



**Address to the Assembly of States Parties**

**14 November 2008**

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Prosecutor of the International Criminal Court**

Excellencies, Ladies and Gentlemen,

I have the honour to report to the Assembly of States Parties on the work of my Office during 2008 and on our plans for 2009.

Based on the *proprio motu* power of the Prosecutor, the Office proactively analyses available public sources to collect and assess data on crimes within our jurisdiction and on related national proceedings. We have also received and analysed 4248 communications on purported crimes in 2008 so far.

Situations in four continents are under analysis: Colombia, Georgia, Kenya, Côte d'Ivoire and Afghanistan. I led a mission to Colombia in August and I requested information to states in the Americas and Europe on domestic investigations on networks of support to groups such as the FARC.

The Office received officials of the Georgian Government. We are analysing reports from Georgia and over 3,000 documents were received through the Russian Government, a non state party. We have already sent our first mission to the field.

The Office requested information to the Afghan Government and Afghan human rights bodies and two weeks ago, I met with an Afghan delegation to foster support for the Office activities.

The Office is following the situation in Kenya where an independent Commission was established to assess crimes that could fall under our jurisdiction. There are intense discussions in Kenya on possible domestic proceedings.

As we anticipated during the last assembly, our investigations in CAR and Darfur progressed. We requested an arrest warrant in the case of Mr Bemba in May. We requested an arrest warrant in the case of Mr Al Bashir in July.

In November, in the DRC, we started our third investigation which will focus on the Kivus.

In September, Pre-Trial Chamber I confirmed the charges against Mr Katanga and Mr Ngudjolo Chui for crimes committed against the civilian population of Bogoro, in DRC.

Next week we will request new arrest warrants, for the attack against African Union peacekeepers in Haskanita. This is our third Darfur investigation.

To collect the evidence needed in all these cases, my staff conducted 137 missions to 15 countries.

Today, the top leaders of four armed groups are detained at Scheveningen. In previous years, Mr Lubanga and Mr Katanga, when transferred to the Court, were already in national custody. In 2008, for the first time, two persons were arrested following the decision of the International Criminal Court. Mr Ngudjolo Chui was a Colonel in the DRC Army and Jean-Pierre Bemba was arrested in his Brussels house. States cooperated intensively. DRC and Belgium performed the arrest. Portugal worked for months to prepare for the arrest, before Mr Bemba moved to Belgium. Portugal, DRC and Belgium facilitated search warrants. Others provided timely information.

I would like to highlight now some aspects of the Office's work this year.

## **1. Security for witnesses and persons who may be at risk**

We investigate massive crimes, focussing on those most responsible, in insecure environments. This carries many challenges, but protection of witnesses and persons at risk is the most challenging of all. In the last months, members of the "FRPI" and other forces tried to re-take Bogoro, leading to mass displacement. Supporters of Mr Bemba resorted to violence in the DRC and in Europe after his arrest.

Despite these difficulties in four years of investigations no ICC witness has been attacked, wounded or killed. Intermediaries are also receiving protection in accordance with the decision of the Appeals Chamber of May 2008 extending the possibility of protective measures to all persons at risk on account of the Court's activities. This careful approach to the security of witnesses and others is an ethical and legal obligation; it is also the cornerstone of our efficiency. We must draw lessons from the Haradinaj case at the ICTY which illustrated how

lack of protection can have a detrimental impact for justice. Any mistake will cost lives and will substantially affect the work of the Court. We have to increase our efficiency in the face of such challenges to maintain the current level of security. All of you can contribute. The relocation of witnesses is a last resort measure. Other contributions, such as the development of assistance for setting up witness protection programmes in situation countries, are also valuable. Such cooperation can benefit our investigations, but it can also help territorial States to carry out national proceedings.

## **2. Legal developments**

The Rome Statute is an innovative legal design. As the Prosecutor I have to apply this new law, I have to make daily decisions and, as many other parties, I need clarity.

In 2008, the Court was able to provide certainty on key legal concepts.

