Transcript

Second public hearing of the Office of the Prosecutor

Interested States

New York, 17 October 2006

Luis Moreno-Ocampo, Chief Prosecutor

Your excellencies, ladies and gentlemen,

Thank you for your attendance this afternoon. Thank you very much to the Friends of the Court who organized this meeting. We are very pleased to be in New York to present to the state representatives our report summarizing the last three years 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.

Today we launch a dialogue with states representatives in New York. We will also consult with civil society. We propose to use the same format that we used at the first public hearing, when I just took office in June 2003. We will present a brief summary of the documents after which we will take comments.

At the end of October we will review our documents in light of the comments received. You will receive an amended version of the same documents in order to facilitate your deliberations at the Assembly of States Parties.

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

The Three Year Report

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.

During these three years, the Office focused on the selection, investigation and prosecution of its cases.

The first challenge the Office faced was: how to begin ICC cases?

We had to dissipate fears that the Court would have no cases or that the Office would begin frivolous prosecutions.

There are two distinct aspects to consider:

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

In selecting its situations and cases, the Office is guided by the standard of *gravity* as mandated by the Rome Statute. The situations in the Democratic Republic of the Congo and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court, and the situation in Darfur, the Sudan, also clearly met the gravity standard. The Office understands concerns about a geographic focus, but regional balance is not a criterion for situation selection under the Statute.

With regard to triggering cases, while the *proprio motu* power is a critical aspect of the Office's independence, we adopted a policy of inviting voluntary referrals from states to increase the likelihood of important cooperation and support on the ground.

The **second challenge** faced by the Office was how to conduct investigations into situations of on-going violence, where even travelling to the areas in question may be impossible, or where the territory suffers from a collapse of functioning institutions. The Office had to learn how to: approach the possible witnesses without exposing them; identify safe sites for interviews; and secure discreet transportation for investigators and witnesses. In addition, 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. In Northern Uganda there are four local languages, Acholi, Lango, Ateso and Kumam, and in Ituri district of the DRC there are three, Lendu, Lingala and local Swahili, while in Darfur there are four, Fur, Zaghawa, Massalit and local Arabic. Because there are few qualified professional translators, finding persons with the appropriate skills and background required exceptional efforts. Conditions on the ground for investigators are typically quite difficult.

Two **measures to meet** the challenges presented by these exceptional 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.

The office succeeded in collecting evidence of massive crimes in a short amount of time, and getting arrest warrants issued. It took the Office 10 months to file a broader but still focused arrest warrant request in the Uganda situation against 5 LRA commanders, while 18 months were needed for the more narrow arrest warrant in the Lubanga case in the DRC. The level of cooperation and the conditions under which the Office needs to operate impact heavily on the speed of the investigation.

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 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 in DRC. Therefore, after careful consideration of the evidence gathered, 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.

With regard to the Darfur situation, the Office has been able to successfully investigate the crimes allegedly committed in Darfur without going to Darfur.

In addition to a moral obligation, the Office is under a legal duty to protect victims and witnesses under articles 54.1 (b) and 68.1 of the Statute. The absence of a functioning and sustainable system for their protection continues to prohibit an effective investigation within Darfur. The Office has therefore collected evidence of crimes alleged to have occurred in Darfur in more than 15 different countries. In the meantime we are conducting an ongoing assessment of the national proceedings in the Sudan. And the Sudan facilitated a visit to Khartoum in which we interviewed each of the judges, and each of the prosecutors who work on the cases.

It is the belief of the Office that effective justice should be delivered to the victims of the crimes in Darfur either at a national level, where the domestic authorities are genuinely prosecuting

those most responsible for the most serious crimes, through the ICC, or via a combination of domestic and international mechanisms.

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. Arresting Kony and other LRA leaders is the biggest challenge for the States Parties.

The Office is now in the process of litigating numerous pre-trial issues and is ready to go to trial. The confirmation hearing of Thomas Lubanga Dyilo is scheduled for 9 November.

The Office is ready to transition to its next phase. The Court is becoming a more complex organisation in which judges will issue rulings, victims will participate in proceedings and, in due course may receive compensation, and States Parties' support will be needed in all areas, notably in securing suspects against whom arrest warrants have been issued.

Until this work has begun in earnest and several trials have been concluded, it will be too early to truly measure the impact of the Office. Instead, this report provides a comprehensive resource by which to follow what the Office has accomplished thus far.

H.E. Ambassador Ellen Margrethe Løj of Denmark

I would like to thank Prosecutor Ocampo and his staff very much for the reports and the briefings outlining the accomplishments and challenges of the Office of the Prosecutor during its first three years in operation.

It is never a simple matter to develop tools to assess progress and challenges – especially not in an institution like the ICC, the ultimate objective of which would have to be empty court rooms and a prosecutor with nothing to do. Regrettably, however, we are far from that goal today.

The **establishment of the ICC** was in itself a historical leap forward in our fight against impunity for the most serious crimes of concern to the international community as a whole. It took us more than 50 years to get that far.

The ICC is still in its infancy, but it is already having an impact. The establishment of the Court has, in our assessment, been a key factor in ensuring that the question of justice is more firmly embedded in any peace talks than ever before. The question of justice is no longer a theoretical, generic concept to juggle at some future date. Justice is something very concrete and very present that needs immediate attention.

