

Fostering Relations with African Prosecution Authorities

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Your Excellencies,
Ladies and Gentlemen,

Thank you for being here today. It is a great pleasure for me to address this forum of honourable prosecutor-colleagues. I thank the Africa Prosecutors Association for the very kind invitation to present some reflections on the mandate of the Prosecutor of the International Criminal Court and its relations with national prosecutorial authorities.

In our countries, the Congress, the Police, the Prosecutors and the Courts are the basic institutions to establish law and order.

As the great Greek philosopher Aristotle once said: “law is order, and good law is good order”. Good order can only be brought about by good institutions.

But what about the international context? How are we supposed to counter and prevent massive crimes of global character such as genocide, crimes against humanity and war crimes, like those that were committed in Darfur or in the Great Lakes region?

Here too we need institutions. Institutions with a global character, such as the International Criminal Court: a permanent and independent judicial institution, complementary to international jurisdiction designed to put an end to impunity for the most serious crimes of concern to the international community and thereby contribute to the prevention of such atrocities, as a new component to the world’s efforts to achieve peace and security.

The Rome Statute framework establishing the International Criminal Court has created an opportunity to realize international justice by applying one standard to all its States Parties and the people that are under its protection.

In 1998, this was just an idea on paper. In 2012, we have put it into motion, thanks largely to the African continent that has been supporting the Court from its inception and assisting the Court at each step of its development: in referring situations of massive atrocities to the Office for investigation, in cooperation with the Office and facilitating the investigations, in pursuing and arresting individuals sought by the Court, in protecting witnesses, etc. These are not just words. African States, including Non States Parties, receive more than 50 percent of the Office's requests for cooperation. Over 70 percent are met with a positive response.

This support and cooperation is critical for the successful implementation of the mandate bestowed upon the Court and its Prosecutor by the Rome Statute.

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To achieve its goal of holding accountable the perpetrators of massive crimes, the Rome Statute created an interdependent, mutually reinforcing system of justice with a Court that is complementary to national judicial systems. The Rome Statute, in its preamble, clearly recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," thereby giving States the primary responsibility for investigating and punishing atrocities. The strength of the Rome Statute system lies therefore in the possibility for

shared responsibility and complementary action between the Court and the domestic judiciary.

The Court will only start investigations and prosecutions if national systems do not carry out proceedings or when they claim to do so but in reality are unwilling or unable to carry out such proceedings genuinely. Proceedings before the ICC should remain an exception.

In all seven situations where the Office of the Prosecutor opened investigations, the independently assessed first if there were any ongoing national proceedings regarding the same individuals and the same crimes the Office was looking into. The Office has been doing so in cooperation with national with national authorities and with full respect for national judicial processes.

This assessment of the existence and genuineness of national proceeding is part of a more comprehensive process, called preliminary examination, during which the Office independently considers whether the Rome Statue criteria relating to jurisdiction, admissibility and the interest of justice are met, before deciding on the opening of an investigation.

For example, the situation in the Central African Republic, was referred to the Office by the Government on 22 December 2004. The Office's assessment whether or not to open the investigation had to be thorough and required the Office to wait and assess the pronouncement of the Cour de Cassation on crimes allegedly committed in the CAR in 2002-2003 that would potentially fall within the jurisdiction of the Court. The Cour de Cassation, the country's highest judicial body, confirmed that the national justice system was unable to carry out the complex proceedings necessary to investigate and prosecute the alleged crimes. This process

alone took two years and a half before the Office finally started investigations.

Another example regards the situation in Kenya, where the Office publicly announced it had started a preliminary examination into the post-electoral violence in February 2008. There was a lot of collaboration between the Office and the Kenyan authorities committed themselves to refer the situation to the ICC if efforts to conduct national proceedings failed. In October 2009 the Prosecutor, in this spirit of collaboration, met with the President and the Prime Minister of Kenya in Nairobi to inform them his duty was to request authorization to open an investigation. Both the President and the Prime Minister stressed the need to prevent the recurrence of violence during the next election cycle and publicly expressed their full commitment to cooperate with the Court's activities. Today, the Judges have confirmed the charges against four suspects, and their trials are set to start in April 2013. This is success for the Court and for Kenya. At the same time, challenges remain in relation to the security of witnesses in particular.

I should stress that an admissibility determination is not a judgment on a national judicial system as a whole. The Office's assessment relates to whether a State has investigated or prosecuted, or is investigating or prosecuting, in a genuine manner, cases selected or considered for selection by the Prosecution. It is an examination of relevant national proceedings in relation to the person and the conduct, which forms the subject of a case hypothesis.

