

Parliamentarians for Global Action

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The ICC and Challenges for the Future

Judge Philippe Kirsch

President of the International Criminal Court

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Thank you very much Mr. Tooyama.

It is my pleasure to address you on the occasion of the fourth Consultative Assembly of Parliamentarians for the International Criminal Court and Rule of Law. I would like to thank Parliamentarians for Global Action for this opportunity, as well as for the organisation's long-standing support of the Court. PGA and its members have provided essential cooperation and assistance to the ICC, particularly in terms of generating better understanding of the Court's work, emphasising the need for cooperation with its activities, and advancing the Court's universality. The ICC greatly appreciates these significant contributions and we look forward to our continued cooperation.

In my remarks this morning, I would like to speak about the Court today, the role and impact of the Court, the importance of cooperation, and the broader emerging system of international justice. I will be then pleased to respond to questions. □

I. The Court Today

I will start with the Court today. 104 countries – representing broad geographical diversity – have now ratified or acceded to the Rome Statute. This is an impressive pace for a treaty establishing an international institution. Yet, we are still a long way from universality and the Court must have support from all regions.

On 17 March this year, the first wanted person was surrendered to the Court. Mr. Thomas Lubanga Dyilo, a national of the Democratic Republic of the Congo, is alleged to have committed war crimes, namely conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities. A hearing on the confirmation of charges against Mr. Lubanga has just concluded and the judges are deliberating. This is a historic moment for the Court. These are the first ever proceedings at the ICC against a charged person. Many of the innovations adopted by States in the Rome Statute are now being put into practice. A Pre-Trial Chamber will determine whether or not to confirm the charges before trial. Victims are participating directly in the proceedings through their legal representatives. Should the charges be confirmed, a trial would start next year.

Arrest warrants have also been issued in the situation in northern Uganda for five

members of the Lord's Resistance Army (LRA), including its leader Joseph Kony. The alleged crimes against humanity and war crimes contained in the warrants include sexual enslavement, rape, intentionally attacking civilians, and the forced enlistment of child soldiers. The arrest warrants were initially issued under seal because of concerns about the security of victims and witnesses. The warrants were only made public once the Pre-Trial Chamber was satisfied that the Court had taken adequate measures to ensure security. The Office of the Prosecutor recently indicated that DNA tests have confirmed that one of the five persons subject to warrants is deceased. The other four warrants remain outstanding.

The first Pre-Trial proceedings have been conducted in the situation in Darfur, Sudan dealing with issues such as the protection of victims and the preservation of evidence. As you may be aware, the Prosecutor announced at the recent Assembly of States Parties that his Office has collected enough evidence to identify some of those who bear the greatest responsibility for the worst crimes committed in Darfur. According to the Prosecutor, the evidence provides reasonable grounds to believe that these individuals committed crimes against humanity and war crimes that include persecution, torture, rape, and murder. The Prosecutor also noted that before presenting his evidence to the judges, he will assess whether the Government of the Sudan is conducting or has conducted genuine national proceedings concerning the same incidents and individuals that his investigation has identified. If there are not genuine national proceedings in the Sudan, the Prosecutor will present his evidence to the ICC judges.

The Appeals Chamber has issued judgments relating to its powers to review a decision of the Pre-Trial Chamber denying leave to appeal and concerning restrictions on disclosure prior to the confirmation hearing. There are currently four appeals under consideration of the Chamber brought by the defence of Mr. Lubanga concerning jurisdiction, interim release, and further issues relating to disclosure. Victims have filed observations in relation to two of the appeals currently under consideration. The Appeals Chamber has also rendered a number of other procedural decisions.

The judges of the Court have had to interpret and apply complex legal provisions of the Rome Statute and Rules of Procedure and Evidence. They are addressing fundamental issues which will determine how future proceedings will be handled. Some of these issues may also require a decision of the Appeals Chamber. As the Court's jurisprudence is established, proceedings can be expected to increase in efficiency.

The emphasis of the Court's operational activities continues to be in the field. In addition to investigations, the Court is carrying out other critical functions through its field operations including facilitating victims' applications for participation and reparations, protecting and relocating witnesses, supporting defence counsel, and conducting outreach to local populations.