We may not always be comfortable with it, but we have come to understand that **sustainable and lasting peace goes hand in hand with justice**. This is in itself a remarkable achievement. Also the Security Council has subscribed to this view, when it stated in June this year that 'ending impunity is essential, if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians and to prevent future such abuses'.

The international community does not always readily adjust to new institutions. We cannot expect the ICC to be an exception to the rule. It is going to take a lot more than three years for all international actors to get used to the Court and to find their role vis-à-vis this new structure. This is not a time for complacency. Not for the Court. Not for its State Parties. And not for countries and international organizations sharing the objectives of the Court.

As for the **Court and the Office of the Prosecutor**, it should strive to move as quickly as possible beyond formulating strategies and into the realm of its court cases. We are pleased to see – but frankly also expect - that the ICC and its Prosecutor has as a strategic goal to become 'a model for public administration'. This entails *inter alia* recruitment through a process of a transparent, public competition and careful attention to the attrition rate, as also stressed in the three-year-report. We urge the Prosecutor to pay careful attention to these matters.

As for the **States Parties**, the court was not established to work in a vacuum. The Rome Statute foresees other bodies in addition to those of the Court to play important roles in the implementation of the statute. Part 9 – on international cooperation and judicial assistance – is a vital building block in the ICC construction. We all need to look closely at which kinds of national support we are – or could be – able to provide to the Court. And this should go far beyond rhetorical support in public meetings or when negotiating resolutions in the United Nations General Assembly. It should amount to real and tangible support in concrete situations, to enforcement agreements and to witness protection programs. The States Parties are an integral part of the system for international justice established by the Rome Statute, and we should take care that our actions support this goal.

As for **international organizations** sharing the objectives of the ICC, much more can be done to strengthen cooperation with these organizations. The United Nations has come a long way in allowing the Prosecutor access to documents and employees. But this is only the beginning. The Prosecutor needs to also be able to actively use some of these documents and potential witnesses in court. We urge all relevant bodies to work proactively to ensure that the ICC receives all possible support and cooperation in all stages of the court procedures.

The **Security Council** has a special role to play. It is in many ways already intimately involved in the work of the ICC. Denmark was an active partner in securing the first Security Council referral – that of the Darfur situation – to the Court last year. The Security Council also acted swiftly to lift a travel ban in order to allow for the transfer to The Hague of Mr. Lubanga of the DRC. But as we all know, there is still room for improving the relationship between the Court and the Security Council. It is key that we – current and future ICC States Parties in the Council – do everything we can to ensure that the ICC be given all the support it needs, both in situations referred to the Court by the Council and in other situations being investigated by the Prosecutor. At times it might appear as if there is a delicate balance to be struck between

ongoing peacemaking efforts and the need for justice. No doubt should be left that in the end one cannot exist without the other.

The ICC will grow to become a cornerstone in the international efforts to assist conflict-torn countries in avoiding relapsing into conflict. The Court, and the Office of the Prosecutor in particular, has been through three difficult years of 'firsts'. Denmark pledges its full support and cooperation on the way ahead.

Sir Emyr Jones Parry of the United Kingdom

[Summary of remarks]:
He thanked the Prosecutor for the comprehensive and thoughtful report on the last three years of work by his office, and the forward-looking Prosecutorial Strategy. This was a good opportunity for States Parties to discuss the issues and have input to the work of the Office of the Prosecutor. The fact that the Prosecutor was now investigating three situations, two referred by the States themselves (DRC and Uganda) and the third by the Security Council (Darfur) sent a crucial message that the international community would not tolerate impunity for serious international crimes. The Prosecutor's approach of concentrating his efforts on those carrying the greatest responsibility for the most serious crimes was absolutely right.

Now that the ICC had been established for some four years, the ICC States Parties needed to move beyond a feeling of success based on the fact the Court existed at all, and move toward success based on a solid record of fair and efficient trials. The Prosecutor's report therefore rightly identified the need to arrest and transfer indictees as the critical challenge for the next phase of the ICC's activities. The need to end impunity for the five LRA indictees was a critical challenge. However understandable the need to negotiate an end to conflict and to achieve sustainable peace, at the end of the process those who had committed the gravest crimes could not be allowed to enjoy impunity.

States and international organisations had to stand ready to fulfil their obligation of co-operation with the ICC and to think creatively about how to help the Court. This was what had happened in the arrest and transfer of Thomas Lubanga to The Hague from the DRC. And, although not an ICC detainee, the arrest and transfer of Charles Taylor to the Sierra Leone Special Court also demonstrated what was possible when the regional States and organisations combined with the UN and other States which were able to help. Sir Emyr therefore encouraged the Prosecutor's office to maintain contacts with all concerned, to give thought to how they might best encourage the conditions for success, and to prepare the ground so that the logistics could come together quickly when opportunities for arrest and transfer to The Hague arose.

H.E. Abdul Haleem of the Sudan

1. I would like to express my sincere appreciation for the briefing by Mr. Luis Moreno-Ocampo, the Prosecutor of the International Criminal Court on the activities performed during the first three years and the strategy for the upcoming three years.

