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**The Office of the Prosecutor's experience in respecting
complementarity**

International Criminal Court - Pacific Outreach Roundtable

Statement

Sidney

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Excellencies,

Ladies and Gentlemen,

Thank you for being here, and thank you to the Australian and the New Zealand Governments for convening this very important meeting.

I am delighted to participate in it, and since our discussions this morning, I am sure it will help to bring clarity and understanding on the mandate and the work of the International Criminal Court, and encourage those present here today to consider becoming a member of this new global justice framework or implement the necessary legislation.

As Deputy Prosecutor and Prosecutor-elect of the ICC, I would like to address the role of the Office of the Prosecutor in respecting and encouraging national efforts to investigate and prosecute Rome Statute crimes, in full compliance with the complementarity principle that underpins the Rome Statute system.

To achieve its goal of holding accountable the perpetrators of massive crimes, the Rome Statute created an interdependent, mutually reinforcing system of justice with a permanent International Criminal Court that is complementary to national systems. The Statute, in its preamble, recalls 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', thereby giving states the primary responsibility for preventing and punishing atrocities.

The Court is intended to complement, not to replace, national systems. It can only prosecute if national systems do not carry out proceedings or when they claim to do so but in reality are unwilling or unable to carry out such

proceedings genuinely. Proceedings before the ICC, as court of last resort, should remain an exception to the norm.

The Court should therefore handle a limited number of cases. The Office of the Prosecutor will select for prosecution those most responsible for the most serious crimes, based on the evidence. The strength of the system lies in the possibility for shared responsibility and complementary action between the Court and the domestic judiciary.

Since it started operations in 2003, the Office of the Prosecutor has moved while fully respecting the principle of complementarity. In all seven situations we opened, we independently assessed first if there were any national proceedings ongoing regarding the same individuals and the same crimes we were looking into. We have been doing so in full cooperation with national authorities and with full respect to national proceedings. In all seven situations, that was not the case.

Regarding the situation in the Central African Republic, for instance, which was referred to our Office by its own Government on 22 December 2004, the Office's preliminary examination required, in order to be thorough, for it to wait and assess the pronouncement of the *Cour de Cassation* on crimes allegedly committed in the CAR in 2002-2003 that would potentially fall within the jurisdiction of the Court. The *Cour de Cassation*, the country's highest judicial body, confirmed that the national justice system was unable to carry out the complex proceedings necessary to investigate and prosecute the alleged crimes. This process alone took two years and a half before the Office finally started investigations.

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

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

Let me now turn to the principle of positive complementarity, a key principle underlying the prosecutorial strategy of the Office.

Already in 2003, the Prosecutor noted that a major part of the external relations and the outreach strategy of his Office would be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes.

This positive approach to complementarity means that the Office fully respects and encourages genuine national proceedings where possible, relying on national and international networks and by participating in a system of international cooperation.

The Office will not be directly involved in providing direct technical assistance or capacity building, as it is not a development agency, and these tasks are best reserved for other competent bodies.

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

Recent years have shown that the preliminary examination phase offers the first opportunity for the Office to ensure the fulfilment of the Rome Statute goals, promoting national proceedings. The Office makes public announcements of the beginning of a preliminary examination activity and is able to send missions, and request information from national governments. This information can be factored in by all States and relevant organizations, in order to promote timely accountability efforts at the national level.

I can provide you with examples of how we have achieved this promotion of national proceedings in situations such as Colombia, Georgia and Guinea later, if you are interested.

Following the opening of an investigation into a situation by the Office, positive complementarity continues to inform its policy toward selection of

cases to be the focus of its investigation and prosecution. Situations under investigation by the Office will typically involve a large number of crimes committed by numerous perpetrators against scores of victims. Pursuant to our policy of focused investigations and prosecutions, the Office will investigate and prosecute those bearing the greatest responsibility for the most serious crimes, based on the evidence that merges in the course of an investigation.

Accordingly, our Office will support a comprehensive approach to combat impunity and the prevention of recurring violence, by combining our own efforts on the most serious crimes and on those who bear the greatest responsibility, while encouraging and supporting national investigations and prosecutions of other alleged perpetrators as well as truth and reconciliation mechanisms. For example, we can provide national authorities with information collected by the Office that could be of assistance to their national proceedings, subject to the existence of a credible local system of protection for judges or witnesses.

We have had successful examples in this area, including in Uganda and regarding the crimes committed by the FDLR in the Kivus in the DRC. I am happy to share these experiences with those interested at a later stage.

In Prosecutor Moreno-Ocampo's statement on the occasion of the ceremony for his solemn undertaking as Prosecutor of the ICC, he said that: *"As a consequence of complementarity, the number of cases that reach the Court should not be a measure its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."*

The Court will only do a few cases. We need to conduct these cases according to the highest international legal standards. That is important.

However, as those primary responsible for investigating and prosecuting the crimes defined in the Rome Statute, States Parties have a fundamental role to play within the Rome Statute system. Throughout our activities, the OTP has always endeavored to work in full respect with national proceedings, promoting understanding, coordination and exchanges when applicable, and only seeking to intervene as a measure of last resort. The Court is a back-up system.

States and national authorities are the first enforcers of the Rome Statute system. We would like to encourage those who are considering ratification and domestication into their legal systems in the Pacific region and we look forward to working with you.

Thank you