AMNESTY INTERNATIONAL

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THE INTERNATIONAL CRIMINAL COURT: COMING CHALLENGES, ISSUES AND CONCLUSIONS

Thank you to the organizers of this important conference.

The 10th anniversary of the ICC is an important moment for reflection on what has been achieved in the last decade. For me, I remember that when I first started working for the establishment of the ICC in September 1999 only four countries had ratified the Rome Statute. There was clearly a long way to go to reach the magic number of 60 that would bring about the establishment of the ICC. As Professor Schabas noted yesterday, no-one foresaw the extent to which governments around the world - supported by global and national civil society campaigns – would rally to the cause of ending impunity for genocide, crimes against humanity and war crimes. Yet, less than three years later – on same day - 11 April 2002 - 10 states deposited their instruments of ratification passing the target of 60.

Ten years after the ICC’s establishment on 1 July 2002, there is much to celebrate. The ICC is now a reality, but there is still a long way to go to realise its true potential in the fight against impunity. For what was created 10 years ago was much more than a Court that will prosecute a small number of cases each year. It was a system of international justice under which states must meet their obligations to investigate and prosecute the crimes. When they fail the ICC will step in. The next ten years are going to be vital in determining whether this Court will meet the expectations that captured the imagination of the world and drove its early establishment.

I am about to identify a list of serious internal and external challenges that Amnesty International considers the Court to be facing. I want to emphasise that while some the comments I will make may appear critical of the ICC, they are made with an understanding of the complex tasks that the dedicated ICC staff and officials are facing in getting this unique institution up and running. Amnesty International also acknowledges the complex political challenges that states supporting the Court face in the Assembly of States Parties and other bodies as well as the financial challenges posed by the global financial crisis. It is, however, our role – civil society’s role – to keep expectations high. To remind ICC officials and states of what is at stake and what can be achieved. What must be achieved to bring justice to the victims of these unimaginable crimes and send a strong message around the world that they can no longer be committed with impunity. To push back against the political, financial and policy compromises that so often undermine international institutions with devastating consequences for the people they were intended to assist.

Most of these challenges fall into three inter-related categories:
- Ensuring the ICC’s global reach
- building the ICC into a judicial institution of the highest calibre
- ensuring that the states parties fulfil their commitments to the ICC.

The first challenge is to ensure the ICC’s global reach

Although providing the ICC with universal jurisdiction was not included in the final, take-it-or-leave-it compromise package in Rome, the goal must be to ensure that genocide, crimes against humanity and war crimes committed anywhere in the world must not be beyond the reach of international justice.

The failure of the Security Council to refer to the ICC Prosecutor situations where impunity exists for crimes committed in the last decade, such as Gaza, Iraq, Myanmar, Nepal, Pakistan, Russia (Chechnya), Sri Lanka, Syria and Zimbabwe whose governments have not ratified the Rome Statute, is an outrage that weakens international justice.

Much more has to be done in the pursuit of universal ratification – in particular to implement the Plan of Action adopted by the Assembly of States Parties in 2005 which has become obsolete due to lack of investment. As discussed yesterday, efforts to promote more ratifications from the Asia-pacific region are particularly needed. In the meantime, until universal ratification is achieved, governments must demand referrals by the United Nations Security Council in situations where crimes are being committed outside the immediate jurisdiction of the ICC. In particular, states parties must seek to put pressure on the Security Council through their work at the UN Human Rights Council and the General Assembly - as regrettably in many of these situations these bodies are also failing the victims of crimes in these places.

The ICC also has a major role in ensuring its own global legitimacy. Much has been made recently of the Prosecutor’s decisions to only investigate and prosecute crimes on the African continent. The reality is that most of the situations now under investigation in Africa were referred either by the Security Council or by the states concerned. Thus, it is not accurate, as some critics have claimed, that the Prosecutor initiated all these investigations. However, it is proper to ask why is the ICC Prosecutor not responding to crimes committed in situations outside the region such as Afghanistan, Colombia, Georgia and Honduras, which have ratified the Rome Statute?

