

# Past Achievements and Future Challenges of the ICC

keynote speech for the 20<sup>th</sup> Anniversary of the Rome Statute

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Good afternoon, Distinguished participants,

I would like to begin by thanking the organizers for this opportunity to say a few words, based on my personal experience.

The creation of the ICC in itself was a great achievement. I believe that the advent of the ICC and the broader Rome Statute system has changed the way the world has come to think of and respond to grave international crimes. The ICC's judicial interventions contribute to establishing lasting peace, as a key element in reconciling societies and ending cycles of violence.

By helping the entrenchment of strong legal and societal norms that prohibit massive crimes and human rights abuses, the Rome Statute system can help us move toward a safer world in which people around the globe can live and prosper in peace. However, this is not a task for the justice sector alone; it is a goal that can be achieved only with the simultaneous strengthening of democracy, development and the rule of law.

When 18 judges first met in The Hague in 2003, they were full of hope, pride, a sense of mission and desire to build a permanent international judicial institution. At the same time, there was clear uncertainty about the ICC's prospects for survival, mainly due to strong criticism from outside. However, the 18 judges managed to go through with the establishment of the ICC.

Just 30 years ago, who would have thought that crimes against humanity, war crimes and genocide would be prosecuted by an independent, permanent international institution? And that investigating such crimes would become the expected norm, instead of being a rare exception?

The monumental achievement of the Rome Statute is that it set up an entirely new paradigm of international criminal justice, which has made accountability for atrocity crimes an integral aspect of the rule of law that simply cannot be ignored any more. Now the world knows that perpetrators of the gravest crimes need to be and can be held accountable – in the first place by national courts, and failing that, by the ICC.

There are already signs of a growing deterrent effect of the ICC's permanent presence. Ministers from some African States personally told me that the risk of prosecution by the ICC was a crucial factor that helped prevent large-scale violence surrounding elections in those countries.

Another big achievement is the fact that we have turned the ICC from a Court on paper into a leading actor in the area of the enforcement of international justice. 123 States have so far ratified the Rome Statute. The ICC has active cases at all stages of proceedings. All triggering mechanisms of the ICC's jurisdiction have been activated.

There is now a large body of jurisprudence on many fundamental legal issues, and I am proud to say that the ICC Judges have successfully safeguarded the procedural fairness, as a cornerstone of the Court's integrity. Whoever has closely followed the ICC trials will have seen that the judges are truly independent and impartial, and they are the ones who have the last say in the courtroom.

Another great achievement of the Statute is the strong emphasis it places on the victims' position. It allows victims to be substantially integrated into the ICC's proceedings even when not called as witnesses. The Statute is mindful of the particular interests of the victims, including women and children. In the countries where the Court has active cases, the ICC's outreach program

communicates actively with the local population, informing the victims of their rights and helping communities generally understand the ICC's mandate and proceedings. The Statute directly mentions the relationship between the ICC and the Trust Fund in the case of court-ordered reparations following guilty verdicts. The Fund also has a mandate to assist victims outside the context of the court proceedings, and it has already supported tens of thousands individual victims and their affected communities.

As the president, I decided to lead the new institution into the future with the primary emphasis on victim protection. It was my hope that the traditional entrenchment of retributive justice could be expanded to include restorative as well as reparative justice. I felt that the victim protection was the first such experiment in human history that we could not afford to see fail.