2. Since the adoption of Security Council resolution 1593, the Government of the Sudan has begun an intensive process of cooperation with the Prosecutor. We are quite confident that the various delegations sent by the Prosecutor to the Sudan attest to the degree of this cooperation

3. I wish also to commend the work done so far by the Prosecutor which reflected a great amount of professionalism, neutrality and transparency.

4. I trust that the Prosecutor and his assistants have had the opportunity to see how the Judiciary in the Sudan has a long-standing history of experience and integrity.

5. Finally, I would like to reiterate our commitment to continue the established process of cooperation between the two parties.

H.E. Frank Majoor of the Netherlands

Thank you Mr. Prosecutor and Madame Deputy Prosecutor for taking the time to come to New York and for briefing us on the work that your office has carried out over the last three years, as well as on your intentions for the coming three years. It is important that the Court maintains a close relationship with the UN and the delegations that are based here, and we therefore commend you on this initiative.

The Court is an independent judicial institution. At the same time it does not work in isolation from the real world. On the contrary, it is active in ongoing conflicts which are considered by the UN and therefore the activities of the Court have an influence and the work of the UN, and vice versa. The Court is also dependent on the cooperation of States and international and regional organisations for the effective implementation of its mandate.

The recently established liaison office has an important role to play in this regard. It will enhance communications between the two organisations and facilitate cooperation. Regular visits by yourself and other organs of the Court to NY will help to further develop this.

But the ICC cannot do this alone. States Parties should make sure that the ICC is able to fight impunity. By giving concrete assistance, in the form of sharing of intelligence, the provision of planes, and most importantly arrest and surrender.

Apart form these concrete forms of assistance, Member States of the ICC here in New York should ensure that the ICC perspective is taken into account in the work of this organisation. The Friends of the ICC, with more than 100 members, is a vehicle for doing this, but individual

Member States have a major role to play here as well. For example when draft GA resolutions on related topics are discussed, when a travel ban needs to be lifted, or when mandates of peacekeeping forces are being discussed. The States Parties which are members of the Security Council, both permanent as well as non-permanent members, have a specific responsibility in this respect, and I would like to thank these states for their efforts so far and encourage them to continue to do so.

For this to be effective, we should make sure that it is not just the legal advisors that are active. Permanent Representatives themselves should be engaged, and I am happy to see so many of my colleagues here today. But also the people dealing with issues such as conflict prevention, rule of law, as well as the Africa desk officers should be included into these efforts. The NL will continue to try to actively further the objectives of the Court, both here as well as in The Hague.

Mr. Prosecutor, Madame Deputy Prosecutor, once again thank you very much for organizing this hearing here at the UN, and I wish you every success in the fulfilment of your mandate for the next few years.

H.E. Ronaldo Mota Sardenberg of Brazil

Mr. Prosecutor and Madam Deputy Prosecutor, I wish to express our thanks to you and your competent team for this opportunity to discuss the Three Year Report and the Report on Prosecutorial Strategy. The Three Year Report depicts an institution that is doing an outstanding job in spite of the difficulties inherent to its work.

It is encouraging to see that investigations carried out by the Office of the Prosecutor with the logistical support of the Registry are being actively pursued in connection with the situations in northern Uganda, the Democratic Republic of Congo and Darfur. Regardless of the many practical difficulties encountered, a good example of positive development is the case in DRC when investigations have already resulted in the surrender of the first individual to the custody of the Court.

I wish to highlight the importance of the role of justice in establishing peace and ending violence in situations of conflict. Integration of peace and justice although sometimes delicate, is essential. Justice must be seen as a necessary fundament of the rule of law and therefore as one of the basic pillars of a sustainable peace. Notwithstanding its awareness of the role of justice in the search for peace, the Office of the Prosecutor has rightly strived for impartiality in seeking accountability for those responsible for the most serious crimes.

The Office has shown an ability to adapt. In northern Uganda for instance it avoided involvement in initiatives that fall outside of its mandate and maintained a low profile during the investigations. It pursued investigations even under adverse situations shows that the Court will not hesitate in its determination to punish those responsible for serious violations. In Darfur, in spite of the fact that ongoing conflict has so far prevented investigations on the ground, the report describes the impressive amount work that has been done: in more than 50

missions to 15 countries more than 500 potential witnesses were screened and more than 9700 documents were collected and reviewed.

Cooperation by states continues to be a key element for the success of the investigations and for the attainment of justice as it has been especially relevant in areas such as the arrest and surrender of suspects and the protection of witnesses. At various instances the Office has adopted policies aimed at encouraging that cooperation. One example is the policy of inviting voluntary referrals from states which have occurred in the situations in northern Uganda and the DRC. Another example is the respect for genuine efforts at national levels to deliver justice to the victims of serious crimes. These policies tend to build confidence and increase the odds that states will be willing to cooperate with the Court.

I would also like to take note of the comments made by the Ambassador of Sudan regarding the cooperation that has been extended to the Court. We acknowledge the relevance of the objectives and principles that have been guiding the action of the Office of the Prosecutor in this period. We agree that its work should be guided by basic principles of positive complementarity, focused investigations and prosecutions and maximizing impact. Positive complementarity is important in so far as the Office encourages national proceedings in the first place thereby giving states the opportunity to fulfil obligations that are primarily theirs. We are aware that the exact scope of complementarity is sometimes difficult to determine given the delicate balance between the need to take action against serious crimes and the need to respect as much as possible the domain of national jurisdiction. Focusing investigations on the most serious cases is also useful as it allows a most rational use of the resources with best results from the point of view of the service rendered to justice. Seeking maximized impact also in terms of preventative effects of activities of the Office is also extremely important since the elimination of impunity can discourage the committing of serious crimes in the future which is also an important objective of the Court.