Well, to some degree the ICC Prosecutor has taken action in these situations. The Office of the Prosecutor has begun “preliminary examinations” into these and four other situations since 2002. The purpose of the preliminary examination is to allow the Court to evaluate situations in which crimes within its jurisdiction appear to have been committed and to determine whether an investigation is necessary, including giving the national authorities the opportunity to show that they are able and willing to investigate and prosecute the crimes. The problem is that to date the mechanism has been inconsistently implemented and little progress appears to have been made in most preliminary examinations. The ICC currently does not put any time restrictions on states to make real progress in
delivering national justice before it will step in. In most cases, no explanation for the ICC’s inaction has been given to the victims in these situations who have been waiting for years without the prospect of national justice. Even in Colombia – which is sometimes cited as a success – the impact of the ICC’s examination has been national progress on only a small number of emblematic cases while the vast majority of crimes (in particular those involving gender-based violence) are being ignored. The situation creates an enormous national impunity gap. One of the first tasks we will be urging the new Prosecutor to conduct when she takes office will be to review the preliminary examinations strategy in order to maximise its impact in all situations around the world where the ICC has jurisdiction, through demanding states to fulfil their complementarity obligations and using her hard-won *proprio motu* power to seek authorization from the Pre-Trial Chamber to open investigations when the authorities fail to fulfill their responsibilities. We also agree with Ambassador Wenawaser that more consideration needs to be given to states parties referring situations in other countries to the ICC.

**The second challenge is to build the International Criminal Court into a judicial institution of the highest calibre**

For the International Criminal Court to succeed it must meet the highest standards of international justice. Weaknesses in the ICC’s practice will be exploited by opponents seeking to discredit the Court, disappoint its supporters and affected communities and undermine its impact. This places a significant burden on the ICC at a time when implementing a whole new system for the first time – yet it is essential that it meets the challenge given that perceptions developed now, as it completes its first cases, will likely persist for many years.

The following aspects of the current prosecution strategy threaten the ICC’s credibility and need to be addressed.

- Firstly, questions about the impartiality of investigations and case selection have been raised, in particular in relation to Central African Republic, Democratic Republic of Congo and Uganda. These are situations where the governments of the countries referred the situation to the ICC and no cases have been brought against government officials or armed forces despite extensive and well-documented allegations of crimes committed by them. A different approach may be taken in relation to Cote d’Ivoire as it has been indicated that cases will deal with crimes committed by both sides, although they are being prepared sequentially.

- Secondly, although it is widely accepted that the ICC cannot prosecute all crimes in a given situation, it has been criticized for being too restrictive in its charges in some cases and situations. As the International Criminal Court is intended to act as a catalyst for national justice, it is important that the Court investigates and seeks to prosecute (where there is sufficient admissible evidence) cases and charges that are representative of overall patterns of crimes. As we have heard in other sessions, in a number of situations, the OTP has sought justice for gender-based violence, however, this is not reflected in all cases where there has
been credible evidence to suggest that such crimes were committed. This is well-documented in the 2011 Gender Report Card, of the Women's Initiatives for Gender Justice, but one example I would mention here is the failure of the Prosecutor to include certain crimes, including gender-based crimes, in his submission to open an investigation into the situation in Cote' d'Ivoire. It was the Pre-Trial Chamber that pointed out repeatedly that information provided by the Prosecutor to support his submission indicated reasonable grounds to believe that additional crimes, such as rape and other forms of torture, had also been committed but had not been specified in the submission.

