Universiteit Utrecht

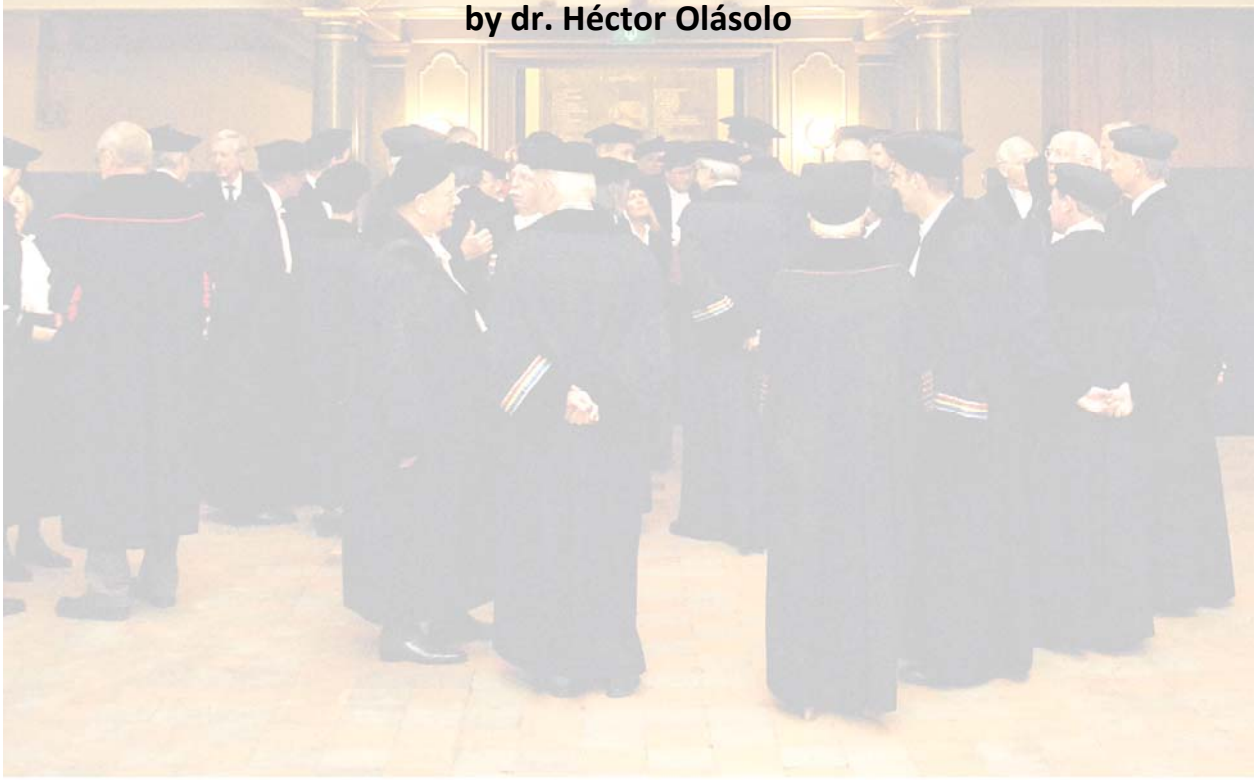
Willem Pompe Institute
for Criminal Law and Criminology

THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN PREVENTING ATROCITY CRIMES THROUGH TIMELY INTERVENTION:

FROM THE HUMANITARIAN INTERVENTION DOCTRINE AND EX POST FACTO JUDICIAL INSTITUTIONS TO THE NOTION OF RESPONSIBILITY TO PROTECT AND THE PREVENTATIVE ROLE OF THE INTERNATIONAL CRIMINAL COURT

Inaugural lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, delivered on 18 October 2010 at the Aula of the Academic Building of Utrecht University

by dr. Héctor Olásolo



Rector Magnificus,

The brutal legacy of the twentieth century speaks bitterly of the collective inadequacies of international institutions and the profound failure of individual States to live up to their most basic and compelling responsibilities. Given the profound and long-lasting costs to a society of engaging in atrocity crimes, strengthening preventative action becomes of utmost relevance. This is emphasized by the emerging notion of the "responsibility to protect".

