

ON THE ICC: ITS ACCOMPLISHMENTS, CHALLENGES AND MANDATE – AN OVERVIEW

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Good afternoon. Let me express my deep appreciation to the PGA and to the Japanese organizing group led by Senator Tadashi for this highly successful conference still ongoing. But because I am given only ten minutes like the rest of the panelists, I shall divide my time with five minutes for a general overview of the ICC's accomplishments and challenges. The other five minutes I shall devote to the practical experiences we have had here in the Asian region with respect to the difficulties and some little gains we are making in trying to put Asia right in the middle of the ICC community of nations.

First is the general overview.

The most significant development in the work of the International Criminal Court (ICC) since its establishment in 2003, after the Rome Statute entered into force and effect in 2002, is the hearing being conducted by the Court, through one of its Pre-Trial Chambers, to confirm the charges against Mr. Thomas Lubanga Dyilo, the first person charged before the Court. Mr. Lubanga is from the Democratic Republic of the Congo and is the alleged founder and leader of the *Union des Patriotes Congolais (UPC)* and its military wing, the *Forces Patriotiques pour la Libération du Congo (FPLC)*.

Lubanga is charged with the commission of war crimes, specifically the recruitment of child soldiers to fight for the FPLC. In his Opening Remarks to the Fifth Session of the Assembly of States Parties on 23 November 2006, ICC Prosecutor Luis Moreno-Ocampo, citing Senior Trial Attorney Mr. Ekkehard Withopf at the confirmation hearing, said that the children, "as young as seven, eight and nine years old, x x x were instructed to kill the enemies regardless of whether they were combatants or civilians. The commanders forced children, boys and girls, to fight at the frontlines. Forced by threats of execution."

Lubanga was surrendered to the Court in March 2006 pursuant to a warrant of arrest issued by the Court. The Office of the Prosecutor (OTP) submitted an application for an arrest warrant against him in January 2006, after 18 months of investigation and Pre-Trial Chamber I issued a sealed warrant of arrest on 10 February 2006. The arrest warrant was timely because while Lubanga was already in the custody of the Democratic Republic of the Congo since March 2005, for the killing of United Nations peacekeepers, there was a possibility that he could have been released in March 2006 after a review of his detention by a military judge.

The confirmation hearings in the case of Lubanga are significant, because there is now the possibility, if the Judges confirm the charges, of conducting the first ever trial before the ICC and under the Rome Statute next year, 2007. This puts the court on the way of fulfilling its *raison d'être*, that of prosecuting and punishing those who are most guilty of the most serious international crimes, and thereby fighting impunity.

The confirmation hearings are also significant because what Judge Philippe Kirsch, President of the ICC, called a "historic moment" in his Opening Remarks at the Fifth

Session of the Assembly of States Parties at The Hague, has been made possible by the hard work done by the various organs and offices of the Court, as well as the cooperation of states and international organizations. The structures and processes of the Court established by the Rome Statute are working as they were designed to do.

We are fortunate that we are holding our Consultative Assembly just after the conclusion of the Fifth Session of the Assembly of States Parties last Friday, 1 December 2006, because the papers and reports taken up there give us a glimpse into the internal and external workings of the Court that have made this “historic moment” possible.

These papers and reports show, among others, how the hard work of the Office of the Prosecutor in conducting its field investigation, of the Registry in providing the needed administrative support and ensuring the rights both of the victims and the defense are protected, and of the judges and court personnel in the pre-Trial Chambers and Appeals Chamber in making sure that the judicial proceedings proceeded smoothly and fairly, and the non-governmental organizations working hand-in-hand with the Court, have all contributed to the “historic moment” described by Judge Kirsch.

As we all know, aside from the situation in the Democratic Republic of the Congo, the Court is also seized with the situations in Uganda and the Central African Republic – all referred to by the States Parties themselves – and with the situation in Darfur, Sudan, referred to by the UN Security Council.

The confirmation hearings in the Lubanga case are taking place in Pre-Trial Chamber I along with initial pre-trial proceedings on the situation in Darfur, Sudan, while the Uganda and Central African Republic situations are in Pre-Trial Chambers II and III, respectively.

Some of the proceedings in the Pre-Trial Chambers have already reached the Appeals Chamber on appeals from rulings on issues of scope of possible appellate review, jurisdiction, admissibility and participation of victims in proceedings.

In other words, the judicial proceedings in the Pre-Trial and Appeals Chambers have, to quote Judge Philippe Kirsch, “addressed for the first time fundamental issues such as the system for disclosure of evidence, the modalities of victims’ participation and the respective roles of the Pre-Trial and Appeals Chambers.” These are novel ideas, processes and structures in the Rome Statute that are now being tested by the Court in practice.

