

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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*Keynote speech at Commonwealth Meeting on the International Criminal Court*

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Ladies and Gentlemen,  
Dear Friends,

*[INTRODUCTION]*

Good morning. At the outset, let me sincerely thank the Commonwealth Secretariat and Mr. Akbar Khan for inviting me to give a keynote speech at this important gathering. And thank you all for being here today.

This three-day meeting promises to be a very timely event which provides an opportunity to discuss several crucial aspects of the system created by the Rome Statute of the International Criminal Court. Before those detailed discussions start, let us first remind ourselves what the International Criminal Court – the ICC – is there for and what has been achieved so far.

*[HISTORY]*

The Rome Statute of the ICC, adopted in 1998, marked a historic decision of the international community to put an end to the most serious crimes of concern to humanity as a whole – genocide, crimes against humanity, war crimes and the crime of aggression.

The ICC's origins trace back to the aftermath of the Second World War. The terrible crimes committed in the course of that War led to the creation of military tribunals in Nuremberg and Tokyo. These tribunals embodied a new recognition that the darkest crimes should be met with fair and public trials. The seeds of international criminal justice had been planted.

The horrors of the Second World War also prompted States to adopt the four Geneva Conventions of 1949 and the Genocide Convention, as well as the Universal Declaration on Human Rights.

Soon afterwards, however, the Cold War and its polarising effect on the international community paralysed the progress of international criminal justice for almost 50 years. International humanitarian law continued to develop but the penal repression of war crimes at the international level was not a realistic option. At best, justice was an afterthought to peace, if it was considered at all.

Then, in the early 1990s, with the newly found consensus among the world's leading powers, the United Nations Security Council took the unprecedented step of creating *ad hoc* tribunals to try those responsible for the atrocities committed in the former Yugoslavia and Rwanda. Hope for international justice was revived.

Encouraged by the success of the *ad hoc* tribunals, in 1998, States decided to create a permanent international criminal court, the ICC. Gathered in Rome, 120 states adopted the ICC's founding document, the Rome Statute. The mandatory 60 ratifications of the Statute followed faster than anyone expected and already in 2002 the ICC was ready to open its doors. Today, eight years later, it is a fully functioning international criminal court with 113 States Parties.

### [ACHIEVEMENTS]

The creation of the ICC in itself is a great achievement. But the Rome Statute has far wider implications than the mere establishment of an international court; the Statute created a truly progressive multilateral system that is making a very concrete impact on the global struggle against impunity.

The Rome Statute reflects the conviction of the majority of the world's States that genocide, crimes against humanity, war crimes and the crime of aggression cannot be tolerated and that it is the duty of every State to exercise its national criminal jurisdiction over those responsible for such crimes.

Accordingly, the ICC is a court of last resort which may only exercise its jurisdiction if national courts are unwilling or unable to carry out genuine investigations and prosecutions of the crimes under the Statute. In other words, the ICC is a safety net which ensures that impunity will not prevail even when justice cannot be provided in a national setting.

Therefore the ICC is not a substitute for national justice systems; it merely complements them. While this principle of complementarity is well known, its importance cannot be overstated. One of the most important effects of the ICC and the Rome Statute is that they act as a catalyst for States to ensure their domestic capacity to deal with the crimes under the Statute. So far, almost 50 States Parties of the ICC have enacted implementing legislation to that end and others will hopefully follow soon.

Perhaps we do not always realise what a momentous development this is in the struggle against impunity. Let us not forget that the vast majority of crimes under the Rome Statute have been recognised as crimes under customary international law for decades, yet it took the impetus of the Rome Statute to push States to finally ensure that their national laws allow the prosecution of such crimes.

Of course the effective functioning of the ICC itself is also an important factor in deterring future violations and setting standards in the prosecution and adjudication of

crimes under the Statute. And indeed a lot has been achieved over the last eight years; the ICC now has five active situations under investigation or on trial. Four suspects in total are currently in custody and three others have appeared before the Pre-Trial Chamber. Our first trial began in January 2009, and the second trial began last November. A third trial may start very soon.