In closing my remarks, I should stress that the report before us shows that the Office has been extremely active in the fulfilment of its mandate and very able in developing the capabilities to that end. An active and independent though accountable Office of the Prosecutor is an indispensable element for the proper functioning of the International Criminal Court in its defence of human rights and promotion of justice and the rule of law. Moreover, our debate today demonstrates that your office is not only active and independent but also strives to maintain the highest level of accountability.

Outlining the Prosecutorial Strategy - Fatou Bensouda, Deputy Prosecutor for Prosecutions

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 three years, the Prosecutor has identified five key areas in which we aim to achieve further tangible progress: 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 litigation.

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 States 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, or 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 the 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 rise 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, the 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 of the 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.

H.E. Mr. Jean-Marc de La Sablière of France[1]

1. I should like to thank the Prosecutor of the ICC for inviting us to a dialogue with him about his Prosecutorial Strategy.

Sir, you are the Court's engine since in a way you are the one who 'fuels it' through your investigations and prosecutions. Your success is essential for the Court's success. Your criminal policy is therefore fundamental.

2. We are all mindful of the independence of the Court and its Prosecutor. We also realize that the Court acts in a given context and permanently interacts with a whole range of actors. It is part of the international system which is designed to ensure peace, security and justice, and its mission is to be universal.

But the Court is still a new actor on the international scene and its relations with its environment are in the process of being defined. So we must take care to see that it finds its proper place and is neither marginalized nor wrongfully used. Each of our decisions affecting our relations with the Court and its Prosecutor must be carefully weighed for with each step we establish precedents that will be determining for the future.

3. I should like for my part to respond to your invitation to 'hear from State parties on how to achieve the goals of the Rome Statute' by concentrating on the relations that the Security Council may have with you.

A few remarks first on the framework of these relations.

- The Court and the Council share in certain situations a common objective: the fight against impunity. But while justice and the fight against impunity are central to the Court's mandate, for the Council they are objectives ensuing from its primary mission: maintaining international peace and security. For nearly 15 years, the Security Council has made the fight against impunity one of the key elements in a return to a lasting peace. To achieve this, it must turn to other institutions, national, mixed or international. But in many situations the objectives of the Court and of the Council converge.

- There is more common ground: We are concerned with the same situations. The crimes where the Court has jurisdiction are usually committed during conflicts which naturally engage the Council's attention. At this time, all your investigations deal with situations being followed by the Council. This coincidence is not an accident of fate even though it must not be absolute.

[1] This is an English translation provided by France of the original French text.

The Council is therefore increasingly obliged to take your action into account. I note with satisfaction moreover that its more reluctant members are beginning to consider the Court an institution of reference, capable of providing support to others by hosting the trial of Charles Taylor and providing the head of a commission of inquiry established by the Council. The Council is grateful to you.

4. The common ground I have just described has practical consequences. I would like now to mention some of them before going on to look at the interaction expressly provided for in the Rome Statute.

- First, you intervene in countries where the Security Council has established missions or peacekeeping operations. You need their support at the level of logistics and security. One of the most sensitive questions is that of executing arrest warrants. The mandate of PKOs and the need not to endanger their members or the humanitarian operators, the victims, witnesses and your investigators, make your intervention in the field particularly complex. Regimes for cooperation should be gradually improved.

- Next, certain of the Council's sanctions committees take an interest in individuals you are investigating or may wish to prosecute. For instance, Thomas Lubanga was the subject of a travel ban which the Council lifted so he could be transferred from Kinshasa to The Hague. The newness of the operation and the need to maintain confidentiality until it was completed necessitated explanations from the Court's host country and friendly countries in the Council. But the states not party to the Statute did not try to block or delay the course of justice. The transfer took place according to the scheduled plan.

- The charge against him, namely enlisting children to fight, is one of the crimes to which the Security Council has paid special attention in the last few years. Certainly the charge against Thomas Lubanga sends a very strong signal to all those who resort to such practices. It strengthens the mobilization against the crime generated by the Council and the secretary-general's special representative. Given that not only the penalties but the charges themselves serve as an example, we approve of your aim 'to represent the entire range of criminality' in a given situation.

5. I'd like now to speak of cases where the Council and Prosecutor interact, which are expressly provided for in the Rome Statute.

- First of all, the Council may turn to you, as stated in Article 13-b. It has done so in referring the situation in Darfur to you. This decision was considered a 'new founding act' for the Court in that the establishment of an *ad hoc* tribunal competent to hear the same types of crimes would have weakened the Court. It is also a tremendous challenge. You run the risk of encountering the same difficulties in terms of cooperation as the entire international community.

It seems to me that the risk of not obtaining adequate cooperation from the parties to a conflict must not stop us, and that we must take up a situation, on an emergency basis if necessary, based on its own characteristics. Then, naturally, we must ensure maximum cooperation.

