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**“Working with Africa: the view from the ICC Prosecutor’s Office”**

Statement

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## Executive Summary

Ladies and gentlemen,

Today, I would like to present facts, not perceptions. The facts will show you that African institutions, African leaders and African activists are building the system of international justice designed by the Rome Statute to protect the victims of massive crimes.

I will summarize my presentation in 6 points:

1. Humanity needs to adopt a new strategy to confront massive violence. Trying to kill the killers or to appease them is not working. It did not work with Hitler. It did not work in Rwanda. And it is not working with Joseph Kony.
2. The Rome Statute adopted a new strategy to control massive violence and to prevent future crimes. A global commitment to end impunity for the most serious crimes. Now, it is the law for 110 states all over the world. The Court is a piece of the system ensuring that the law is enforced.
3. Africans are leading the adoption of the Rome Statute and its implementation.
  - a. Kofi Annan convened the Rome Conference, Médard Rwelamira, Phakiso Mochochoko, Sivu Maqungo were some of the drafters.
  - b. African states led the ratification process. Senegal was the first state party. Africa is the most represented region of the world in the Rome Statute. 23% of the state parties.
  - c. African judges are 25% of the bench.
  - d. African leaders referred three situations to the Court. Benin and Tanzania, as African members of the Security Council voted in favour of Darfur referral. Algeria abstained.
  - e. 50 % of our requests for assistance go to African states.
  - f. African countries surrendered 75% of the suspects.
  - g. The AU panels in Kenya, Darfur or Guinea are supporting end of impunity.
4. Since the LRA case there has been a controversy over “appeasement or justice.” We are producing a new policy paper on this and we will be delighted to engage in a deeper dialogue with AU or African state parties.
5. Since the request for an arrest warrant for President Bashir, there has been a controversy about an alleged “Africa bias” promoted by President Bashir and supported by some leaders.
  - a. There are two problems of perception: That we are targeting Africa following a neo-colonialist agenda and that we are ignoring other criminals. I will not follow the advice to adjust to misperceptions.

My duty is to follow the law. I will open an investigation into Kenya.

- b. **About targeting Africa.** There are 14 accused, all of them are Africans. There are more than 5 million African victims displaced, more than 40.000 African victims killed, thousands of African victims raped. Hundreds of thousands of African children transformed into killers and rapists. 100% of the victims are Africans. 100% of the accused are African. As Desmond Tutu said: Choose your side. Do you associate with the victims or the perpetrators? I am on the victims' side. I will not apologize for that.
  - c. **About ignoring other bigger criminals, in particular from the North.** Africans are tired of double standards. So am I. The issue is: are we going to implement one standard? Or are we going to reinforce the double standard? I am not the world Prosecutor; I am the Prosecutor of 110 states. Complementarity and Colombia, Iraq, Lebanon or Israel are not state parties. However, creative lawyers can offer legal options. NPA's Minister of justice convinced its government to accept jurisdiction of the Court in Palestine. Another example: a group of South African lawyers supported by Max Du Plessis and John Dugard came to my Office to submit information on alleged crimes committed by a South African citizen who was working as the legal advisor of the Israeli Armed Forces during the Gaza operation. Regardless of the final assessment my Office will make on our jurisdiction in Palestine, their activity is a contribution to new ways of promoting a new system of justice.
6. I see the upcoming **Review Conference** in Kampala as a crucial opportunity to reaffirm African commitment to protect the victims and do justice. The Review Conference must be an event. African leaders should be there to show their consistency, their commitment and their ability to keep leading the Rome system.

## Statement

Ladies and gentlemen,

Let me start with the basics: The creation of the Rome Statute.

The Rome Statute was adopted under the leadership of an African, Kofi Annan, the then Secretary General of the UN, and is largely the product of the commitment of Africa, Europe and Latin America, 3 regions which suffered massive crimes during the last century.

The Rome Statute provides that nobody, including Heads of State can commit genocide, crimes against humanity or war crimes with impunity. States accepted their duty to punish such crimes when committed in their territory, and a new actor was created: an independent and permanent International Criminal Court, to intervene where national courts failed to act. A global coalition of states, international organizations and civil society was created to guarantee lasting respect for and the enforcement of international justice, and to prevent future crimes.

The drafters of the Rome Statute, including those from Africa such as the late Médard Rwelamira, Phakiso Mochochoko, Sivu Maqungo, and others were not naïve idealists. They were the ultimate realists.

