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*The Tenth Anniversary of the ICC and Challenges for the Future:  
Implementing the law*

Speech

London School of Economics

London  
8 October 2008

Ladies and Gentlemen,

I would like to start by thanking the London School of Economics and Professor Gerry Simpson for his kind invitation and for his commitment to International Criminal Law. We are celebrating this year the ten years of the creation of the Rome Statute. It is a crucial moment in international criminal law, we are moving from an era of *ad hoc* international tribunals to a global criminal justice system.

One of the most important achievements of Nuremberg and the *ad hoc* tribunals, the ICTY and ICTR, is that they paved the way for the Rome Statute, and the establishment for a permanent and potentially worldwide system of international criminal justice. The Rome Statute is a novel legal design; a 21<sup>st</sup> century institution, a criminal justice system without a State, but aiming to protect each citizen in the world. An institution so different, that we have to rethink how the law works.

As the Prosecutor of the International Criminal Court, I have been mandated to apply this new law.

I would like to take this opportunity to highlight some legal aspects of our past work and present some of the issues to be discussed.

Today, I will start by referring to the context: the Rome Statute as the foundation of a global criminal justice system, before turning to the specific activities of my Office, and finally I will use the example of Darfur to show how the international community must adjust to the new legal framework.

## **1. The Rome Statute as the foundation of a global criminal justice system**

As stated in its Preamble, the goal of the Rome Statute is to end the impunity for the most serious crimes of international concern and to contribute to the prevention of such crimes.

To achieve its goal, the Rome Statute integrates sovereign states and an international criminal court in one legal system. The Rome Statute also incorporates detailed definitions of genocide, crimes against humanity and war crimes in one text; the content of different international conventions such as the Genocide Convention and the Geneva Conventions and Protocols have been incorporated; elements of crimes have been defined; based on the jurisprudence by *the ad hoc* tribunals the definition of crimes, particularly those of sexual violence, have been further elaborated, and special emphasis has been put on crimes against children.

For the enforcement of the law, the Rome Statute relies on a system of interaction between states, international organizations and a permanent International Criminal Court, supported by an emerging global civil society. This interaction is based on two main principles: complementarity and cooperation.

In the words of the Preamble, the Rome Statute consolidates the *“duty of every state to exercise its criminal jurisdiction over those responsible for international crimes”* and establishes a system of international cooperation. National States remain primarily responsible for investigating and prosecuting crimes committed within their jurisdiction, but in addition they have to support an independent and permanent International Criminal Court whenever and wherever the Court decides to intervene. States Parties have to *“guarantee lasting respect for and the enforcement of international justice”*.

It took more than a century to develop this model. In 1873, Louis Gabriel Gustave Moynier, the Swiss lawyer who co-founded the International Committee of the Red Cross, proposed a similar concept, recognising the challenge of compliance. Moynier stated: *“a treaty was not a law imposed by a superior authority on its subordinates (but) only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience”*.

A ruling of the ICC will not only decide on the guilt or innocence of the accused, but it will reverberate with at least 108 states and citizens all around the world. The judges' decisions will contribute to establish the rule of law in the world. Even before our first trial, for example, in Sri Lanka and Colombia there have already been discussions about the use of child soldiers by local militias.

We need to further explore the possibilities and constraints of such a novel system.

There have already been significant achievements in the implementation of the Rome system by different actors. National legislation has been approved in more than 50 countries. Diplomats and negotiators are increasingly excluding amnesties for the crimes covered by the Rome Statute. For example, provisions have been included in DRC in the Goma agreement and in the agreement signed for reconciliation in the Central African Republic. Armies around the world, even from non-signatory states, are adjusting their regulations to the Rome Statute. They are seeking to prevent their personnel from committing acts falling within the jurisdiction of the ICC. This is the way to stop crimes. The law makes the difference between a soldier or a terrorist, a policeman or a criminal.

On the level of State cooperation with the ICC, the most obvious example is the execution of arrest warrants, which is a responsibility of States Parties. The DRC surrendered two individuals that they had in custody and arrested one that was an officer in the national armed forces who had previously been granted an amnesty. Belgium moreover recently arrested one individual sought by the Court in relation to the DRC situation, located on its territory. Arresting accused persons who are protected by militias, such as Kony, leader of the LRA in Uganda, is more complicated, as it requires regional and international coordination. Arresting individuals protected by the territorial state, such as in the case of Ahmed Harun and Ali Kushayb, who are responsible for crimes in Darfur, also requires coordination at the political and diplomatic levels between a number of actors. Those challenges are real. They can, however, not lead us to change the content of the law and our commitment to implement it.

