Transcript

Second public hearing of the Office of the Prosecutor

NGOs and Other Experts

The Hague, 26 September 2006

Chief Prosecutor Luis Moreno Ocampo - Opening Remarks

We are pleased to present to you our report on the last three years of activity of the Office of the Prosecutor and the Prosecutorial Strategy for the next three years. It has to be clear that the Prosecutorial Strategy is part of the strategic planning of the Court, the entire Court. These documents are the result of a process of discussions with all OTP staff. The process started last January with meetings to which all members of the Office were invited and were present, and resulted in consensus on the five strategic objectives.

After that, in accordance with the One Court principle, we discussed our plans with the heads of the other organs and with senior staff. We took their comments into consideration. We also offered to discuss the documents with the Staff Representative Body. Yesterday, we launched a dialogue with States Parties and today we open the dialogue with civil society and we thank you for coming and representing them. We propose to use the same format that we used at the first public hearing which as you may remember, was held when I had just taken office in June 2003.

Olivia Swaak-Goldman and Michel de Smedt will present a summary of the documents to allow experts on different topics to present to you some ideas and then if some of you wish to intervene, please register and we will include you in our list of interveners for a short format. The idea is that the commentator will talk for about 10 minutes and the interveners will talk for 3 minutes. This format will allow us to respect your ideas and your independence as well as the independence of the Office of the Prosecutor. We will take notes of each intervention; in this sense this is a public meeting. If there is something you wish to keep confidential, please inform us specifically. It is a public meeting, and that is why we have a film crew present.

At the end of the morning we will make a few comments on process, not substance. Within the next fifteen days, we will prepare a document with proper answers on the substance and we will present them to you in due course. And this document will allow for a more in-depth discussion at the meeting in New York. This is the first round of discussions; the second round will be in October, when we plan to do something comparable in New York. We also plan to have another dialogue in Addis Ababa with the African Union people, at the beginning of the next year. By the end of October we will review our documents bearing in mind the comments and ideas received. We plan to use these documents first to start a review of our regulations and protocols and standard operating procedures but they will also be useful in the discussions leading up to the Assembly of States Parties. I hope a better understanding of what we are planning to do will inform your cooperation with the Court as well as provide a context for you to express your concerns and criticism.

Basically what we are trying to achieve is to align expectations. We are trying to have you understand what we can do. Today we would like to receive your comments on what else you think we have to do, or ideas about why we cannot do something, and at the end of the process we will take your ideas into consideration and that will be the plan for the next three years. I will now give the floor to Olivia Swaak-Goldman, to explain the main ideas in the Three Year Report.

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 that 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.

Ms. Géraldine Mattioli – Human Rights Watch

Thank you for giving me this opportunity to make a few remarks on behalf of Human Rights Watch about the work of the ICC OTP over the past three years.

While there is a wide range of topics to touch on from the very interesting report that was provided to us, I will focus my remarks on behalf of HRW this morning on some policy issues before the OTP: specifically, I will discuss aspects of the "focused investigations and prosecutions policy".

But, before doing so, I would like to begin with a few brief general remarks about this second public hearing.

General remarks:

On behalf of HRW, I would like to express our appreciation for the dialogue with the Chief Prosecutor, initiated literally on his first day in office three years ago and continuing to today's meeting. As you know, we are convinced that it is not only possible but necessary to have these

substantive exchanges of opinions, while respecting the independence of the Office of the Prosecutor.

It is worthwhile reflecting on the work accomplished and headway made by the OTP after 3 years. At the outset, we wish to acknowledge the enormous challenges that the Office has faced and continues to face. The report certainly does a vivid job of outlining them. There is no doubt in our mind that any assessment must take place in light of the challenges faced.

As you well know, Mr. Prosecutor, HRW has followed very closely the work of the OTP over the past three years. We were present in June 2003, for the public hearing of the prosecutor. I personally attended a first bilateral discussion between the prosecutor and NGOs on July 15th 2003, and we have since participated in the numerous consultations with NGOs. On the basis of this ongoing interaction, we are interested in what the "three year report" reveals of the evolution in the OTP's thinking and the explanations for the decisions made to date.