These proceedings are important for the future work of the Court and its organs. They are laying down the procedure and practice, important for the future jurisprudence of the Court, to guide the conduct by all parties concerned in the pre-trial and trial stages of cases before it.

But as pointed out by Judge Kirsch, many of the Court’s activities take place in the field. And at the forefront of the work of the Court in the field is the Office of the Prosecutor headed by Mr. Luis Moreno-Ocampo.

It investigates cases and situations, gathers evidence and prepares cases for prosecution and trial. Its investigation work in the situation in the Democratic Republic of the Congo is what led to the arrest of Lubanga and to the confirmation proceedings now

being conducted by Pre-Trial Chamber I. It is also conducting a second investigation into crimes allegedly committed by another Ituri armed group in the Democratic Republic of the Congo. Its work has also led to the issuance of five arrest warrants against commanders of the Lord's Resistance Army (LRA) operating in Northern Uganda. While none of these commanders have been arrested (one was killed in a confrontation with the Ugandan army, and the four remain at large), the arrest warrants have created an impact of their own. In the Darfur situation, despite difficulties in doing its work inside and on the ground because of the ongoing violence, it has gone ahead and conducted its investigation outside.

The Office of the Prosecutor has been ably assisted in its field work by the Registry of the Court, which provides judicial and administrative support to all organs of the Court. But in the field, it has provided valuable administrative support to the Office of the Prosecutor as well as conducted its own activities in relation to the areas of outreach, defense, victims and witnesses.

It has established a Field Operations Section, working closely with the Office of the Prosecutor. The Registry also provides regular threat assessments, ensures field security as well as information security and attends to witness protection.

The Registry is also the organ primarily responsible for outreach activities, conducting workshops, seminars, informational meetings to promote knowledge and information about the ICC, and thereby to generate support for its work.

The Office of Public Counsel for the Defence is now operational and provides necessary assistance to defence teams. It has now a list of 152 persons inscribed on the list of counsel established pursuant to the Rules of Procedure and Evidence.

The Office of Public Counsel for Victims has also been established. It is independent and provides support and assistance to victims and their legal representatives.

All of these different organs and offices of the Court have come together to produce the accomplishment of the Court of being at the threshold of conducting the first ever trial under the Rome Statute.

This coordinated and cooperative functioning of the different components of the Court are expressed in a Strategic Plan by the Court adopting a common framework for its activities in the next ten years and the "one Court" principle. It was submitted to the Committee on Budget and Finance and the Assembly of States Parties.

In the Strategic Plan, the Court states its mission thus: "As an independent judicial institution in the emerging international justice system, the ICC will:

- Fairly, effectively and impartially investigate, prosecute and conduct trials of the most serious crimes;
- Act transparently and efficiently; and
- Contribute to long-lasting respect for and the enforcement of international criminal justice, to the prevention of crime, and to the fight against impunity."

It identifies three strategic goals to fulfill this mission: 1) to ensure the quality of justice; 2) to become a well-recognized and adequately supported institution; and 3) to be a model for public administration

A Prosecutorial Strategy and Outreach Strategy have also been developed, concurrently with the Plan.

The Prosecutorial Strategy developed by the Office of the Prosecutor for the next three years focuses on five strategic objectives: “1) to further improve the quality of the prosecution, aiming to complete two expeditious trials; 2) to conduct four to six new investigations of those who bear the greatest responsibility in the Office’s current or new situations; 3) to gain the necessary forms of cooperation for all situations to allow for effective investigations and to mobilize and facilitate successful arrest operations; 4) to continuously improve the way in which the Office interacts with victims and addresses their interests; and 5) to establish forms of cooperation with states and organizations to maximize the Office’s contribution to the fight against impunity and the prevention of crimes.”

The success of the Court so far would not have been possible without the resources and support provided by the Assembly of States Parties through the budget and other mechanisms. Investigation work, witness protection, outreach and other work of the Court rely on this kind of support.

The cooperation provided by other states and international organizations has also been key to the successful operations and functioning of the Court. Field investigation work, protection and transport of witnesses and service of arrest warrants can only be done with good cooperation from states, international organizations and civil society. In this regard, the Court has continued to build upon the Negotiated Relationship Agreement with the United Nations by entering into numerous arrangements with programs, funds and offices of the UN system. It has also concluded a cooperation agreement with the European Union and continued negotiations with the African Union and the Asian-African Legal Consultative Organization.

So what has been the impact of all this work of the Court. On this matter, I would like to quote Judge Kirsch: “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, by providing hope to victims or by bringing about the conditions for peace.”

This is evident in the Northern Uganda situation, Prosecutor Luis Moreno-Ocampo tells us. While the persons subject of the arrest warrants issued by the Court have not been arrested and surrendered, “the Court has made a significant impact on the ground”. Uganda and the Democratic Republic of the Congo, states parties to the Rome Statute, and the Sudan, a non-state party, have all committed themselves to the enforcement of the warrants and has forced the Lord’s Resistance Army to move its headquarters from southern Sudan to the DRC border.

