Transcript

Second public hearing of the Office of the Prosecutor

Interested States

The Hague, 25 September 2006

Opening Statement by the Chief Prosecutor

Your excellencies, ladies and gentlemen,

Thank you for your attendance this morning.

We are presenting to you our report on the last three years of activity of the Office of the Prosecutor and our Prosecutorial Strategy for the next three years.

This Prosecutorial Strategy is part of the strategic plan of the court.

The documents are the result of a process of discussion with all the OTP staff. The process started last January with meetings to which all members of the Office were invited. As a result, the Office reached consensus about the five strategic objectives.

In accordance with the One Court principle, and without compromising our independence, we consulted the opinion of the heads of the other organs and their senior staff. We took their comments into consideration.

We also offered to discuss the documents with the Staff Representative Body.

Today we launch a dialogue with States representatives. We propose to use the same format that we used at the first public hearing, held shortly after I took office in June 2003.

Olivia Swaak Goldman and Michel de Smedt will present a brief summary of the documents and then Ambassador Hlengiwe Buhle Mkizhe of South Africa and Edmond Wellenstein,

Director General of the ICC Task Force will comment for ten minutes on the Three Year Report, while Gareth Evans and Richard Ryan will comment on the Prosecutorial Strategy.

We also have a list of interveners who will speak for around three minutes each.

This format allows us to respect your ideas as well as the independence of the Office of the Prosecutor.

We will take notes on each observation, and at the end of the morning we will make a few comments. We will prepare a proper answer during the next 15 days.

We will have a similar meeting tomorrow with representatives of civil society.

In October we will host a comparable event in New York and we are planning a similar dialogue in Addis Ababa with the African Union at the beginning of next year.

At the end of October we will adjust our documents according to the input received. We will use them as a starting point for a review of our regulations and protocols and to establish the Standard Operating Procedures of the Office of the Prosecutor.

You will receive an amended version of the documents in order to facilitate your deliberations at the ASP.

This process is designed to align expectations without compromising the independence of the Office of the Prosecutor.

Outlining the Three-Year Report – Ms. Olivia Swaak-Goldman

Your excellencies, ladies and gentlemen, good morning. We assume that everyone has read the Three Year Report, but just in case - given that it is over 30 pages - we thought it would be useful to briefly sketch the main elements.

As mentioned, the Report details the activities performed during the Office of the Prosecutor's first three years, the challenges faced and the rationale upon which the decisions and strategies of the Office were based.

To summarize: during these three years, the Office developed its policies in a transparent manner with increasing consensus around the Rome Statute.

It began investigations in the gravest cases, dissipating fears that the Court would have no cases or that the Prosecutor would begin frivolous prosecutions.

Moreover, it did so with the agreement of the territorial States. The Prosecutor also received a referral from the Security Council regarding the Darfur situation. This is of critical importance because it shows the concurrence of the international community with the role that the Court can play and the relationship between security, peace and justice.

In conducting its investigations, the Office collected evidence in very difficult circumstances, despite ongoing conflicts and tremendous logistical challenges.

It succeeded in collecting evidence of massive crimes in a short amount of time, and getting arrest warrants issued. With regard to the Darfur situation, the Office has, at least thus far, been able to successfully investigate the crimes allegedly committed in Darfur without going to Darfur.

It was also able to cooperate successfully with other critical internal and external actors. For example, the transfer of Thomas Lubanga Dyilo to the Court involved excellent cooperation between the Pre-Trial Chamber, the Office and the Government of DRC, with the support of the Government of France and the United Nations Security Council.

The Office is now in the process of litigating numerous pre-trial issues and is ready to go to trial. As it is, the Office is ready to transition to its next phase.

The way in which these developments have occurred can best be illustrated by the description of the challenges that the Office had to address in its first three years. Not only do they contain the policies that have been developed and the principles guiding the investigation and prosecution, but also touch upon the relationship with victims and witnesses, which has had an enormous impact on various facets of the Office's work, as well as the Office's relationship with external actors. This relationship is critical for the Office and the Court as a whole, and runs the gamut from formal agreements, to cooperation with regard to arresting suspects. Finally, these challenges show the necessity of building an organization and a team that can effectively address all of these issues.

As such, I would like to **briefly** run through the three major challenges that the Office had to learn to address in its first three years.

The **first challenge** the Office faced related to how to begin its cases. This has two distinct aspects:

- first, how to **select situations** to investigate, and
- second, what method to use to **trigger** the jurisdiction of the Court.

With regard to the first issue, the **selection of situations**, once it is determined that the Court has temporal and subject-matter jurisdiction, the Office turns to the standard of **gravity**.

Although any crime falling within the jurisdiction of the Court is serious, the Rome Statute clearly requires an additional consideration of "gravity" whereby the Office must determine that a case is sufficiently grave in order to justify further action by the Court.

All three of the situations the Office is addressing – in the DRC, in Northern Uganda and in Darfur -- clearly meet the gravity standard.

With regard to the second aspect of the first challenge, namely the **method to trigger the jurisdiction** of the Court, the Prosecutor adopted the policy of inviting voluntary referrals by territorial States as a first step in triggering the jurisdiction of the Court in order to increase cooperation.

This policy resulted in a referral of situations in Northern Uganda and DRC respectively..

The **second challenge** faced by the Office it its first three years was how to conduct investigations into situations of ongoing violence.

With this in mind, the Office had to determine how to resolve numerous **logistical difficulties, f**or example, how to:

- approach possible witnesses without exposing them;
- identify safe sites for interviews; and
- secure discreet transportation for investigators and witnesses.

Additionally, the Office had to communicate effectively with witnesses in different languages, some of which have no corresponding words for the legal terminology required for the interview.

Finally, it should be mentioned that conditions on the ground for investigators are typically quite difficult.

Two **measures to meet** the challenges presented by these exceptional logistical difficulties were to **reduce the length and scope** of the investigation.

In this regard, the Office adopted a policy of focusing efforts on the **most serious crimes** and on those who bear the **greatest responsibility** for these crimes.

Determining which individuals bear the greatest responsibility for these crimes is based on the evidence that emerges in the course of an investigation. Moreover, the Office also adopted a "sequenced" approach to selection, whereby cases within the situation are selected according to their gravity.

This second challenge also requires the Office, whenever possible, to present **expeditious and focused cases while aiming to represent the entire range of criminality**. In principle, incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization. In Northern Uganda, for example, the Office selected six incidents out of hundreds that occurred and charged the five top leaders of the LRA with crimes against humanity and war crimes.

Sometimes, however, there are conflicting interests which force the Office to focus on only one part of the criminality in a particular conflict. In the situation in the DRC, for example, the

Office initially investigated a wide range of crimes allegedly committed, seeking to represent the broad range of criminality. The Office subsequently decided in its first case to focus on the crime of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.

The decision to focus on this crime was triggered by the possible imminent release of Thomas Lubanga Dyilo, who had been under arrest in the DRC for approximately one year before he was transferred to the Court. Therefore, after careful consideration of the evidence gathered, including linkage of the suspect to the alleged crime and in accordance with the requirement to prove charges beyond a reasonable doubt, the Office decided to limit the charges to those mentioned.

The approach used in the selection of incidents and charges assists the Office in reducing the number of witnesses called to testify. This is one of the measures taken to address the security challenge. Additionally the Office, together with the Victims and Witnesses Unit and the Security Section, developed plans to adequately protect witnesses and ICC Staff.

The **third challenge** faced by the entire Court is how to execute arrest warrants. This is perhaps the most critical issue of the system created by the Rome Statute. Under the Statute, it is the States Parties that bear the responsibility for arresting suspects and delivering them to the Court for prosecution.

The Court was able to effectively address this challenge in the Thomas Lubanga Dyilo case because he was already in custody, but more assistance is needed to enforce the outstanding arrest warrants. The Office anticipates that this will be a key challenge in the next phase of its operations and it is essential that States Parties work with the Office in this regard.

Finally, in closing I would like to reiterate that the Office was able to overcome these challenges, conduct investigations of massive crimes in a short period of time, and after two years receive a referral from the Security Council. This referral illustrates the support that has emerged in the international community for the role that the Court can play and the relationship between security, peace and justice.