To return to cases where the Security Council refers a situation to you, it seems to me that in so doing it has a duty to support you. We therefore took care to ensure that resolution 1593 clearly spells out the obligations of parties to cooperate, under Chapter 7, and that the Council hears from you regularly on the progress in this investigation in order to manifest its support.

- While the Council may refer a situation to you, it may also, under Article 16 of the Statute, ask the Court to defer investigation or prosecution for one year, which may be extended. The idea is to allow the Council to intervene in cases where there is a threat to peace, acting under Chapter 7, if it considers that the Court's action might impede the completion of a peace process. It may then request a temporary suspension, not a cancellation, of actions. This article must be used with the utmost discernment because it is not without risk for the deterrent aspect of the Court and the fight against impunity.

It basically constitutes one of the ways, though not the only one, to resolve the tension in a given situation and over a given period that may momentarily surface between peace and justice. But in a general way, and this is a very important point, the fight against impunity and justice strengthen peace processes. Observers thus recognize that your arrest warrants against leaders of the LRA have helped to persuade them to curtail their atrocities and even to negotiate.

6. The Court may perhaps have played an ancillary role in peace in this way. It also plays a preventive role, which should grow stronger with time. Justice which happens can at last be a factor in reconciliation. Peace and reconciliation are certainly not the primary missions of the Court but the latter can be an important actor in an international system where peace and justice are perceived as complementary. In a way, in such a system we have complementarity between the Court and the Security Council.

What conclusions are to be drawn from these observations? First, it is in the Security Council's interest for you to succeed. Second, as representatives in New York we must see to it that you receive all the requisite assistance from both the United Nations and also States that have obligations to the court.

Mr. Sivu Maqungo of South Africa[2]

Well let me just touch upon issues the Prosecutor spoke about regarding last three years. I think that we will have time to review the Statute during the review conference. But this opportunity is to look exactly at how far we have gone in the last three years. And in looking at how far we've gone in the last three years, naturally we have to look at the architecture of the statute – exactly what we intended to accomplish when we set up the International Criminal Court back in Rome.

[2] This is a transcript of his presentation not a statement.

The Prosecutor has indicated exactly how he has proceeded in the last three years. Now when we set up the court in Rome first we indicated that we wanted a permanent institution for purpose of deterrence. Because there had already been established *ad hoc* tribunals, but we wanted a permanent institution. We also indicated that such an institution should be complementary to domestic justice systems. And then we indicated that this institution should look at the gravest of crimes and tabulated exactly what we meant by those crimes – genocide, war crimes and crimes against humanity – and then indicated that we would look as well at aggression and for that we are hoping upon Professor Ben Ferencz to assist us to finalize the aggression part. And then we indicated that we would accord powers to the Prosecutor in terms of how cases would come to the court, states can bring cases to the court and as well we accorded powers to the Security Council to refer matters to the court. And most importantly we indicated that this court would depend on cooperation from states.

Now with regard to the issue of deterrence, I was struck yesterday, I had the honour of hosting African representatives back at the mission and there we had the Prosecutor and the Deputy Prosecutor to come to speak to some of the African representatives who were there.

And I was struck by what Ambassador Adonia of Uganda had indicated regarding the issue of deterrence. And if he doesn't mind, I will quote him. He indicated as follows, "We have already seen the deterrence effect of the ICC in the Uganda context. To them it has become clear that the issuance of the arrest warrants have in fact assisted towards ensuring that Joseph Kony and his team come to the negotiating table because they fear these arrest warrants. It is one of their main fears." And for that reason he indicated that he was extremely happy with the work that the ICC was doing. And that in fact the ICC had assisted in ensuring that there is no more commission of further crimes and currently as Ugandan colleagues have indicated as well as Ambassador Adonia currently there is no further commission of crimes.

On the complementarity aspect, I want to agree with the manner in which the Prosecutor is conducting himself on the whole issue of complementarity. I was here and I also listened to the Ambassador of Sudan when he indicated his satisfaction with the cooperation that the Government of Sudan is having. So in terms of reviewing how the Prosecutor has conducted himself in respect of complementary I must say on the part of South Africa we are very, very happy. We are also happy that the Prosecutor has invited states to be ones that make referrals especially in this early stage of the court's inception. That rather than the Prosecutor himself with the powers he has – the *proprio motu* power – in respect of the DRC and Uganda who were States Parties to the ICC where he could have easily exercised his *proprio motu* powers, he rather chose to invite the states to participate.

Now on the issue of the crimes again we are happy with the way in which the Prosecutor has indicated the focus of the crimes on those who bear the most responsibility.

Now then coming to the important part – the part about the cooperation of states. We need to look at ourselves as to whether our responsibility as states, have we brought our part to the party? So to speak. And I must say to the Prosecutor that I think as an Assembly of States Parties we may need to look at this issue more closely. And the Prosecutor in his usual diplomatic way may need to tell us exactly where he will wish for us to do more with regard to

cooperation. Because I do get the sense that we do not have mechanisms in place yet for appropriate cooperation when the court should seek such cooperation. Currently the Prosecutor is only reliant upon the states where the crimes have taken place and hardly the other states outside. Those states have a minimum role so to speak unless of course the Prosecutor is able to indicate these directly to us and we look forward to receiving this.