Despite the efforts of the ICC in bringing persons bearing the greatest responsibility for the most serious crimes of international concern before it, an “impunity gap” could possibly emerge with respect to crimes and persons outside of this scope. *The question before us is how this problem could be addressed, and in particular, the role of national systems to remedy this gap.*

The answer, I think, lies in national legislation, implementing legislation in the case of States Parties, and translating the Rome Statute into domestic legislation in the case of non-States Parties. By passing effective implementing legislation of the Rome Statute, States Parties can ensure the prosecution of all persons responsible for the crimes, including those not necessarily the most responsible. The national judicial system would have the first shot at prosecution in any case, under the complementarity principle. Non-States Parties, countries that have not yet ratified the Rome Statute, are encouraged by the treaty to pass legislation translating the Rome Statute into domestic legislation. Even if they are not (yet) part of the ICC system, domestic legislation of this kind will allow the national criminal justice system to prosecute persons responsible for Rome Statute crimes. We, in the Philippines, have filed a bill of this kind.

House Bill No.4998, entitled “An Act Defining and Penalizing Crimes Against International Humanitarian Law and Other Serious International Crimes, Adopting Corresponding Principles of Criminal Responsibility, Operationalizing Universal Jurisdiction, Designating Special Courts, And For Other Related Purposes” includes among its most serious crimes of international concern genocide, crimes against humanity and war crimes. It sources its principles and provisions from the Rome Statute, international human rights instruments, UN guidelines on the Role of Prosecutors, UN basic principles on the independence of the Judiciary, and the UN Basic Principles on the Role of Lawyers, among others. It is currently being deliberated upon in the House Committee on Justice.

We also have a Bill against Torture which has been approved by the Committee on Justice and is ready for sponsorship and plenary deliberations. Our bill against forced abduction or involuntary disappearance has been passed on third and final reading by the House and awaits the same from the Senate. My compensation bill granting to some 10,000 martial law victims under Ferdinand Marcos compensation from the government might make it on International Human Rights Day, at the earliest, as a law signed by the President. Our Anti-Rape Law has amended the obsolete definition of rape and has elevated this as a heinous crime. However, in compliance with international human rights standards, we have abolished the death penalty law and so therefore maximum punishment is life imprisonment or *reclusion perpetua*. We have also recently passed the Juvenile Justice Act guided by the principle of restorative justice. All of these bills and laws I mention have been principally authored by *Akbayan* during my stint as Chair of the Committee on Human Rights.

In this regard, I wish to announce that Daniel Smith, American soldier accused of raping a young Filipina, has just been convicted of rape and is given as punishment life imprisonment. I am happy that the Philippine Court has so ruled because this is the first time in the history of Philippine-American relations since the US military occupied the Philippines in the early 1900s that a Philippine court has been able to convict an American soldier guilty of rape. We have had so many rape cases by American soldiers but this is the first time an American has been tried and convicted in a Philippine court. This is a historical breakthrough. However, another reason for my good feelings is the fact that death penalty is repealed and maximum punishment given the soldier is life imprisonment.

I also wish to cite the regional efforts we have made since Harry and Ross organized the PGA Consultative Assembly in New Zealand. We PGA members from Asia gathered together and formed a rag-tag working group which we continued in another PGA

meeting in Dublin. We had a much more formal consultation among Asian MPs in Manila last August 15 and 16. With the help of the Philippine Coalition for the ICC and the Coalition for the ICC – Asia/Pacific, the Friedrich Ebert Stiftung and some European governments, our rag-tag army of PGA Asian MPs successfully held our consultation and came out with a Manila Declaration which is found in this publication. Likewise, the consultation was intended as a step towards the direction of our 28th Annual PGA Consultative Assembly now ongoing in Tokyo. I appeal to the Assembly that we look seriously into the Manila Declaration and use this, if approved, as a working guide for our work today and in the future.

The challenge before us all, and in Asia, in particular, is to work hard for the universal ratification of the Rome Statute, so that there will be no gaps in the international justice system anywhere. Asia needs to work extra hard in this respect. We are heartened by the fact that Japan is now on the way of ratifying by next year, 2007. We hope that ratification by Japan will encourage other Asian states to do the same, and soon. Because for as long as Asia, with the most number of people and many conflict areas, has the lowest number of ratifications, an Asian impunity gap could emerge, and those guilty of war crimes, crimes against humanity and genocide in this region will go unpunished. Our region and our countries could also become a “safe haven” for international criminals from other regions and countries.

Thank you very much. Domo, Arigato Gosaimas.