Regarding victims' participation, the challenge for the Court was to address all issues in a consistent manner. Victims' participation "*is a right accorded to victims by the Statute*". As the Prosecutor, I believe that as many victims as possible may participate to express their views and concerns, presenting a different social dimension of the crimes and obtaining respect and reparations. I have requested clarity on the modalities of participation. The Appeals Chamber in its decision of 11 July 2008 started to define such modalities. Victims can tender evidence within confined limits, consistent with the role assigned to the Prosecutor and with the rights of the accused and a fair trial. We expect such enhanced clarity will allow victims' participation to proceed efficiently. The completion of a Courtwide Strategy for victims in 2009, under the leadership of our new deputy registrar, is one of our five strategic goals.

The Court was able also to settle the tensions between duties of confidentiality and disclosure of exculpatory information. On 21 October 2008, the Appeals Chamber made a seminal decision: the Trial Chamber as well as any other Chamber of the Court will have to respect confidentiality agreements concluded by the Prosecutor under Article 54 (3)(e). In accordance with the decision, no Chamber of the Court can order the disclosure of Article 54(3)(e) materials to the defence without prior consent of the information provider. This is a guarantee for those who cooperate with the Court.

In the case of Lubanga, such legal certainty has been key to reassure information providers and the Prosecution has been able to place all relevant material before the judges, unredacted and for the duration of the proceedings. Trial Chamber I is now reviewing the information and will render its decision shortly.

Time spent on such discussions has been important. The Court has to act as an impartial judicial institution. Certainty of a fair trial is a cornerstone of the Court's legitimacy.

### **3. Management**

This is a complex area. I have the mandate to act independently with full authority on my Office, but at the same time we rely on services provided by the Registry and the cooperation provided by states, international organizations and other stakeholders.

I appreciate the CBF comments welcoming the flexible approach of the Office through rotation of resources according to needs. I remind the Assembly that the use of GTA contracts has allowed us to manage unforeseen events in the past. With this caveat, I agree with the CBF that we have the size needed to conduct our work.

With the Registry, we have a commitment to finalize by the end of the year Service Level Agreements to consolidate working practices in different areas. The implementation of the independent oversight mechanism which will address misconduct including internal sexual harassment/abuse is also a shared priority.

Two years ago the Office presented its prosecutorial strategy for 2006-09 aiming to facilitate our interaction with other organs in the context of the Court strategic plan, and with other actors. We are planning to update the prosecutorial strategy for the following three years. You will be invited to comment.

We are fully involved in the Legal Tools Project, financed by voluntary contributions of Canada, Finland, Norway, Switzerland, Austria, the Netherlands and Germany to seven outsourcing partners and to my Office.

## **Let me now turn to future challenges**

The Rome Statute created a global criminal justice system based on two principles: complementarity and cooperation. The Office has a role to play in selecting situations, in investigating and prosecuting cases. I have a duty to build the Office as an institution. We have a responsibility in galvanizing cooperation, in particular for arrests, and in putting complementarity into practice wherever possible.

## **Selection of situations and cases**

The Statute provides a clear framework to select situations and cases to investigate. Governments, as well as perpetrators, must know that my Office evaluates the crimes committed, their gravity and national proceedings. I have to apply the law. Nothing more, nothing less. The decision that ending impunity will ensure lasting peace and security was taken in Rome. I should not, and I will not take into consideration political considerations. Geographical balance is not a criterion adopted in Rome to select situations. The idea of an African bias has been used by some to divert attention from the crimes. It ignores the law, ignores the African leadership in ending impunity and ignores that the crimes were committed against millions of African citizens.

## **Investigations**

We are carefully planning the investigation in the Kivus. We are liaising with all actors involved in the region. A multiplicity of crimes, sexual violence, displacements, pillaging, killings are allegedly committed by a multiplicity of groups, such as the CNDP of Laurent Nkunda, the FDLR, the regular forces and others. The Office will focus its investigation on those most responsible for the most serious crimes committed in the Kivus. To maximise our impact and reduce the impunity gap we are also considering ways to produce "*dossiers d'instruction*" and transmit them to the DRC judiciary. The main obstacles to such a project are lack of security for witnesses and judicial authorities and risks of political interference.

This will not be the last investigation related to the DRC. The Office also plans to bring a case against those who organized and financed militias active in the DRC.