Three States Parties - the Democratic Republic of the Congo, Uganda and the Central African Republic – have referred situations to the Court themselves, asking the ICC to investigate crimes that occurred on their territory. One case – that of the Darfur region of Sudan – was referred to the ICC by the United Nations Security Council in accordance with the Rome Statute. And one investigation – that concerning post-election violence in Kenya – was opened by the Prosecutor at his own initiative and approved by the Pre-Trial Chamber. Therefore, all three mechanisms for bringing a situation before the ICC have now been used in practice.

One of the great achievements of the Rome Statute is that it puts a strong emphasis on the position of victims. 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 of violence against women and children. In the countries where we have active cases, the ICC's outreach programme communicates actively with the local population, informing the victims of their rights and helping communities generally understand the ICC's mandate and proceedings. The ICC has the power to order reparations to victims – including restitution, compensation and rehabilitation, and a separate Trust Fund has been set up to collect donations for this purpose. The Trust Fund also has a mandate to assist victims outside the context of the court proceedings, and it has already supported tens of thousands of beneficiaries.

While the Rome Statute is very progressive with respect to victims, it also guarantees fair trials and protection of the rights of the accused.

I would like to stress that the ICC's mission is purely judicial. It is not part of the United Nations system or any political organ. The independence of the ICC, its 18 judges and the Prosecutor are protected under the Rome Statute. The Judges and the Prosecutor are elected by the States Parties, which number 113 at the moment. Of them, 31 are African States, 25 are Latin American and Caribbean States, 17 are Eastern European States, 15 are Asian States and 25 belong to the group of Western European and other States.

#### *[ROLE OF THE COMMONWEALTH]*

From the very start until today, the countries of the Commonwealth have played an immeasurable role in the creation of the ICC. It was **Trinidad and Tobago** that resurrected a pre-existing proposal for the establishment of the ICC at the United Nations in 1989. This year, **Uganda** hosted the first ever Review Conference of the Rome Statute in Kampala and it was also the first country to refer a situation to the ICC in 2004. **Kofi Annan** of **Ghana** played an important role in the process leading to Rome during his mandate as United Nations Secretary-General.

Numerous Commonwealth States had a very active role in the negotiations on the adoption of the Statute and most voted to adopt the Rome Statute. **Philippe Kirsch** of **Canada** was the chairman of the Rome conference in 1998 and the subsequent Preparatory Commission for the ICC, and he served as the first President of the ICC until last year. Seven of the first 18 Judges of the ICC were Commonwealth nationals and three others have later been elected to the Court. These ten judges have come from countries as diverse as Botswana, Canada, Cyprus, Ghana, Kenya, Samoa, South Africa, Trinidad and Tobago, Uganda and the United Kingdom. **34 Commonwealth countries**

**have joined the ICC**, three of them this year. Five other Commonwealth states have signed the Statute.

*[WHERE DO WE STAND TODAY]*

As I have already explained, the ICC's achievements are truly impressive; we now have a system that encourages States to investigate and prosecute the most serious offences under international law and that provides an international court as a backup. It is a system that sends out a strong statement against impunity and a warning for anyone who contemplates the commission of crimes under the Statute. It is a system that promotes the rights of victims, deters future atrocities and demonstrates in practice that persons responsible for atrocities can and must be held accountable. The ICC really is ushering in a "new era of accountability", to quote the expression used by the UN Secretary General, Ban Ki-moon.

But, unfortunately, man's cruelty against man still terrorises populations in many regions of the world. I have recently visited war-affected communities in Uganda and the Democratic Republic of the Congo and I had a chance to speak personally to victims, some of them with severely mutilated bodies, their arms or legs having been intentionally cut off.

While this experience saddened me greatly, it also reinforced my commitment to the ICC and the Rome Statute, reminding me that a lot of work still needs to be done if we wish to end impunity and achieve universal deterrence of the most serious crimes which "threaten the peace, security and well-being of the world".<sup>1</sup>

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<sup>1</sup> Rome Statute, Preamble.