In particular, we note some interesting shifts in thinking. The OTP has remained committed to many policy concepts since 2003 (for example, the notions of "focused investigations and prosecutions" or "positive complementarity"), whereas in others there have been departures. I would like to mention a couple of shifts in more detail:

- The thinking of the prosecutor seems to have changed on the notion of "interests of justice" and the debate over "peace and justice". The latest version of the OTP's draft policy paper on this subject reflects an evolution which we welcome.

- The same is the case with field presence. Early discussions with the Office suggested that a field office was not deemed necessary. It was thought that it would be possible to conduct "fly in and fly out" investigations without ongoing field presence in the countries concerned. But now there has been a welcome change in that view.

The evolutions and lessons learned from these changes would be interesting to discuss in the OTP's subsequent reports.

In the light of the challenges, the OTP has arguably achieved major successes and accomplishments over the past three years. It has set up an office, hired numerous competent people from all over the world, and adopted important policies and procedures. The OTP has strived to improve internal coordination as well as coordination with other organs within the "one court principle"; it has also carried out intensive consultation with external actors. With all that, the office also has opened investigations in three of the most serious crises in the world, issued six arrest warrants, and obtained custody over one accused, Mr. Lubanga.

While it is perfectly understandable that the Office had to mainly concentrate on internal matters over the past three years, stake-holders expect, at this juncture, more focus on the substantive work of the Court: investigations and prosecutions.

Remarks on the focused investigations and prosecutions policy:

The policy of focused investigations and prosecutions has been a pillar of the OTP's strategy since 2003. To our understanding, this policy means that the OTP will pursue a limited number of cases with a limited number of accused, focusing on those who bear the greatest responsibility. Focused investigations will lead to narrow arrest warrants with a limited number of counts, representative of the victimisation of a certain population.

Prima facie, HRW thinks this is a good policy – it takes into consideration the reality of an institution with global jurisdiction but limited resources. It is a wise policy that clearly tries to learn from the experience of the other international tribunals. As the three year report explains, it may in addition have practical advantages when operating in situations of ongoing conflicts.

While it is a good policy in theory, the devil lies in the details of implementation. We would like to address the concrete implementation of the policy. We are concerned, in the context of the experience with the ad hoc international tribunals, that the ICC's policies appear to swing the pendulum too far in the other direction. We would like to make some recommendations on implementing this policy in a way that will enable the Court and the OTP to have maximum impact on the local communities most affected by the crimes.

1. *Selection of cases and gravity criteria:*

Since the ICC will not be able to prosecute all crimes committed in a given situation, the selection of cases is crucial. We have reviewed the OTP's draft paper on selection of situations and cases, and we welcome the way that the criterion of "gravity" is laid out. Maintaining objective criteria in assessing whether certain cases merit investigation or prosecution is important to ensure that prosecutions before the ICC do not appear politically-motivated. Using an objective threshold in assessing potential criminality avoids the danger of making comparisons between groups or individual perpetrators in determining whether or not to initiate an investigation or prosecution. Once a determination is made that an individual perpetrator meets the objective threshold for prosecution, then a case should be brought forward even if the scale of the underlying crimes is not of the same magnitude as that of other defendants before the ICC.

2. *Who should be prosecuted?*

With a policy of having a limited number of accused, not all the perpetrators will be prosecuted. We would like to discuss how this group of perpetrators "eligible for prosecution" should be identified to maximize the impact of the Court.

We welcome the Prosecutor's policy of focusing on those who bear the greatest responsibility, but urge the Office to keep a degree of flexibility with respect to the implementation.

Article 27 of the Rome Statute, which emphasizes the irrelevance of official capacity for prosecution, is crucial. The ICC may indeed be the only institution with the authority to prosecute people who are in position of power, including political and military leadership.

