

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Council on Foreign Relations

Keynote Address

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Ladies and gentlemen,

Tonight, I would like to discuss with you how the work of the Court can contribute to the prevention of massive crimes. Crimes we thought, over and over, would never happen again, only to see them occur, again and again, before our eyes: genocide, crimes against humanity and war crimes.

I would like to discuss with you how the preventive impact of our work could be maximized. How can we ensure that the crimes committed in Georgia during the summer of 2008 are not repeated? How can we stop current crimes in Darfur? How can we prevent a new cycle of violence during the next elections in Kenya scheduled for 2012? How can we support Colombia's efforts to end half a century of violence?

I will say one word: institutions. In our countries, the Congress, the Police, the Prosecutors and the Courts are the basic institutions to establish law and order. The Rome Statute is building the same idea internationally: Judicial institutions are created to contribute to prevent and manage massive violence.

Let me present the International Criminal Court. It is comprised of 18 judges, their staff, an Office of the Prosecutor with 300 staff members and a Registry with other 500 staff members, from 80 different nationalities; it is seated in The Hague. The Court is the hub of an international system of criminal justice created in 1998 by the Rome Statute, a treaty signed by 136 states from all over the world and ratified to date by 110 States.

How does the system work?

It is based on two principles: complementarity and cooperation.

First, the States Parties to the Rome Statute committed to investigate, prosecute and prevent massive crimes when perpetrated within their own jurisdiction.

Second, they accepted that, should they fail to investigate and prosecute, the International Criminal Court could independently decide to step in.

This is the principle of complementarity.

Third, States Parties committed to cooperate with the Court whenever and wherever the Court decides to act. The Court can rely therefore on the cooperation of the police of 110 States Parties to implement its decisions. This is not just an abstraction. Cooperation with the Court is a fact. The Democratic Republic of the Congo arrested three of its nationals and surrendered them to the Court. Belgian police implemented in one day an arrest warrant against Jean-Pierre Bemba, former Vice-President of the DRC.

Who are the current members of this system?

Three regions have taken the lead: Europe, South America and Africa. Their decision is not just a matter of principle: it is a matter of realism. These regions have suffered massive crimes: they learnt that a national state alone cannot protect its citizens. Europe saw how massive crimes crossed borders during the Nazi regime and the Balkans conflict; South America and Africa witnessed how massive crimes crossed borders during the cold war; Africa also saw the Rwanda Genocide, which resulted in the death of one million and flows of refugees to Tanzania and Congo. This exodus was at the root of the Congo wars, where four million people died, and where, even today, sexual violence reaches unspeakable levels. For these regions, it is a strategic priority to avoid a repetition of their experience.

States in other regions, Canada and Mexico; Japan and South Korea; Jordan and Afghanistan; Australia and New Zealand are also States Parties. They have chosen the law as a tool to protect their citizens and their land. The Ambassador of Costa Rica to the UN explained recently why his country was so active in the Security Council on the issue of Darfur, why Costa Rica had to show leadership on an issue apparently so far from its interest: *“There are 26 countries with no armed forces in the world; Costa Rica is the biggest among them”*.

Thus, for Costa Rica, promoting the rule of law internationally is a matter of domestic security.

Christian Wenaweser, the Ambassador of Lichtenstein at UN in New York and current President of the Assembly of States Parties of the ICC explains it well: *“States Parties are under the protection of the Court”*. This is the main concept, the cornerstone of the international criminal justice system: the rule of law as a protection.

In 1998, this was just an idea on paper. In 2010, we have put it in motion. Let me now explain how.

The Statute defines my mission: to put an end to impunity for the most serious crimes of concern to the international community and thus, contribute to the prevention of future crimes.

The Statute defines my mandate: to select the situations where the Court should intervene, to investigate and to prosecute the gravest crimes.

The Statute defines the checks and balances: when the Prosecutor requests an arrest warrant or a confirmation of charges, the decision is made by a panel of Judges, subject to the review of the Appeals Chamber.

Being the Prosecutor is a privilege, but also a huge responsibility. It is the first time the Prosecutor of an international Court is given the mandate to independently select situations to investigate. In the instance of the Nuremberg, ex-Yugoslavia and Rwanda tribunals, the States selected the situations to investigate. The Statute provides the Prosecutor with precise criteria to select situations to investigate.