For all our investigations, as I mentioned earlier, maintaining the efficiency of the ICC system of protection for witnesses and others will be the main challenge. Issues of disclosure that affected the first years of the Lubanga investigation do not arise in later investigations. In the Central African Republic case, five documents have been provided under Article 54 (3) (e) restrictions and had potentially exculpatory value. All information is now disclosed.

## **Prosecutions**

We are aiming to contribute to expeditious proceedings. In all cases, we presented focused charges, based on diverse forms of evidence and a limited number of witnesses. Only 31 witnesses will be called by the Prosecution in the Lubanga case.

As Prosecutors, we are eager to start trials and see jurisprudence develop on a number of issues. The characterisation of an armed conflict of an international character will be addressed in the Lubanga case. A new mode of liability in international justice, perpetration through the use of other persons, is discussed in the Bashir case. The war crime of attacking peacekeepers is the focus of the third Darfur case.

I believe that the crimes of enlisting and conscripting children under the age of 15, the main charges of the Lubanga case, will be recognised as one of “the most serious crimes of concern to the international community as a whole.” With children trained to kill, trained to rape, used as weapons or sexual slaves, there is no future for the affected communities and for humanity.

Sexual atrocities, the weapon of choice in most armed conflicts, will be central to the case against Germain Katanga and Mathieu Ngudjolo Chui. In the case against Jean-Pierre Bemba, for the first time, the international criminal justice system will try a case in which allegations of sexual crimes far outnumber those of killings. In Darfur, the Prosecution alleges that Mr Al Bashir is responsible for the systematic rape of women in and around the camps for displaced persons, constituting an act of genocide under Article 6(b) and (c) of the Rome Statute. Rape in Darfur is an integral part of destroying the Fur, Massalit and Zaghawa. A victim explains “They kill our males and dilute our blood with rape. [They]...want to finish us as a people, end our history.”

In order to help identify, prioritise and prosecute sexual and gender-based crimes under the Statute, my Office relies on its Gender and Children Unit, on the role of Deputy Prosecutor Bensouda as focal point for all such issues and, since this week, on the expertise of a high level consultant on gender issues reporting to the Executive Committee of the Office.

### **Cooperation for arrest**

There are 6 arrest warrants outstanding. Bosco Ntaganda is sought by the Court for crimes committed as a deputy of Mr Lubanga. Today, he is a leading member of Laurent Nkunda's CNDP in the Kivus.

Joseph Kony, Okot Odhiambo and Dominic Ongwen, senior leaders of the LRA, remain at large. Kony used the Juba peace talks to gain time and support, to rearm and attack again. Since January 2008, Joseph Kony has abducted almost 500 children in Southern Sudan, DRC and the CAR in order to expand the ranks of the LRA.

All of you can contribute to their arrest. It is time to reduce the political and financial support that indicted persons are receiving, to isolate them, to control the networks supplying them with money and weapons, and to encourage demobilisation or defections of their combatants. It is time also for the territorial states, the regional states, states with operational capabilities and relevant organisations to increase their coordination and actually plan and execute arrests.

The arrest of Mr Harun and Mr Kushayb require a different strategy. Judicial, humanitarian and political efforts in Darfur must be better integrated. For one year, the two arrest warrants were ignored by political leaders in discussions on Darfur. They ignored the Court's decision, and they ignored the facts. They ignored Harun's role in the Humanitarian Aid Commission – the main obstacle to humanitarian assistance. They ignored Harun's membership of the UNAMID oversight committee, affecting the deployment of peacekeepers. In August 2007, Harun was appointed head of a committee to investigate human rights abuses in the Sudan, thus providing certainty to other members of the Government that crimes were condoned. I believe that today, the international community has understood the need to adjust to the legal framework in order to prevent crimes. It is difficult. But it is necessary.

Let us also avoid any confusion on admissibility. There are no national proceedings in the Sudan in relation to the massive crimes investigated by the Court. The report of the Government of the Sudan circulated to the African Union and the United Nations on 17 September 2008 indicates that over the last 5 years, the Sudan has only tried and completed seven cases, in ordinary Courts, and with no connection with the campaign of crimes coordinated by Ahmed Harun, perpetrated by Ali Kushayb and others, and, as the Prosecution alleges, ordered by Mr Al Bashir. In spite of all the statements about the work of Special courts in the Sudan since 2005, nothing has been done. Denial and impunity remain.