In light of the fact that two of the three investigations at the ICC have been triggered by "self-referrals" from the states concerned (DRC and Uganda), it will be particularly important that the OTP applies objective criteria rigorously and goes after those bearing the greatest responsibility, even if they are within the state apparatus. For example, in the DRC situation, the Prosecutor has said that Thomas Lubanga Dyilo is one of those bearing the greatest responsibility in the Ituri conflict. This is true. However, HRW's position is that the Ituri conflict is part of a broader conflict in the Congo and in the Great Lakes region. At this point, we think it will be important to investigate those who have armed and supported militias in Ituri and who may still be in positions of power in Kinshasa, Kigali and Kampala.

The policy of the OTP to investigate and prosecute "those bearing the greatest responsibility" seems to also have been approved by the Pre-Trial Chamber in the Lubanga case. The Pre-Trial Chamber used the category of "those most senior officials responsible for the most serious crimes" in its decision on the arrest warrant against Lubanga. We are concerned that these definitions may be too restrictive. The Rome Statute simply refers to the "perpetrators" of "the most serious crimes of concern to the international community as a whole," but doesn't have such a restrictive definition.

In that regard, we believe that the ICC should be distinguished from the Special Court for Sierra Leone and the *ad hoc* tribunals. Unlike the Statute of the Special Court for Sierra Leone, the Rome Statute does not explicitly limit the mandate of the ICC. Moreover, concerns of the Special Court and the *ad hoc* tribunals relating to their limited timeframes are not shared by the ICC. We think that some measure of flexibility in terms of pursuing middle-ranking officials may have a great impact and strong deterrence effect. In some contexts, pursuing those officials further down in the chain of command whose prosecution could have a significant impact for victims on the ground and/or may be necessary for the implementation of an effective prosecutorial strategy in a particular country situation.

For example, in the context of Darfur, HRW believes it is important for the ICC to prosecute state governors and provincial commissioners, as well as Janjaweed leaders. Our research suggests that their prosecution could have a tremendous impact for the victims on the ground, by, for example allowing victims who have been displaced as a result of the "ethnic cleansing" campaign to return to their villages. In addition, going after mid-level ranks may have practical advantages in helping the Prosecutor to build cases leading to those at the top level in the chain of command. As such, it may be beneficial to also bring forward cases involving mid-level perpetrators, at least initially, for prosecution in certain country situations.

3. *Representative charges:*

In terms of representative charges, we welcome the policy of the OTP of having a narrow set of counts which will be representative of the range of victimization in a certain area. This is a very important policy in terms of impact and in terms of enabling a range of victims to participate in the work of the ICC. We are interested in any lessons learned on the challenges of implementing this policy and methodologies to succeed in its pursuit. For example, as expressed in a joint letter to the OTP last July, HRW regrets that the arrest warrant against Lubanga, issued 18

months after the OTP launched the investigation in the DRC, only contains charges pertaining to the recruitment and use of child soldiers, when our research suggests that the militia group led by Mr. Lubanga, the UPC, allegedly committed other serious abuses.

4. *Sequential approach:*

I have one last remark on investigative policy and it concerns the sequential approach adopted by the Office. The prosecutor's policy paper states that his office will investigate cases and groups in a conflict "in sequence," meaning cases and/or groups will be investigated one at a time. From HRW's perspective, we have concerns about the Office opting for this approach as a policy. We feel there are a lot of problems resulting from this approach, such as delays in the investigations and consequences for the preservation of evidence or serious problems of perception for the Office. We understand that it may be unavoidable to proceed in sequence sometimes for practical reasons (such as resources and security) but we urge the Office to consider how to mitigate the shortcomings of going case after case, group after group.

To refer to the Congo example again, the OTP has currently issued an arrest warrant against Lubanga, leader of one of the major militias in Ituri, associated with the ethnic group of the Hemas. When the arrest warrant was issued last March, the OTP was effective in explaining that the investigation in the DRC is continuing and that other groups will be targeted. But this was already more than six months ago. Information recently collected by our Congo researcher suggests that the Hemas are starting to accuse the ICC of "selective justice" for not having acted on crimes committed by the Lendu militia, the FNI.