In this inaugural lecture, I will address the role of the International Criminal Court in implementing the notion of responsibility to protect through means other than ending impunity for past crimes.

I Humanitarian Intervention Doctrine and the Responsibility to Protect

The nineties saw the establishment, by the United Nations, or with the direct involvement of the United Nations, of several international tribunals with jurisdiction over atrocity crimes that had already taken place. These tribunals were characterized by their primacy over national jurisdictions, their temporary nature, and the limitation of their jurisdiction to a specific crisis situation, such as the breakup of the former Yugoslavia or the Rwandan genocide. As explained by Leila Sadat and Michael Scharf, they were part of a broader post-conflict UN strategy, and their primary goal was to facilitate reconciliation.

Extending the basis for judicial intervention, while perpetuating a global system that tolerated atrocity crimes through inaction, was unsustainable. As a consequence, the nineties also saw the greatest development of the humanitarian intervention doctrine, and its application to situations such as those in Somalia in 1993 and Kosovo in 1999.

This doctrine is based on the understanding of sovereignty as responsibility, which can be traced back to Francisco de Vitoria and Bartolomé de las Casas. Their ideas led to the 1542 New Laws of the Indies, which abolished native slavery for the first time in European colonial history. In the early seventeenth century, Jesuit Francisco Suarez, leading representative of the School of Salamanca, underscored that political power originates in the consensus of free wills, and that men are thus entitled to disobey even to the point of deposing an unjust government. Subsequently, Hugo Grotius, John Locke, and the contract theorists of the eighteenth century, developed the notion of sovereignty as responsibility so as to shape it into its current form.

Based on this premise, the humanitarian intervention doctrine, formulated for the first time by Hersch Lauterpacht in the immediate aftermath of World War II, justifies a right of armed intervention into a state that is unwilling or unable to protect its own population against atrocity crimes. According to its supporters, humanitarian intervention by the United Nations, or by states with or without UN authorization, is consistent with the principles of sovereignty and territorial integrity embraced in the UN Charter. Such principles, they argued, aim to protect the citizens of states rather than the States as entities. As a result, they cannot apply to States that perpetrate or otherwise fail to prevent atrocity crimes.

Nevertheless, the humanitarian intervention doctrine has been progressively abandoned in the last decade for several reasons. First, it failed to provide precise criteria to define those circumstances giving rise to the alleged right to armed intervention.

Second, it did not receive broad consensus as many argued that the UN Charter's prohibition on the use of force contains no exception for humanitarian intervention.

Third, as the notion of humanitarian intervention was limited to the reaction to actual atrocity crimes, it left States with no other option than to choose between two undesirable choices: standing by in the face of mounting civilian deaths, or deploying military force to protect the threatened populations.

With the loss of support for the humanitarian intervention doctrine and the structural limitations of *ex-post facto* judicial institutions, there was a need to identify new effective mechanisms for preventing atrocity crimes. The notion of responsibility to protect, endorsed by the UN General Assembly at the 2005 World Summit, reaffirmed by the UN Security Council in 2006, and further elaborated on by the UN Secretary-General in 2009, aims at fulfilling this role.

Like the humanitarian intervention doctrine, the notion of responsibility to protect is based on the understanding of sovereignty as responsibility. Nevertheless, it has several distinctive features, which, as Carsten Stahn has pointed out, have secured its broad acceptance in a short period of time. First, it addresses the dilemma of intervention from the perspective of those suffering from atrocity crimes rather than from the perspective of those asserting a right to intervention.

