THE INDEPENDENCE OF THE ICC AND SAFEGUARDS AGAINST POLITICAL INFLUENCE

SPEECH OUTLINE

HIS EXCELLENCE JUDGE SANG-HYUN SONG

A paper prepared for the Symposium on the International Criminal Court

February 3 – 4, 2007; Beijing, China

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This paper was produced as part of the
Department of Foreign Affairs and Trade Canada funded
Promotion of the International Criminal Court in China Project

February 2007

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I am honoured to have been invited to address this workshop on the International Criminal Court, or ICC. China is a key player in international criminal justice and it is important that the awareness and understanding of the ICC is enhanced in China as well as generally in Asia. I have been in China several times during the last couple of months and I am very pleased with the continuing and growing interest in the ICC and in our work.

Today, I will address a topic that is of utmost importance to the ICC: its independence and the safeguards against any political influence. Before doing so, however, I would like to give you a brief overview of the ICC, its jurisdiction and history.

I. History of the ICC

Let me start with the history of the ICC: the idea of a permanent international criminal court dates back to the war crimes trials of the major war criminals of the Axis powers after World War II. The lesson of Nürnberg and Tokyo was simple: in order to avoid genocide, crimes against humanity and war crimes, those responsible for such crimes must be brought to justice. Thus, in the 1950s, a statute of an international criminal court and a code of crimes against mankind were drafted and discussed within the framework

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of the United Nations. The Cold War, however, brought this development to a temporary halt.

With the end of the Cold War, new development was possible. The gruesome conflicts in the former Yugoslavia and in Rwanda convinced the international community that the time for international criminal justice was ripe. The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR) also paved the ground for a more ambitious goal – the establishment of a permanent ICC. In the summer of 1998, representatives of more than 160 states and of more than 250 non-governmental organizations met in Rome to negotiate what should become the Rome Statute of the International Criminal Court. The Rome Conference adopted the Statute on 17 July 1998. 120 states voted in favour of the Statute, seven against it, and 21 states abstained.

The necessary number of 60 ratifications of the Statute was reached surprisingly quickly and on 1 July 2002, four years after its adoption, the Rome Statute entered into force. Thus, the ICC came into existence as an independent international institution. As of now, the Rome Statute has 103 States Parties.

II. Structure of the ICC

The ICC has four organs: the Chambers are the principal judicial organ, consisting of the 18 Judges of the Court. The Chambers have three Divisions – the Pre-Trial Division, the Trial Division and the Appeals Division, of which I am a member. The second organ, the Presidency, consists of three Judges, bearing the overall responsibility for the administration of the Court, its representation etc. The Office of the Prosecutor, the third organ, is responsible for investigating and, eventually, prosecuting crimes that fall under

the jurisdiction of the Court. Finally, the Registry provides the administrative backbone of the institution.

III. Exercise of jurisdiction of the ICC

The jurisdiction of the ICC is limited to the most heinous crimes that are of concern to the international community as a whole: genocide, crimes against humanity, and war crimes. The definitions of these crimes are firmly established in customary and conventional international law. The temporal jurisdiction of the ICC is limited to crimes committed since the entry into force of the Rome Statute. Thus, there is no retroactivity of the Statute. The personal jurisdiction of the Court extends to persons who either are nationals of a State Party or who are alleged to have committed crimes on the territory of a State Party. Only when the Security Council of the United Nations, acting under Chapter VII of the UN Charter, refers a situation to the ICC can the jurisdiction of the Court be extended to the territory of a state that is not party to the Rome Statute.

Investigations by the Prosecutor can be triggered by the referral of a situation by a State Party or by the Security Council. Thus far, the Prosecutor has received three referrals from States Parties, concerning the situations in the Democratic Republic of the Congo, northern Uganda, and the Central African Republic. Furthermore, the Security Council has referred the situation in Darfur/Sudan to the Prosecutor. The Prosecutor has opened investigations into all situations with the exception of the Central African Republic. Thus far, the Court has issued arrest warrants in relation to suspects in the Uganda situation and in relation to a suspect in the Congo situation. The Congolese suspect, Mr. Lubanga Dyilo, was transferred to the Court last year and is awaiting trial. A confirmation hearing in relation to charges of recruitment and use of child soldiers has already been held. And

on last Monday, 29 January 2007, the Pre-Trial Chamber confirmed most of the charges in relation to Mr. Lubanga Dyilo. Thus, the first trial before the ICC will start in the near future, which aptly demonstrates that the ICC has become a functioning and efficient international institution in very little time.

This concludes my brief outline of the ICC. Let me now turn to the independence of the ICC and the safeguards against political influence.

