A Path to Global Justice
My Insider's View

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Thank you very much. Actually, it was good to hide behind my mask. Now, I can see that I am—really this is a very emotional moment for me, thank you, thank you very much, and let me start by saying good evening to all of you, and I would like to start by expressing my deep, deep, gratitude to Provost Ben Vinson, Professor Shannon French, Case Western Reserve University leadership, the Inamori Foundation, the Inamori International Center for Ethics and Excellence, and the donors and community partners. I'm honored and humbled by the Inamori Ethics Prize that has been awarded to me. I'm also a bit intimidated, I have to say, by the list of extraordinary men and women that have preceded me. I am not extraordinary by any means, but I hope that at least I share some of their commitment and enthusiasm for a good cause, as well as the conviction that by working hard with others toward a well-defined goal, we can contribute in concrete ways to a better, more ethical world.

These contributions can take many forms and relate to achievements in most diverse areas, such as genetics, business, the environment, philosophy, policy, the arts, or, as in my case, justice, or, more specifically, international criminal justice. Justice, in general, and international criminal justice in particular, are closely related to ethics. Indeed, ethics are the very foundation of the criminal justice system. Ethics help us as a society to define what we consider to be reprehensible conduct, what an acceptable punishment, and what an acceptable manner to determine that such a contact may be attributed to an individual in a concrete case. A national system of justice is indeed based on standards and values generally shared by the society to which it belongs and from which it derives, but what about an international system of justice? What would the values and standards be for such a system, and who needs to share them? At the international level, we often speak about the international community, but it suffices to look around into our fragmented, divided world to realize that the notion refers at best to a broad and ill-defined group of people and governments of the world with various

and often-opposed standards. Are any of these standards or values shared by all, or at least a large majority of the members of such group? If yes, how do we then identify them, give them a concrete form, and apply them in practice?

These were some of the questions we had to ask ourselves when we embarked in the creation and setup of the International Criminal Court to fight impunity for atrocity crimes at the global level. We had to find the way of aligning this loosely conformed international community with a common vision. We did it through a multilateral process open to all, but led by some. I have been part of this process that is still ongoing since its inception until now in various capacities including as negotiator, judge, president of the court, and now as president of the Assembly of States Parties. I would like to use this opportunity to share with you my insider's view on the path we followed which could serve, I think, as a model for initiatives in other domains as well. I will focus on how we succeeded in bringing together this otherwise fragmented international community to pursue the global goal of creating an international criminal court. How we managed to identify together the values, the standards, and procedures on which to base it and make it operational. And finally, I will share with you what we are doing today at this very moment to keep it alive and relevant. This is a long story, but I will focus on three main central acts of this thirty-year-long story.

The first act was about gathering support for the creation of the court and defining the common standards. In the days that followed the creation of the International Criminal Court, many grand phrases were set and written. The famous phrase by the French writer Victor Hugo was often repeated. The phrase goes, "Nothing is as powerful as an idea whose time has come." A good phrase for sure, but it doesn't fully convey the difficult, hazardous process involved in materializing an idea. As history well demonstrates, good ideas do not flourish by themselves. On the contrary, they need to be identified as such and be promoted with vision, perseverance, and hard work. The International Criminal Court (the ICC), was created in Rome on the 17th of July, 1998, after some four years of intense negotiations that took place at the UN headquarters in New York. Only hours before the dramatic adoption of the founding treaty of the Rome Statute, many continued to think that an agreement was not possible, that the time for such an ambitious institution had simply not come. And yet four years before, at the time of my arrival in New York as a young diplomat, the idea that international justice for the gravest international crimes was crucial for sustainable peace was gaining momentum at the United Nations.

The end of the Cold War had altered, dramatically, the relations between big powers, which in turn had had a huge impact on the work of the Security Council and of the United Nations more broadly. A few months before I arrived, the Security Council had reached an unprecedented agreement to create an ad hoc international criminal tribunal to deal with genocide, crimes against humanity, and war crimes in forming Yugoslavia. A similar tribunal would follow in 1994 to address the genocide committed in Rwanda. The same year, the International Law Commission (the ILC) submitted to the General Assembly at the UN a draft statute for an international criminal court to deal with the same type of crimes on a permanent basis, wherever committed. Most importantly, the ILC also recommended states to convene immediately a diplomatic conference to negotiate the creation of such a court on the basis of its draft. The draft and the recommendations were received with great enthusiasm by many. However, despite the growing acceptance for international justice, the proposal to convene a diplomatic conference immediately to create an independent global court was a bridge too far for a significant minority of states, which included the United States and all other permanent members of the Security Council. As we all know, if you want to kill a good idea, you create a committee to deal with it, so instead of immediately convening a diplomatic conference, not one but two committees were successively put in place at which the ILC draft was considered during the four years that followed. However, protracted discussions that took place at both committees did not kill the idea. Enthusiasm survived and actually grew thanks to an intense campaign by states and civil society organizations to promote the court and its expeditious establishment.