First, the Office has to assess its jurisdiction, examining whether the alleged crimes are committed by nationals of States Parties or in the territory of States Parties. For instance, Iraq, Lebanon, Sri Lanka, Burma, Zimbabwe, Nepal or Somalia are not States Parties. Therefore the Court has no territorial jurisdiction to investigate alleged crimes committed there.

Second, the Office has to assess its temporal jurisdiction which extends only to crimes committed after 1 July 2002 when the Statute entered into force.

Third, the Office has to assess whether alleged crimes fall under the Court's subject-matter jurisdiction which covers genocide, crimes against humanity and war crimes. In Venezuela, the Office did not open an investigation because the allegations did not constitute such crimes.

Fourth, under the principle of complementarity, I have a duty not to investigate when there are genuine national investigations or prosecutions. In terms of gravity, when I took office, Colombia and the DRC were the gravest situations under our jurisdiction. The difference between the two was that Colombia was and is conducting national proceedings against guerrilla leaders, paramilitaries and their political supporters, and in some cases against members of the Police and the Army. The DRC is not.

Fifth, the Statute requires that the crimes reach a threshold of gravity. For instance, my Office conducted a preliminary examination of alleged crimes committed in Iraq by

nationals of 25 States Parties involved in the military operation there. We found cases of willful killings and torture but they were not committed “*as part of a plan or policy or as part of a large-scale commission*”. So we did not open an investigation because the cases did not reach the gravity threshold established by the Statute. Additionally, in all those cases, the States concerned were conducting domestic investigations.

Sixth, in accordance with the Statute, the Prosecutor has the authority to decide not to proceed with an investigation or prosecution if it is not in the “interests of justice”. It would be exceptional for a Prosecutor to decide that an investigation is not in the interest of justice, and the victims. The “interests of justice” must of course not be confused with the interests of peace and security, which falls within the mandate of other institutions, such as the UN Security Council.

As the President of the Court Judge Song said, “*The Court is a judicial institution operating in a highly political environment*”. I shall not be involved in political considerations. I have to respect scrupulously my legal limits. Our policy is never to stretch the interpretation of the norms adopted in Rome. This is the only way to build a judicial institution. The Rome Statute sets out the legal criteria that in most national systems are provided by the Congress or the Ministers of Justice or the Council of the Judiciary. My Office also issues public policy documents to further explain how the criteria are implemented.

In addition, to further facilitate the work and planning of political actors and to help them perceive the new legal limits, I inform them in advance of my prosecutorial strategy and of my next steps for each situation and case, thus ensuring that my Office is transparent and predictable. I apply the law without political considerations. But the other actors have to adjust to the law.

To make things more interesting and complicated, and I can further elaborate during the Q and A discussion, there are other exceptional ways for the Court to obtain jurisdiction, through an *ad hoc* decision of a State or a referral by the UN Security Council:

A non-state party can accept jurisdiction on an *ad hoc* basis for a specific situation without joining the Rome Statute. This is what Ivory Coast did. A year ago, the Palestinian National Authority also used this provision of the Statute to lodge a declaration accepting the jurisdiction of the Court for crimes committed in Palestine. My Office is currently assessing if this declaration meets statutory requirements.

The UN Security Council acting under Chapter VII can refer to the Court a situation in any UN Member State. On 28 March 2005, the UN Security Council referred the Darfur situation to my Office. But even in such cases, you must remember that the Prosecutor has to apply all the criteria listed before and those that I spared you.

In fact, when the UNSC referred the case of Darfur to the Court, some members were quite upset that I didn't open an investigation immediately. I did not. I still checked the legal criteria, in particular, whether there were national proceedings.

Ladies and Gentlemen,

Based on those criteria, we selected for investigation in 2003 the gravest situations admissible under the Court jurisdiction, which were crimes against humanity and war crimes committed in the Democratic Republic of the Congo and Northern Uganda. They were followed by investigations into the situations in Darfur and the Central African Republic.

