this dynamic could be further exacerbated. Finally, there is the dimension of financing: Under the current practice, the costs for investigations carried out pursuant to a Security Council referral are born by the States Parties. Meanwhile, the letter and the spirit both of the Rome Statute and the Relationship Agreement between the Court and the UN indicate otherwise: That these costs, mandated by the UN, should be paid for by the UN membership. While it will not be possible to change this practice very soon, it is important to keep the discussion alive. In the meantime, we cannot accept a scenario in which the same States, who decide to send an investigation to the ICC and to exempt the UN membership from bearing the costs, also refuse to pay for the resulting increase in the Court's budget. So Security Council referrals should be looked at as the complex and difficult decision that it is.

We can certainly be proud of what we have achieved so far, of the consistent growth and consolidation of the Court. But we must not be complacent. The anniversary should be a moment to move the accountability agenda another step forward, to mobilize the political will of States to do their part and to get us closer to the vision of the Rome Statute – having

established a solid foundation, we must realize how much more we yet have to do to have this Court live up to its full potential.

I thank you for your attention.