To this effect, NGOs created the coalition for the establishment of the International Criminal Court. States founded the Like-Minded group. I was co-founder of the latter, which comprised only a handful of state representatives at the beginning. We used to meet in small side rooms of the UN. In one of our missions, we were very vocal about our existence and goals but remained deliberately vague about our actual composition because we wanted to give the impression that we were numerous, powerful, unstoppable, and indeed we were. The group grew quickly, to the point that we stopped counting and became more demanding. We ceased to focus solely on accelerating the creation of the court and started to develop the principles that we considered essential for an independent, strong, and impartial institution. States that wanted to become a member of the Like-Minded group were now required to adhere to these principles.

By the time of the conference, we were a big and powerful group of more than sixty states of all regions. We had been careful to avoid the north-south divide and had managed to engage states of all continents to ensure a cross-regional approach to the matter. The NGO coalition had also grown quantitatively and qualitatively. By the time of the conference, it comprised hundreds of organizations that promoted the court, put forward policy and technical documents, and gave assistance to smaller delegations. The like-minded group working in partnership with the NGO coalition was an extremely powerful voice. It provided initiatives, strategies, and support to the leadership of the conference. I was myself part of both, as vice president of the negotiating body of the conference, as well as a member of the core group of states that steered the like-minded. The four previous years of preparative discussions had been extremely useful to address multiple political, substantive, and procedural matters; however, most issues remained unresolved by the time the conference started. At the conference, finding common ground among hundreds of participants from all regions required extensive and complex negotiations. We consider that the recourse to a vote as a way of solving disputes among delegations was not an option. We were convinced that such a global institution could not be built on occasional majorities, but through very large agreements on shared standards. But did we have any meaningful common standards at all? The fact that we had managed to convene the conference to create the court was a positive sign already, but what type of court based on what values: Western values, African values, Asian, Latin American?

In order to narrow the differences, we also narrow the scope of our discussions to a very limited number of the most serious international crimes. Genocide, war crimes, crimes against humanity, and also aggression, which found its way into the statue despite the controversies. But even with relation to these core crimes, agreements were difficult, because only then genocide had a broadly accepted definition. For this first time ever, we embarked in a multilateral effort to achieve a detailed and comprehensive definition of war crimes and crimes against humanity. The definitions were supposed to be only a codification of pre-existing norms, but ended up including some ambitious, innovative, and progressive elements. Most notably, the war crimes and crimes against humanity incorporated new sexual offenses and a gender perspective. Furthermore, the definition of war crimes did not abolish, but significantly blurred the traditional distinction between international and non-international armed conflicts. The definition of aggression would come later in 2010 at the review conference held in Kampala, Uganda.

In addition to the crimes, and many other crucial institutional features, we also needed to determine the criminal procedures—namely, how someone would be investigated, arrested, transferred, tried, and eventually punished by the court. Last but not least, we needed to determine the appropriate system for victims' participation and reparations, something that was at the time totally unprecedented in international criminal justice. The principles inscribed in the International Covenant on Civil and Political Rights, such as the presumption of innocence and the right to an adequate defense, represented standards widely recognized by the world, and constituted therefore a very good starting point, and indeed all these fundamental principles are now inscribed in the Rome Statute. But, in addition to general principles, some insisted that it was the prerogative of states to prescribe in great detail how the entire criminal process would unfold, and what would be the appropriate penalty. While all other international courts and tribunals had been allowed to adopt their own rules for the conduct of the proceedings, the International Criminal Court was to apply state-made law only. The legislative effort by states required a constant comparative effort among various legal systems of the world. A global court could not favor one system in detriment of others. Indeed, it had to represent all and attach to none. Again, states embarked in a lengthy process of negotiations to agree on a workable procedural scheme.

Judge James Crawford, who chaired the work for the International Criminal Court and the International Law Commission, once described how they have "to contend with the tendency of each duly socialized lawyer to prefer his own criminal justice system's values and institutions." And I can fully corroborate this tendency, as I was personally in charge of leading this international drafting of the criminal procedures for many years—before, during, and after the Rome Conference. There was a permanent clash, and endless discussions between representatives of the two major criminal law systems of the world: the common law and the civil law system, based on arguments of efficiency and firmness, and also a certain degree of cultural chauvinism. At the start of the conference there were still hundreds of points of controversy with numerous options of suboptions that had to be addressed and solved, and they were solved, one by one, in marathon accessions of the conference.