During their lifetime, they watched how the world ignored the millions of Khmer Rouge victims, the victims of Srebreniça and Rwanda. They saw that the international community would offer lip service to the victims. They also saw that the first strategy of political leaders, diplomats and negotiators was to appease international criminals. The international community kept gambling with impunity and in most of the cases, 94 % to be precise, they failed.

Appeasement did not work with Hitler. It did not work in Rwanda. And it is not working with Joseph Kony.

Appeasement cannot be the main tool for protecting victims of massive crimes. During the Rome Conference, the South African Minister of Justice made the link between ending impunity and managing violence when he stressed that the establishment of the Court *“would ultimately contribute to the attainment of international peace.”*

The first state to ratify the statute was Senegal. Africa is the most represented region of the world in the Rome Statute. This is not by chance. The same ideas are contained in African seminal norms. The Constitutive Act of the AU provides that the organization shall function consistently with the “condemnation and rejection of impunity”, among other principles and - quite extraordinarily - also provides for the right of the AU to intervene in a Member State in the event of war crimes, genocide and crimes against humanity. This is a unique provision in the founding document of an intergovernmental organisation.

As the Prosecutor, my duty is to turn these ideals into reality. I have to unveil the facts and I have to establish who is criminally responsible, I have to apply the law without political considerations. I have three different tasks: to select situations under the jurisdiction of the Court, to investigate and to prosecute. Nelson Mandela provided the vision for our work:

*“The Challenge for the modern Prosecutor is to become a lawyer for the people. It is your duty to build an effective relationship with the community and to ensure that the rights of the victims are protected. It is your duty to prosecute fairly and effectively according with the rule of law, and to act in a principled way without fear, favour or prejudice. It is your duty to build a prosecution service that is an effective deterrence to crime and is known to demonstrate great compassion and sensitivity to the people it serves.”*

African states have helped me at each step. In opening the investigations, in conducting the investigations, in pursuing and arresting individuals sought by the Court and finally in maintaining a firm commitment to the principles established in Rome.

### Opening an investigation

My Office determined that in accordance with the Rome Statute the situations of DRC, Uganda and Kenya should be investigated. Fully respecting national authorities, I informed them in advance of my plans, providing them with the option to refer the situations to the Court. In the early years of the existence of the ICC, President Museveni and President Kabila referred the situations in their countries to the Court, helping to start investigations without any controversy. Their initiative paved the way for the UN Security Council referral on Darfur, with the positive votes of Benin and Tanzania and the

abstention of Algeria. The African Union expressed its willingness to cooperate with the Court in such an endeavour.

Subsequently, Central African Republic and Ivory Coast also asked the Court to intervene on their territory.

Regarding Kenya, just last week I met with President Kibaki and Prime Minister Odinga. They stressed to me the need to prevent a recurrence of violence during the next election cycle, and they publicly expressed their full commitment to and cooperation with my Office's activities. I informed them that in December I will proceed with a request to the ICC Judges to open an investigation, using my *proprio motu* powers.

### Conducting an investigation

Regarding cooperation during the investigations, my Office's aim is to secure the support of the territorial state; this is the way to conduct more efficient investigations. My Office received cooperation from Uganda, DRC and CAR and even from the Government of the Sudan. We were able to travel to Khartoum and interview all those conducting national activities that could be relevant to our assessment of complementarity; we were also allowed to interview as a suspect the General in charge of military operations in Darfur.

More than 50% of our Requests for Assistance are sent to Africa and more than 85% of our requests are implemented. In the Haskanita case, our witnesses are from Nigeria, Mali, Senegal, the Gambia; our documentary evidence comes from the AU: our overview military expert is a renowned Kenyan general. Rebel leader Abu Garda surrendered thanks to the assistance of Libya, Egypt, Chad and Kenya. The Nigerian military requested to participate in the proceedings in the capacity of an institution.

### Arrests and surrenders

In terms of arrest of the individuals sought by the Court, again Africa is leading; three out of our four prisoners were surrendered by the DRC. Uganda is the only foreign country willing to provide troops to arrest LRA leaders in the DRC and CAR.

Regarding President Bashir's arrest, the most difficult issue of all, African States have consistently committed to meeting their responsibility. As of today, President Bashir has not been able to travel to different State Parties

like South Africa, Uganda and Nigeria. Even before President Zuma's inauguration as president, South Africa stated officially: "If today President Bashir landed, in terms of the provision [of the Rome Statute], he would have to be arrested." This position has not changed since.

