

**ICC Review Conference
Statement by Ms. Patricia O'Brien,
Under-Secretary-General for Legal Affairs,
The Legal Counsel,
for the Stocktaking Panel on "Cooperation",
3 June 2010, Kampala, Uganda**

Thank you, Judge Kirsch,
Thank you also to the focal points,
Colleagues, Ladies and Gentlemen,

I am very grateful for this opportunity to share with you the experience of the United Nations in cooperating with the ICC.

[Principles governing UN-ICC cooperation]

As we are all aware and as we have been reminded again and again in recent days, the Court is an independent international organization. However, in order to be able to discharge its mandate, it relies on the cooperation of States, both Parties and non-Parties to the Rome Statute, as well as the cooperation of International Organizations and NGOs. As former President Kirsch put it, "the Court is independent but interdependent".

I believe it is important to bear in mind that the primary responsibility to provide the Court with the cooperation which it needs to discharge its mandate lies with States, and, first and foremost, with States Parties to the Rome Statute. The United Nations is but a secondary source on which the Court can count, along with other international organizations and NGOs.

Yet, while it is a secondary source, it is one that enjoys a special position. Not because of its practical or material capacities. These are limited. But because of the special relationship which exists between the Organization

and the Court. The United Nations was “present at the Court’s birth” and, as the Secretary-General recalled in his speech on Monday, is strongly committed to its noble cause. Further, the Rome Statute expressly provides, in its second Article, for the Court to be brought into relationship with the United Nations.

So it was that, on 4 October 2004, former Secretary-General, Kofi Annan, and the then President of the Court, Philippe Kirsch, signed the UN-ICC Relationship Agreement. It is that Agreement, together with the General Assembly resolution approving it — resolution 58/318 - which are the instruments governing the Organization’s cooperation with the Court .

The Relationship Agreement is based on the fundamental principle, as far as the United Nations is concerned, that the Organization will cooperate with the Court, whether it be in the administrative, logistical or legal field, whenever and wherever this is practically feasible, with due regard to the Organization’s responsibilities and competence under the Charter and subject to the Organization’s rules as defined under applicable international law.

The Relationship Agreement, in turn, serves as the legal basis for the conclusion of further more detailed arrangements to provide for and regulate specific instances or fields of cooperation.

The most prominent and well known of these is probably the Memorandum of Understanding between the United Nations and the Court concerning cooperation between the United Nations Mission in the Democratic Republic of the Congo (known as MONUC), and the Court. This MoU deals with the provision of assistance by MONUC to the Office of the Prosecutor and the Registry in connection with the Prosecutor’s investigations into the situation in the Democratic Republic of the Congo.

But there have been many other arrangements, including, for example, those dealing with the provision of international telecommunications facilities for the Court's field presences and transportation services for its personnel on mission.

[I thought it might be of interest to talk about challenges of UN-ICC cooperation – with focus on a particular practical and very real example which has arisen during my term as Legal Counsel]

The relationship between the ICC and the UN is solid and efficient. This was not however, achieved without real effort and constant dialogue with our ICC partners. Many challenges had to be overcome.

Perhaps, the biggest challenge arose in the context of the case against Mr. Thomas Lubanga Dyilo.

In this case, the United Nations had provided a large number of documents to the Prosecutor on condition of confidentiality — or, to be more precise, subject to the legal protections provided for in Article 18, paragraph 3, of the Relationship Agreement, which is, in turn, based on Article 54, paragraph 3 (e), of the Rome Statute. The Prosecutor was consequently barred from disclosing these documents to any third person, including the judges hearing the case, without the Organization's prior consent. The Prosecutor approached the United Nations for its consent to the disclosure of certain of those documents, but, in order to ensure the protection of its staff and of those persons it is mandated to assist in the field, the Organization had, on initial review, declined to give its consent.

The Prosecutor believed that, among those documents, there was a number that contained information that was potentially exculpatory or otherwise relevant to the conduct of Mr. Lubanga's defence. The judges considered that, not being able to examine those documents themselves, they were unable to verify if any of them needed to be disclosed to the accused in order to ensure his right to a fair trial. So they decided to stay the proceedings.

This obviously represented a major setback for the prosecution of the first trial.

Intense discussions followed between the UN and the Prosecutor in order to find a suitable solution that would allow for the necessary documents to be disclosed while preserving the interests of both organizations.

The discussions resulted in the United Nations consenting to the Prosecutor's disclosing the documents but only to the judges. For their part, the judges made clear that they would not disclose the documents to the Defence without the consent of the UN. After inspection of the documents, the judges would decide which ones needed to be disclosed to the Defence. The Prosecutor, would then disclose those documents in full to the Defence, if the United Nations agreed. Alternatively, if the United Nation still did not consent to their disclosure, the Prosecutor would propose, in consultation with the United Nations, alternative ways of disclosing the "vital" information that they contained to the Defence. These included the provision of agreed narrative summaries of the documents concerned.

The solutions proposed were to the satisfaction of the judges, who authorized the resumption of the trial.

The reason why this major obstacle occurred was because both the UN and the Prosecutor struggled to balance competing obligations that arise from their mutual cooperation.

The UN has to reconcile its will to cooperate with the Court to the maximum extent possible, on the one hand, with the need, on the other hand, to protect its personnel and the people it assists in the field, as well as the need to safeguard its very ability to carry out its operations or activities. As a result, the UN will be obliged in some instances to provide documents to the Prosecutor on condition of confidentiality or decline to consent to their disclosure.

The Prosecutor, on his side, also has to reconcile two potentially competing obligations. On the one hand, he must investigate crimes under the jurisdiction of the Court. To this end, he may need to obtain documents that the United Nations can only communicate on condition of confidentiality for the reasons I have just explained. On the other hand, the Prosecutor needs to ensure a fair trial for the accused by disclosing to the Defence any document that may be of an exculpatory nature.

The United Nations and the Prosecutor have constructed a procedure that allows for these tensions to be resolved in an appropriate manner and to the satisfaction of the Judges.

[Conclusion]

I believe that my Office and the different organs of the Court have put in place a working relationship that develops and grows stronger year by year. By now, many of the requests which the United Nations receives from the Court for its cooperation and assistance can be handled as a matter of standard procedure. This was only made possible because of the dedication and trust that both parties demonstrated in working together to overcome the many challenges that they encountered along the way.

You will understand that, for the reasons I indicated earlier, I will not be able to discuss the details of many of the specific cases in which the United Nations has provided support or legal assistance to the ICC. That said, I hope that you will have found this brief overview to be of interest.

I look forward to the discussion with all of you.