The result was the elaboration of an innovative, unique, hybrid system which combines elements of the common law and the civil law systems. The product of the extensive negotiations of substantive law and procedure is now contained in the Rome Statute and its complementary instruments adopted two years after the conference. They reflect common standards achieved by

consensus across regions, in discussion open to all states of the world, including all major powers. Among them, the United States supported the creation of the court and participated actively in the negotiation, contributing greatly to all aspects of this framework with a large and capable delegation. While all these standards were agreed by consensus, the Rome Statute was itself put to a vote at the end of the conference at the request of the American delegation. The breaking point was related to the exercise of jurisdiction by the court over nationals of a non-state party. Seven countries voted against; 21 abstained; 120 voted in favor.

The adoption was accompanied by an explosion of applause, emotion, and tears. In light of this final vote, some wondered whether there would be sufficient support to ratify the treaty and set up the institution. Like four years before, some considered, again, that the time had not come. For them, the court would not see the light, at least not in our lifetimes. And yet, the second act to which I now turn had already begun. Act two was about gathering support for the setup of the court. Immediately after Rome, the NGO Coalition of the Like-Minded reassembled forces and engaged in an active campaign to obtain the large number of sixty ratifications required. Exceeding all expectations, this was achieved in less than four years. The treaty entered into force on the first of July, 2002, and the first Assembly of State Parties was convened.

The assembly envisaged in the statute is the oversight of the legislative body of the court. It is composed of representatives of all the states that have ratified or acceded to the Rome Statute, currently 123. As its first session, the assembly adopted all the instruments complementary to the Rome Statute, including the rules of procedure and evidence, and took all necessary decisions to set up the court. Months later, it elected the first eighteen judges and the prosecutor, who were sworn in in the semester of 2003. Soon afterwards, investigations started, and proceedings began. The first suspects started to arrive in The Hague. They were tried; some of them were convicted. The first trial of the court was against Thomas Lubanga, a Congolese rebel leader accused of forcefully recruiting and enlisting child soldiers. As part of the final allegations at this historic first trial, Ben Ferencz, former prosecutor at Nuremberg, appeared before the judges to contribute to the pleadings of the prosecution. The International Criminal Court was finally operational and demonstrating it could deliver justice, against all odds.

The first investigations and trial were followed by others, and gradually the court became the large institution that it is today, with its headquarters

at The Hague in the Netherlands, a liaison office in New York, and seven field offices in various countries in Africa and in Georgia, Asia. As of today, the prosecutor has opened fourteen investigations, most of them in Africa, and three in Asia: Afghanistan, Georgia, and Myanmar. The court has issued ten convictions, four acquittals, and thirteen people wanted by the court are currently at large.

Despite all this movement and growth, the enthusiasm of the negotiating years gradually turned into disappointment. The court was accused of focusing too much on Africa, of not having enough cases, of being too expensive, too inefficient. There were threats of massive withdrawals and two states, Burundi and the Philippines, actually withdrew in 2017 and 2018. There were politically motivated attacks against the court, but also good-faith criticism from strong supporters. By the time I joined the court as a judge in 2010, internal and external problems were already mounting. Proceedings were slow and convoluted, and interactions between the various organs of the court—the presidency, the judiciary, the prosecutor, and the registry—and within each organ, were difficult. Despite constant appeals by the Assembly of State Parties to pursue a one-court principle, fragmentation prevailed.

The lack of cohesion was evident within the judiciary itself. Judges coming from all regions of the world had, like negotiators before them, the tendency to favor their respective legal system, and tended to interpret and apply the ICC legal framework through the lens of their own. Furthermore, as judges sit in separate chambers, the same matter result in one chamber could very well lead to a similar discussion but different solution in another one. This did not contribute to forge a stable, consistent, and predictable jurisprudence. The replacement of a third of all judges every three years did not make cohesion any easier. I was struck by a sense of déjà vu when I had my first discussions in chambers with my fellow judges. I felt I had ventured in a time tunnel and taken a trip back to the negotiations and procedures that were held fifteen years ago. The ICC community was encountering similar problems to those confronted by the international community before, and that risked undermining the common standards forged in Rome.

External and internal observers worried, and initiatives to improve started to emerge and be developed by various organs of the court, including some concrete amendments proposals to the legal framework. From 2012 onwards, efforts to take stock of lessons learned and improve the work accelerated under the supervision of the Assembly of the Parties. Upon

my election as president of the court in 2015, I made it a top priority of my three-year presidency to enhance the overall management of the court and the efficiency and effectiveness of judicial proceedings. I emphasized the importance of cohesion and collegiality. To increase cohesion of the court, I applied some of the techniques that had succeeded to bring some unity within the international community in the years of negotiations. At the court, I strived to improve decision-making on joint strategies and policy issues by strengthening or creating inter-organ platforms for dialogue. Within the judiciary, I tried to replace fragmentation by collective thinking. For the first time, all judges engaged in a joint assessment of methods of work, the legal framework, and their practices for each phase of the proceedings. They did this through annual judges retreats, regular judges meeting organized within each judicial division, and the appointment of individual judges as focal points to lead discussions on specific issues. Gradually, all judges, as well as members of the legal support staff, became involved in various ways in the review of proceedings with a view to agreeing on the best practices to streamline proceedings and, if needed, propose discrete amendments to the applicable rules.