As a result of this multi-faceted assistance of Africa, we are prosecuting Thomas Lubanga for recruiting boys and girls aged 9, 11, 13 from Ituri and forcing them to kill and loot, to rape and to be raped.

We are prosecuting Joseph Kony and other leaders of the LRA. For more than 20 years they killed thousands of persons and abducted thousands of children. The victims were ignored. For years, almost ten thousand kids walked each day to the center of Gulu to sleep in a safer place. This is over. But the LRA is still attacking civilians in other areas. At first the LRA victims were from Acholi land, but the LRA then attacked other areas of Uganda, Southern Sudan, CAR and DRC.

We are prosecuting Germain Katanga and Matthew Ngudjolo for the killing and raping of civilians in Ituri. We are prosecuting Jean-Pierre Bemba, for a massive campaign of rape and pillaging in CAR.

We are prosecuting Harun and Kushayb for massive attacks against civilians in Darfur; the same civilians that they, as public officers, have to protect.

We are prosecuting the President of the Sudan because he masterminded and commanded the plan to attack and exterminate at least 2.5 million Africans. The AU is sending its soldiers to protect those civilians. No State outside of Africa is willing to provide the helicopters required to protect Darfuris.

We are prosecuting a rebel leader, Abu Garda, for attacking those AU peacekeepers that are protecting Darfuris.

These are our cases. Working with Africans, providing rights to African victims. These are the facts. This is the reality.

Ladies and Gentlemen,

The early fear of a frivolous Court has gone. Today, States have to face the most serious challenges created by a serious, fully functional institution. Political leaders and negotiators in the context of international conflicts are learning – not without reluctance – to manage international conflicts and to demobilize violent groups, respecting the new framework established by the Rome Statute.



The Court challenged the *status quo*; it is applying a new framework. For centuries, there have been two main tools to control massive violence: wars against the criminals or appeasing the criminals. Both have failed. The idea of a global system of justice is new. We are just starting to implement it. So today there is a debate, and even controversy, on the role of the ICC. There is a necessary debate on how to ensure that justice is respected and victims are protected. Remember that during the 19<sup>th</sup> century those who proposed to abolish slavery were called criminals or troublemakers.

Part of the debate is produced by individuals with vested interests like President Bashir. Let me address some of the issues that were mentioned during the morning.

Discussions during the first years of Court operations were centered on the “appeasement versus justice” debate. Interestingly, discussions in this regard were initially related to the situation in Uganda, and included Darfur after the Prosecution application in the case of Harun and Kushayb. The arrest warrant application with respect to President Bashir and the subsequent decision of the judges set off a frenzy of reports claiming “African bias”. President Bashir himself invoked a bias against Africa as a reason for the focus on Darfur.<sup>1</sup> The new chairperson of the AU commission, Mr Jean Ping, was reported as stating that “*it seems that Africa has become a laboratory to test the new international law*”<sup>2</sup>, and that the ICC is focusing only on Africa. The President of the AU, Colonel Gaddafi, said that the “*court is against the countries colonised in the past and they want to re-colonise now. It is a practice of a new world terrorism that is not below the standard of the other terrorism.*”<sup>3</sup> Western “experts” on Africa helped to promote this misperception.

It is unfortunate that a wide range of important voices were not given the same echo in the press. President Kikwete of Tanzania, then President of the AU, visited the Sudan on 9 September 2008 and, standing next to President Bashir in a press conference, stated that while the AU was in favor of a deferral of the case, the AU was not condoning impunity. The Presidents of Botswana and Chad expressed full support for the implementation of the Court’s decision. On 3 December 2008, Ambassador Kumalo, Permanent Representative of South Africa to the UN, referring to the Report of the

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<sup>1</sup> CNS News, “Tensions Mount as Sudan Awaits Int’l Court Ruling”, 3 March 2009: <http://www.cnsnews.com/news/article/44363>.

<sup>2</sup> BBC News, “Vow to pursue Sudan over ‘crimes’”, 27 September 2008, <http://news.bbc.co.uk/2/hi/africa/7639046.stm>.

<sup>3</sup> *ABC News*, Gaddafi slams ICC as ‘new form of world terrorism’, March 30, 2009, <http://www.abc.net.au/news/stories/2009/03/30/2529298.htm>.