Second, it does not limit responsibility and intervention to the reaction to actual atrocity crimes. On the contrary, the notion of responsibility to protect constitutes a holistic approach to address crisis situations based on the premise that an effective response requires a continuing intervention that starts with the adoption of preventative measures. Only if such measures fail, reaction to actual atrocity crimes will be needed. Moreover, the determination of the most appropriate mechanisms for reaction, including military intervention, must be driven by the need to subsequently fulfill the

commitment to build long-lasting peace, and promote good governance, rule of law and sustainable development.

Third, the notion of responsibility to protect is based on a complementarity approach with three main Pillars. According to Pillar I, States whose populations may be at risk have the primary responsibility to protect them from the incitement and commission of atrocity crimes. When States concerned are unable to do so because of capacity deficits or lack of territorial control, other States, as well as the international community at large, must support and assist them under Pillar II.

If assistance measures are of no use because of the unwillingness of national leadership or the great deficit of national capacity, responsibility devolves to the international community to take timely and decisive action under Pillar III, including armed intervention in extreme circumstances. As a result, the notion of responsibility to protect can be said to place a particular emphasis on prevention. This has led, in turn, to a shift in the focus of the debate from the criteria under which military intervention, with or without UN authorization, may be justified, or even required, to the timely implementation of effective preventative measures.

II The Two Dimensions of the ICC´s Preventative Mandate: General Prevention and Timely Intervention

As the 21st century has witnessed a change in focus from the humanitarian intervention doctrine to the notion of responsibility to protect, it has also experienced a shift from *ex post facto* judicial institutions to the establishment and consolidation of a permanent International Criminal Court.

As Cherif Bassiouni has underlined, the ICC represents a rather different approach to the adjudication of atrocity crimes because it: (i) has been created through an international treaty by the States Parties; (ii) constitutes an independent international organization with a permanent nature; and (iii) is not part of a broader post-conflict UN strategy. In particular, the ICC has been established with a view to act over situations of atrocity crimes that take place after the 1st of July, 2002 in the territory of any of its 114 States Parties, and even outside such territories when there is a substantial involvement of their nationals or a UN Security Council´s referral. Furthermore, the ICC operates on the basis of a complementarity regime, according to which it can only exercise its jurisdiction when States are inactive, or they are unwilling or unable to genuinely carry out their own national proceedings.

There is a clear connection between the notion of responsibility to protect and the ICC´s mandate as both have their focus on future situations of atrocity crimes, and are based on the primary responsibility of the states concerned. Last year, the UN Secre-

tary-General Ban Ki-moon referred to the ICC Statute as "one of the key instruments relating to the responsibility to protect."

In this regard, it must be noted that the ICC shares, with *ex post* facto judicial institutions, a commitment to ending impunity as a means to promote: (i) positive general prevention, consisting of upholding the application of international criminal law and reinforcing the core societal values protected therein; and (ii) negative general prevention or deterrence, resulting from sending the message to the world's leadership that those engaging in atrocity crimes will not get away with them. Such commitment is fulfilled by combining judicial proceedings with a number of external relations, outreach and public information activities. The ICC's efforts on general prevention may assist UN officials and other stakeholders to emphasize, under Pillars II and III of the notion of responsibility to protect, both the costs of engaging in atrocity crimes and the benefits of abandonment.

Nevertheless, unlike *ex post facto* judicial institutions, the ICC´s preventative mandate has a second dimension. It consists of timely intervention into situations where there are tangible threats of future atrocity crimes, or where atrocity crimes are already taking place. It is mainly discharged by the ICC Prosecutor through his preliminary examinations and investigations, and may cover a broad range of situation. This is shown by: (i) the 9000 communications received to-date by the Prosecutor from individuals located in more than 140 countries; and (ii) the variety of geographical locations in which preliminary examinations or investigations have been started since 2003, which include: Afghanistan, Central African Republic, Colombia, Darfur, Democratic Republic of Congo, Georgia, Guinea, Iraq, Ivory Coast, Kenya, Palestine, Uganda and Venezuela.