Ambassador Hlengiwe Mkhize of South Africa

Thank you very much for that informative presentation. My comments are related to where I am located -- South Africa and Africa. In Africa, we try to work as members of the continent rather than individual countries. With regard to the relationship between the Court and Africa, I would note that the Rome Statute's entry into force on 1 July 2002 represented the culmination of strenuous international efforts to address impunity. African countries played a significant role in the negotiation of a comprehensive and robust treaty which lays the foundations for an effective international strategy for the prosecution of the most serious crimes of international concern and for the attainment of justice for the victims of these crimes.

At this point it is important to know that at that time there were already commissions in Africa to strengthen the rule of law in Africa. For example, following the Gatumba massacre in Burundi in August 2004, President Thabo Mbeki of South Africa underscored the relevance of the Court in securing justice for the victims and invited the Court to punish those responsible. There is also the example of Rwanda. The pre-existing institutions are important but certainly not adequate.

We [Africa] participated actively for the establishment of the ICC. I attended a few of the sessions initiated by Redress on issues such as reparation for victims. The support of African countries is also evident in the comments made by the AU, through the Chairperson of its Commission, Professor Alpha Oumar Konaré. Professor Konaré has consistently stated that impunity, where it exists, cannot be allowed to continue and that there is clarity within the AU on this issue.

The Court is an important institution for Africa as it is a symbol of our determination, together with other regions and individual states, to put an end to impunity in accordance with the commitment of African countries to work towards this goal. This determination is reflected, for instance, in the Constitutive Act of the AU, which provides that the organisation shall function consistently with the "condemnation and rejection of impunity", among other principles. In fact, the Constitutive Act - quite extraordinarily - also provides for the right of the AU to intervene in a Member State in the event of grave circumstances (such as war crimes, genocide and crimes against humanity). Apart from being a unique provision in the founding document of an intergovernmental organisation, this provision demonstrates an intention, at the continental level, to take violations of international human rights and humanitarian law seriously.

The African continent's early support for and faith in the Court are also evident in the current focus of the Court's investigations. As you are aware, the situations in Uganda, the DRC and Darfur are being investigated by the Court, with the situations in Uganda and the DRC having been referred to the Office of the Prosecutor by President Museveni and President Kabila, respectively. The Darfur investigation was initiated following a United Nations Security Council referral and so, rather than indicating an excessive geographical focus on Africa, these facts point to African countries' concern that serious international crimes be punished.

I have had the opportunity to consider the Three-Year Report prepared by the Office of the Prosecutor and have noted the dynamic cooperation with regional, national and local authorities in Africa. This process is important for the continent – and an educational component for a generation that has lived in continuous violence to have faith in the rule of law. In a continent that experiences abuse of power, new generations believe that this is the way it should be. The communications strategy is crucial to demonstrate that people are held accountable.

In relation to cooperation generally, I wish to stress that the full and vocal support of the international community is indispensable for the Court to function effectively. The Court does

not have an independent enforcement mechanism and so it falls to the States Parties and to other countries who share our vision to offer assistance as and when necessary. Within the continent there are talks to do everything possible to assist the Court in ensuring that justice is done.

I am also very encouraged by the consideration given to the interests of victims, as indicated, for example, by the consultations held with the local communities and with victims' groups in Uganda. Through interaction with victims, the Court positions itself so that its work and methodology remain relevant to their interests and, to the extent possible, address their legitimate concerns. This approach is unique to the Rome system and is an important acknowledgement that it is principally on behalf of the victims that the Court acts.

I wish to speak briefly about the relationship between peace and justice, a relationship with which the international community continues to grapple from time to time. The mandate of the Court is to dispense justice for the victims of crimes within its jurisdiction. As many of these crimes occur in the context of an armed conflict, it is necessary to determine the appropriate interplay between the delivery of justice (through the Court and/or through local or national initiatives) and efforts to secure peace and reconciliation.

There have been many vibrant discussions about this, regarding for example South Africa or the DRC. When talking with people in the continent, some people say reconciliation commissions are better because if not the country might be divided in opinions. South Africa held a Truth and Reconciliation Commission, but all parties had made a huge commitment over the decade to peace-building; armed forces were disarmed, and a constitution based on human rights was in place. But there is no substitute for justice.

Last week there was a conference led by judges in The Hague in which they looked at this question. People were talking about the truth commission or if support should be given to the ICC. The loudest voice was that national parties have the responsibility to build their countries but also state parties have the responsibility to strengthen international law.

The peace and justice question is on a continuum. Those responsible for mass crimes must be held accountable. Victims are entitled to have justice *and* peace. The Prosecutor must pursue justice without undermining the peace processes. Activities undertaken by the ICC can strengthen peace. International cooperation does not detract from the obligation of States to prosecute crimes. Sometimes difficulties will arise in domestic court systems, and this is when States Parties have the choice on how to deal with this.

I wish to conclude by emphasising that this public hearing provides a useful forum for us to consider the progress which the Court has achieved and to discuss the crucial issues arising from the Prosecutorial Strategy and the Three-Year Report, a few of which I have referred to briefly. I am certain that we will make the most of this opportunity.

Dr. Edmond H. Wellenstein, Director-General, Task Force ICC

The Netherlands commends the OTP for the excellent, concise and easily readable documents which it prepared for stimulating the dialogue between the ICC and the International Community. Notwithstanding the fact that the Court, and for that matter the OTP, is an independent body, that the ICC is still in a trial-and-error phase, and that the OTP strategy must develop through practice, the insights and views provided on the OTP's activities offer an excellent opportunity and instrument for the States Parties to also help the OTP steer into the future.

The mere existence of the ICC, since July 2002, has resulted in the fact that (fighting) impunity is on every (inter)national agenda.

The documents of the OTP show that it has been very active and creative in its mission over the past three years. But even in situations where States cannot take action against impunity, and the Court must intervene, the most important responsibility (still) rests with the States: they must provide the Court with assistance, including logistical support, and ultimately with the arrest and surrender of suspects. If States do not act, the Court cannot act either. The States Parties, in this phase of the Court's existence, i.e. still a trial and error phase, seem to be looking for the right "format" to substantiate their role as a police force and as an arrest team. Maybe there is no one format, and a case by case, i.e. tailor made approach, is more appropriate.

One may wonder, though, whether today's reality is not more complicated than what is reflected in the ICC Statute, and if so, what needs to be changed, and how.

The challenges and difficulties in OTP's day-to-day life, as reflected in the OTP's documents, mirror those encountered by Dutch public prosecutors who deal with the Statute's crimes: very complex; time consuming; difficulties *in situ*; difficulties in obtaining evidence; difficulty in obtaining mutual legal assistance agreements. Hence, the importance of a tailor-made approach, and the need for adequate means. Implementing the Rome Statute into national legislation is not in itself a guarantee for success. One needs ample resources, expertise, determination, co-operation between States, and co-operation of States with the OTP. Hence, a growing need to exchange views and experience among national and international prosecutors dealing with these complex cases. My proposal is to create an ICC network of contact points. Hence the need to exchange up-to-date knowledge about the situation in the countries / regions concerned between the OTP and individual States Parties. The MFA in The Netherlands has created an informal dialogue mechanism with the OTP. Country desk experts and embassies abroad are involved. The Dutch Government's donor policy is calibrated with the activities in the field of the OTP e.g. strengthening national capacities. My appeal to States Parties is to also engage in such an informal bilateral dialogue with the OTP, based on mutual confidence, anonymity of resources, and confidentiality.

The Investigation Strategy of the OTP is by definition its prerogative. Criteria like "gravity of crimes" and "those most responsible" seem convincing in terms of focus. One may wonder, however, whether the practical consequences of applying these criteria are not creating conflicts *in situ*, i.e. leading to increased political tensions, and a *de facto* impossibility for States Parties to

arrest and surrender the suspects to the Court. The DRC investigation is among the gravest of admissible situations, however the only person detained so far from that situation is accused of relatively "limited" crimes compared to other crimes committed. Here, management of expectations and outreach in the field are crucial factors to successfully convince the local and the international community of OTP's strategy.