### Cooperation

By adopting the Rome Statute, States established not just a Court, but an entire system of new international justice. The architecture of the system splits responsibilities, whereby the ICC carries out judicial work, but enforcement is devolved to States. Therefore, the ICC will investigate, prosecute and try crime suspects, but States must assist the ICC for arrest warrants to be implemented, evidence to be provided, witnesses to be protected, and sentences to be enforced. Cooperation remains an area of vital importance to the ICC's function and judicial efficiency. Most of the time, States cooperate with the ICC, but not always, and the lack of cooperation can seriously diminish the ICC's ability to deliver justice. It is important not to lose sight of the fact that cooperation with the ICC is a treaty obligation, and it must be treated as such. However, the need for cooperation goes far beyond the above-mentioned technical issues to the political support that the ICC requires. This is nowhere more evident than with the referrals of situations by the Security Council. In the Sudan and Libya situations, no one has been arrested and tried by the ICC.. In June 2012 4 ICC staff were detained in Libya while on an official mission. It took me 26 sleepless days to get their release through intensive negotiations. Unfortunately, the Security Council has not provided the ICC with the help it needs to discharge the mandates given to it in the Security Council resolutions. A far more consistent and vigilant approach by the Security Council is needed.

There is also a financial question that requires attention. The Rome Statute and the relationship agreement between the ICC and the UN anticipate that the UN shall help fund the costly investigations and prosecutions arising from Security Council referrals. Yet in both Sudan and Libya resolutions a provision was added prohibiting UN funds from helping the ICC.

This means that States Parties have picked up the bill for work done by the ICC stemming from a Security Council decision adopted on behalf of the entire world community in order to preserve peace and security. This conflict will need to be addressed in the near future and I cannot see it resolved easily without a constructive approach by all countries on the Security Council, including the US.

Cooperation should come to be regarded as routine, not an exercise of extraordinary political will. This applies to States Parties and also States not yet parties, since the ICC has no tools to enforce its own decisions.

Priority needs include the arrest of suspects and agreements on the relocation of witnesses, enforcement of sentences and the situation of released persons. As president, I diligently contacted many states parties to conclude these agreements, but with limited success. It is now up to the States who created the Court and its other supporters to identify actions that can be taken. It is my hope that the ASP will consider as a matter of priority how they can best use the political and diplomatic tools at their disposal to bring about cooperation.

### Complementarity

The fundamental principle underpinning the ICC is complementarity. Under this principle, the ICC does not replace national courts, nor does it have the ability to override properly functioning national

courts. The ICC is a court of last resort. This principle has a number of powerful implications. First, it means that every State joining the Rome Statute can be confident that states retain the primary jurisdiction to conduct proceedings for any ICC crimes. I cannot stress enough that this is both the right and the responsibility of each State. Ultimately, the fight against impunity can only succeed when the national justice system of each State is strong enough to stand against atrocious crimes.

To strengthen national justice systems, there are domestic laws to amend, judges and attorneys to train, and penal systems to improve. Yet only about a half of States Parties have adopted implementing legislation. As many partners can assist in expanding the reach and depth of international criminal justice, I raised these and other needs with the Court's many partners, and tried hard to strengthen relationships with regional organizations, states and NGOs.

Tremendous work is already being done to provide expertise, training and material resources. However, more can be done to better bring together and coordinate the different activities, to raise awareness of opportunities, and to bring into the mainstream international criminal law throughout rule of law programs, although these are daunting tasks for States.

This notion has recently attracted a lot of attention in the ASP. The ICC will only ever be able to handle a small number of cases at a time. More must be done to ensure that national courts are willing and able to act. The ICC has very limited ability to assist states that lack in developing national capacity. The bulk of the work will therefore fall to the court's partners such as the UN, EU, international agencies, regional organizations, States, and civil society. The ICC is only one piece of the puzzle. There is also increasing awareness of the need to involve development agencies in helping the strengthening of national justice systems. I am particularly glad that the UN is increasingly taking a strong role in this area, since the UN is simply uniquely placed to advance the rule of law in all parts of the world where international assistance is needed.

#### Universality

The Court's jurisdiction is not universal. The Court only has jurisdiction over nationals of States Parties or crimes committed on the territory of a State Party.

As the ICC president, one of my main priorities was to visit and persuade as many states as possible to ratify the Rome Statute. The number of States Parties then was only 110. My target region was Asia in particular, as I come from the region, and the region is most underrepresented - only 14 then. I realized through my trips that states that still suffer from the wounds of war are rather reluctant to join the Rome Statute system for fear that their leadership might be subject to ICC prosecution for the atrocities that some leaders in power had allegedly committed. To dispel such suspicions, I emphasized that when a state ratifies the Rome Statute, it applies from the date of joining onward. In other words, if a country joins, the Rome Statute would be a safety net for the future. Many states remain strongly suspicious and skeptical of this legal reality of temporal non-retro-activity.