*[WHAT NEEDS TO BE DONE]*

So what can the Commonwealth and its member States do to achieve that goal? They can do a great deal. Indeed, what I want to stress in my remarks today is the primary responsibility of **States** to take decisive and concrete action in order for the struggle against impunity and the deterrence of international crimes to be successful.

States are the main actors in the fields of international relations and international law; States conclude treaties; States enact domestic laws; States direct the activities of regional and other inter-governmental organisations; States are responsible for ensuring that they have effective judiciaries and States are the main funders of rule of law development activities.

That is why I am delighted to speak today here at the Commonwealth Secretariat to an audience consisting largely of representatives from the countries of the Commonwealth, an association of sovereign States united by common values which include peace and the rule of law. Many of you represent governments and other state authorities. Others among you represent intergovernmental or non-governmental agencies that either reflect or seek to influence the actions of States. Together, the people gathered in this room today can make a huge difference by acting decisively in furtherance of justice and of respect for the most fundamental rules of international law.

The Review Conference of the Rome Statute held in Kampala earlier this year highlighted several areas which still require considerable work by States, including **universality, cooperation** with the ICC, the principle of **complementarity** and national **implementing legislation**.



**Universality** may be far away, but every ratification takes us closer to global reach.

**Cooperation** of States is crucial for the ICC, since it does not have enforcement mechanisms of its own. We rely entirely on the assistance of States, especially when it comes to the arrest and surrender of suspects. The fact that eight suspects are at large, some of them for more than five years, shows the seriousness of the challenges that we face. While the arrest of suspects is a legal obligation under the Rome Statute, there are also extremely valuable forms of voluntary assistance that States can provide to the ICC, particularly in the form of agreements on the enforcement of sentences and relocation of witnesses.

I already spoke about **complementarity**, but let me again stress how important it is that States ensure that they have the laws and the practical means necessary to prosecute the worst offences known to mankind.

All these areas require decisive action by States, and I am delighted to see that this conference will devote significant attention to them. Furthermore, I believe that the Model Law developed by the Commonwealth Secretariat can be of great assistance to States in the process of implementing the Rome Statute in their national legislation.

#### *[MISCONCEPTIONS]*

The member nations of the Commonwealth are natural candidates to join the Rome Statute. Yet twenty Commonwealth States have so far not joined the ICC, although five of them have signed the Statute. Unfamiliarity with the ICC's mandate and activities may be one reason why some States have not ratified the Rome Statute. This is why I use every opportunity to raise awareness about the ICC and to dispel any myths that may exist.

One prejudice that one sometimes hears about the ICC is that it is a tool of Western States. This is utter nonsense. The ICC belongs to its States Parties, among which the Western States are in the minority. The Judges and the Prosecutor are elected by the Assembly of States Parties, in which every State has an equal vote. The richest States provide the bulk of the funding for the ICC on the same principles as the UN budget contributions are assessed, but this does not give them more decision-making power in the ICC. It is a global court with participation from all the continents of the world. The geographical and cultural diversity of the ICC, as well as its gender balance, are in fact reflected not only in the totality of the Court's Judges but practically in every bench of the ICC consisting of three or five Judges.

Some claim that the ICC only targets African countries. This assertion is groundless. Of the five situations before the ICC, three were brought to the ICC by the countries themselves, one was referred to the ICC by the Security Council and only one was initiated by the Prosecutor at his initiative. Furthermore, the Office of the Prosecutor is conducting preliminary examinations in a number of countries, including Afghanistan, Georgia, Guinea, Côte d'Ivoire, Colombia and Palestine. But I wish to stress that the Prosecutor cannot initiate a formal investigation without the approval of the Pre-Trial Chamber following an independent judicial review. This is to prevent any frivolous or politically motivated investigations without proper basis. An even higher threshold must be met before a warrant of arrest can be issued against an individual. These are just some of the many checks and balances contained in the Rome Statute.