Now a lot has been said about this debate justice versus peace. And of course many times the issue of truth and reconciliation is also referred to and, South Africa having gone through the process of truth and reconciliation, on many occasions we are also requested to comment on this issue. For South Africa we would not presume at all to teach anybody as to how they should undergo their peace process. We did our own peace process because that is what made sense for us at the time. It doesn't mean that it will make sense for the next country. So in our view, the lesson we have learned from all of this is that it is always best to give room to the country concerned to find its way through this. The Prosecutor did this actually by inviting countries to make referrals and this was good. I think in the process currently the room has been given for the states concerned to take the lead in the whole process of peace versus justice. For us, we will not presume at all to advocate one way or the other. It is interesting this whole issue of sequencing and what have you but when it comes to specific issues, specific countries it is always best to give room for the countries concerned to make their own way through their peace processes.

With that I wish to thank the Prosecutor and the Deputy for the work they are doing.

H.E. Jean-Marie Ehouzou of Benin[3]

Mr. Prosecutor,

1. I wish to thank you for inviting me to take part in this public hearing on the activities of the International Criminal Court. I would like to take this opportunity to pay tribute to the Court's senior management for its success in establishing the authority of international justice.

2. One aspect of the Court's activities is of particular interest to Benin: namely, the current and possible future prosecution of persons suspected of recruiting and using children in conflict situations. The International Criminal Court's Statute lists as a war crime conscripting or enlisting children under the age of 15 years into national armed forces or using them to participate actively in hostilities, be it in armed conflicts of an international or non-international character. Benin applauds the work undertaken by the Court to give effect to these provisions of its Statute.

3. The proceedings initiated against those responsible for such crimes represent an important step forward in the fight against impunity in this field. The cases of Thomas

[3] This is a translation provided by the ICC/OTP of the original French text.

Lubanga Dyilo in the Democratic Republic of the Congo and the LRA in Uganda are of great significance in this respect. We encourage the Court to continue with and, indeed, step up its activities in this area in order better to protect children in situations of armed conflict.

4. At this point, I would like to restate Benin's position on how the crime of enlisting children into armed forces and using them to participate actively in hostilities is characterised. Benin is of the view that the crime must be re-characterised upwards from a war crime to a crime against humanity in order for the relevant international legal standards to serve better as a deterrent.

5. Admittedly, the conditions are not yet right for achieving a consensus on such a proposal. Nevertheless, the fact remains that it is fully warranted by the wholly inhumane nature of the crime, a crime that dehumanises children who are turned into killing machines for the purposes of committing the most abominable crimes against even those people closest to them.

6. This is also the forum in which to welcome the adoption of Security Council Resolution 1612 (2005) which implements a monitoring and reporting mechanism on children and armed conflict, and establishes a Security Council working group to review the mechanism's reports. It is pleasing to see that the appropriate measures to put this plan into operation have been taken by both the Security Council and the Secretary-General. Real results have already been achieved in implementing the mechanism thanks to the joint efforts of the Security Council working group and the Deputy Secretary-General and Special Representative for Children and Armed Conflict. I would like to pay tribute to her personal commitment and to the dedication of her team on account of the efficiency they have shown in driving the mechanism forward.

7. I would especially like to applaud the work of the French Ambassador, His Excellency Mr Jean-Marc de La Sablière, who has displayed courage and determination in chairing the working group established pursuant to Resolution 1612 (2005) and who has adeptly guided its work in such a way as to ensure that the monitoring and reporting mechanism remains universal.

8. All of these factors go to increase the pressure on warring parties to demobilise child soldiers and foster the rehabilitation and social reinsertion of children within their communities. It is important that the international community be able to mobilize the resources needed for this.

9. Pressure should be maintained on the parties concerned through both the mechanism and the Court. We encourage the Court to take on cases on its own initiative wherever possible so as to help end impunity for persons responsible for violations of children's rights. Seeking cooperation from the relevant states is essential and we praise the Court for the work it has done to obtain this cooperation whilst demonstrating utmost regard for the principles of complementarity. The strategy of having the Court handle those

persons bearing the greatest responsibility for the most serious crimes is, in this respect, entirely justified.

10. Peace initiatives need not be an obstacle to pursuing the proceedings instigated by the Court. For without justice, any peace will remain fragile. We urge the states concerned to cooperate actively with the Court in order to ensure that the rule of law rests on solid foundations.

    Thank you.

Mrs. Maria Telalian, Legal Adviser and Deputy Permanent Representative of Greece

We would like to express our appreciation for this open dialogue with the Chief Prosecutor and his staff on the past and future work of the OTP. This exchange of views and the two reports presented by him offer States the opportunity to better understand the enormous challenges that the Office has faced and continuous to face.

We have followed very closely the work of the Prosecutor over the past three years and we are thankful for all his efforts to come up with a consistent prosecutorial policy, that will allow a more effective focus on the substantive work of the Court, namely: investigations and prosecutions and eventually fair and effective trials.

At this point I would like to make a few comments on three of the Office's guiding principles for the prosecutorial strategy, specifically the principle of 1) focused investigation and prosecution and 2) positive complementarity and 3) the issue of the enforcement of arrest warrants.