An effective communications strategy cannot replace the need for the OTP to act promptly in taking action against different groups alleged to have committed crimes within the ICC's jurisdiction. In our view, maintaining such an approach will aid in preserving the perception of impartiality of the OTP and the ICC and will provide a sense that justice is being done to the different groups victimised on the ground.

I would like to conclude by stressing that, at the end of the day, the success of the Office will depend on continuity and consistency in the implementation of its policies and strategies.

Mr. William Pace – Coalition for the International Criminal Court (CICC)

Mr. Chief Prosecutor, Deputy Prosecutor, distinguished participants and colleagues,

Tragically the scale of war, conflict, war crimes and crimes against humanity have not subsided in the years since the Rome Statute entered into force. But it is our hope that the Court will prove to be a great tool of peace in the 21st century.

At the first public hearing three years ago, many including myself, commented that you were undertaking one of the most difficult jobs in the world. Nothing in the last 3 years has changed that assessment of the role of the Chief Prosecutor of the ICC. It is important that NGOs, international organizations (IOs) and governments and others, as we participate in the evaluation, that we do not forget the truth of this observation. Indeed the height and diversity of the expectations continue to grow.

Through its nearly 2000 members, and through the CICC Secretariat, the Coalition has monitored the work of your office since the first OTP representatives came to The Hague. The extent of our activity in monitoring the Court is a profound demonstration of our continued committed support for the ICC and the Rome Statute system. While the input resulting from NGOs' monitoring activities is not always welcomed by ICC officials, sharing expertise and concerns are one of the main investments that civil society is making in this new system.

However, it does not end there; the Coalition members contribute to the Rome Statute system in general, through its worldwide campaigns on ratification, implementation, cooperation, combating opposition to the ICC and international justice, and through major awareness-raising and educational initiatives.

Mr. Prosecutor, we note in your report a commitment to continue our semi-annual consultations, in addition to the regular contact with NGOs, as well as other external relations efforts. The twice yearly consultations and hearings such as these today are progressive developments by your office; we realize such meetings are still not common practice in many international organizations. We compliment you especially on your efforts to share and consult on the development of major planning and policy matters.

The achievements of the OTP are well recognized by our members world wide; we have followed how States have placed trust in the ICC in terms of four referrals, including the UN Security Council referral, and a non-State Party's recognition of the jurisdiction of the Court, the building of an office from 0 to 130 staff, the OTP's initiation and maintenance of three investigations, the first six arrest warrants and the first surrender of an accused, the initiation of prosecutions, the adoption of a number of legal documents, reports and strategies. This list represents impressive achievements by the OTP and ICC in its first three years; and many of our members have commented that the ICC and OTP can point to significant successes in comparison to the other ad hoc and special international tribunals in their first years.

The CICC, too, has grown since 2002. Another concrete indication of the success of the Court is that the civil society organisations all over the world, continue to join our global campaign to end impunity.

Diverse expectations – the Coalition is not about seeking consensus among its members – it is about coordination and communication. While there are certain major principles that Coalition members agree upon, the member organizations of the CICC are extraordinarily diverse in their mandates and objectives. Indeed, there are more issues that Coalition members disagree upon. Many issues in the two documents presented today are subject to these diverse opinions, but there are certain issues that occurred in discussions leading up to this meeting. One recurring reaction was the lack of analysis in terms of lessons learned. We are wondering how you reached the conclusions you did and what were the difficulties getting there? Are there certain policies that you will reassess as you go along?