As the notion of responsibility to protect places the emphasis on prevention through timely intervention, the ICC´s timely intervention can make a unique contribution to discharging the responsibility of the international community under Pillars II and III of the said notion.

III The ICC´s Timely Intervention as a result of Tangible Threats of Future Atrocity Crimes

Atrocity crimes are not unavoidable. They take long planning and preparation, as they require a "collective effort" and an "organisational context". Moreover, there is usually sufficient information about impending atrocity crimes, which, regrettably, is ignored or minimized by high-level national and international decision makers with competing political agendas. Hence, statutory provisions on planning, preparation, incitement and attempt are of the utmost relevance for the effectiveness of preventative efforts through timely intervention.

It may thus come as no surprise that - except for the definition of genocide which has always been taken *verbatim* from the 1948 Genocide Convention - the approach taken by the ICC Statute is rather different than that taken by the statutes of the e*x post facto* judicial institutions. In the latter, as William Schabas has explained, provisions on planning, preparation, incitement and attempt would simply have been superfluous and were not included.

Article 25 of the ICC Statute provides for liability for attempt in relation to all atrocity crimes, not just genocide, and attaches such liability to "action that commences the execution of a crime by means of a substantial step". Although this definition requires more than just planning, the question arises as to where to draw the line between mere preparatory acts, and conduct amounting to a substantial step for the execution of atrocity crimes. Neither the ICC Statute nor the case law of international tribunals provides guidance on this matter.

Some national systems, such as Germany's, have taken a more restrictive approach and require a direct movement towards the completion of the crime. Others, such as the United States´, favour a broader conception by attaching liability for attempt to the possession, collection or fabrication of the means of the crime or the tracking of the victims of the crime.

As a result, should the ICC case law embrace a less restrictive approach? Liability for attempt may encompass situations such as that which occurred in Rwanda, where for sixteen consecutive months starting in January 1993, more than half a million machetes were imported and distributed, along with firearms and grenades, under the guise of a self-defense program.

Article 25 of the ICC Statute also attaches criminal liability to acts of "public and direct incitement to commit genocide". Despite its limitation to the crime of genocide, its scope of application may be significant in situations like that in Rwanda, where starting in 1991, the media systematically incited Hutus to perpetrate violence against Tutsis, or like that in Cambodia, where for years, the radio of the Khmer Rouge urged listeners to "purify" the "masses of the people" of Cambodia.

Regarding the crime of aggression, the definition approved in June 2010 at the first ICC Review Conference, attaches criminal liability to the "planning" and "preparation" of an act of aggression. This brings the ICC Statute more in line with most national systems, in which criminal liability can arise as a result of agreeing to commit a crime, participating in the design of a criminal plan or contributing to establish the necessary conditions for its execution. Indeed, if today it is broadly accepted at the national level that criminal liability arises for such preparatory acts, there is no justification to say otherwise at the international level in relation to offenses of the magnitude and gravity of atrocity crimes.

Although the existing provisions on attempt and incitement provide a sufficient basis for the ICC´s timely intervention, extending liability for "planning" and "preparation" to all atrocity crimes will significantly strengthen the ICC´s preventative role. Moreover, as senior leaders are usually directly involved in the planning and preparation of atrocity crimes, focusing on this early stage of the *iter criminis* will reduce the controversy over some forms of criminal liability underscored by Kai Ambos, George Fletcher, Göran Sluiter, Herman van der Wilt, Elise van Sliedregt, Tomas Weigend, or Gerard Werle. Furthermore, this will be in line with the ICC´s gravity threshold and Luis Moreno-Ocampo´s policy of focusing on the "most responsible persons".

As long as an individual communication or a referral letter contains tangible *indicia* of attempt or incitement to commit atrocity crimes, the ICC Prosecutor must initiate a preliminary examination. This examination aims to distinguish between: (i) those situations that require a formal investigation; and (ii) those other situations better dealt with by other means.