IV. Independence of the ICC

For any court, independence and freedom from political pressure are critical. Only if the judges are independent will the judiciary be able to carry out its functions of controlling the other branches of government and administering justice properly. This is recognized, not least, by the "Basic Principles on the Independence of the Judiciary", which the United Nations General Assembly endorsed in 1985. International human rights instruments such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights stipulate that suspects have a human right to be tried by an independent court. And only if the judiciary is independent will it be respected by society.

For the ICC, independence is equally important but perhaps even more challenging than for domestic courts. The type of crimes the ICC has jurisdiction over typically are committed on a large scale and often are state-sponsored. The crimes will have arisen in the course of armed conflicts, with high political stakes. As the experience of the ICTY and of the ICTR shows, the suspects likely to be brought before the ICC may even include former cabinet ministers and state presidents. Thus, the ICC is operating in a

highly political environment, making the independence of the ICC from political pressure very important.

Will the ICC withstand the political pressures that it may face and act completely independently? To my mind, the answer is in the affirmative because the Rome Statute provides robust mechanisms to protect fully the independence of the Court and to safeguard it from political influence. I will elaborate my assessment in two steps: first, I will highlight certain institutional safeguards that protect the independence of the institution as a whole. Second, I will address the independence of the Judges of the Court.

V. Independence of the ICC as an institution – investigations and selection of cases

The independence of the Court as an institution is particularly relevant when it comes to the selection of situations that are to be investigated by the Office of the Prosecutor and, eventually, of the cases that are brought to trial. The Rome Statute provides several mechanisms to ensure that no undue political influence can exercised over the ICC and its Prosecutor. As I have mentioned already, States Parties and the UN Security Council have the right to refer a situation to the ICC. Thus, at first sight, it might seem that this alone would amount to substantial political influence on the Court because states and the Security Council might have political rather than judicial reasons for a referral to the ICC. Such fear, however, is unwarranted. First of all, the Prosecutor does not automatically open an investigation once he has received a referral. Rather, he is under an obligation to scrutinise whether or not there is a reasonable basis to proceed with the investigation. Only if he is convinced that there is such a reasonable basis, will he open an investigation into the situation that has been referred to him. It should also be noted in

this context that states and the Security Council can only refer a *situation* to the Prosecutor, that is a conflict defined by temporal, geographical and personal parameters, and not a specific case against a specific suspect. Therefore, a referral cannot be used to target a specific person. It is for the Prosecutor to decide who the suspects are and who should be brought to trial.

But what happens if, for political reasons, neither a State Party nor the Security Council refer a situation to the Court, even though that situation clearly would need the attention of the ICC? This question was hotly debated when the Rome Statute was negotiated. Some states favoured an approach whereby a referral by a state or by the Security Council would always be required, which might have led to "negative" political influence on the Court, effectively blocking any investigations if neither a State Party nor the Security Council wanted them.

Fortunately, a different solution was finally adopted: the Prosecutor may open an investigation into a situation on his own motion without a referral if he believes that there are reasonable grounds for such a step. Thus, the Prosecutor can do his work independent from political influence. I should mention in this context that the Rome Statute also provides for a check of the Prosecutor's decision to open an investigation on his own motion: he may do so only with the authorisation of the Pre-Trial Chamber. Thus, three Judges will closely scrutinise the Prosecutor's decision in order to avoid that any unsound decision is taken or that the Prosecutor himself is acting out of political motivation.

I also should mention that there is one instance in the Rome Statute where a political body may exercise direct influence on the investigations of the Prosecutor: pursuant to article 16 of the Statute, the Security Council, acting under Chapter VII of the UN

Charter, may request the Prosecutor not to commence or not to proceed with an investigation for a period of up to twelve months. The reason for this provision is that there may be situations where investigations by the ICC at a certain moment could be detrimental to efforts by the Security Council to establish peace. Of course, once the situation has changed, the investigations of the Prosecutor could continue. Therefore, I do not consider the possibility of a deferral as leading to undue political influence, but as a concession to the fact that sometimes, first a political solution has to be sought to bring a conflict to an end before justice can be done.

VI. Independence of the institution: financing of the Court

Let me now turn to another aspect of the independence of the ICC that may be often overlooked: the financing of the Court. For any judicial institution, the mode of financing is of high importance for the independence of that institution. Politicians may be tempted to exercise influence on the judicial system by not allocating sufficient money to the judiciary. If there is no money available for investigations and trials, there simply won't be any investigations and trials. Under-financing also is a very real threat to the international criminal justice system; this problem has been experienced, for example, by the Special Court for Sierra Leone, an internationalised criminal court set up to try the crimes committed in the course of the civil war in that country. The Special Court depends entirely on voluntary contributions by states and at times, the financing of that court has been at risk.