The Court operates in circumstances very different from any other court or tribunal. The Court is active in situations of ongoing conflict, where crimes continue to be committed. Security in the field continues to be an omnipresent concern. Our activities must be carried out in such a way as to ensure the safety of staff, victims, witnesses and others at risk. On occasion, field presences have been temporarily reduced for security reasons. Missions to the field have been cancelled or postponed at the last minute.

In addition, the Court faces significant logistical challenges. The regions where crimes occur are not necessarily easily accessible. In many areas, the Court interacts with victims, witnesses and others who may speak any one of a number of local languages.

All of these factors can slow down field operations and in turn cause some delays in proceedings. □

II. The Role and Impact of the Court

I would like to turn now to the role and impact of the Court.

At this stage, and indeed at all times, it is important to continue to keep in mind the reasons why the Court was created. These reasons are set out in the preamble to the Rome Statute: to put an end to impunity for the most serious international crimes; to contribute to the prevention of these crimes; to address the threat such crimes pose to peace and security; and to bring justice to victims and to guarantee lasting respect for and the enforcement of international criminal justice.

To achieve these aims, States created the Court as a strong, judicial institution. The Court's role is to carry out fair, credible and efficient judicial proceedings. By doing so, the Court – together with other actors – is expected to contribute to justice, accountability, and ultimately deterrence and peace.

The Court has not completed the first cycle of its activities. It is very early to develop a fully-formed view of the impact of the Court. Nonetheless, there increasingly are indications that the Court is making a difference by deterring potential perpetrators, providing hope to victims, or bringing about the conditions for peace.

In his July 2006 Progress Report on the Prevention of Armed Conflict, the UN Secretary-General observed that the ICC is already having an effect in deterring serious crimes. We are now also seeing specific indications from different sources that the ICC is having an impact on situations where it is active. As proceedings progress, the deterrent effect of the ICC should increase over time, as envisaged in the preamble to the Rome Statute.

As I said previously, the Court is operating in situations of ongoing conflict where crimes continue to be committed. This has created practical challenges which I described earlier, but at the same time, it has increased the potential for the Court to contribute to deterring ongoing crimes or fostering conditions for lasting peace in the short term.

The extent of the Court's impact depends on a number of factors. Experience has shown that one such factor is the capacity of the Court to conduct outreach to local populations affected by crimes. These populations must be able to see and to understand the Court and its activities. The Court has installed outreach teams in both the Democratic Republic of the Congo and Uganda. Following the approval by the Assembly of States Parties of additional funds for outreach in the 2007 budget, the Court will increase its outreach resources and activities next year.

In the future, holding proceedings in or near areas where crimes have been committed may further the impact of the Court. The decision to hold proceedings locally belongs to

the judges. The Court has not yet conducted its first trials in The Hague. Nonetheless, the Court is preparing for future proceedings to be held close to areas where crimes occurred. An estimate of the resources required for local proceedings has been included in the 2007 budget. The Court will further develop options for local proceedings in the context of its strategic planning process. □

III. The Importance of Cooperation

I would like to turn now to the importance of cooperation. For the first three years of its existence, the burden of developing the Court rested in large part on its own shoulders. The Court recognizes its continuing responsibility to demonstrate its credibility in practice, through the fairness and efficiency of its proceedings. We are also fully committed to ensuring and maintaining an efficient and sound administration. However, the Court has now reached a stage in its operations where it has become increasingly clear that its success will depend equally on the cooperation it receives from States Parties, and by extension, international and regional organisations.

In establishing the ICC, States set up a system designed on two pillars. The Court itself is the judicial pillar. The enforcement pillar belongs to States. In national systems, the two pillars are intertwined. Courts rely automatically on the enforcement powers of the State. In the case of the ICC, the two have been separated. The Court depends on the cooperation of States. The outstanding arrest warrants highlight just how essential this cooperation is. The Court does not have the power to arrest these persons. That is the responsibility of States and other actors. Without arrests, there can be no trials.