To make such a determination, it is not sufficient to gather and analyze information concerning the allegations of attempt or incitement. It is necessary to review the available information regarding *inter alia*: (i) the admissibility of the relevant situation, due to the inaction, unwillingness or inability of national authorities and the gravity of the violence; and (ii) the possible existence of substantial reasons to believe that the investigation would not serve the interests of justice.

As a result, as Antonio Cassese and David Scheffer have pointed out, the Prosecutor can respond appropriately on grounds of admissibility or interest of justice where national authorities take meaningful steps to actually prevent atrocity crimes. Moreover, according to article 25 of the ICC Statute, those who start the execution of atrocity crimes by means of a substantial step shall not be liable if they abandon their efforts to commit such crimes or otherwise prevent their completion. Hence, the Prosecutor can close a preliminary examination into allegations of attempt or incitement if his timely intervention has contributed to successfully defusing the threat of atrocity crimes occurring.

Although at this stage, the Prosecutor cannot rely on measures of a coercive nature and not all forms of State Party cooperation are available the potential of preliminary examinations to incentivise national authorities should not be underestimated. As shown by several preliminary examinations, including Georgia, Guinea, and Palestine, the Prosecutor, in addition to receiving testimony and seeking information from reliable sources, may: (i) send missions to the relevant States; (ii) receive in The Hague national delegations of members of governments, representatives of high-courts, opposition leaders and NGOs; (iii) provide advice on those measures that should be taken at the national level to defuse the threat of atrocity crimes; (iv) discuss a prevention

strategy with the United Nations and other stakeholders; (v) exchange information with national and international actors; and (vi) address in the media the evolution of events and the degree of cooperation by national authorities.

Using diplomatic and media channels to bring the world's attention to the plans of senior leaders to engage in atrocity crimes, along with highlighting the possibility of them escaping ICC prosecution should they abandon their plans and take the necessary preventative measures, can be a powerful tool.

Moreover, from the perspective of ensuring a timely reaction to tangible threats of atrocity crimes, the ICC Statute appears to offer unprecedented opportunities. While other organs of the international community, such as the UN Security Council or the UN General Assembly, usually require long negotiations before deciding to intervene in a situation, the ICC Prosecutor need not consult with interested stakeholders prior to opening a preliminary examination.

Despite the absence of conclusive evidence at this stage, it appears that the preliminary examination in Afghanistan, contributed to NATO, and in particular the United States subsequently tightening its airstrike policy. The United States also appears to have reaffirmed its commitment to its internal mechanisms of investigation and prosecution, which may have led to the opening in April 2010 of a high profile military inquiry into civilian deaths allegedly caused by US Special Forces.

In turn, the preliminary examination in Iraq, which started upon the receipt of numerous individual communications since 2003, was closed in light of the proceedings initiated in the United Kingdom with regard to each instance of war crimes allegedly involving British nationals.

Furthermore, the preliminary examination in Kenya appears to have strengthened the message sent by former UN Secretary-General Kofi Annan to caution Kenyan authorities that there will be no impunity for those engaging in atrocity crimes.
Whenever a preliminary examination is unsuccessful in incentivising national authorities, the investigation stage, in which the Prosecutor can rely on coercive measures and all forms of State Party cooperation, may prove to be a useful mechanism to fulfill the ICC´s preventative mandate.

Article 53 of the ICC Statute empowers the Prosecutor to close an investigation when "there is no sufficient basis for a prosecution". This standard is comprised of similar criteria to those applicable during the preliminary examination. As a result, the Prosecutor can close an investigation if it has served to prompt reluctant national authorities to take meaningful steps to actually prevent the commission of atrocity crimes.

IV The ICC´s Timely Intervention When Atrocity Crimes Are Already Taking Place

The ICC´s timely intervention can also take place in situations in which atrocity crimes are already occurring. The focus in these situations will be on stopping ongoing atrocity crimes. Moreover, abandonment of future crimes will not exclude liability for those already committed. Therefore, preliminary examinations and investigations could only be brought to an end by the Prosecutor on admissibility or interest of justice grounds.