Yet another common misconception is that the ICC may start digging into a country's past if it ratifies the Statute. This is patently impossible. The ICC's jurisdiction with respect to a new State Party starts only after its ratification. And in any case the ICC cannot ever have jurisdiction for crimes that took place before 1 July 2002.

The international atmosphere for expanding the reach of the Statute has improved greatly. In the early years, many countries came under intense pressure from the American government not to ratify the Rome Statute. But those days are over. I have had extensive discussions with senior officials in the Obama administration and the prevailing US policy with regard to the ICC is now one of positive engagement with the Court. The US officials have assured me that there will be no retribution from the United States for any country seeking to join the Rome Statute.

The United States in fact participated actively in the Kampala Review Conference and pledged to support rule-of-law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide. This pledge by the US goes to show that the goals set by the Rome Statute are also shared by many, probably most non-States parties, which for one reason or another so far have not joined the ICC.

*[ASSISTANCE FOR AND IMPLICATIONS OF RATIFICATION]*

I know that for some small states, government capacity can make ratification processes daunting. The ICC lacks the resources to provide assistance, but others are available to assist – notably, in this case, the Commonwealth Secretariat. Other important partners include for instance the United Nations, the European Union, the International Committee of the Red Cross, Parliamentarians for Global Action, Amnesty International and the Coalition for the International Criminal Court. There is also a special Trust Fund for the Least Developed Countries to assist States with less means to participate in the Rome Statute system.

Joining the ICC sends out a clear signal of a country's commitment to the rule of law, peace and the struggle against impunity, not only at home, but around the world. Ratification also gives a State the right to nominate candidates and to vote in the election of the highest officials to the ICC. The next elections for the Prosecutor and six posts of Judges will take place in 2012, so now would be an excellent time to join the ICC to shape its future development and make it even more global than it is now.

Yet another consideration is that citizens of States Parties are preferred in the recruitment of staff to the ICC. Therefore, membership in the ICC opens an avenue for the lawyers and other professionals of a country to participate in the work of a Court that is on the cutting edge of the development of international law.

I would be thrilled to welcome additional Commonwealth states as new States Parties. But I wish to reiterate that this is a decision for your governments alone to make.

#### *[CONCLUSION]*

Let me now conclude by summarising what I would like to see happen in the near future:

1. I would like to see all Commonwealth countries that are States Parties to the Rome Statute use their good relations with Commonwealth non-States parties to highlight the benefits of membership in the Rome Statute system.
2. I would like to see the Commonwealth States Parties and the Commonwealth Secretariat offer their help to those Commonwealth countries that may be in need of technical assistance to facilitate their ratification of the Statute.

3. I would like to see the Commonwealth States Parties make sure that they have national procedures in place in accordance with Article 88 of the Statute to allow effective co-operation with the ICC.
4. I would like to see the Commonwealth States Parties make sure that they have the necessary legal and other means to investigate, prosecute and try the crimes under the Rome Statute.
5. I would like to see Commonwealth countries that are **not** States Parties to the Rome Statute consider ratification with an open mind, and to seek additional information about the ICC if necessary. I am always available to assist in that respect.
6. I would like to see all of you gathered here, in your capacity as experts on the ICC, use any opportunities you may have to spread awareness of the ICC and the Rome Statute, particularly among your colleagues in your own countries.
7. I would like to see all States share information among them on the technical aspects of ratification and implementation, and to use the assistance and resources provided by the Commonwealth Secretariat as well as non-governmental organisations and regional organisations. Please note that we welcome Visiting Professionals from any country to learn about the ICC from the inside.
8. I would like to see the Commonwealth Secretariat continue its excellent work as a facilitator of technical assistance and a catalyst in promoting ratification and full implementation of the Rome Statute among the Commonwealth countries.

Furthermore, I would be delighted to see the next Commonwealth Strategic Plan include explicit reference to the struggle against impunity for the crimes included in the Rome Statute.

Let me stress that these are all just wishes – as the ICC President I am in no position to demand anything. But I do want to inspire you all to work hard towards the noble goals set by the Rome Statute for the good of humanity.

Thank you.