The climate for achieving universality has improved over time. Many countries initially faced intense pressure from the American government not to ratify the Rome Statute. Now the US policy with regard to the ICC is one of positive engagement with the Court.

I travelled to many states whose governments were actively considering a sovereign decision to adopt the Rome Statute. The Court does not lobby them, but it can provide information to ensure that policy considerations are based on facts. On these visits, the Court benefited greatly from partnerships with the EU, States Parties and civil society. It was through just this type of partnership that together I managed to expand the reach of the Rome Statute. My persistent efforts for universality met with a fruitful result: 14 more ratifications, a significant achievement.

#### Protecting the neutrality and judicial independence of ICC

The ICC is an institution independent of the UN system or any political organ. The independence of the Court, its 18 judges and the Prosecutor is protected under the Statute. The Statute also

guarantees a fair trial and the protection of the rights of the accused.

The ICC is a judicial institution operating in a political world. The ICC is politically neutral and judicially independent, but the world around us can be very political, and political matters should best be left to States and such political venues as the Security Council.

With the Court's judicial activity increasingly drawing the eyes of the world, we must remain vigilant in keeping politics separate from judicial proceedings. Once a situation comes before the Court, we must let justice follow its course. States must accept that judges cannot and will not take political considerations into account.

The Court should be able to rely on the states that created it to shield itself from political winds. And the ICC relies especially on the legal community to speak up on behalf of the rule of law and to defend the law from interference of politics. The ICC's activities cannot be turned on or off according to the availability of funds, or changing political priorities. Once a judicial process starts before the ICC, it will take its own course."

#### The Relationship between the ICC and States Parties

Although my continuous efforts contributed significantly to the strengthening of the ICC's relationship with the host state and states parties, I believe that the relationship between the Court and the States Parties would have to be more streamlined.

In addition to the initiatives taken by the President and the judges for amendment proposals, States Parties also created the roadmap to streamline discussions on amendments, but, frankly, it has made the whole process exceedingly cumbersome and difficult. It worked well in the first year, where amendments were limited, but then States told the Court to increase the number of amendments, with which the ICC complied. Everyone knows how they ended; the Court-submitted proposals well ahead of time, but in the end the ASP could not adopt them because the Assembly sticks to consensus rather than vote on them. To be honest, many States Parties do not have the expertise to deal with RPE amendments. Since then, the Court has leaned more toward practice improvements instead of amendments to the legal framework. It is most important that States Parties encourage each other to do more for the Rome Statute system, rather than micro-manage the Court.

States Parties' engagement on issues related to the Court has gradually become more formalized through more facilitations and subsidiary bodies of the ASP. Still, the ICC is not a reporting body. Chambers' judgments are the ICC's "reports." ASP should request fewer reports and let the Court focus on its work.

#### Weaknesses

Lastly, two areas of weakness in the Rome Statute should be highlighted: 1) more effective procedural and substantive means to address States Parties' non-cooperation should be devised under Art. 87, Paragraph 7, and 2) a practical solution for the situation of acquitted or released persons needs to be found, especially when that person refuses to go back to their own country.

#### CLOSING REMARKS

In closing, there are many challenges – competing interests, limited resources, political opportunism, cultural differences, different visions and so on – but at the end of the day, there are also undeniable shared values and common goals that humans everywhere hold dear. Men, women and children everywhere want to live in a world of peace, security and harmony, without fear of violence and suffering.

The international arena in the 21st century is very dynamic and crowded by various international organizations, and more. The ICC should encourage the next generation of leaders and actors to always aspire for universal criminal justice, as the ICC will continue its mission from now into the future as a giant leap forward in the global fight against impunity. (23 minutes)