- Thirdly, in Pre-Trial proceedings regarding 14 suspects so far, the Office of the Prosecutor has failed to submit sufficient evidence needed to satisfy the relatively low threshold to confirm the charges and enable prosecutions to be commenced against four persons and, as noted yesterday, many charges of gender based violence have not survived the process. The rulings themselves highlight what appears to be the approach of Office of the Prosecutor to present only the minimal amount of evidence to achieve the low threshold of establishing “substantial grounds to believe that the person committed the crime charged.” For example, in one of the Kenya cases, the Pre-Trial Chamber noted “the Prosecutor relied on one anonymous and insufficiently corroborated witness.” In the decision not to confirm charges against Calixte Mbarushimana the Chamber strongly criticized evidence submitted by the OTP which it concluded showed ICC investigators badgering and leading a witness.

- Fourthly, in November last year, following the capture of Saif al-Islam Gaddafi, the Prosecutor controversially announced in a press conference in Tripoli that he would support transferring the case to the national authorities. When questioned about the serious fair trial concerns resulting from the collapsed justice system in the country, he indicated that the ICC would only consider the genuineness of the national proceedings, not whether they met fair trial standards. This statement is contrary to Article 17 of the Rome Statute, which requires the ICC in determining unwillingness in a particular case to have “regard to the principles of due process recognized by international law”. Moreover, the idea of the ICC deferring to unfair trials especially when the accused faces the death penalty is abhorrent. We hope that the Pre-Trial Chamber, which has the final say in this issue, will make clear that the requirements of Article 17 must be met.

There is clearly a need for urgent internal review of the OTP's strategies in relation to the scope of investigations and certain practices, the approach to charges, the confirmation of charges process, and its approach in relation to requests for the ICC to defer to national proceedings. We very much welcome the important commitment by Deputy Prosecutor Bensouda that a gender policy is being developed and will be reviewed regularly. Although there are clearly advantages to government self-referrals, the OTP must also consider the implications that pursuing such referrals raise for its perceived independence and impartiality.
Concerns also arise in other areas of the ICC’s work. Despite very strong provisions in the Rome Statute on the rights of the accused and victims, in practice these rights are being increasingly eroded.

Amnesty International is particularly concerned about current proposals being considered by the Court to cut legal aid for defence and victims’ representation at the insistence of states parties who reacted negatively to increases in legal aid in the 2012 budget. These include removing the criminal investigator from the defence team and limiting victims’ representation to one team per case. I hope you will understand the vital importance of legal aid in relation to fair trials and effective victims’ participation and appreciate that the costs involved in providing high level counsel in complex criminal proceedings taking place in another country will not be cheap.

There are also other areas where the ICC is falling down in relation to its victims’ mandate. Last year, it emerged that hundred of victims were being denied their right to participate in certain proceedings because the Court was unable to process their applications in time due to a lack of resources. The Court recognized the problem in the budget document indicating that it needed 10 additional staff to resolve the issue. However, the Court then went in to only request two of the posts.

Finally, despite the fact that the Court may be about to start its first reparation process if there is a conviction in the first cases, the judges have not agreed in advance on principles on reparation required by Article 75 to guide their determination of reparation orders. As a result, the thousands of victims who have applied for reparation have no information on what they might expect from the process. This is fuelling confusion and frustration. Rather, the judges have indicated that they will develop the principles on a case by case basis. It is difficult to see how this approach can lead to decisions on reparation that are consistent, fair and incorporate a comprehensive gender focus.

A radical new approach is required to ensure that the ground breaking victims mandate set out in the Rome Statute – which sets the ICC apart from its predecessors - is fully implemented and not set aside at the expense of the people who are most affected by the crimes.

The third challenge is to ensuring that the states parties fulfil their commitments to the ICC.

Each of the 120 states that have ratified the Rome Statute has a vital role to play in ensuring the success of the Court both individually and through the Assembly of States Parties and other inter-governmental bodies.

Individually, states parties must ensure that they can meet their obligations under the Rome Statute to cooperate fully with the ICC and to ensure that they can investigate and prosecute the crimes nationally. They must review and amend or enact national legislation, ratify the Agreement on Privileges and Immunities of the ICC and should also enter into bi-lateral agreements with the ICC on enforcement of sentences in their national facilities (which must meet international standards) and provide for relocation to their countries of witnesses at serious risk. Given that many convicted persons
may be indigent, states are also encouraged make annual voluntary contributions to the Trust Fund for Victims towards fulfilling reparation orders and other projects of assistance.