There are many other ways in which States can provide support to the Court's efforts. They may provide evidence in their possession or facilitate the Court's access to other evidence. The Court's ability to conduct investigations and trials will depend on the extent and quality of information it can access. States may assist the Court in the questioning of persons, execution of searches and seizures, or identification and tracing of assets.

Several States have entered into agreements on the relocation of witnesses. A broad network of such agreements is necessary to ensure witnesses can testify before the Court without fear of repercussions, taking into account the witnesses' physical and psychological well-being. The cultural adaptation of witnesses is a vital element of successful relocation. For that reason it is particularly useful to have agreements with States where witnesses will be able to more easily adapt culturally during their relocation.

Under the Rome Statute, sentences of persons convicted by the Court will be served in States willing to accept these persons. One State – Austria - has concluded a bilateral arrangement with the Court setting out a general framework for the enforcement of sentences.

Logistical and operational support can also be of significant assistance to the Court. For example, France facilitated the transfer of Mr. Lubanga by providing the use of an airplane.

In addition to States, international and regional organisations contribute vitally to

enabling the work of the Court. The support of the United Nations has been key to enabling the Court's activities, especially in the field. The United Nations peacekeeping mission in the Congo has notably provided logistical support to the Court, such as accommodation and transport. The UN Security Council's Sanctions Committee facilitated the surrender of Mr. Lubanga to the Court by waiving the travel ban against him so that could be transferred to The Hague.

Non-governmental organisations, and civil society more broadly, are also instrumental to the work of the Court. NGOs have played a large role in urging ratification of the Rome Statute; assisting States in developing legislation implementing the Statute; and disseminating information about and building awareness of the ICC.

I would also take this opportunity to note the important role of parliamentarians in supporting discussion of the Court nationally, and in many cases, regionally. Parliamentarians in all countries – whether States or non-States Parties - can contribute in many ways to the success of the Court. Through remarkable networks of information and contacts, parliamentarians have produced tangible results in furthering the goals enshrined in the Rome Statute. Parliamentarians play an important role in promoting universal ratification, in taking an interest in their countries' foreign policy regarding the ICC and in generating information about the Court to their peers and constituencies. Now that the Court is operational, the significance of Parliamentarians only continues to increase. As I mentioned earlier, the Court requires cooperation from States in carrying out its work. Having appropriate domestic legislation in place will be critical for effective cooperation; and in that respect, Parliamentarians have a direct and essential role to perform. □

IV. The Broader Emerging System of International Justice

I would like to turn now to the place of the Court within the broader emerging system of international justice. We must always remember that the primary responsibility for investigating and prosecuting serious international crimes – like all crimes – belongs to national courts. The ICC only comes into the picture when national courts are unwilling or unable genuinely to investigate or prosecute crimes.

The emerging system of international justice also includes other international courts and tribunals such as the *ad hoc* tribunals and hybrid courts. These courts and tribunals have increasingly assisted each other in carrying out their respective mandates. Following the acceptance of the request from the Special Court for Sierra Leone by the States Parties, for example, the ICC is providing facilities, services and support to enable the Special Court to carry out the trial of Charles Taylor in The Hague.

The work of other actors may also overlap with the aims in the Rome Statute. There increasingly are discussions of the role of the ICC on issues such as transitional justice, the rule of law or peace negotiations. The ICC does not participate in these discussions. It is a purely judicial institution. However, the outcome of these discussions can have practical implications for cooperation with the Court – for example in the drafting of mandates of peace-keeping or other missions which facilitate cooperation with the Court, or in the operational decisions taken by different actors. □

V. Conclusion

The creation of the ICC was a historic achievement, more than fifty years in the making. Its creation was only the beginning. The Court now stands as a permanent institution capable of punishing perpetrators of the worst offences known to humankind. From this point forward, potential perpetrators are on notice they may find themselves before the Court.

As early as 2004, the UN Secretary-General stated that the Court was “already having an important impact by putting would-be violators on notice that impunity is not assured and serving as a catalyst for enacting national laws against the gravest international crimes.” To be fully effective, we must continue our efforts to ensure that the Court has the support necessary to dispense justice as fairly and efficiently as possible.

Thank you.