The Secretary-General of the United Nations, in his recent report on UN activities, states "…Justice in conflict and post-conflict societies is a fundamental building block of peace…The international community should ensure that justice and peace are considered to be complementary requirements…" A more than theoretical question is how the ICC and the international community can put this into practice given the notions of "in the interest of the victims" and "in the interest of Justice", which are deeply enshrined in the Rome Statute. The OTP, in its document, rightly states that the fight against impunity and the prevention of future crimes are the driving forces of the Court.

Justice needs to be seen: there is an increasing demand (e.g. in African States) for trials *in situ*, whereas there are still very often insufficient means to do so. In the absence of local trials, outreach in the field, a high public profile and a sophisticated communication strategy are of crucial importance in order to bridge the gap between what is ideal and what is realistically feasible.

Human resources. The OTP may be seen as the engine of the Court; OTP staff as the fuel. The 22% staff turnover within the OTP, the 90% of the Office's investigators returning with illnesses from their missions, not to mention mental stress the investigators are confronted with, and the long lead time (combined with relatively low results) of the recruitment of personnel for full time positions are facts to be taken seriously: quick action, and measures of a structural nature to redress these worrying matters, are required. It is my conviction that the OTP investigation capacity as from 2007 should be increased to address these problems.

Ambassador Alfonso Maria Dastis Quecedo of Spain

First of all I would like to echo the comments of previous speakers by thanking the Prosecutor for having this meeting and for the transparency and quality of the documents.

I would like to make four comments:

1) In terms of the standards applied by the OTP – the standard of gravity and focused investigations – we entirely agree with them in principle but note that they entail some risks which have to be addressed. The risk is that it appears to people outside the Court as if you are not fighting impunity enough. There are some points in the document, for example when you discuss interviewing as few witnesses as possible or addressing as few crimes as possible, that may give this impression. The task of explaining this standard is important.

There is also the risk of appearing geographically limited. The three cases chosen so far make that impression. The future situations mentioned also happen to be on the same continent.

One of the solutions treated in the document is complementarity. I cannot stress enough the importance of complementarity. It is a mechanism that may not lead the Court to cases but it links the Court with the national judicial bodies concerned to make sure they act, thereby fighting impunity and achieving international criminal justice at the same time.

2) With respect to the interplay between the ICC investigations and conflict resolution initiatives, the role of the Court is to render justice. The Court should fight the tendency to subordinate its activities to conflict resolution mechanisms. The best way the Court can maximize its impact or encourage parties to the conflict to solve that conflict is by imparting justice.

3) In terms of the role of external communications of the Court, the documents say that you have two challenges to address, namely: 1) to be open and transparent in explaining the role of the Court and 2) protecting the confidentiality of witnesses. In case of conflict between them, it is important that the second challenge prevail.

4) Regarding the role of States, we admit that we have a big role to play and sometimes we may appear not to be giving the Court what it deserves and requires. I encourage the Court to complete detailed, extensive and concrete requests for support as general requests are more difficult to substantiate.

Finally, I would like to reassure the economists in the room that lawyers also think of economic considerations, so I would like to ask the Prosecutor if there are any mechanisms to align the level of recruitments to that of investigations, which by their very nature are temporary and whose number may vary greatly over time.

Thank you.

Ambassador Mirjam Blaak of Uganda

I would like thank the Prosecutor for outlining the accomplishments achieved by the ICC in the past three years and I would like to recognize the many challenges that his Office faces in pursuing its mandate. I would like to comment on what the Prosecutor has stated in his report and emphasize the need for a closer, more intensified state cooperation. As you may have read in the media and the press, Uganda and the organization called the LRA, against whose five leaders the ICC issued warrants of arrest, have been the focus of attention. The LRA has terrorized the people of Northern Uganda and Southern Sudan for twenty years. The protracted nature of this campaign of violence is due to the lack of reliable support from regional and international partners.

In December 2003 the Government of Uganda (GoU) decided to refer the case to the ICC, not because the Government was unable or unwilling to try the LRA itself, but because the ICC was established specifically to deal with crimes of this magnitude and the GoU was unable to access the LRA who were operating outside its territory. We thought that the ICC would galvanize international cooperation and compel those countries harbouring the LRA to act appropriately. In September 2005, when the warrants of arrest were served, the GoU expected the UN and the States Parties to honour their international obligations to assist in giving effect to the arrest warrants.

However, even though the general whereabouts of the LRA commanders are known, their apprehension and the safe release of those women and children abducted by them, remain a significant challenge to the international community. This inability to arrest factored into the decision of the Government of Uganda to enter into a process to negotiate peace.

I would like to give you some background information to explain why the GoU has agreed to negotiate peace.

1. The Warrants of Arrest were served on Uganda nearly one year ago. However, in spite of significant efforts made by the GoU, the international community has not been able to give effect to those warrants.
2. In September 2005, the LRA began to relocate to Garamba National Park in the DRC. This relocation of the LRA was due to the military pressure of the UPDF and SPLA, as well as the pressure of the ICC who has contributed to isolating the LRA.
3. The LRA, including the five named in the ICC arrest warrants, are located in three countries, two of which are members of the ICC and one of which signed an agreement with the OTP to arrest. Within these three countries, there are five military forces that may be able to assist in arrest. These include the national armies of Uganda, the DRC, and Sudan, as well as the UN peacekeeping forces of MONUC and UNMIS. Despite the tragic confrontation of the Guatemalan peacekeepers, eight of whom lost their lives confronting the LRA, none of these forces was able to arrest the five.
4. Giving effect to the warrants of arrest is the responsibility of the States Parties to the ICC. The Government of Uganda has done what it can to fulfil its obligations. However, the GoU would like to stress that successful execution of the arrest warrants requires concerted international and regional cooperation.

Earlier this year, the President of Southern Sudan, Salva Kiir, invited President Museveni to use his good offices to assist in mediating a peaceful solution with the LRA. The LRA had become a regional security threat, which was also threatening the implementation of the CPA between the Government of Sudan and the Government of Southern Sudan. Therefore, President Museveni offered the LRA a "soft landing" by seeking a peaceful solution to end this longstanding conflict, once and for all. Peace talks mediated by Vice-President Riak Machar started in July this year and, as you are aware, resulted in the signing of a Cessation of Hostilities Agreement in August.

The people of Northern Uganda, including the victims of these crimes, want an end to the war and want to return home. They also want those who have been abducted by the LRA and forced to fight, to come home. Due to the current peace efforts, security has begun to return to

Northern Uganda and thousands of people have started resettling into their former homes with the assistance of the GoU and development partners.
Uganda is continuously in touch with the OTP to keep the Office abreast of developments in the peace process. I would like to emphasize that if it were not for the warrants of arrest hanging over the heads of the indictees, the LRA may not have agreed to the peace process. The ICC is playing a very significant role and the arrest warrants remain a constant pressure on the LRA leaders to stay committed to the negotiating process. The GoU has shown its commitment to execute the warrants of arrest: as recently as 12 August the UPDF engaged an LRA unit in Northern Uganda believed to be under the command of Raska Lukwiya. We think that Lukwiya was killed in the ensuing clash and we are currently working, with the support of the OTP, to identify the body by means of DNA testing.

As you may have been informed, there are several hundreds of combatants and non-combatants who are in or near the two assembly points in Southern Sudan where they are waiting for a process of demobilization, the terms of which are still subject to negotiation. A signed comprehensive peace agreement would enable them to return to Uganda.

In the interest of peace and security for the victims of crimes committed by the LRA, the Government of Uganda is committed to conclude the peace talks successfully. The talks require the parties and the facilitators, including the GoU, to have contact with senior LRA commanders, including Joseph Kony and Vincent Otti, who can facilitate humanitarian access and the process of demobilization. Despite this, the GoU assures the ICC that we are seeking a permanent solution to the violence that serves the need for peace and justice, compatible with our obligations under the Rome Statute. The talks remain at an early stage and it is speculative to determine the outcome at this moment.

What Uganda has experienced serves as an example of the acute need for international cooperation to give effect to ICC arrest warrants and makes us realise even more the need for all States Parties to cooperate with the ICC in fulfilling their obligations. In addition to the ICC arrest warrants, the UN Security Council has recognized the LRA as a regional threat that cannot be resolved without the cooperation of States. I would like to call on all States Parties to recognize that executing the ICC arrest warrants is a collective responsibility requiring intensified international cooperation.
Thank you.