Unfortunately, most states have yet to enact comprehensive legislation and much of what has been enacted contains flaws. Even the effectiveness of Australia’s legislation is called into question by its incorporation of a declaration issued upon its ratification which provides absolute discretion to the Attorney General on whether to surrender a suspect to the ICC. It is long overdue that this declaration – which amounts to a reservation prohibited by the Statute - be withdrawn and the legislation amended.

50 states parties have yet to ratify the Agreement on Privileges and Immunities. Only eight states parties have entered into enforcement of sentences agreements and it is reported that a small number of states have entered into witness relocation agreements. These gaps need to be addressed as soon as possible or the Court may quickly find itself in a cooperation crisis or overloaded with cases that the national authorities do not have the laws to prosecute effectively.

Collectively, states parties have a responsibility to support the Court in other bodies. In particular, African states parties to the Rome Statute, have a challenging task ahead of them to address the disturbing decisions by the African Union in recent years that its members should not to cooperate with the arrest and surrender of Sudanese President Omar al-Bashir to the ICC which has resulted in some African states parties ignoring their obligations under the Rome Statute by refusing to arrest him during visits to their countries.

Finally, the Assembly of States Parties needs to develop into a much more dynamic institution. Regrettably, in recent years, the Assembly’s agenda has become dominated by bitter budgetary battles and highly politicized elections that often ignore the need to elect the highest qualified candidates. As a result important issues such as universal ratification, effective implementation, cooperation and complementarity rarely make it into the agenda. This has to change and we welcome the commitment by President Intelmann to review the format of the Assembly’s sessions.

In December, the Assembly of States Parties made the latest in a series of very damaging budgetary decisions. It rejected the ICC’s request for €123 million for 2012 (a €20 million increase on 2011). The increase was requested to respond to the new situations in Cote d’Ivoire and Libya and a projected increase in judicial activities. Leading up to the session, however, the five highest paying states – France, Germany, Italy, Japan, UK - demanded “zero growth” for 2012 - €103 million. Eventually, the Assembly agreed on allocating €108.8 million to the Court for 2012. A logical outcome for the diplomats who pursue such compromises and consensus on a day to day basis. A potentially devastating outcome for the Court. Its officials have indicated the decision will undermine their work in the current situations and cases for the year ahead.

The long-term implications are also vast. Essentially, a small group of states are succeeding in turning
the ICC into a “resource driven” court not a “demand driven court.” As such, the Court will not have the resources to conduct work on its current situations effectively, areas of its work will suffer, and it will not be able to respond to the alarming rate at which these crimes continue to be committed in other situations. Unless this approach changes, the Court will become obsolete and it will be open to political interference through the budget process. To overcome this serious threat, supportive states parties like Australia must step away from the business as usual practice of seeking financial compromises at the Assembly and instead stand up and demand that the ICC be given the resources it needs. If necessary - and we do not make such calls lightly - they should push the issue to a vote if such cuts are demanded in future years. I can assure you that my organization and I am sure many others will bang on the doors of the ministers of any countries that refuse to pay their full assessment.

In conclusion – the world has created a new system of international justice that has the potential to have major positive impact in the lives of countless people. As in 1999, when there were only four ratifications, there is still a long way to go to fully realise the vision of Rome and there will be many complex challenges on the way. However, as we saw with the unprecedented collaboration between states and civil society in the drafting of the Rome Statute and bringing about the early entry into force, much can be achieved when the supporters of the ICC from all perspectives work together. This is an area we need to work on - to bring governments, NGOs, academics and - now that the ICC is established - ICC officials together to meet the many challenges that lie ahead. I can assure you of Amnesty International’s commitment and good will in this regard.

Thank you.