I would like to mention a few examples of issues based on questions frequently raised by CICC members:

- For example, NGOs often experience that the Prosecutor has publicly been very silent in terms of addressing issues of non-cooperation. Has this strategy been successful? Will there be situations when the OTP will speak up? The few generally positive conclusions in the report, adding to the public silence throughout the years seems to give the impression that you are getting the cooperation you need, which in its turn disables any civil society efforts to advocate for increased cooperation by States Parties. While cooperation (arrest, intelligence sharing, etc) is the main responsibility of states, and we continue reminding them of that, we recognize the importance of the Prosecutor as a catalyst. The report refers little to the approach vis-à-vis other international organizations – from the outside, it seems that the strategy towards, for example, the African Union has been too ad hoc.
- Another example, are there lessons learned in terms of positive complementarity and efforts done by the OTP to encourage or stimulate national proceedings? What were the steps taken and what did/did not work? There is some mentioning of technical assistance to authorities in the DRC. Have similar initiatives been taken elsewhere, and are there lessons learned in terms of the role of the ICC to encourage national proceedings in countries where the OTP has not yet initiated investigations?
- The Coalition has followed how both local and international media have related to the ICC, often manipulated by forces opposed to the ICC or infected by misinformation – what have you learned so far? How has your strategy been adjusted accordingly?
- The 'mission approach' in terms of investigations: while we see the advantages of this (people being able to use The Hague as base, have the team united, easier management, security, etc) it would be interesting to know if the Prosecutor has, at some stage, assessed having at least parts of the investigation teams based in the field? As with the 'mission approach', there are disadvantages, but are there counterbalancing advantages (less travel, quick reaction, contacts with the field and local/national developments)?
- In terms of [so-called] auto(self)-referrals to the Court (or "the policy of inviting and welcoming voluntary referrals by territorial states"), the work of civil society would also be strengthened by your conclusions as to what the advantages and disadvantages of this approach have been; are there situations where cooperation can be secured by other means? Have the referrals actually guaranteed cooperation, and what has been the impact on the perception of local communities?
- The differences between common and civil law traditions have presented challenges to all international courts, and need to be addressed in a rational way. Judicial institutions from all over the world would benefit from more of an analysis from the OTP as to how this challenge is addressed, and what the challenges deriving from the Rome Statute and the legal texts have been so far.

Mr. Chief Prosecutor, in our brief time we can only raise a few issues emerging from the OTP report. We are realistic and we understand that this report is an important tool for the OTP, also in terms of public relations and external communications. One last comment: States, IOs, and NGOs should be able to accept constructive and even critical evaluation of their activities in

relation to the OTP, and we therefore would welcome more constructive criticism of these actors in your future reports.

The ICC is the most significant effort in history to combat impunity for the most serious crimes. We join you in this cause and look forward to continuing to work together in this effort.

Mr. Thomas Verfuss AJICC

Mr. Prosecutor, ladies and gentlemen,

I feel honoured that the ICC gives me this opportunity today to address you once again at a Public Hearing on behalf of the AJICC, the Association of Journalists at the International Criminal Court.

Before I deal with the two documents which the OTP has submitted to us for comment, I should like to update you on the core points of the message we put to you more than three years ago, after you took your solemn undertaking in the Peace Palace[1].

At the time, we identified one group of journalists who, because of both their difficult position and their crucial role, will require the particular care and attention of all parties involved. It is not people like me who live in the wealth and security of this peaceful city on the North Sea, but journalists in the countries where the war crimes under the jurisdiction of the Court have been committed. And then I am not thinking of those journalists who engage in state propaganda and enjoy the protection of the regime, but of those colleagues who try and report objectively, independently and faithfully about war crimes trials, even under adverse circumstances. They are the journalists the Court and the victims need.

At the time, I was speaking in the abstract void of a situation at the ICC where you had just been appointed and where, of course, there were no referrals and no situations under analysis or investigation yet. But my words were based on many years of experience at the ICTY where Western journalists like myself had seen the problems which colleagues from the former Yugoslavia had to face while authoritarian rulers like Tudjman and Milosevic were still in power. There was pressure from the police and secret services and attempts to destroy the free word by economic means or through abuse of the legal system[2].