There are currently three trials ongoing at the ICC : the case of Thomas Lubanga, a militia leader who once decided on the life and death of the people of the Ituri region of the DRC, and who is charged with the crime of recruiting child soldiers and using them to rape and kill; the case of Germain Katanga and Matthew Ngudjolo, two leaders of militias who committed war crimes and crimes against humanity against civilians in the DRC; the case of Jean-Pierre Bemba, the former Vice-President of the DRC and leader of a militia allegedly responsible for hundreds of rapes and pillaging in the Central African Republic.

The Court has issued 9 arrest warrants, which are still pending execution: Joseph Kony and other leaders of the Lord's Resistance Army abducted thousands of girls and boys and transformed them into killers and sexual slaves; Ahmad Harun, former Sudanese Minister of State for the Interior coordinated the Armed Forces and the reserve forces called Militia/Janjaweed into committing crimes against humanity and war crimes against the Darfur people; Ali Kushayb was a Janjaweed militia leader under the authority of Harun; Sudanese President Bashir is charged with crimes against humanity, war crimes and possibly genocide since the Appeals Chamber granted yesterday our appeal. Finally, there is Bosco Ntaganda, who is charged for crimes committed in Ituri as Lubanga's deputy and who is now the leader of a militia allegedly responsible for the most serious gender crimes committed in the Kivus region.

The Court has also issued a first summons to appear against the leader of a rebel group which attacked the African Union peacekeepers at the Haskanita base in September 2007. Abu Garda appeared voluntarily in Court and the decision on the charges is expected shortly.

We are conducting preliminary examination to assess if we have jurisdictions in different situations, including Colombia, Georgia, Afghanistan, Cote d'Ivoire, Guinea and Palestine. We are regularly visiting Colombia to follow the progress of proceedings. The

Colombian authorities prefer to investigate and prosecute the crimes themselves and avoid our intervention. In contrast, Kenya has accepted my decision to open an ICC investigation. Two months ago, I requested the judges of the International Criminal Court for authorization to start an investigation in Kenya. The decision is pending.

Ladies and Gentlemen,

The Rome Statute system is in motion. I would like to focus now on a last point: impact, or how this new institution can prevent recurring violence.

Criminal law scholars and practitioners tend to focus their analysis on final judgments, the fairness of the proceedings and the Court's legal arguments. It is important. The International Criminal Court must meet and even go beyond all expectations in all these aspects. Full respect for the rights of all the parties involved is the cornerstone of the Court's credibility. At one point, the Judges ordered the stay of the proceedings in the Lubanga case. I had informed them that some documents in the possession of the Prosecution could be material for the Defence but could not be disclosed because they were received under guarantee of confidentiality. I offered alternative solutions. Finally a solution was reached and the trial resumed. But what is important here is that Judges were ready to halt the first trial of the Court and free Lubanga, rather than compromise on fair trial and that the Prosecutor was ready to lose its first case, rather than compromise on its duties of transparency to the Defence and confidentiality to its information providers.

However, high quality and fairness will not be enough. The true relevance of the Court is its global impact. Even before any ruling in the Lubanga case, the issue of child recruitment gained new momentum, triggered debates in remote countries like Colombia or Sri Lanka and child soldiers were released in Nepal. The Special representative of the UN Secretary-General on children in armed conflicts immediately

factored in such potential and used us as a tool to campaign around the world, and secure even more releases. This is an example of how to use the law to prevent crimes.

This is the way forward. Our Court will deal with only a few cases over the years but the impact of its cases and rulings extends to at least 110 States which are Parties to the Rome Statute and even beyond to reach non States Parties. The shadow of the Court.

About thirty years ago, Professor Robert Mnookin wrote an article entitled “Bargaining in the Shadow of the Law”, which examined the impact of Court decisions on divorce cases. He argued that, while family courts make rulings on specific cases brought before them, their rulings are later used by many other couples and lawyers to resolve their disputes and work out their own agreements. Accordingly, the majority of cases never reach the courts; they are solved in the “shadow of the law”. This is the shadow concept. One court ruling on divorce affects a multiplicity of cases and this may well be considered as the most important impact of a family court, or any court.

What is the shadow of the International Criminal Court?