Ambassador Guillermo Fernández de Soto of Colombia

During the last three years of work, the International Criminal Court has made significant progress, as is well illustrated in the summary report presented to us today.

All this work has strengthened the support of States Parties to the Court. This is crucial because, as you have rightly insisted on several occasions, to be successful, the Court cannot rely only

upon its organs, but also relies on the cooperation of States, both in judicial and non judicial matters. On the other hand, it has allowed States to have a better understanding of the Court´s work.

I welcome this new opportunity to hear from you about the plans and policies of your Office and to exchange points of view with States, and would also like to briefly comment on some matters which I consider could be useful for our discussions here today.

In the first place, I would like to point out the importance of having a well established level of engagement by States in issues that are in principle of exclusive competence of the Court or are attributed to other organs such as the Committee on Budget and Finance. This will allow States to have clear expectations about their contribution to the work of the Court. In some issues the involvement might be at the level of recommendations (for example with regard to Strategic Planning), in others it might be at the level of decision making (for example in matters related to budget). This certainty about the expected contribution of States will allow them to have clarity about the nature of their work.

A second aspect is related to the emphasis that I believe should be made on substantive matters as opposed to administrative and organizational issues. These include issues related to policy documents and protocols, but should not include detailed analyses of issues like human resources or organization of work. In this respect I would like to draw attention to the large number of organizational and administrative objectives (15) in the strategic planning document, as opposed to judicial objectives (7 and 8). The involvement of States in conversations with the Court should focus more on substantive matters with, of course, due respect for its independence.

In the third place, I would like to refer to the so-called issue of positive complementarity. Your Office has made an important point when indicating that the effectiveness of the Court cannot be measured exclusively by the number of investigations underway, as States remain principally responsible for investigating and prosecuting crimes. The positive approach to complementarity means that there should be some degree of cooperation between the Court and States with the goal of enhancing the capacity of national judicial systems. This requires analyzing the extent to which the Court may be involved with national systems in order not to hinder its independence. The budgetary implications should also be taken into account, as well as the risk of duplicating efforts already made by other institutions, but nevertheless this is an issue that deserves very close analysis. It is my understanding that your Office is preparing a policy paper on this matter for the States' comments.

As you well know, States have also been very involved in discussions about the location for the permanent premises of the Court. This issue will have important budgetary implications and therefore it is in the States' interest to take a very well informed decision. In order to achieve this we need to look not only at financial and location options, but also at other matters such as what we have called decentralization of the works of the Court, that is if the Court will be conducting trials in places closer to the communities directly affected by the crimes under investigation. The estimated number of simultaneous investigations as well as the staffing levels will also have an impact on the decision on the permanent premises. Several documents have

already been elaborated by the Court on some of these matters, but some further information will still be necessary.

It is no secret that States attach great importance to the budgetary implications of the work of the Court. Although it is understandable that as a recently created institution the Court needs to increase its budget significantly, it would be useful to know when it considers that the budget will tend to stabilize. Sending a message about this will allow States to have more certainty about their future contributions to the Court and therefore make it easier to obtain the necessary funds.

I want to thank you, Mr. Prosecutor, for having taken the initiative to organize this public hearing in which States have the opportunity to learn about the work of your Office and express in a frank and constructive manner their concerns and points of view. As always, Colombia remains a strong and active supporter of your work and that of the Court as a whole. We look forward to continuing this dialogue in the future. Thank you.

Comment by the Chief Prosecutor

Thank you. This is so interesting for us. If someone else would like to make a remark please do so. Just raise your hand. There are some interesting issues on the table and we are glad to have this dialogue.

I think that I have to be conservative. The only remark I'd like to comment on now is something that the Colombian Ambassador mentioned about learning how to facilitate interaction. Ambassadors in The Hague are saying: you are a new institution; we have to cooperate with you but respect your independence.

I believe the Court can help end impunity and start peace. The only way we can do this is by remaining independent. If the Court is in the hands of some States, it has no meaning for you. We have to find the right balance, and today is a good example of how to do that. This is what we need and what we are trying to do - taking your comments into consideration and giving an answer.

It is important for me to hear your concerns and also to receive your comments on how you see this. We have noted all your comments and will give you transparent answers.

You have decision making authority in budget issues. There are some conflicting views about whether having only one prisoner to date is an issue. Fatou will talk about Thomas Lubanga. This is an important case, with three dimensions: 1) determining guilt or innocence 2) sending the message to end the impunity in the Democratic Republic of the Congo, 3) the problem of child soldiers around the world. The Court is saying that this is a serious war crime and should be stopped. For me one case is perfect. Ideally we will be a Court with only a few cases because the aim of the Court is that States do their job of investing and prosecuting. To control spending

we need few cases. Two persons worked on the surrender of Thomas Lubanga, but only after we sent 70 missions to the field. The Court is based on the principle of complementarity.

In terms of process, we encourage you to send comments on how to enhance this process of engagement and will include this dialogue with the ASP.

Brief Intervention by the Deputy Prosecutor Fatou Bensouda

I would like to comment on what the Prosecutor said about the duty of confidentiality and on being transparent and to explain to our partners and ASP what the Court is doing. I like the comment of HE Ambassador of Spain about striking the balance on keeping confidentiality and transparency. Confidentiality will have to take precedence to protect witnesses and victims. It is a constant balancing act that we have to do. We appreciate the feedback that we have received from you. The Three-Year Report is just the beginning to follow up. But we also need your feedback from time to time.

Remarks by the Chief Prosecutor (continued)

We are finding a good process for holding discussions. We will prepare a report answering your questions in 15 days. In similar meetings we will follow up on this public hearing. We would be delighted to review your suggestions.

On how to find the balance with your engagement on respecting independence: in your areas we respect your independence. The budget is in your area. From my side, I would like to see what you expect in the upcoming years. This is a mutual dialogue to respect each other. We need to understand and respect each other's positions. It is easier for you to establish your own plans for cooperation on arrest. The LRA case is one in which the States can help. These are the areas in which we need to receive your plans.

I invite you for coffee and we will be back in 20 minutes.

Remarks by the Deputy Prosecutor Fatou Bensouda

Our Operational Head of Investigation Division, Michel de Smedt will be presenting to you the Prosecutorial Strategy of the Office of the Prosecutor. Before giving the floor to Michel, let me take the opportunity to update you on the Thomas Lubanga proceedings before the PTC, especially regarding the confirmation hearing which was due to be held on 28 September 2006 but which by a decision of the PTC on 20 September 2006, has now been postponed. According to the decision postponing the hearing, no new date has yet been fixed, but the PTC has

convened a status conference scheduled to take place today. We hope that amongst other issues to be discussed presently before the PTC, a new date will be fixed for the confirmation proceedings to take place.

You will recall that the original date of the confirmation hearing of 24 May as scheduled during the initial appearance of Thomas Lubanga Dyilo was **postponed** to 28 September by the Pre-Trial Chamber in response to the time needed to implement measures for the **protection of victims and witnesses** in the Democratic Republic of the Congo.

The notification dated 20 September **is therefore the second postponement of the confirmation hearing.**
This is necessitated by the obligation to **safeguard the rights of the accused**, especially to ensure that all the Prosecution's evidence and material listed in the *List of Evidence* filed together with the *Document containing the charges* on 28 August 2006 is available to the Defence in time for them to prepare for the Hearing.

Let me just mention here that since the transfer and initial appearance of Mr. Thomas Lubanga Dyilo in March of this year, there has been **substantial pre-trial activity, with multiple filings from the parties and related decisions from the Pre-Trial Chamber**.

The Pre-Trial Chamber and the Single Judge (in particular the Single Judge assigned to the disclosure of evidence issue), the Defence Counsel and the Office have had multiple exchanges and discussions that have led to the **disclosure and inspection of almost 400 documents and more than 5,000 pages of information**, including incriminatory and potentially exculpatory evidence and other material such as videos for instance.