In this context, prompting national authorities to stop ongoing atrocity crimes goes hand in hand with: encouraging and assisting them to comply with their duties to investigate and prosecute those crimes which already occurred (positive complementarity), and dividing with the ICC, particularly in cases of substantial capacity deficits, the burden of adjudicating the crimes (cooperative complementarity). As a consequence, supporting receptive States to strengthen their judicial systems and carry out national proceedings is a core component of the ICC´s timely intervention.

As stated by William Burke-White and Christopher Hall, the Prosecutor, in order to fulfil this mandate during his preliminary examinations and investigations, may rely on those measures referred to in the previous section. In particular, the Prosecutor may train national actors in the adjudication of atrocity crimes, and may assist them in the establishment of protection programmes for victims and witnesses and effective systems of information management. He can also monitor and provide feedback regarding the development of national proceedings, and work in coordination with other ICC organs to increase the efficacy of overall preventative efforts.

It must be stressed that, despite the international cooperation of other stakeholders, the national authorities of receptive States appear to have a strong preference to receive advice and guidance directly from ICC officials. As national authorities are aware that their efforts to adjudicate atrocity crimes will be reviewed by the ICC, the ICC's advice and guidance is considered of the utmost importance to ensure the success of such efforts. As a result, the potential of the ICC to strengthen, through timely intervention, the rule of law and improve good governance in receptive States is major. The preliminary examination in Colombia provides some *indicia* of this potential.

Investigations of those paramilitary members demobilized in Colombia since 2003 did not start until May 2006, when the Constitutional Court upheld the center-peace of the demobilization process: the Peace and Justice Law. Soon afterwards, the ICC Prosecutor made public his preliminary examination, and in October 2007 and August 2008 he personally conducted two on-site visits to Colombia.

Since then, the Supreme Court of Colombia has underscored the importance of focusing investigations under the Peace and Justice Law on the pattern of atrocity crimes committed against the civilian population, and the structure, membership and external

support of those paramilitary organizations through which the crimes were committed. This has been fully reflected in the sixteen-page Protocol for the presentation of evidence issued on the 23rd of August, 2010 by the Bogota Peace and Justice Trial Chamber.

Furthermore, since the end of 2007, the Colombian Supreme Court has also been conducting investigations and prosecutions for alleged links with paramilitary groups against a third of the members of the Colombian Parliament, as well as against nineteen Governors. These proceedings, which are based on confessions made by demobilised paramilitary leaders, have led so far to eighteen convictions, most of them against members of political parties that supported the Colombian Government in 2007. Such confessions have also led to the investigation in lower courts of several hundred civil servants, local politicians and members of the armed forces and the police.

It is indisputable that only a handful of high ranking military and police officers are currently facing investigation, and that the application of the Peace and Justice Law is facing significant challenges, such as: (i) the lack of publicity of the criteria to select those demobilized paramilitary members investigated under such a Law; (ii) the few convictions entered so far; (iii) the extradition to the United States on drug-trafficking charges of fourteen key high-level paramilitary leaders; (iv) the lack of demobilization of guerrilla members and (v) the new increase in the level of violence, spurred partly by armed groups comprised of former paramilitary members.

Nevertheless, in assessing whether the ongoing Colombian proceedings for atrocity crimes are contributing to strengthening the rule of law and improving good governance, one must take into consideration the long decades of mass violence in which paramilitary groups and their aides enjoyed full impunity in Colombia.

As shown by the visits of the Colombian Attorney General and an ample delegation of the Colombian Supreme Court to the ICC in 2010, the Prosecutor´s preliminary examination appears to be a contributing factor to the new situation in Colombia. Nevertheless, it is difficult to measure its impact on the Colombian national authorities as there are several other contributing factors, such as: (i) the conditions imposed by the US Congress to approve US military aid and favorable trade conditions for Colombia; and (ii) the judgments of the Inter-American Court of Human Rights against Colombia for paramilitary violence. In this context, further coordination between the ICC´s timely intervention and those other contributing factors will increase the effectiveness in Colombia of the measures taken by the international community pursuant to the notion of responsibility to protect.