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Already in 2003, the former Prosecutor noted that a major part of the prosecutorial strategy of the Office would be to encourage and assist States to carry out their primary responsibility of investigating and prosecuting crimes.

The Office has therefore adopted a positive approach to complementary, meaning that encourages genuine national proceedings where possible, through publication of periodic reports, dialogue⁴ with States and support for national proceedings.

Recent years have shown that the preliminary examination phase in particular offers an opportunity for the Office to ensure the fulfillment of the Rome Statute goals and can promote the initiation of national proceedings.

The Office makes public announcements of the beginning of a preliminary examination activity and is able to send missions and request information from national governments. This information can be factored in by all States and relevant organizations in order to promote timely accountability efforts at the national level.

The situation of Guinea is a clear example of the impact of the Office's preliminary examinations activities in triggering national proceedings in accordance with the Rome Statute. Shortly after the Office publicly informed that it was monitoring the serious allegations surrounding the events of 28 September 2009 in Conakry, Guinean Foreign Affairs Minister Alexandre Cece Loua traveled to the Court and met with me on 28 - 29 October 2009. Minister Loua described the events and set out what measures had been taken by Guinea to ensure that the crimes allegedly committed would be investigated. He stated that the national judiciary was "able and willing" to proceed. Since then, the Office has

sent various, regular missions to Guinea to enquire and confirm that a national investigation had been opened into the 28 – 29 September 2009 events, and to assess the progress. The Office has in so doing sought to encourage and cooperate with national and international efforts to conduct genuine national proceedings, thereby ensuring that justice is enforced without the need for the Office to intervene, including with a view to preventing further crimes.

Also following the eventual opening of an investigation into a situation by the Office, positive complementarity continues to inform its policy toward selection of cases. Situations under investigation by the Office will typically involve a large number of crimes committed by numerous perpetrators against scores of victims. Pursuant to its policy of focused investigations and prosecutions, the Office will investigate and prosecute only those bearing the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation.

Accordingly, the Office supports a comprehensive approach to combat impunity and the prevention of recurring violence by combining its own efforts on the most serious crimes and on those who bear the greatest responsibility, while encouraging and supporting national investigations and prosecutions of other alleged perpetrators as well as truth and reconciliation mechanisms.

It may, for example, provide national authorities with information collected by the Office that could be of assistance to their national proceedings, or share with national authorities' expertise in relation to its best practices in the conduct of investigations and prosecutions, including witness protection and evidence handling.

In Uganda for instance, in addition to the Office's investigation and prosecution of the top leaders of the Lord's Resistance Army (LRA), the Office has been providing assistance to national authorities to investigate and prosecute other individuals.

Naturally, there are limitations to what the Office of the Prosecutor can do. The Office cannot be directly involved in providing technical assistance or capacity building as it is not a development agency, and these tasks are reserved for other competent bodies, such as States, the World Bank or UNDP.

There are also statutory limits to the type of activities the Office can be involved in: it will not be directly involved in providing legal advice as such action could risk tainting further ICC admissibility proceedings, nor will it provide information without the proper security standards and national authorities' willingness to receive such information.

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Allow me to conclude.

The ICC will deal with only a few cases over the years. Its deterrent impact, or as the Secretary-General of the UN has called it, its shadow, will depend on the cooperation and the complementary action of other actors.

The true relevance of the ICC will depend on the consistent efforts of national authorities i.e your efforts as prosecutors, to genuinely investigate and prosecute massive crimes, or, in the alternative, the extent to which you support the activities of the Office. If you, as

prosecutors, genuinely investigate and prosecute these serious crimes, there will be no need for ICC intervention in Africa. The only reason the ICC is investigating in Africa is because there were not national investigations of these crimes in any of our situation countries and these countries appealed for ICC intervention.

In front of me, I see a room filled with knowledgeable, dedicated prosecutors. I started my tenure as Prosecutor only 4 months ago but I am confident that I can count on your support and assistance to end impunity for the crimes that have plagued our continent and elsewhere. Having been nominated and supported for this position by the AU, I consider myself to be a mere extension of the African fabric for ending impunity and, like you, I am guided by the law and the cardinal principles of independence, impartiality and fairness. Victims of massive crimes are crying out for our help. I stand ready to work with you in answering their call.

Thank you for your attention and I wish you fruitful deliberations for the remainder of this conference.