The consequences of the disclosure for the protection of victims and witnesses had to be dealt with as well and very **time and resource-extensive redactions had to be undertaken by the Office's Joint Team**, with input received from the Victims and Witnesses Unit, under the guidance and direction of the Single Judge.

Victims' participation requests were also the object of litigation. As this right recognised to victims is a new feature before international criminal tribunals, the procedural challenges it raises have to be faced for the first time ever.
Finally, the **Defence's applications for release** entailed further judicial activity involving the Defence Counsel, the Office, the Representatives of the victims and the relevant authorities in the DRC, consulted on the matter.

As I mentioned before, as we speak a status conference is underway to determine, we hope, a new date for the confirmation hearing. This new date shall be communicated to you all in due course.

Let me now hand over the floor to Michel De Smedt to present to you the Prosecutorial Strategy of the Office of the Prosecutor.

Thank you.

Outlining the Prosecutorial Strategy - Mr. Michel De Smedt

Your excellencies, ladies and gentlemen,
In presenting the Prosecutorial Strategy, I will focus on three aspects: the objectives for the coming years, the organization required to achieve them, and finally the way to evaluate the performance of the Office of the Prosecutor. The three guiding principles for the strategy, *positive complementarity, focused investigations and prosecutions, and maximizing impact,* have already been addressed by previous speakers and will not be developed further here.

The Prosecutorial Strategy is embedded in the broader ICC strategic plan because it highlights those objectives that are specific to the mandate of the Prosecutor while at the same time integrating them into the overarching ICC goals of quality of Justice and a well-recognised & adequately supported institution.

In his strategy for the coming 3 years, the Prosecutor has identified five key areas in which further tangible progress is an aim: prosecutions, investigations, cooperation, victims and impact. Please allow me to touch upon each of these key aspects in greater detail.

In the field of prosecutions, the aim is two-fold: to further improve their quality and to complete two trials.

By reviewing the results achieved through our filings and prosecutions, the Office will be in a position to assess the effectiveness of its argumentation and style. This is our first focus on improving the quality of our ligitation.

Another aspect of the quality of the prosecutions will be its impact on the length of trials. The Office aims at contributing to an expeditious trial through the limited quantity and the high quality of the evidence it will present, while recognizing that the judges are of course in charge of the proceedings and other factors like the defence's strategy, victims participation or witness security considerations will impact on its duration.

A figure of at least two trials is being presented, based on assumptions about the duration of the proceedings. Keeping in mind their novel character, these assumptions of 15 to 18 months for a trial and nine months for an appeal should be seen as provisional. Whether the Court will conduct more than two trials in the coming three years, will depend heavily on factors outside its control and more within the remit of the State Parties, namely the number of people arrested and the timing of their arrest. Looking at Uganda for instance, whether the four remaining LRA commanders mentioned in the arrest warrants are arrested all at the same time, at different moments, or not at all, will strongly impact on the number of future trials, as will of course the ongoing investigations.

The Office of the Prosecutor aims to conduct four to six investigations between June 2006 and the end of 2009. This number is based on an assessment of different factors: (1) the information collected concerning alleged crimes falling under the jurisdiction of the Court, (2) the gravity threshold for starting an investigation, and (3) the duration of the investigations.

As we can already see with the past and present investigations, the level of cooperation and the conditions under which the Office needs to operate impact heavily on the duration of the investigation. It took the Office ten months, for instance, to file a broader but still focused arrest warrant in the Uganda situation against five LRA-commanders, while 18 months were needed for the more narrow arrest warrant in the Lubanga case in the DRC.

Increasing the size of the teams will not really impact on the speed of the investigations given their focused nature and given the fact that the key aspect of proving criminal responsibility is not achieved by having many investigators but by having access to the limited number of carefully selected elements of proof. The difference in speed and results between the Uganda and the DRC case where there is a small Uganda team and a bigger DRC team proves that team size is not the determining factor.

At this stage, the Office is therefore confident that it can perform four to six investigations from June 2006 with three teams of the present size. If, based on new information or referrals in relation to alleged crimes, the Office needed to go beyond six investigations, then it will resort to the contingency fund or as a next step ask the Assembly of State Parties if it is willing to provide additional funds.

The Office will also pay specific attention to the investigative strategies and methods used in relation to the specific group of child, sexual or gender-related victims.

Cooperation is a key element if the Court wants to operate effectively, as was illustrated by the previous examples of the duration of the investigation and the impact of the arrests on the number of trials.

If there is no general support to the Court, or if there is no assistance in gathering information and evidence or for the logistical and security questions that arise when operating in areas of ongoing conflict, then the Office will hardly be in a position to investigate. If no arrests are performed by the international community, then there will be no trials that bring justice or that have a deterrent impact.

Therefore the Office will further expand its network within the international community, while at the same time consolidating and expanding its relationship with the United Nations and focusing on strengthening its relationship with regional organizations, in particular with the African Union and the European Union.

Given the importance of cooperation, the Office will be grateful to hear from States Parties and other partners their own plans on how to further expand the cooperation with us.

The Office has the obligation to assess the interests of the victims as part of its determination of the interests of Justice under article 53 and rule 48 of the Rome Statute. The Statute also provides for the participation of the victims in the proceedings so that their views are taken into account.

For these reasons and in light of our past experience, the Office will develop clear protocols and provide mechanisms (1) to ensure that the views of the victims and the local communities are systematically sought and (2) to allow for adequate outreach to enhance the understanding of the role and impact of the Office, without however (3) exposing victims and local communities to uncontrollable security risks due to a higher communication profile.

The Preamble of the Rome Statute as well as the strategic goals defined by the three organs of the Court all emphasize the importance of the ending of impunity and the prevention of the most serious crimes of concern to the international community.

Next to its primary contribution of investigating and prosecution, the Office will support, within the limits of its mandate, national and international efforts to move forward these goals. Concrete examples of such cooperation can already be mentioned like the logistical support given to SCSL for the Charles Taylor trial, like the sending of Deputy Prosecutor Serge Brammertz to lead the Hariri inquiry in Lebanon or like the active contribution to the Interpol-led project on arms dealing in the great lakes region in Africa.

Further efforts will be made to align to the extent possible the strategies of the Office with broader efforts aimed at stabilizing situations of violence and crime.

To implement the strategy, we need not only good cooperation but also a streamlined organization.

The Office will continue to participate in coordination with the other organs to implement the third organizational goal of the ICC strategic plan, while specifically emphasizing the development of and care for its staff.

In the interaction with the other organs a better division of tasks has been achieved in the last three years. Now the specific aim is to develop service level agreements with the Registry so that coordination and cooperation can be further enhanced.

On the OTP side, time has now come after the first three years of building experience and achieving the first results to enter into a second phase where we further stabilize the structure and functioning of the Office with clear regulations, protocols and SOP's.

Finally, the Office feels that the discussion could be started on what would be the best way to evaluate the added value it brings. Measuring its performance in helping to end the culture of impunity and the prevention of crimes under the Court's jurisdiction is a complex task that requires a clear evaluation of the whole Rome system. The Office indeed depends on other elements of the Rome system to perform its tasks and furthermore, those elements have their own role to play.

Under the system of complementarity, much of the work done towards achieving the goals of the Rome Statute, may take place in the national systems around the world. Changes in legislation, increases in national proceedings, inclusion of legal advisors in the preparation of military operations, are all effects that could be measured in order to assess the full scale impact of the Rome system.

The number of cases that reach the Court or its judicial proceedings should therefore not be the sole or even a decisive measure of it effectiveness. And even in evaluating these judicial activities, one should be very careful: what to say when a perfect investigation has been done but no arrest could be performed by the international community; or how to evaluate the situation in which no arrest is performed but where due to the existence of the arrest warrants the crimes and violence are put to an end.

It is clear that it will be a crucial yet complex discussion on how to conduct such an evaluation in order to objectively assess the performance of the Rome system and of the Office of the Prosecutor therein.

Thank you for your attention

Ambassador Richard Ryan of Ireland

The American writer and educational philanthropist, Agnes E Meyer, observed that tension is a prerequisite for creative action. Today's public hearing is, I think, a creative exercise – an attempt to help to confront unprecedented challenges, and to help formulate policy for a still young, permanent Court. Fortunately, then, our exercise is not lacking a fair degree of tension.