Prosecutor to the UN Security Council, stated: *“We appreciate that the Prosecutor’s responsibility is to follow the evidence wherever it leads him and to implement the law without fear, favour or even political considerations and we support his role in this respect. We however also recognise a corollary responsibility of the Security Council, which is to consider political imperatives in situations, which the Council is seized with that are before the Court and if the Council finds it meritorious to request the Court to defer prosecution in accordance with Article 16 of the Rome Statute.”* President Zuma has been consistent in this position *“What the AU did not say is President Bashir must not be arrested. All it asked was a deferment of that action on the basis of the progress we’re making in terms of the peace intervention.”*

The Africa bias is a baseless debate started and promoted by President Bashir. He knows how to divide groups to follow his goals. He did it in Darfur and he is trying to divide those who are trying to stop the crimes. President Bashir should not divert our attention from the discussion on how to implement justice and, in particular, how to stop the crimes against Darfuri victims.

The “Africa bias” is a baseless accusation. I will not apologize for protecting the rights of African victims. As Archbishop Desmond Tutu said, you have to choose your side, to protect the criminals or their victims.

Besides this propaganda, I am very pleased to see that the AU, as an institution, has played and continues to play a leading role in peacekeeping efforts and in conflict management in Darfur.

The African Union also appointed an AU High Level Panel on Darfur, under the chairmanship of former President Thabo Mbeki. The panel produced a report that requests more, not less, accountability in Darfur. The report respects the role of the ICC as an independent, judicial institution and it challenges neither the warrants issued nor the ultimate role of the ICC Judges in its Darfur cases. The report proposes additional solutions including the creation of a hybrid court to complement the action of the ICC, to address those cases that the ICC will not deal with.

This African commitment to ending impunity is the reality and we have to find the way to focus our attention on that, focus our attention on the African leadership.

In the Kenya situation, the African Union Panel of Eminent African Personalities, chaired by Kofi Annan and former President Mkapa and Mrs

Graca Machel, requested the end of impunity to avoid a repetition of violence. The Panel supported a three-pronged approach proposing that ICC proceedings should go hand in hand with complementary investigations and prosecutions at the national level against the low level perpetrators as well as healing and reconciliation processes through reforms and mechanisms such as the Truth, Justice and Reconciliation Commission. These three tracks will complement each other. The Panel submitted to the OTP materials collected by the Waki Commission. The leadership of President Kibaki and Prime Minister Odinga will be essential. They have to be supported. Kenya could provide an historic example for the world on how to address and prevent massive crimes.

What happened in Guinea, a State Party to the Rome Statute, is another example of the common efforts of the AU and the ICC. The AU called for our intervention when they joined the Guinea contact group statement of 12 October 2009 stating: *“The Group urgently requests the United Nations Secretary General, in collaboration with ECOWAS and the African Union, and with the support of the High Commission for Human Rights, to facilitate the establishment of an International Commission of Inquiry to investigate the 28 September 2009 gross human rights violations including the massacre of unarmed civilians and rapes, identify the culprits and prosecute them in the competent courts in Guinea or at the International Criminal Court so as to put an end to acts of impunity”*. My Office stated on 14 October that we were monitoring those allegations and just six days later, Foreign Affairs Minister Alexandre Cécé Loua travelled to the Court and met with Deputy Prosecutor Fatou Bensouda. We have requested written information from the Guinean government on the crimes and modalities put in place for conducting national investigations and prosecutions of those responsible.

Before I conclude, let me mention the activities of the African civil society. They are building a global coalition against atrocities. They are exploring all the avenues, they are pushing my Office. One example among many is the work of a group of South African lawyers supported by Max Du Plessis and John Dugard who came to my Office to submit information on alleged crimes committed by a South African citizen who was working as the legal advisor of the Israeli Armed Forces during the Gaza operation. Regardless of the final assessment my Office will make on our jurisdiction in Palestine, their activity is a contribution to new ways of promoting a new system of justice.

As I said at the beginning, the reality is that Africa is leading the Rome Statute, African civil society and political leadership is committed to protect the victims of massive atrocities in the continent and I am proud to be part of this process.

Ladies and Gentlemen, let me conclude.

I will propose to all of you to ignore political campaigns, to keep the focus on the victims from Darfur, Gulu, Bunia, Bogoro, Bangui and Nairobi and to keep leading the Rome system.

I see the upcoming **Review Conference** in Kampala as a crucial opportunity to reaffirm African commitment to protect the victims and do justice. The Review Conference must be an event. African leaders should be there to show their consistency, their commitment and their ability to keep lead the Rome system.