



Mrs Fatou Bensouda
Deputy Prosecutor of the International Criminal Court

Overview of situations and cases before the ICC, linked with a discussion of the recent Bashir arrest warrant

Statement

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Ladies and Gentlemen,

Thank you for being here, and thank you to Judge Albert Hoffmann and to the Faculty of Law of the University of Pretoria for this kind invitation.

The International Criminal Court was created 10 years ago in Rome. It was built upon the lessons of decades when the world had failed to prevent genocides, in Europe and in Africa. It was built upon the simple recognition that all the old recipes to stop violence and conflicts – amnesties or golden exiles for dictators, sharing of power with massive criminals – just did not work.

The International Criminal Court is a new instrument of peace in a world where conflicts transcend borders. The ICC is not only about altruism, it is also about our self-interest. If States don't deal with massive crimes, there are no safe borders for the global community. A global problem needs a global solution. The ICC is more than a Court; it is a comprehensive and global criminal justice system.

In Rome in 1998, participants including civil society and countries with different legal traditions debated the creation of the Rome Statute from different perspectives, but all shared the same sense that this Conference was not just an exercise in putting ideas on paper. They knew that the new legal design would profoundly impact the way international relations are governed. Accountability and the rule of law would be the framework.

Under the Rome Statute, substantive law has been codified into one detailed text; States have reaffirmed their duty to prosecute the worst criminals; an independent, impartial and permanent International Criminal Court has been established; and authority has been vested in the Court to intervene if States fail to carry out their own responsibility to conduct genuine proceedings, while at the same time providing an incentive to States to assert their own responsibilities in the cause of international justice. The Court is complementary to national jurisdictions. But let us understand well the meaning of complementarity: if the States do not prosecute those most responsible, the ICC will do it. Impunity is not an option.

Furthermore, the drafters of the Rome Statute clearly recognized the intrinsic link between justice and peace. As stated in the Rome Statute Preamble, by putting an end to impunity for the perpetrators of the most serious crimes, the Court can and will contribute to the prevention of such crimes, thus having a deterrent effect.

As you may know, 30 African States are States Parties to the Rome Statute, which clearly demonstrates the high level of responsibility expressed by African States. In February 1999, Senegal became the first State Party to ratify the Rome Statute. Africa's commitment to the ICC, and to the cause of international justice, has never decreased.

In Rome, the South African Minister of Justice stressed this new vision of a fundamental link between justice, accountability, and international peace: *"We believe that the establishment of such a court would not only strengthen the arsenal of measures to combat gross human rights violations, but would also ultimately contribute to the attainment of international peace."*

Today, we are building a global community; new technologies and globalization have deeply contributed to this evolution. Communities and people that were isolated before are today coming together, exchanging and communicating at a tremendous speed.

This global community has also led to the consolidation of global criminality. Global crimes, that transcend borders, that affect entire regions and continents, but with no global government to fight it, and with poor institutional backing. With prevailing impunity.

The current global governance system is using old techniques against new threats. New models need to emerge.

The ICC and the Rome Statute are one of them: creating global governance without a global government but with global/international law and courts.

New challenges require new models. The Rome Statute defined three crimes that required global regulation – genocide, crimes against humanity and war crimes. It called in its Preamble for the need *"to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes"*.

There is a need for innovative, strong and consistent diplomatic and political action by all actors to ensure compliance with the Court's decision. When it comes to perpetrators of massive crimes, there should be only one answer: the full and transparent implementation of the law.

Let me update you on the situations and cases ongoing at the ICC.

The Democratic Republic of the Congo (DRC)

It has been 5 years since President Kabila referred the situation of the DRC to the International Criminal Court, and international justice has become an integral part of the efforts for peace and reconciliation in the Great Lakes region.

In **DRC 1**, *Prosecutor versus Thomas Lubanga Dyilo*, Mr. Thomas Lubanga Dyilo is being tried for the war crimes of enlisting, conscripting and using children under 15 to participate actively in hostilities, during the armed conflict in the Ituri region from 2002-2003.