For centuries, conflicts were resolved through negotiations without legal constraints or wars. When the world was confronted with massive atrocities, there were essentially only two options available: either negotiate impunity with the worst perpetrators or go to war. In Rome in 1998, a new and entirely different approach was adopted. Respect for the law will guarantee lasting peace. Impunity for the perpetrators of the most serious crimes is no longer an option. Those who are managing conflicts have to update their strategies in order to respect and consolidate the new legal framework.

As the Prosecutor, my duty is to apply the law without political considerations. I cannot adjust to political considerations. I have to present evidence to the Judges and they will decide on the merits of such evidence. To facilitate other actors to adjust to the legal framework, we offer as much clarity and predictability as possible. My Office made public its prosecutorial strategy, including the focus on those most responsible, and the anticipated number of investigations based on available information. We announced our next steps in advance during our regular diplomatic briefings and in my regular briefings about the Darfur situation to the Security Council. For instance, in December 2007, I informed the Council about the preparation and the focus of my second case in Darfur which I presented in July 2008 to the Judges.

These efforts of transparency and consistency in our work will ensure our legitimacy, and help to increase other actors' commitment to, and cooperation with, the Court and the OTP. The rule of law must be respected.

Let me now turn to the way in which the Office selects the situations and cases in which to investigate and prosecute.

## 2. The selection of situations

One of the characteristics that make the ICC such a novel project is the *proprio motu* power of the Prosecutor to select situations to investigate, as established by Article 15 of the Rome Statute.

From Nuremberg to the *ad hoc* tribunals for Yugoslavia and Rwanda, political authorities selected which situations would be investigated and prosecuted. International prosecutors could only select cases within the situations. They did not have the authority to decide not to investigate the situation at all, and they could not decide to investigate further than the jurisdiction granted by a political body.

By establishing the *proprio motu* powers of the ICC Prosecutor to open an investigation, subject to judicial review and without an additional trigger from States or the UNSC, the Rome Statute seeks to ensure that the requirements of justice will prevail over political decisions.

Before making a decision to open an investigation, my Office must in all cases conclude that there is a “reasonable basis to proceed” and, to this effect, assess all information relevant to the different criteria established by article 53 of the Statute. Namely:

1. Jurisdiction;
2. Admissibility, including complementarity and gravity; and
3. Interests of justice.

Complementarity under Article 17 of the Statute is sometimes paraphrased as saying that the Court will act when States are unwilling or unable to act. Where there have been no relevant national proceedings, as in DRC, Northern Uganda and Darfur, then the case is admissible.

Even in cases referred by the Security Council the admissibility test must be performed and the Office must respect the principle of complementarity.

Although any crime falling within the jurisdiction of the Court is a serious matter, the Statute foresees an additional admissibility consideration of “gravity”. Thus, even where subject-matter jurisdiction is satisfied, it must still be determined whether the case is of sufficient gravity “to justify further action by the Court”. Factors relevant in assessing gravity include: the scale, the nature, the manner of commission, and the impact of the crimes. For instance, we are about to present a case against rebels in Darfur, who attacked peacekeepers in Haskanita in September 2007. Gravity in this case is not a matter of numbers, but a matter of impact.

My Office opened the first investigations in the two gravest admissible situations within the jurisdiction of the Court; DRC and Northern Uganda. The Darfur and CAR situations also clearly met the gravity standard. My Office takes note of the concern of its focus in Africa but regional balance is not a criterion for situation selection under the Statute. The court's legitimacy is not dependant on having cases from all over the world, its success will instead depend on the world supporting its cases whenever and wherever the Court decides to proceed.

The third factor - interests of Justice is a *countervailing* consideration that might produce a reason *not* to proceed. In light of the mandate of the Office and the objects and purposes of the Statute there is a very strong presumption that investigation and prosecution are in the interests of justice, and a decision not to proceed would be highly exceptional.

Having made the assessment that the statutory requirements to initiate an investigation were in principle satisfied in DRC and in Northern Uganda, the question for my Office was no longer whether we would open an investigation in those situations, but simply how such an investigation would be triggered.