The Rome Statute sought to find a solution to this problem: any state that is party to the Statute has to pay contributions to the Court, which are used to finance the Court's budget. The contributions are assessed on the basis of the system used by the United

Nations. Thus, a clear and pre-defined system is used for the financing of the Court, which avoids political influence. Each year, the Court proposes a budget, which is discussed in the Committee on Budget and Finance and eventually adopted by the Assembly of States Parties in a transparent process.

Another potential challenge to the independence of the ICC could be seen in voluntary contributions that states may make to the Court. Could states try to make use of voluntary contributions to influence the Court's actions? The States Parties were mindful of this potential problem and already in the year 2002 adopted a resolution, requesting states that wish to make voluntary contributions to declare that such contributions are not intended to affect the independence of the Court. The Registrar of the ICC is under an obligation to assure himself that any voluntary contribution indeed does not affect the independence of the Court. In case of doubt, he has to refuse the money. The Registrar also is under an obligation to report all voluntary contributions to the Assembly of States Parties, regardless of whether they were accepted or not. Thus, transparency is assured, which prevents any suspicion of undue political influence.

A similar challenge has arisen with regard to the Trust Fund for Victims. This Fund is established under the Rome Statute for the benefit of victims of the crimes under the jurisdiction of the Court. Upon conviction of an accused, the Trial Chamber may order reparations to be paid to the victims of the crimes of the accused. Under certain circumstances, the Fund may also pay reparations to victims independent of a conviction. This Fund depends to a large extent on voluntary contributions by states and other entities. To avoid any political influence, the Regulations of the Trust Fund provide that

states, when making contributions to the Fund, may not "ear-mark" the money for specific purposes or for specific victims or groups of victims.

VII. Independence of the Judges

Let me now turn to the independence of the Judges of the Court, which is, of course, of utmost importance. Only when the Judges of the Court are independent will the ICC as a whole be an independent institution.

There are several aspects to the independence of the Judges of the ICC. There is, first of all, the legal framework for the election and office of the Judges. The Judges of the ICC are elected by the Assembly of States Parties, where each state has one vote. The candidatures have to be submitted well in advance of the elections, so as to enable the states to carefully scrutinise the qualification of each candidate. Successful candidates require a two-thirds majority by the Assembly of States Parties. Thus, Judges are not representatives of their own governments, but have the trust and support of the international community as a whole.

Judges are elected for a term of office of nine years. There is, in principle, no possibility of re-election, which is meant to strengthen the independence of the judiciary. Judges serving on a full-time basis may not seek outside employment. The salaries of the Judges, which are determined by the Assembly of States Parties, may not be reduced during the term of office of a Judge. This avoids that financial pressure is used to influence a Judge. In sum, the Rome Statute provides for all necessary institutional safeguards for the independence of the Judges and fully complies with the United Nations Basic Principles that I have mentioned earlier.

But the independence of the judiciary goes beyond the institutional safeguards enshrined in the Rome Statute. The Judges of the ICC are asserting their independence on a day-to-day basis. The establishment of the ICC has been dubbed one of the most important developments in recent international relations. The world community has high hopes that the ICC will contribute to the establishment of the rule of law in countries torn by conflict, thereby also contributing to sustainable peace. Thus, governments, other international organisations, as well as non-governmental organisations monitor closely every step of the Court. This scrutiny is much appreciated. Nevertheless, the Court and its Judges have to avoid any impression that they are unduly influenced by comments made by outside actors. To my mind, and I know that this view is shared by all of my colleagues, it would be detrimental to the cause of the Court if the ICC were to give in to any outside pressure or only create such an impression. Some of the decisions that the Court might take in the future may not be always be popular. But eventually, the Court will be judged on the basis of the quality of its work, not on short-lived political considerations.

Before concluding my presentation, I would like to draw your attention to the Code of Judicial Ethics that the Judges of ICC have adopted. In this Code, the Judges have reconfirmed their intention to abide by highest standards of professionalism and independence. The Code further clarifies the rules that ensure the independence of the judiciary. For example, the Code provides that Judges of the Court shall not exercise any political function and shall not accept any gift or advantage that could be perceived as being intended to influence the performance of their judicial functions.

The Code of Judicial Ethics is an important document not only because it provides further guidance to the Judges of the Court. Being the first Code of Judicial Ethics of any international court, it demonstrates the continuing commitment of the Judges of the ICC to safeguard their independence and to withstand any political pressure that they may face.

I am confident that the ICC will fulfil its role of promoting justice and peace. The independence of the Court is key to this.

Thank you very much!