The very helpful Report of the Office of the Prosecutor on the Activities Performed During the First Three Years illustrates the considerable progress that has been made to date: from the first

investigations, self-referral, referral from the UN Security Council and arrest, to the crucial agreements concluded with the UN and the EU, the detailed policy papers prepared by the OTP and the over 130 draft policies, guidelines and standard operating procedures adopted, relating to specific aspects of the Office's work.

In addition, however, the Report also highlights a number of significant challenges that have arisen due to competing influences and interests. It is frequently the tension between these competing claims that demands, and, hopefully, can inspire creative solutions.

I would like to comment briefly on the past three years' activity by the OTP by discussing issues of possible tension in five areas: (i) selection criteria; (ii) the interests of justice; (iii) management and organisation of the Office; (iv) communications or outreach and (v) the role of other agencies and organisations. Finally, I want to touch on one area in which there is not tension, but rather the need for a stronger embrace: that is, the important role of state support.

(i) Selection Criteria

Regarding selection criteria, perhaps the most obvious and crucial tension experienced by the OTP is that between what is desirable and what is feasible; between idealism and reality.

In 2002, the international community overwhelmingly acclaimed the establishment of the ICC in General Assembly Resolution 57/23. Expectations as to what this momentous development in international criminal law would mean in practice were, perhaps understandably, extremely high. Since then, however, we have developed recognition of the need to guard against impatience and to temper our expectations with more cautious optimism, optimism rooted in realism.

In the ICC context, the clichés of unchartered territories, and steps into the unknown, have been employed often, perhaps, for the simple reason that, in this case, they are entirely true. As the Report notes, "the tension between the Office's need to consistently meet the highest levels of judicial standards and the need to create standards and policies that are tailor-made to meet the Court's *unprecedented* mandate has led the Office to pursue institution-building and policy protocol development with the same rigour that it has pursued its investigative and prosecutorial activities". In response to this tension, states the Report, the OTP spent very much of its first three years developing its policies and regulations. It is surely very important that we, the States Parties, need to understand fully and to respect this important balance.

Those who have long advocated the creation of an international criminal court may be forgiven for being somewhat taken aback upon finding an objective such as the completion of "expeditious" trials in the Report on the Prosecutor's First Three Years. Yet, in establishing criteria for the selection of incidents, cases and charges, the OTP, guided by the terms of the Rome Statute, must endeavour to bridge the gap between what ideal justice demands and what resources and practicability dictate. Further, the procedural manner adopted must be one that inflicts the least possible violence on the central concept of impunity. Perhaps at this point in the developing life of the Court we, the States Parties *as a whole* may benefit from a sharper recognition of this fact; and thereby better help the Court's prosecutorial work.

The OTP is to be commended on the extensive and thoughtful work it has conducted on these difficult questions, and for the quality of the policy documents it has produced. By way of one observation, I wonder whether, within the selection criteria outlined in the Report, there may be a further internal tension between prosecuting the *most serious* crimes, and simultaneously attempting to represent the "*entire range* of criminality"? The two are not mutually exclusive, of course, and it would seem to me that, with due consideration, the criteria applied can accommodate the most serious criminal acts which are also representative of other serious acts across the full range of alleged crimes in the cases concerned.

The competing influences which give rise to tension in the area of selection criteria can also be irreconcilable. No matter how it may wish it otherwise, the OTP must work within the resources available to it, and must contend with external obstacles and impediments as it attempts to fulfil its mandate in given situations. Yet, unlike the external challenges posed by, for example, state co-operation or the execution of arrest warrants, *internal* challenges such has how to apply optimal selection criteria to help the Court to maximise its impact in difficult logistical and evidentiary situations, should be solvable by the Court within the parameters of the Rome Statute. This nonetheless remains a significant challenge for the Court and it is surely of very great importance, not only that all interested parties assist the Office in its immensely difficult task, but also that the OTP robustly articulates and engages in open dialogue on its chosen criteria. Today's public hearing is a useful practical example of such a dialogue.

A further tension that some may detect is between practical respect for the principle of complementarity and wanting the Court to be seen to be effective – "to get results". Yes, the ICC will one day be truly successful when its court rooms stand empty and its prison cells unlocked, and the price of impunity has been seen everywhere to be too high a risk to take. But, during the current and ongoing early phase, we must expect, and require, the Court and the OTP to pursue its mandate with full vigour and tenacity, and great circumspection regarding evidentiary and other standards; the limited targets for the prosecutorial strategy over the next three years are, I believe, realistically informed by these characteristics and standards. The OTP's stated policy of a *positive approach* to complementarity should largely assuage fears of tension and difficulties. For example, the technical assistance and other cooperation strategies being developed with the judicial authorities of the DRC are a case in point. By giving the national authorities of the DRC the means by which they can take on some of the prosecutorial workload, the ICC will further bridge the gap between justice – what *should* be done – and practicability – what *can* be done.

(ii) Interests of Justice

My second point relates to the interests of justice. Related to the issue of selection criteria is what the Report, interestingly, refers to as the "interplay" between OTP investigations and separate conflict resolution initiatives.

That tension may arise between the demands of justice and the pursuit of peace is evident from recent cases in point. As the Report notes, efforts to create enduring stability require a *harmonisation* of the OTP's activities and other national, international and community initiatives.

Nevertheless, the Report goes on to state that the policy of the OTP must be to maintain its own *independence* and to pursue its mandate to investigate and prosecute. This concern regarding tension between harmonising efforts with other parties, while simultaneously maintaining an independent course, is one that frequently appears in the Prosecutor's Report. It is an important and delicate concern.

The promotion of dialogue, aimed at developing understanding, is of crucial importance to any attempt at harmonising parallel initiatives or, at the very least, at minimising the risk of friction between them. This dialogue should be nourished from the earliest possible stage of a process, and be sustained throughout. The OTP's efforts to promote dialogue on the situation in Northern Uganda are a real case in point and may well provide valuable lessons for the future. The current debate on immunity only serves to highlight the critical need for such dialogue and mutual understanding. The UN Under-Secretary-General for Humanitarian Affairs has recently expressed a belief that the ICC indictments had been a factor in pushing the LRA into peace negotiations. It is clear that the work of the OTP has implications beyond the prosecution of offences. As a result, the Office must be constantly aware of the wider context in which it operates and, while acting independently, must seek to maintain a dialogue with other stakeholders involved.

All that said, however, the prosecutorial work of the Court must not, in any context of negotiation between parties to conflict, be allowed through any pressure to become a negotiating card by one or more of these parties. We should support the Court in this regard, and we should rely on the court's own fine judgement as to how best to protect its independence while pursuing its mandate within a wider context of political action.

A consideration of the interests of justice is, of course, built into the Rome Statute by way of Article 53. The OTP's paper on this most sensitive of questions must be borne fully in mind by all supporters of the Court's and the OTP's work.

(iii) Management and Organisation

My third point concerns management and organisation. Tension has undeniably existed between the OTP's need for impartiality and independence, and its reliance on services provided by a common administration shared with judges and defence lawyers. This is a challenge that has been addressed by the Office, and the other organs of the Court, through the establishment of a clear division of tasks. It is envisaged that the implementation of the Court's strategic plan and associated service level agreements will help improve this situation further.

However, tension is also present between the independence of the OTP's own prosecutorial strategy, and the need to coordinate this strategy with the overall Court's Strategic Plan.

As in its relationship with external actors, the OTP faces the challenge of maintaining a balance between coherent harmonisation and independence. Over the past few years the OTP has sought clarifications from the Pre-Trial Chamber and Appeals Chamber as to the respective responsibilities of each, for example in the Lubanga case, where the Pre- Trial Chamber clarified the relationship between the OTP, the Registry and Chambers in relation to the making and

transmission of a cooperation request for arrest and surrender. This process of clarification will of course continue as the court develops.

Although the impartiality and the integrity of the OTP is of great importance, so too is the need for a unified front by the Court, as clearly expressed in the One Court principle. The credibility of the Court requires absolutely that, notwithstanding rigid divides within its in internal structure, it speaks to the outside world with one coherent and effective voice.