Ladies and Gentlemen,

Arrest is the responsibility of the territorial state. In the case of Darfur, the Court is not asking for international forces to intervene. We are asking for innovative, strong and consistent political action by all to ensure Sudanese compliance with the Court's orders. Solutions that favour impunity, such as deferring decisions and granting immunities, are not an option.

The decision on the request for an arrest warrant against Mr Al Bashir is in the hands of the Judges. But be prepared: the Judges will decide on the arrest warrant sooner or later and States should adjust to this fact sooner rather than later.

### **Cooperation to establish the law**

Since the Prosecution's Application against Mr Al Bashir on 14 July 2008, there has been increased international attention to the issue of compliance with the Rome Statute. Mr Al Bashir, instead of addressing the issue judicially, uses the Sudanese state apparatus to challenge the Court's intervention through political and communication channels. It is a moment when States Parties and other stakeholders must show consistency and emphasise the importance of justice.

I would like to note in this regard the responsible reactions of most African leaders and their insistence that impunity not be condoned. Tanzanian President Kikwete, current President of the AU, insisted during his statement at the UN General Assembly that *"when we talk about deferment, we should not in any way be perceived as condoning impunity. Justice is a matter of essence"*.

I met with Abdoulaye Wade, President of the Republic of Senegal, who confirmed his support to the ICC and stated publicly that he would not make an exception in favour of Mr Al Bashir should an arrest warrant be issued. A similar position was expressed by the President of Botswana, Festus Mogae.

The establishment of the law owes a lot to such individuals. Let me also mention Bruno Stagno Ugarte, President of this Assembly. Delegates in this room know how he harmonised the work of States in New York, The Hague and capitals. His contribution to the cause of justice during the Security Council discussions on Darfur in June 2008 was even more impressive. I witnessed how, as Minister for Foreign Affairs of Costa Rica, he secured the support of States Parties' members of the Security Council and with them, drove the entire Council to adopt a Statement in support of the Court on Darfur. On 16 June 2008, Presidential Statement 21, urging the Sudan to cooperate fully with the Court, was unanimously adopted.

In this vein, I want to congratulate Ambassador Christian Wenaweser, the new President of the ASP. In the coming years, the Rome Treaty will need a President with leadership and Ambassador Wenaweser will provide it.

Before I conclude, let me recognise Philippe Kirsch, the first President of the Court. This was his last report to you. His term ends in March. Everyone knows the role Philippe Kirsch played in Rome. His talent as a diplomat enabled him to harmonise 160 delegations and achieve the Rome Treaty. He is a great Judge – you can read his decisions. He has built the organisation – managing a very complex institution. This was difficult for all of us but it has been accomplished under the leadership of Philippe Kirsch. As the President of the Court, his reputation has been an asset. His knowledge of the diplomatic world has been key to explaining judicial activities to the international community, and – in just 5 years – the position of the ICC as a new important actor in international relations.

The contribution of Philippe Kirsch will continue after the end of his tenure, he will always stand for the ideas of the Rome Treaty and the achievements of our Court. Think of Kofi Annan today. Stopping crimes in Kenya. As a citizen his authority is higher than ever, his voice louder, our respect even greater. In the same way, the best of Philippe Kirsch is yet to come.

Ladies and gentlemen,

In Rome, on 15 June 1998, Kofi Annan said: “We have before us an opportunity to take a monumental step in the name of human rights and the rule of law. We have an opportunity to create an institution that can save lives. Let us rise to the challenge. Let us give succeeding generations this gift of hope. They will not forgive us if we fail.” You did not fail in Rome.

Now we have to transform hope into reality. As the UN Secretary General, Mr Ban Ki Moon said, we have to contribute to the creation of a global community based on respect for the law.

We have to rise above to ensure that no matter how powerful they are, no one will be above the law, no one will abduct children, rape women, or commit genocide with impunity. Thank you.