This historic trial just started on 26 January. The Lubanga case, beyond the guilt or innocence of Mr Lubanga, is also a clear message to perpetrators of crimes against children such as enlisting them as soldiers, are very grave and will be prosecuted.

Since the beginning of the trial, the Trial Chamber has examined 16 Prosecution witnesses. This includes former child soldiers, political, military and other insiders, as well as experts. We have presented documentary evidence, including videos, and documents from the UPC. In the next weeks, we will hear around 20 prosecution witnesses. We expect the Prosecution case to be completed by June 2009. The Defence has announced that they will call witnesses; in principle, they will appear in September.

These 11 weeks of trial have confirmed the existence of two main challenges for the whole Court: the need to ensure the protection and the proper conditions for vulnerable witnesses coming from situation countries, where tensions still remain. These are challenges that the Court is currently addressing. It remains the highest priority of the Prosecutor to ensure the security of all witnesses called by his office.

In the **DRC 2** case, Pre-Trial Chamber I recently confirmed the charges against two militia leaders, Germain Katanga and Mathieu Ngudjolo, for war crimes and crimes against humanity while their armed groups attacked the village of Bogoro in February 2003. They are criminally responsible for the murders, cruel treatment, use of children in hostilities, sexual enslavement, and pillaging which were carried out by the allied forces under their command. Ngudjolo Chui and Katanga ordered fighters under their command, comprising hundreds of armed adults and child combatants, to “wipe out” Bogoro. Hundreds of villagers died in the attack, and the civilian population was forced to flee.

The Prosecution is ready to go to trial. It is scheduled to start on 24 September.

We are trying to present each prosecution case in less than six months. We will present about 25 witnesses in the Katanga/Ngudjolo case.

As you know, we still have one suspect at large in DRC, Bosco Ntaganda. Ntaganda was Lubanga's subordinate in the UPC, and has been active in the Kivus as Chief of staff of the CNDP. Bosco seems to have taken over the leadership of the group when Nkunda was arrested by Rwanda. We are in discussion with the DRC and all partners in the region in order to ensure that Bosco is surrendered soon.

Our third investigation in the DRC continues, with a focus on the Kivu provinces, where we have received numerous reports of crimes committed by a multiplicity of perpetrators and groups, including numerous reports on sexual crimes. In this **DRC 3** case, we are aiming at a coordinated approach whereby national judicial authorities in the region and beyond as appropriate will take over cases in order to ensure that all perpetrators are prosecuted. The possibility for us to transfer information collected in the course of our investigations will depend on the development locally of protection for witnesses and judges.

Let me turn to Northern Uganda

President Museveni referred the case to us 5 years ago. The Court has done its job, issuing arrest warrants for Joseph Kony and senior leaders of the LRA for crimes against humanity and war crimes as early as 2005. But arrests have not been prioritized by the international community. Negotiations have allowed the Lord's Resistance Army to re-build and re-arm.

Despite the drawn out peace process the LRA has refused to release the children and sexual slaves it holds despite calls by UNICEF and the UN Special Representative of the Secretary General on children in armed conflicts to release the abductees immediately.

Kony used the Juba peace talks to gain time and support, to rearm and attack again. We have collected information indicating that at the end of 2007, Joseph Kony issued orders to abduct 1,000 persons to expand the ranks of the LRA.

LRA crimes against civilians have resumed with the same cruelty and across a growing area in Northern DRC, Southern Sudan and close to CAR.

The joint operation by regional states that we witnessed is recognition of the need for action. The fact that the Governments of the region acted together, with the objective of executing a warrant, is an encouraging signal.

The capture of high level commanders, and information gathered on supply networks should help continue the work against the LRA.

Outstanding arrest warrants have to be executed.

Let me now turn to **the Central African Republic**, a situation referred to us in 2004 by President Bozize.