(iv) Communications / Outreach

My fourth point concerns communications and outreach. The Report states that in conducting its external communications the OTP faces two different and, implicitly, often competing, challenges: (i) to communicate with a variety of different audiences so as to achieve cooperation and to have a preventative and deterrent effect, and (ii) during an investigative phase, to communicate as necessary with great discretion and confidentiality. As a case proceeds, the weight afforded to either consideration may well shift back and forth, requiring the OTP continually to re-assess the delicate balances in its external communications. This, in itself, is both a fact and an important message which ought to be clearly conveyed and to be widely understood. By extension, it must be clear that if, at any particular time, the Prosecutor's Office and the Court are not elaborating publicly about a particular investigation, it does not at all mean that work is not being done. The very contrary is likely to be the case: it certainly should be the case. That being so, it deserves our full respect and patience.

In order that expectations are properly managed and realistically met, it is important that the international community fully understands the true extent of the obstacles of perception and understanding facing the OTP. In her recent statement on Sudan, the UN High Commissioner for Human Rights called on the ICC to exercise its mandate in relation to Darfur "robustly and visibly," with the full support of the Sudanese Government and of the international community. It is clear, however, that until that cooperation and support are strongly deployed, a visible ICC presence on the ground in Darfur would not help, but would merely serve to endanger seriously the lives of both potential witnesses and ICC staff. Despite highly commendable work on the external relations of the Court, led by President Kirsch, which I much admire, there would appear to remain a need, over the next three-year period now under consideration, for more systematic and greater explanation as to what may reasonably be expected from the Court in what are, frequently, the most difficult of circumstances.

(v) Role of other agencies and organisations

My fifth point concerns the role of other agencies and organisations. The situation in Darfur has highlighted the crucial role that may be played by other agencies in the work of the ICC. While a formal agreement has been concluded with the UN, and a Memorandum of Understanding concluded with the UN peace-keeping mission in the DRC, there is a clear need for the Court to consolidate its relationship with the UN generally and significantly to expand its relationship with various UN bodies and agencies, in particular OCHA, UNICEF, DPKO, the Office of Political Affairs and the Office of Legal Affairs; and, more widely, with the regular troop-contributing countries, the TCCs.

Although there remains much room for continuing improvement, the machinery of the UN has become increasingly sophisticated and efficient in its capacity to plan and manage interventions in conflict situations. It is essential that the Court integrates itself fully into this process. If it is to fulfil its mandate effectively in given situations, the interaction between the ICC and the various UN agencies, and TCCs, should be comprehensive, systematic and very regular. Once opened, the Court's New York Office must, as a matter of priority, establish itself as an essential bridge between the Court and the UN system, facilitating a comprehensive two-way free flow of cooperation on an ongoing, daily basis. I believe there is a very strong case for States Parties' support for the strengthening of the ICC New York Office, to give it this essential capability in all our interests.

It is also essential, whenever the machinery of the UN moves toward intervention in a conflict area, that the ICC is engaged systematically at all stages in the work toward and following a Security Council Resolution. Everything should be done, as necessary, to build the ICC's relevance and role into the textual fabric of the Resolution concerned. This will not always be easy, particularly in the short term. However, risking a very slightly coded message, I believe the climate in the Security Council is improving in this regard, and that constructive drafting, as always, can find the necessary Resolution language to achieve this important objective.

State Support

Finally, a word on State support. There is one area where the presence of tension is often lightly suggested, when, in fact, there is no evidence for it. Whereas the Court, as a judicial body, must be free from interference in the exercise of its functions, it need not and should not be free from the sustained vocal support of states. Rather, States Parties ought to be as robust in their support for the Court, as the Court must be in explaining and promoting its activities.

Only two of the five Permanent Members of the Security Council are States Parties. However, over the next ten years, fifty UN member states will seek and obtain election to the Security Council, and a large percentage of them, more than 25% of the entire UN membership, will be States Parties to the ICC. As members of the Security Council, they have a unique and influential role to play in support of the Court's work. In planning for their two-year terms on the Council, they must, as an absolute priority, build in this responsibility and challenge. It should be a fundamental policy cornerstone of states which are aspirant members of the Council that, in seeking the votes of the wider membership - our votes - they should make absolutely clear their commitment to make verifiable contributions on this issue. Furthermore, States Parties which are approached by any states (State Party and non-State Party alike) seeking their support for Security Council membership should have high on their list of expectations a convincing presentation by these candidate states regarding their commitment to action in the Council in support of the ICC.

We need to hear these states in the Security Council raising their voices together to support the Court's engagement in situations where crimes under the Rome Statute are being committed. If they do this consistently and tenaciously, they will certainly receive strong support, not only from one hundred ICC States Parties, soon to become one hundred and two, but also from very

many of the remaining UN membership which, after all, will have voted in large numbers to place them on the Council.

Mr. Gareth Evans of the International Crisis Group

I very much appreciate this opportunity to bring an international NGO's perspective to this essentially intergovernmental meeting reviewing the progress of the International Criminal Court. The International Crisis Group has very much valued the willingness of the Office of the Prosecutor (OTP) to engage in outreach and consultation and this is an excellent example of that willingness. Crisis Group's value-added on this occasion is, I guess, that we are a global organization with a very close on-the-ground knowledge of just about all the geographic areas on which the OTP has been focused, and that we bring a perspective that is primarily one of conflict prevention and management rather than human rights or justice. We are constantly wrestling with the tension between peace and justice, which has become a recurring issue for the OTP, as it has for policymakers everywhere, and doing so from a perspective which is perhaps a little different from the Court's own, and that of many other of its supporters.

The challenge of dealing with this issue is particularly acute for this Court because, with its jurisdiction only available for events occurring after July 2002, a great deal of its work is necessarily bound up with ongoing conflict. The peace versus justice dilemma is much less of a concern when prosecuting past crimes arising out of concluded conflicts. But the ICC does not have the luxury of waiting for clear air: there will always be pressure for it to intervene in ongoing conflict situations, because the threat of prosecution is such a potentially effective tool in changing the calculations of warring parties on the ground.

But before offering some thoughts on this difficult and complex issue, first let me offer a short response to the two reports before us from the Office of the Prosecutor, looking back and looking forward respectively.

Looking Back. The OTP has done a good job so far in establishing its team, laying the foundations for the future, compiling procedural manuals, selecting initial cases and getting investigation processes started. There is a disposition to under-appreciate the complexity of the process and the sheer size of the task of getting a Court like this under way. But I do think that it has learned and effectively applied many lessons from the inevitable missteps of its specialist predecessors, the ICTY and ICTR.

The OTP Report of 12 September 2006 on the activities performed during its first three years (June 2003- June 2006) highlighted three particular challenges that had to be faced. The first was the selection of cases. The 'gravity' criterion that has been applied seems quite appropriate, from Crisis Group's perspective. Taking into account the complementarity principle, the cooperation available from relevant states, and the willingness of the UN Security Council to initiate proceedings, the choices made – of the DRC, Northern Uganda and Sudan – seem to be entirely defensible, even though all of them happen to be in just one continent, Africa.

As to the second challenge, conducing investigations, we have no quarrel at all with the narrow focus on the most serious crimes, and on those individuals bearing the greatest responsibility. Because of the sheer difficulty of working in on-going conflict situations, this is an inevitable and necessary choice, and should not be criticised. On the third challenge, cooperation from the international community, in particular in arrests, I found the document exceedingly polite. Frankly, there has been a lot of general rhetoric from states but not much action when it was needed, with Northern Uganda being a good example: the government itself may have been supportive, but has manifestly not had much support from neighbouring or other states in terms of intelligence or military cooperation.

Looking Forward. The OTC Report on Prosecutorial Strategy of 14 September 2006, addressing the coming three years, contains an unexceptionable list of five strategic objectives, of which I will comment on just the first two. The first stated priority is to 'complete two expeditious trials'. Certainly there is an urgent need now, after three years, to get some successful prosecutions under its belt. These reinforce the ICC's credibility – making clear to the international community that it is getting value for its money - and are crucial for the Court's deterrent effectiveness. The best way of getting the impunity message out is through successful trials.