War crimes are not typically committed in Western democracies, but in countries with a deficit regarding both democracy and press freedom. To illustrate this, I should like to draw your attention to the press releases which the International Federation of Journalists (IFJ) has put out - this month only! - concerning the countries under investigation or analysis by your office:

[1] See: http://www.icc-cpi.int/library/organs/otp/ph/030714_otp_ph1s5_Thomas_Verfuss.pdf
[2] For further analysis also applicable to the ICC situation, please see: "Trying Poor Countries' Crimes in a Rich City: The Problems of the Press from the Former Yugoslavia" by Thomas Verfuss, Journal of International Criminal Justice, Oxford University Press, June 2004

IFJ Condemns Brutal Murder of Newspaper Editor in Sudan
(press releases, 07/09/2006) - The International Federation of Journalists (IFJ) today condemned the kidnapping and gruesome...
IFJ Calls for Fair Trial for Journalists Accused of Offending Ivory Coast President
(press releases, 14/09/2006) - The International Federation of Journalists (IFJ) today urged judicial authorities to hold a...
IFJ Calls for Investigation of Fire that Destroyed Two TV Stations, One Radio Station in DRC
(documents, 20/09/2006) - The International Federation of Journalists (IFJ) called for a full investigation of the fire that...

There is, of couse, no evidence that the incidents described by the IFJ[3] are in any way linked to ICC investigations. But they are indicative of the general climate in which journalists have to work in those countries, a concern we should all remain aware of and draw attention to at the appropriate occasions.

Another point we put to you in June 2003 was the difficulty for journalists from the former Yugoslavia to obtain visas and residence permits for The Netherlands when they want to come to The Hague to cover the then Milosevic trial or other ICTY cases. This may not seem a matter for the AJICC, but we always considered the visa procedures for Serbian, Bosnian and Croatian colleagues as a test case for the African colleagues who will have to come in the near future to cover ICC trials.

I know that dealing with host state problems is first and foremost a matter for the Registry and the Presidency of the ICC, not for the OTP. I would like to take this opportunity to thank both the Registrar and the chef du cabinet of the president who have assured us that they would indicate to the host state that a solution to this problem is a priority for the Court, as it wants justice to be reported about and thus to be seen to be done in the countries concerned.

The ICC Task Force of the Foreign Ministry of the host state has made many efforts to insure that journalists receive visas in a timely manner now. The main problem that remains to be addressed is the high cost of residence permits – imagine hundreds of euros of fees to pay by journalists from poor African countries. We are in discussion about this matter with the authorities of the host state.

Money is indeed a crucial matter, not only as far as administrative fees are concerned, but also regarding the cost of living in The Hague, once ICC trial proceedings begin and journalists from e.g. the DRC or Uganda will have to cover them on a daily basis and thus live in The Hague.

I described to you three years ago that it took years before structures were in place to make sure that there would be independent reporting about ICTY proceedings for the benefit of the

[3] Source: www.ifj.org. The AJICC is most grateful for the assistance which the IFJ has given to our efforts to solve the visa problems for journalists from the ex-SFRY who want to come to The Hague to cover ICTY proceedings. Several AJICC members are also members of national journalists' trade unions like the NVJ which are member organisations of the IFJ, see http://www.ifj.org/default.asp?Issue=IFJ&Language=EN

population of the former Yugoslavia. At this moment in time, I am aware of local initiatives in the DRC to explain the functioning of the ICC to the local population through radio programmes, but I am not assured yet that sufficient funds are available to send reporters to The Hague on a permanent basis. This problem remains a focal point of our attention.

The matter is not without ethical dilemmas. I was writing a letter to an ambassador of a rich country the other day, drawing his attention to the generous support countries like the UK, the Netherlands, Germany and Luxembourg have been giving to independent reporting about the ICTY over the past years, when I received a press release from a humanitarian organisation, saying that they were sending a team of plastic surgeons to Northern Uganda to help people whose lips had been cut off or who had been mutilated otherwise. But they could help only twelve or so people for lack of funds.