By the time I left in March 2018, we had achieved some positive and tangible results at the court in general, and at the court room specifically, including a noticeable reduction of the length of trial proceedings. However, it was clear that much more needed to be done to achieve drastic systemic changes. Not only did this not happen, but on the contrary, some institutional and judicial setbacks triggered, again, serious concerns. By then, patience had run out.

In June 2019, four former presidents of the Assembly of the Parties reflected the general sentiment in a public letter entitled "The Court Needs Fixing." In the letter, they noted that, I quote, "The powerful impact of the court's central message is too often not matched by its performance as a judicial institution. We are disappointed by the quality of some of the judicial proceedings, frustrated by some of the results, and exasperated by the management deficiencies that prevent the court from living up to its full potential." According to them, it was time to make a new deal between the ICC and the state parties. In the spirit that made them succeed in Rome, importantly, they acknowledge that this new deal required not only the efforts of the court to improve its own performance, but also implied at the other end an obligation of states to, and I quote, "fully embrace the potential of the ICC as a central institution in the fight against impunity." States, they said,

have to stand up for the ICC mission to be judicially independent, even, or in particular, in situations where that may be politically inconvenient. And states need to give the court the resources it needs to do the job.

As a first step toward this new deal, they suggested to undertake an independent assessment of the court's functioning to provide court officials and non-state holders with a common point of reference going forward. In the same year the recommendation was accepted at the Assembly of the State Parties, and the assembly launched a process of review of the entire Rome Statute system. This is the process that is currently unfolding in what is the third and last act in my presentation to you. This third act is about gathering support for the review of the Rome Statute system. Indeed, following this eloquent letter at the end of 2019, the Assembly of State Parties established an independent expert review with the overall mandate to make concrete, achievable, and actionable recommendations aimed at enhancing the performance, efficiency, and effectiveness of the court and the Rome Statute system as a whole. To this effect, nine experts were appointed from various regions of the world, who presented by the end of 2020 a detailed report elaborated on the basis of hundreds of written submissions, interviews, and meetings with all relevant stakeholders, including ICC former and current elected officers and staff members, legal representatives of victims and accused persons, NGOs, and academia.

The voluminous report contains 384 short- and long-term recommendations of various degrees of complexity. Indicated in an annex, the least of those that in the view of the experts, should be tackled as a matter of priority. As mandated, the experts made recommendations related to issues and the three main clusters: governance, the judiciary, and the proceedings. I stress the holistic and fundamental nature of many of the recommendations that do not only relate to specific issues of structure and decision making, or the legal and technical intricacies of the criminal proceedings. Indeed the experts have gone further to touch upon matters that affect the soul of the system, such as ethics at the court, as well as its culture and working environment, conflict of interest, and conflict prevention and resolution at the court. Some of their recommendations aimed at strengthening cohesion, including by encouraging to go further and deeper in some of the initiatives already taken at the court, to allow for a more collegial judicial approach and more coherence and predictability of the jurisprudence. There are also recommendations to the Assembly of State Parties itself, including to improve the process of nomination and selection of judges. This is in my view a hugely important

and urgent matter. After all, the court, as any other institution, can only be as good as the men and women that work there.

Upon reception of the report, the Assembly of State Parties established a review mechanism to assess and implement the recommendations as appropriate through an inclusive and transparent dialogue open to all — the court, the assembly, civil society organizations, and all other relevant stakeholders of the international community. This will be done in accordance with the comprehensive plan of action that details the roadmap to be followed within a tight and ambitious timeline. Discussions have already started this month with a view to presenting a first report to the assembly at this December's incoming session at The Hague. When I assumed the position of the President of the Assembly of State Parties in February of this year, I emphasized the crucial importance and urgency of this review. This is an absolute top priority for the assembly and for me personally, as I am convinced, like my four predecessors in their letter, that a profound revision of the system is indeed required for the court to be able to deliver on its crucial justice message.

On 17 July, 1998, the international community materialized an idea whose time had come. Driven by a belief that accountability for the most serious crimes was indispensable to attain sustainable peace, and the conviction that a permanent general court had a central role to play in this regard. At the time of an erosion of the rule of law, and taking into account the contemporary challenges to multilateral solutions, an effective court is more important than ever. For this reason, I intend to do my utmost from my current position to contribute to enhance its effectiveness, its credibility, and its relevance. I thank you for your attention