The Lubanga case in the DRC is obviously the most advanced. Human rights organizations have criticized the limited scope of the charges laid – limited to conscripting children - claiming that evidence exists of systematic rapes, torture, and summary executions. But this goes back to the choices and focus of the Prosecutor. If the need is to quickly demonstrate the ICC's effectiveness then the Prosecutor is right to proceed on narrower charges for which he has evidence on which he can move quickly. Additional charges should no doubt be brought later, if the evidence proves equally strong, and additional groups should be investigated. But it is the entirely right choice to keep the focus narrow to get it moving.

The second stated priority is 'to conduct four to six new investigations'in the next three years. I don't want to comment on particular situations. But in terms of the strategy to focus on "current and new" situations, I would also note that (to the extent that the 2002 jurisdiction limit permits) 'old' situations should also be of concern, those where there is not ongoing conflict or an ongoing peace process, but rather clearer ground in which the investigators can work - very important if the OTP is to be able in practice to quickly get more 'runs on the board'. That said, of course investigations have a great preventive potential, in current conflict situations, when actors know there are ongoing investigations focusing on them. In Darfur, for example, a real belief that the ICC, with the full support of the international community, were to be not just looking just at past alleged crimes but closely monitoring possible present and future ones would be a serious deterrent. The ICC is an effective conflict prevention weapon, and it should be deployed this way against Khartoum with a lot more rigor than that for which there is presently enthusiasm in New York.

Part of the 'Prosecutorial Strategy' paper talks of the OTC's aim to 'establish a clear set of performance indicators and evaluation processes'. My short comment here is not to get too hung up on quantitative evaluation. There is always a hunger in all organisations, including my own, to measure things in terms of numbers. But the only evaluation that really matters is

from your peer group – anecdotal accounts, what people who know what is going on are saying about you. So far, the feedback on the OTC is good - but the clock is ticking!

Peace versus Justice. Neither report before us gives more than passing attention to this issue, but it can and does give rise to very real dilemmas which the international community needs to spend more time addressing than it has so far.

My starting point is that dealing with impunity and pursuing peace are not necessarily incompatible objectives at all: they *can* unquestionably work in tandem, even in an ongoing conflict situation. In Northern Uganda, notwithstanding the fury in some quarters about the ICC supposedly obstructing the peace and reconciliation process, there are two reasonable countervailing arguments available:

- The number of crimes being committed by the LRA in Northern Uganda have, as the OTP review states, diminished drastically since the arrest warrants were issued, and it is a reasonable assumption (difficult though it is to know what precise motivations have been at work) that the issuing of the warrants contributed to this because the LRA leadership, now seeing their eventual apprehension as more likely than before, did not want to make things any worse for themselves by multiplying atrocities.

- The issuing of the warrants seems likely to have had a positive impact on in-stalling the peace process itself, to the extent that the LRA leaders (again, to the limited extent that we can confidently assess their motivation) appear to have believed that by coming to the table, they can trade off an end to the hostilities for amnesties, or at least mitigation of penalties.

All that said, we also must acknowledge that situations can arise in which the need to advance a peace process can work against the impunity principle: as much as it may shock the conscience to contemplate not pursuing prosecutions when major perpetrators of atrocity crimes are involved, this *can* be helpful in certain circumstances in ending conflict, and in saving as a result a great many more lives. The classic case is Nigeria's initial grant of asylum to Liberia's murderous Charles Taylor in 2003, not at all unreasonable given the prospect then looming of thousands more deaths in the final battle for Monrovia.

But there are two important principles that must govern any decisions of this kind. The first is that only in the most exceptional cases, where the evidence really is clear that very major peace benefits are involved, should serious consideration be given to discontinuing investigations under way or granting formal amnesties. The obvious downside risk of these situations is that the more the ICC's work is perceived as "negotiable", the more its role as a deterrent of atrocity crimes is undermined: the cases really do have to be *very* exceptional.

In this context, the case for giving immunity from ICC prosecution in Northern Uganda to Joseph Kony and other senior LRA leaders (as distinct from lower level commanders and rank and file), to encourage the final emergence from the bush of that top leadership echelon, is not particularly strong in terms of the direct impact this would have on ending further major violence, when measured against the barbarity of the crimes committed. Again, in the case of

Darfur, some may be tempted to argue that senior governing party and government officials should be promised amnesties in return for cooperation. But this is not a situation where it is easy to see a direct and major benefit to peace in return for the trading away of justice. Khartoum's record of broken promises is cause for great scepticism about any cooperation promised in the future, and it is strongly arguable that the current ICC investigation, difficult though it has been to pursue, and the possibility of prosecutions ultimately flowing from it, help build pressure on Sudan's leadership to recalculate the costs of defying the international community. What is more, accountability for atrocities in Darfur will continue to be a necessary cornerstone for any sustainable peace agreement in the region.

The second principle here is that if decisions to give primacy to peace over justice do have to be made in certain hard cases, those decisions are best made not by the ICC or its Prosecutor but by those with appropriate political responsibility: in the case of this court, the Security Council has that power, if it chooses to use Article 16 of the Rome Statute enabling it to suspend prosecutions for renewable periods of twelve months.

The Prosecutor's job is to prosecute and he should get on with it, with bulldog intensity. His task is to end impunity for the worst atrocity crimes: Article 53 gives him a certain discretion not to pursue matters if the 'interests of justice' so require, but the interests of justice do not necessarily coincide with the interests of peace. Having the Prosecutor make the determination as to when and how to weigh the demands of conflict resolution puts him in an impossible situation. So he has to get on with justice. If the judgement has to be made, on occasion, that the interests of peace should override those of justice, then that should be for the Security Council to decide, not the ICC, and the pressure and weight of expectations should be taken off the Prosecutor's shoulders in this respect.

There may be reluctance – particularly by those who come at these issues from a human rights rather than conflict resolution perspective – to give so central a role to Article 16, and maybe this general balancing role is more than was originally contemplated for it. But the international community has to recognise that there are competing principles of more or less equally compelling moral force involved here, and there has to be some mechanism for accommodating them. Article 16 is capable of doing that job, and this is the way in which we should be thinking about how to apply it. It's the ICC's role to press on with the investigation and prosecution of those whose behaviour justifies it; it's the Security Council's role to make the decision on occasions that the interests of peace should be given priority. Any such decision should not be seen as leaving the ICC 'high and dry', but rather simply as an appropriate division of decision-making responsibility.

The ICC and the OTP have had a good start, and they do have the confidence of the overwhelming majority of members of the international community. Sustaining that confidence will be the trick, for which you will certainly need a strong performance from the Court itself and all its personnel, and some early visible runs on the board. But you will also need very real cooperation – particularly when it comes to executing arrest warrants and assisting in investigations – from states. Rhetorical commitment is all very well, but practical delivery is what ultimately counts, and that message needs to be heard loudly and clearly in capitals.

Ambassador Lyn Parker of the United Kingdom

Comments on the first paper relating to the Prosecutor's first three years (Session 1)

HMA Lyn Parker thanked the Prosecutor for the comprehensive and transparent report on the OTP's work over the past three years. In relation to the "Third challenge" identified in the paper relating to the need for greater State co-operation with the court, he observed that the need to execute warrants was an in-built problem for the Court. He noted that although each case was different, there was nonetheless a responsibility on the part of all States Parties to think creatively as to how they could assist the Court. He highlighted the importance of the issue of rapid staff turnover raised in the report, as well as the role of transparency in the recruitment process in attracting high quality staff.

Comments on the second paper relating to Prosecutorial strategy (Session 2)

HMA Lyn Parker expressed the view that complementarity was very important to the proper functioning of the ICC. The threat of ICC proceedings was also important to discouraging future abuse. A court which is swamped with cases will have failed. However, a court which is viewed as a last resort functioning in a strong international system with effective domestic prosecutions being conducted should be the objective.

Closing Remarks by the Chief Prosecutor

We encourage you to also send comments. In two weeks we will send a reaction to your comments. This will allow you to understand our views.

A meeting in New York will be a second part of the dialogue. Today we have had a good exchange on the topics on the table and the New York meeting will allow us to further discuss these issues. We will try to review what you say and prepare answers to your comments in two weeks.