I am aware that you can spend each Euro only once. Money given to the media to finance the presence of journalists in The Hague cannot be given to humanitarian projects. But I dare say that given this dilemma, the States Parties and other potential donors should bear in mind that the presence of at least one journalist from the country concerned during a trial could be considered a moral duty to a victim who comes to The Hague and testifies about rape, torture or some other terrible crime [s]he has undergone. As a matter of respect to the victims and also in the interest of the deterrence of further crimes, the bottom line should be: Potential donors make efforts to ensure the presence of at least <u>one</u> journalist from the country concerned at all stages of the trial proceedings.

Coming now to our comments on "The OTP report on the activities performed during the first three years", I can be very brief. There are only three and a half lines about the media in paragraph 99, and we don't disagree with it. A fine tuning of practical and technical aspects of the media policy takes place in regular contacts of the AJICC with your media advisor. One matter which is not practical and technical, but a matter of principle, and which I should therefore like to mention here, is the relationship between journalists based in The Hague and colleagues in the countries concerned by ICC cases. For the exchange of information, it is essential that these networks are interconnected better than they are at the present time, and that is why I would encourage you to seize every opportunity to improve contacts. When the LRA arrest warrants were made public, there were separate press conferences for us in The Hague and the colleagues on a phone connection from Uganda. We would have liked to have a joint press conference and to hear our colleagues' questions, comments, and concerns, in order to learn more about Uganda, its history, culture, the present political situation, and the nature of the conflict.

The ICTY experience shows that Western journalists could, of course, read books about the former Yugoslavia, but that could never have replaced the countless conversations we had with Serbian, Croatian, and Bosnian colleagues to improve our in-depth understanding of facts, developments and mentalities in the Balkans. The same will apply in the future for, say, the conflicts between the Hemas and the Lendus. Reading books is not enough.

As for the progress of the different investigations as described in the Report, the members of the AJICC had the opportunity to discuss those matters with you at various opportunities as

journalists, for the purposes of reporting about them. As an Association, we do not think it is our task to make comments on details of your prosecutorial policy or strategy; we are looking forward to discussing them with you, as individual journalists representing our media respective organisations, during future Round Tables.

Thank you very much.

Ms. Mariana Getz - Redress

REDRESS, the international NGO promoting victims' rights, is grateful to the Office of the Prosecutor (OTP) for organising this Second Public Hearing. We hope it will be a useful opportunity to exchange views and to enhance cooperation between the OTP, civil society groups and other stakeholders.

REDRESS has been involved in the ICC since before the Rome Conference. It has focused on promoting the interests of victims in ICC proceedings, as key stakeholders, as active and subjective participants in the justice process given their status as rights-holders in international law. Today, our intervention will place emphasis on ***the active role of the OTP to address the rights and interests of victims***.

COMMENTS ON THE PAST THREE YEARS OF THE OTP

REDRESS's comments on OTP's Three Year Report relate to the following two areas:
- *The Standard of Gravity and Selection of Cases*
- *Conducting Investigating in On-going Violence*

1) Standard of Gravity and Selection of Cases:

REDRESS appreciates that OTP's actions must be focused on addressing the most serious crimes and refers to the list of factors set out by the OTP, relevant in assessing gravity, which include: the scale of the crimes, the nature of the crimes, the manner of commission of the crimes and the impact of the crimes. The OTP has indicated in its Report that this approach has been used to select *situations*; and through its "sequenced" approach to also select *cases within a situation*.

REDRESS is concerned however, that this "*gravity test*" has not been applied to the charges within cases. Whilst the OTP has stated that: "In principle, incidents will be selected to provide a sample that is reflective of the gravest incidents and the main types of victimization" in practice, the charges laid against Mr. Lubanga, which focus exclusively on *conscripting, enlisting or using children under the age of fifteen in hostilities*, do not achieve this. REDRESS is concerned that the "*gravity test*" is here being replaced with something more akin to an "expediency test."