On 24 May 2008, Mr. Jean-Pierre Bemba, a former Senator and Vice-President in the DRC, was arrested in the suburbs of Brussels. Mr. Bemba was charged by the ICC for crimes against humanity and war crimes committed in Central African Republic. His armed militia, the MLC, pursued a plan of terrorizing and brutalizing innocent civilians, in particular during a campaign of massive rapes and looting. Mr. Bemba had already used the same tactics in the past, in CAR, in the DRC, always leaving a trail of death and destruction behind him.

The Prosecution presented the document containing the charges in the case of Mr. Jean-Pierre Bemba on 1st of October. The confirmation of charge hearing just took place from 12 to 15 January 2009.

The Prosecution has a strong case. It is the first case where the number of rapes outnumbers the killings.

On 3 March, the PTC requested the Prosecution to consider submitting an Amended Document Containing the Charges, addressing Article 28 of the Statute on command/superior responsibility. We did so on 30 March 2009. The initial mode of liability under Article 25(3)(a) for individual criminal responsibility has not been dropped. Both modes of liability are submitted as alternatives. The evidence supports both forms of liability.

In the meantime, the investigation goes on: We have performed forensic activities in Bangui (exhumation and autopsy) and are grateful for the cooperation extended by the Central African authorities and a number of partners.

Let me turn to **the situation in Darfur, the Sudan**

The Court issued in April 2007 two arrest warrants against Mr. Ahmed Harun, Minister for humanitarian affairs of the Sudan and Mr. Ali Kushayb, a

militia/janjaweed leader. The Government of the Sudan continues to refuse to cooperate with the Court and to comply with UN Security Council Resolution 1593 (2005), referring the situation in Darfur to the Prosecutor.

The OTP presented a third case in November 2008, regarding the alleged responsibility of 3 rebel commanders for crimes committed against AU peacekeepers in Haskanita on 29 September 2007. We hope to have a decision from the Judges this month. Different rebels groups publicly committed to ensure the appearance of potential suspects in Court. Should the Judges rule in favour of our request, judicial proceedings could start soon.

A month ago, the ICC decided that Omar Al-Bashir shall be arrested to stand trial for crimes of rapes, extermination and killings committed against millions of civilians in Darfur.

The evidence in this second case highlights the continuous attacks against the Fur, Masalit and Zaghawa ethnic groups. They continue to be systematically attacked, in the few remaining villages but mainly in the camps.

The camps in Darfur are a crime scene: thousands of women and young girls are being raped; 2.5 million people, a substantial part of the three groups are subjected to massive crimes.

The President of the Sudan, an increasingly prosperous country, is providing no meaningful assistance to those millions displaced and is hindering the humanitarian efforts of the international community. Women and girls are systematically raped in and around the camps. Mental health clinics, the last lifeline for traumatized women, are closed down by the authorities.

Based on the evidence, and the law, the Prosecution alleges that fear, rape and hunger are the weapons to destroy Darfur communities. One victim escaping from the attack in her house, overheard one attacker say: *“Don’t waste bullets, they’ve got nothing to eat and they will die from hunger”*.

The Prosecution alleges that Mr Al Bashir as President of the Republic of the Sudan and Commander in Chief of the Armed Forces exercises both de jure and de facto authority on the massive military operation conducted for 5 years.

He provided directions to the operations against the civilians in Darfur, he controlled the implementation of the operation, he personally recruited “Militia/Janjaweed”, he provided impunity to those who perpetrated the

crimes and he concealed the crimes, using the media and the Sudanese diplomatic machinery.

Ahmed Harun is still a critical piece in the planning and conduct of atrocities. In 2003, President Al Bashir appointed him as Minister of State for the Interior to coordinate the attacks in the villages. In 2005, as most of the Fur, Zaghawa and Masalit had fled to the camps for displaced persons, Mr Al Bashir appointed Ahmed Harun as the Minister of State for Humanitarian Affairs, to continue attacking his victims. The HAC, Humanitarian Aid Commission, within the Ministry of Humanitarian affairs, works in close association with the intelligence and security apparatus; they block the delivery of aid, expel relief staff, deny visas and travel permits to aid workers.