First on the issue of focused investigation and prosecution, that is based on the ICC Statute and which, as we know has been a pillar of the Office's strategy since 2003. According to this principle the Prosecutor will focus on those bearing the greatest responsibility, following a "sequenced" approach to selection of cases.

We support this principle, but we believe that it requires the setting up of objective criteria in order to make such a determination and to ensure that prosecution is not politically motivated. In addition it requires close cooperation with national authorities concerned to best avoid any issues of an impunity gap. Whereas it is important to focus on greatest responsibility, an open-ended approach for pursuing middle-ranking officials might also be needed to have a stronger deterrence effect.

Second, on the complementarity issue: According to this principle, which is a cornerstone of the ICC, the Prosecutor will first need to assess national proceedings, before reaching a conclusion as to whether ICC investigation is warranted. And this is indeed what the Prosecutor has actually done in the investigations that he has opened in some of the most serious crimes in the world. In this respect he has also carried out intensive consultations with the authorities

involved in order to more effectively deal with this issue. The question however that arises is how much time has to elapse before the Prosecutor makes a determination in this regard.

However, the principle of complementarity should not be strictly construed as a hard rule of presumption in favour of state action. There should be some precision given to the notion of "unjustified delay", after which the ICC can act. Likewise, there is need for some objective criteria to define "unwillingness".

Also, it must be kept in mind that there is no impediment to the admissibility of a case where no state has initiated any investigation or national proceedings. In many cases, the ICC will be considered as the most appropriate forum by all parties concerned.

The above elements are important in our view for a positive complementarity approach, and could be possibly addressed in a comprehensive strategy on complementarity.

Also, while voluntary referrals by territorial states are positive in the sense that they show the willingness of a state towards ICC jurisdiction and towards cooperation with the ICC, they should not replace other trigger mechanisms, such as *proprio motu* or referral by the Security Council.

Third, the problem of enforcement of arrest warrants. This will be the most serious problem for the effective functioning of the ICC in the future, as recent practice shows, and also as has been made clear in the Annual Report of the ICC. Cooperation with all actors involved will be necessary, and the Office of the Prosecutor may maintain close contacts with all those involved. The practice of the *ad hoc* tribunals regarding arrest and surrender could give some useful points in this regard.

The possibility exists that territorial states in particular may be unwilling or unable to proceed to execute arrest warrants or requests of surrender. No compromise however on the question of impunity can be made.

In those cases where there is a Security Council referral under article 13(b), States should offer their support and cooperation to the Prosecutor (including non parties to ICC Statute). This is particularly true with respect to resolution 1593 (2005) that authorizes the referral of the situation in Darfur to the Prosecutor. According to this resolution, which demonstrates the Security Council's determination to end impunity in Darfur, all the parties to the conflict are obliged to cooperate with the Prosecutor. The resolution also urges all States and concerned regional and other international organizations to fully cooperate with the Prosecutor. This resolution therefore gives authority to the Prosecutor to ask cooperation from states and regional and international organizations. In this connection we would like to subscribe to the very pertinent comments made earlier by the French Permanent Representative on the relationship between the ICC and the Security Council.

Thank you Mr. Prosecutor for this important event. My country will continue to support your challenging work both within and outside the Security Council.

Mr. Hugh Adsett of Canada

Thank you very much and I am also conscious of the time and I will perhaps pick a couple of brief points to make at the end of day. Because I think many of the points we would have made have already been covered by others this afternoon including the point about in general wanting to congratulate you and the Court on the work that has been accomplished to date. If I could, though, recognize in particular both the dedication and if I can say it the courage of investigators and others who have gone off to the field to work often in very difficult conditions.

On the strategy I could say in general that we are very welcoming of the strategy you put forward particularly the emphasis on focused investigations and expedited trials. From our perspective that will be the best way to utilize the resources the Court has and it is also a very effective way to bring justice to communities in a timely manner as well that is very important.

Another part of the strategy that we thought was particularly important is the positive approach to complementarity that is being taken, which should help to encourage genuine national proceedings. I think everyone in this room would agree with the principle that states whenever possible have the principal responsibility for both preventing and punishing these crimes. And I think the approach that is taken in the strategy is a good way to lead to that objective.

One issue that has come up this afternoon that others have mentioned and I know was a focus of many interventions already, is the question of arrest warrants and the difficulties that your office will face and is facing in the question of the execution of arrest warrants. Clearly as everyone knows the Court does not have its own enforcement forces. It is up to States Parties to cooperate and I think for States Parties to do more to assist in helping the Court to execute arrest warrants.

This brings me perhaps to a final comment on something that has also been raised by a number of other speakers this afternoon which is the broader question of peace and justice. And I say peace and justice because I know sometimes it is referred to as the question of peace versus justice. But I think it really is, and many other speakers have made this point already, it really is a question if I can use the word of complementarity one more time, where the principles of peace and justice are complementary, one to the other. From Canada's perspective a negotiated agreement to end the conflict in northern Uganda, a negotiated agreement to end a conflict wherever there are allegations of serious international crimes having been committed should include provisions to provide that those who have been accused of these crimes are brought to justice in accordance with international standards. We have confidence in the Court, we have confidence in the ability of the Court to make a determination on how to proceed in the face of the peace talks and we support your efforts in that regard.