In this regard, it must be noted that the need for further coordination between the United Nations and the ICC is especially acute, particularly in light of their mutual rec-

ognition and commitment to cooperation, as well as the existing safeguards against ICC interference with the role of the Security Council.

V Conclusion

The ICC´s preventative mandate is an important means to fulfill the responsibility of the international community under the notion of responsibility to protect. So far, the focus has been on the ICC´s efforts on general prevention by ending impunity for past atrocities. Nevertheless, the ICC´s contribution to the prevention of future atrocity crimes through timely intervention is potentially even greater.

Realizing this potential requires acknowledgment of the ICC's preventative role through timely intervention by the different organs of the institution. It also requires States Parties to recognize this role so as to provide the necessary resources, and extend criminal liability for planning and preparation to all atrocity crimes. Based on this premise, increased coordination between the ICC, the United Nations and other stakeholders will increase the preventive effect of their timely intervention.

In the end, what is at stake is whether the ICC remains as one among several mechanisms for accountability with a limited general prevention mandate; or whether, instead, it fully develops its potential to prevent atrocity crimes, strengthen the rule of law and improve good governance through timely intervention.

Acknowledgements

I would like to thank the *Rector Magnificus* and the Central Board of Utrecht University for my appointment as chair on international criminal law and international criminal procedure. Thanks are also due to the board of the Faculty of Law, Economics and Governance, and in particular the Department of Law, for the trust it has placed in me by supporting my appointment. I am committed to do my best to fulfill its expectations.

I would like to extend my gratitude and appreciation to the Willem Pompe Institute, the ICC, and the ICTY. In particular, I would like to acknowledge my gratitude to Judge Sylvia Steiner, who has been my boss and my close friend for almost a decade. She will always be unforgettable to me.

I would like to acknowledge Ambassador Juan Antonio Yañez-Barnuevo, Law Professor Maria del Carmen Calvo, William Fenrick and Pieter Kruger for having trust in me, ten years ago, when nobody else did it. My gratitude is also extended to some my colleagues here in Utrecht who have put their trust in a young Spanish professor with a "pirate accent"; John, Ige, Stijn, Francois, Dina, Chrisje, Anne-Marieke, Leo, Eric, Diana, Enrique, Jill and Dessy - thank you very much.

A mis padres Valentín y Mercedes quiero agradecerles el amor y el apoyo desinteresado que siempre me han ofrecido desde el día en que, gracias a ellos, vi la luz por primera vez. Ellos son, sin duda, los verdaderos responsables de aquello que soy hoy.

I also want to thank to my sisters Laura and Ana, who travelled yesterday from Spain to be here today. I am particularly indebted to Laura for her generosity in the most difficult of times, as well as my other siblings, Pablo, José and Elena, who unfortunately cannot be with us today. I wish them happiness and good cheer.

I would like to thank Gordon Brandt, for his invaluable help in preparing this presentation, and Sonia, Edwin, Julian, Ana Maria, Alejandro, Romina, Julieta, Teresa and Salvador who have always supported me, even in the most challenging situations. In particular, I want to extend words of encouragement and support to Sonia who is currently facing serious, but not insurmountable, health problems.

And of course I would like to also thank Paola, who has suffered through the drafting of this inaugural lecture day after day for the last year and half, and has made me believe in love again. For her, I have only two words: “Te quiero”.

Finally, to all of you for being here on an unforgettable day; I offer my most heartfelt thanks for your presence. Please, do not forget to leave your email addresses with Diana Contreras so we can send you a digital copy of this inaugural lecture.

And on that note, following the advice of my dear Gerda Blok and Carin Schnitger, I conclude this inaugural lecture by stating that “Ik heb gezegd”.