Its geographical scope is already extensive, but how fast and how far the shadow can extend depends on other actors, and on how we integrate them in a comprehensive network of support for international justice. Who are the other actors? What they can do? Political leaders, the military, diplomats and conflict managers, victims and citizens have a central role to play:

1. Political leaders are progressively excluding from their circle, those individuals sought by the Court. President Al Bashir became a fugitive; he cannot travel to States Parties of the Statute. He looks for political protection in the African Union and in his party, the NCP. South Africa informed President Bashir that he was invited to the inauguration ceremony of President Zuma, but that he would be

arrested upon entry into the country. Uganda, Nigeria and Venezuela did the same. President Lula from Brazil and President Kirchner from Argentina refused to approach President Bashir in an Arab-South America summit. President Sarkozy has taken the unprecedented decision to cancel a French-African summit rather than run the risk of meeting with him in a corridor. Turkey has ensured that he cancels his appearance to a meeting of the Organization of the Islamic Conference in Ankara. In the Guinea case, Morocco refused to keep on its territory President Dadis Camara. It did not want to harbor a possible ICC suspect. Burkina Faso's President Blaise Compaore had contacts with the Office to ascertain there was no arrest warrant before accepting to host Dadis Camara.

2. Armies, all over the world, are adjusting their operational standards, training and rules of engagement to the Rome Statute. This is the way to control violence. The law makes the difference between a soldier and a terrorist. What else can they do? Prepare plans to arrest militia leaders such as Joseph Kony. An arrest operation can be more efficient than a conventional military operation against a group such as the Lord's Resistance Army.

3. Conflict managers and mediators also had to adjust their methods and their toolbox, respecting the legal limits. Kofi Annan's work in Kenya is an example of how justice can promote a lasting peace. On the contrary, having ignored the arrest warrant against Ahmad Harun in the Sudan in 2007 helped neither peace negotiations nor justice. Mediators need to recognize the facts unveiled by the judicial evidence and to respect the new legal framework. UN Secretary-General Ban Ki-Moon issued in April 2009 the strongest guidelines ever, informing all mediators that the ICC's course of action had to always be respected. It is not a limit for mediators; it is an opportunity, it offers the possibility to develop new, more sophisticated strategies when carrying out negotiations. There is something between bombing and appeasing massive killers.

4. Victims have been the drivers and the pushers of the Court. We are their Court. They are participating in many ways. They petition the Court, some of them accepted to become our witnesses, and their stories are evidence. All of them are contributing to the prosecution of perpetrators of massive crimes and to the legitimacy of the system.

5. And finally, citizens and institutions from global civil society, who were critical actors in 1998 in the adoption process of the Rome Statute, are equally relevant in its implementation. The Coalition for the International Criminal Court (CICC) is acting as a platform for a number of civil society organizations active in support of international justice such as Human Rights Watch or the *Federation Internationale des Droits de l'Homme*. Other groups, such as "Invisible children", are campaigning for the "Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009" in the US Congress. The "Justice for Darfur" campaign, rallying many NGOs, is another example of the influence citizens can yield.

The shadow of the Court includes all these actors and its width depends on them.

Speaking of the shadow of the Court, as a final comment, I would like to say a few words on the positions of States not party to the Statute. In my 6 year tenure, I saw a great evolution. I just mentioned the case of Turkey, a State not party. The Chinese authorities describes themselves as a "Non State Party partner of the Court"; Russia sent more than 3,000 communications to my Office on alleged crimes committed in Georgia; my Office regularly interacts and cooperates with Qatar, Egypt, Rwanda, and regional organizations such as the League of Arab States.

Since 2005, the United States has followed a similar policy of constructive engagement with the ICC. John Bellinger is much better equipped than me to explain such policy,

but I can say that the US supported our work in Uganda, the DRC and, in particular, in Darfur, for which we are grateful.

Today, the new administration is also very supportive, including on our efforts to open an investigation in Kenya. US cooperation is important to arrest individuals protected by militias as Joseph Kony or to isolate others such as President Al Bashir.

Ladies and Gentlemen,

Let me conclude.

1. The Rome Statute is a new institution supported by 110 States, committed to use the rule of law to protect their own citizens from massive crimes.
2. The International Criminal Court is in motion, enforcing common standards in situation where massive crimes falling within its jurisdiction are committed.
3. And the shadow of the Court is extending, building upon a network of actors around the world, including Non States parties, to maximize the prevention of those crimes that we promised, over and over, would never happen again.

Thank you.