We invited both countries to refer the situation in order to maximize the cooperation required to ensure an efficient investigation. But I stated clearly that *"If necessary, the Office of the Prosecutor will seek authorisation from a Pre-Trial Chamber to start an investigation."*

### **3. The investigations**

In the course of its investigation and prosecution, my Office must protect the rights of the victims, respecting their interest and the rights of the accused, including to investigate exonerating circumstances.

Based on the Statute, the Office adopted a policy of focusing its efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes. Determining which individual bears the greatest responsibility for these crimes is done according to, and dependent on, the evidence that emerges in the course of an investigation. When the Court does not deal with a particular person, it does not mean that impunity is thereby granted – the Court is complementary to national efforts, and national measures against offenders who are not investigated by the Court should still be encouraged.

Cases inside the situation are also selected according to their gravity. In Northern Uganda the most serious crimes after 2002, when our jurisdiction started, were

committed by LRA and the Office is collecting information about crimes committed by the UPDF. In the DRC, the gravest crimes after 2002 were committed in Ituri, and the most serious allegations were against the UPC/FPLC and the rival militia group the FNI-FRPI. We are also looking at current crimes committed in the Kivus. In Darfur, the Office investigated in its two first cases allegations against members of the government and Janjaweed and is currently investigating crimes allegedly committed by rebel groups against peacekeeping forces. In the Central African Republic, we have investigated crimes committed against the civilian population by the MLC militia.

The concept of “focused investigations” also means that the Office selects a limited number of incidents, while as few witnesses as possible are called to testify in order to preventatively reduce witness protection and security concerns. In principle, incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization, although this is not always possible.

In all the cases we presented, arrest warrants against those most responsible were secured.

- We are prosecuting Thomas Lubanga and Bosco Ntaganda for recruiting child soldiers and transforming them into killers.
- We are prosecuting Joseph Kony and other leaders of the LRA for killing entire communities, raping and abducting children and transforming them into sexual slaves and killers.
- We are prosecuting Germain Katanga and Matthew Ngudjolo for killing and raping civilians.
- We are prosecuting Jean-Pierre Bemba, for a campaign of massive rapes and pillaging.
- We are prosecuting Ahmed Harun and Ali Kushayb for massive killings, rapes and the torture of civilians.
- We have requested an arrest warrant against Omar Al Bashir for genocide, crimes against humanity and war crimes.

At the same time, we are conducting preliminary examinations in a number of different situations, including Afghanistan, Kenya, Georgia and Cote d’Ivoire, and in Colombia.

Let me now address specifically the Bashir case.

As you know, we have requested an arrest warrant against Sudanese President Omar Al Bashir for genocide, crimes against humanity and war crimes.

Why genocide?

Mr. Al Bashir used the entire state apparatus, the Armed Forces and the Militia/Janjaweed to this end. To attack civilians in towns and villages inhabited mainly by the target groups, committing killings, rapes, torture and destroying means of livelihood. Mr. Al Bashir thus forced the displacement of a substantial part of the target groups. As we know, if the civilians are then assisted, this would be ethnic cleansing.

But in a second stage, he continued to target them in the camps for internally displaced persons, while they were even more vulnerable, causing serious bodily and mental harm – through rapes, tortures and forced displacement in traumatising conditions.

As we speak, he continues to deliberately inflict on a substantial part of those groups conditions of life calculated to bring about their physical destruction, in particular by obstructing the delivery of humanitarian assistance and hindering peacekeeping operations. This is why it is genocide and this is why inaction, deferral or any such proposals are not an option.

Let me conclude.

This law is about jurisprudence but it is also the difference between life and death. This preamble of the Statute reminds us that *“millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”* and recognise *“that such grave crimes threaten the peace, security and well-being of the world”*. This whole enterprise is thus ultimately about creating a global community based on the rule of law. It is about putting an end to impunity and thus contributing to the prevention of future crimes.

After five years of operations the Rome Statute is modifying the way in which we think about the law at national level and is affecting the way in which international relations are conceived.

Is this process easy? No. There are tensions when we open investigations and when we request arrest warrants. There are tensions in the courtroom and there are tensions outside. Presidents and ministers have to show leadership and adjust to a new legal framework. It is not easy.

But it is necessary.