So if I could just conclude by saying that I think there have been a lot of lessons learned from the last three years from our perspective. The strategic plan provides a very good basis for future work. I think it is a plan that should inspire the confidence of the international community. And we wish you the best of success in the next three years. Thank you.

Mr. Huw Llewellyn of the United Kingdom

Thank you Mr. Prosecutor and Madame Deputy Prosecutor. I can help with the lateness by being very brief. This is really just a follow up to the comments made by my Ambassador earlier on and in the hope of coming to a short practical suggestion or maybe a question. It is really in the same spirit as one of the comments made by Sivu of South Africa earlier on when he said that the Prosecutor perhaps from time to time should tell States Parties in practical terms what is needed by way of cooperation from states. My Ambassador highlighted the need for us to be as ready as possible when opportunities arise for arrest and transfer of indictees that is the third challenge which you underlined yourself and the need to think creatively about that problem. And perhaps, I don't know to what extent I can speak for other legal advisers and diplomats in New York, but sometimes I feel very remote from some of the practical issues that the court faces on a daily basis. One thing that might help us here in New York would be practical workshops by the Court, by the Office of the Prosecutor to come and tell us in nuts and bolts what is needed by way of cooperation from states to assist with arrest, transfer and other issues like witness protection and witness re-location. The one phrase that London has added to this short piece is "within budgetary constraints," would it be possible for the Office of the Prosecutor to arrange that kind of workshop? Thank you.

Mr. Thomas Fitschen, Permanent Mission of Germany

Thank you very much, and I also promise to be very brief. I would like to refer to the presentation of the new strategy given to us by the Deputy Prosecutor, for which in the first place I would like to thank her very much.

You mentioned the OTP's outreach and networking activities and the need for the Office to strengthen its contacts and improve its own relationships with states, the United Nations and other organs in the field -- activities to which my country certainly fully subscribes.

I know of course that we are at a hearing about the activities of the OTP, and I am also well aware that the Office is an independent organ of the Court that certainly needs to develop its own ways, means and networks to carry out its tasks. But I would nevertheless like to recall in this context what has been termed the "One-Court principle" when it comes to the role of the ICC in the outside world.

My delegation is very actively involved - here in New York and elsewhere - in efforts to reach out to non-States Parties, in efforts to explain the idea behind the ICC and the Rome Statute to others, to States, to the Secretariat, to non-State actors, and to increase accession to the Rome Statute. But building this kind of trust in the work of the ICC is an immensely challenging undertaking, as all of you who work with me here in New York certainly know. It requires coordinated efforts by all organs and member states. I therefore trust that the OTP, in its own outreach and networking activities and in its activities towards capacity building, synchronizes and cooperates closely with other organs of the ICC, particularly the Registry, so that both organs and both activities are closely coordinated and that both players share experiences – also with a view to making maximum use of scarce resources. Thank you very much.

Mr. Hiroshi Tajima, Representative of Japan[4]

We would like to thank the Chief Prosecutor, Mr. Luis Moreno-Ocampo, and his team for convening this Second Public Hearing for interested States. We also appreciate the Three-Year Report and the Report on the Prosecutorial Strategy.

As explained by Mr. Moreno-Ocampo, it is not surprising that the first permanent international criminal court, which deals with on-going violence, faces many challenges. The Court initiated its functions only three years ago, and the process of elaborating better ways of operating methods has just started. In this sense, we particularly support the second central principle of the Strategy, focused investigations and prosecutions. We believe that a focused approach will not only ensure effective and efficient investigations and trials but will also increase the credibility of the Court, in the eyes of both States Parties and non-States Parties, while making the Court more visible to the public by presenting specific cases.

Japan also agrees that the cooperation of States is essential in order for the Court to achieve its objectives. As President Kirsch and Chief Prosecutor Moreno-Ocampo have repeatedly stated on various occasions, "no arrest by States, no trial by the Court". The system the Court is founded on requires the full cooperation of States.

Although it has yet to conclude the Statute of the ICC, Japan fully recognizes the importance of becoming a State Party, so that it will be able to effectively support the Court. We are please to inform that the Government of Japan is redoubling its efforts to prepare for accession to the Statute by taking on some of the practical issues that accession entails.

Japan has high expectations for the activities of the Office of the Prosecutor of the ICC and looks forward to further cooperation with the Court, with the shared goal of eradicating the culture of impunity and preventing the most serious crimes, and thereby strengthening the rule of law in the international community.

Closing Statement, Luis Moreno-Ocampo, Prosecutor

Thank you very much for all your comments; they were really very interesting for me and my team to hear. The particular position you have here in the UN system as Nicholas Michel mentioned today is critically important for us. States Parties plus an international organization which are with us joining this emerging international justice system. I would appreciate if those who spoke today would give us copies of your comments so we can integrate them. We are also preparing a review of the documents you received in light of new ideas from your comments. We hope that we can produce a second version of the document before the end of October in order to allow you to have a fruitful discussion in the Assembly of States Parties.

Thank so much for your contribution, your comments, they were very interesting to us. Thank you to the Friends of the Court for organizing this meeting and I hope to see all of you again in the near future. Thank you.

[4] Mr. Hiroshi Tajima was unable to attend the hearing but provided his intended statement.