The Sudan is obliged under international law to execute the warrant on its territory. If it does not enforce the warrant, the United Nations Security Council, which referred the case to the ICC, will need to ensure compliance.

Today Mr Al Bashir is threatening the victims, African Union and UN personnel, as well as humanitarian workers. The Court and the States cannot be blackmailed. We need to make clear that such threats will not be rewarded with promises of impunity.

In order to prevent future crimes in Darfur, to avoid thousands of deaths next month, we must act now. After the Court's decision, Omar Al-Bashir expelled humanitarian organisations. This is not just an aggravation of the humanitarian crisis. The expulsion of aid workers is another step in the commission of the crime of extermination.

In accordance with the Rome Statute, States Parties have to guarantee lasting respect for and enforcement of international justice. States should implement a consistent diplomatic campaign to support the Court's decision and to deny Omar Al-Bashir any form of support:

Non-essential contacts with Omar Al-Bashir should be severed. When contacts are necessary, attempts should be made first to interact with non-indicted individuals; there are at this time only three persons sought by the Court: Ali Kushayb, Ahmed Harun and Omar Al-Bashir.

In bilateral and multilateral meetings, States Parties should proactively express their support to the enforcement of the Court's decision, request cooperation with the Court in accordance with Security Council resolution 1593, and demand that attacks against the displaced, including through

expelling humanitarians, cease immediately. The Office is grateful for initiatives already taken by some States in this regard.

There can be no “business as usual” attitude regarding the warrant. Strong leadership is required. The kind of leadership we have found in the Great Lakes Region. There, African heads of States have chosen the path of justice and called upon the ICC to help them. National leaders as well as regional and international organisations are working together, integrating the tracks of justice, humanitarian assistance, peace and security. There is still a long way to go. But they have said no to massive crimes. This is the way forward. And this is not happening for Darfur.

There is a need to better integrate the judicial, humanitarian and political efforts. For almost one year, the first arrest warrant, issued against Harun, was ignored by mediators and political leaders in their discussions on Darfur. They ignored the Court’s decision, and they ignored the facts. They ignored Harun’s role in the HAC - 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, thus providing certainty to the other members of the Government that crimes are condoned.

A new comprehensive strategy is needed to factor in the information contained in our Applications and the fact of the arrest warrants.

Arrest warrants have to be executed. They not only serve the interests of justice; they can help alleviate the humanitarian situation, facilitate the deployment and operation of UNAMID and reach lasting political agreements. Massive crimes are not just a moral problem; massive crimes cross borders, destabilize entire regions and affect world security

Let me now turn to **other situations**

Situations in five countries on four continents are under analysis: Colombia, Georgia, Kenya, Côte d’Ivoire, and Afghanistan.

On 30-31 March, upon the invitation of former Secretary General Kofi Annan, the Office participated in the Geneva Conference on Kenya with government representatives, as well as members of the civil society. The leadership of Kofi Annan is essential. We fully support his efforts to encourage local accountability mechanisms. We stand ready to assist Kenya.

On 22 January 2009, the Palestinian National Authority lodged a declaration accepting jurisdiction of the Court in accordance with Article 12(3). The OTP has also received 326 communications related to the situation of Israel and the Palestinian Territory. The Office will examine all issues related to its jurisdiction, including whether the declaration by the Palestinian Authority accepting the exercise of jurisdiction by the ICC meets statutory requirements, whether crimes within ICC jurisdiction have been committed and whether there are national proceedings in relation to alleged crimes.

Conclusion

The Court sets limits. Red lines. But to be efficient, we need the whole of the international community to respect and uphold those red lines. You would not keep changing the goal posts in a soccer game. Do not do it for justice. We must give certainty to the criminals and the negotiators have to respect the same limits.

We all have agreed to draw these lines; as I mentioned before, African countries were essential actors in the Rome negotiations. We have taken this step based on the failures of past models, such as amnesties and immunities. These lines will only be successful, we will only be successful if all actors abide by them. I count on your support.

Thank you