REDRESS, together with a number of other NGOs, wrote to the OTP expressing its concern with the narrowness of the indictment. A narrow indictment will impact upon the range of victims that will be entitled to participate in later phases of proceedings including reparations, and

provides a skewed message to the communities most affected. In addition, recent research conducted by
REDRESS on children affected by armed conflict demonstrates that:
singling out child soldiers against other child victims or other victims in their
communities may have a detrimental effect on child re-integration; child soldiers have suffered numerous other crimes, in addition to, or as part of their initiation into armed groups or forces, most notably sexual violence, being forced to kill family members, etc. These merit fuller investigation by the OTP. In an environment where it is still generally unknown that child recruitment is a war crime, and where children have also joined groups "voluntarily", a concerted OTP outreach strategy is required to explain the charges or its deterrent potential will be lost.

2) Conducting Investigations in Situations of On-going violence

REDRESS is conscious of the challenges faced by the OTP in conducting investigations in situations of ongoing violence, and the need to protect victims and witnesses. Of course, this is a concern that we share. Whilst organisations such as REDRESS can never know the extent of the constraints placed on the OTP, we are nonetheless concerned about the repeated use of the security environment, and
its potential impact on victims, as a reason to delay hearings, prevent proceedings from moving forward or suspend investigations, as recently evidenced by proceedings in DRC and Darfur. OTP's approach to the protection of victims and witnesses appears to be one of reducing the numbers of persons it needs to call as witnesses (and hence reducing the protection burden) by reducing the breadth of the charges. **This approach of narrowing the involvement of those most affected in order to maximize protection [a "*negative protection*"] must be used with caution, given the detrimental impact it has on victims' rights and ability to be involved in proceedings – either as witnesses or claimants. More dialogue on how to protect victims whilst positively enabling them to obtain justice, should be the primary objective.**

In relation to Darfur, we make note of some of the helpful suggestions of Prof. Cassese in his recent amicus report to Pre-Trial Chamber I on measures to protect victims and witnesses and preserve evidence in Darfur. Also, we encourage the OTP to maintain a close collaboration with organizations representing victims inside Sudan in order to continually assess the optimal way to involve victims in the investigative phase. Further, we wonder whether the OTP has considered
whether greater engagement and publicity about the ICC, including visits to Khartoum, and Darfur as far as possible, could positively enhance the general security for victims and witnesses. We also would welcome information on whether the OTP is seriously considering Prof. Cassese' suggestion to formally request the Government of Sudan to report on the measures it is taking to protect
victims and witnesses, as a lever to seek greater compliance.

COMMENTS ON THE OTP's REPORT ON PROSECUTORIAL STRATEGY

REDRESS welcomes the opportunity to comment on the OTP's Report on Prosecutorial Strategy. Our comments follow and reflect the statement prepared by the *Victims' Rights*

Working Group in response to the Court's Strategic Plan, which raised concerns about what was perceived as an over-emphasis on efficiency of administration and insufficient emphasis on the quality of justice and its resonance with key stakeholders. Following on from the Statute's handling of victims'
interests, the Court's vision should make specific reference to the reparative mandate of the Court and should recognise victims as *active* stakeholders with respect to the crimes investigated and prosecuted – and not just the *passive* recipients of justice.

With regard to the Prosecutorial Strategy, and the important objective of continuously improving the way in which the Office interacts with victims and addresses their interests, we make the following remarks:

The OTP strategy paper places significant emphasis on seeking the views of victims and their communities early in the process, as a key means to improving interaction and addressing their interests. REDRESS agrees with the OTP that this is vital, yet reminds that this is but a first step – a multi-layered strategy which recognizes the different rights and roles of victims within the ICC system is needed. With respect to the OTP in particular, this would include:

- ***Maximising the ability for victims' voices to be heard in full dignity***. The OTP should ensure that victims communities approached in the investigative phase are made aware of the ability of victims to participate. REDRESS is aware of the OTP's views on victim participation during the investigative phase, but now that a final decision has been reached by the Court, the OTP should within its mandate, contribute to the implementation of the decision. Furthermore, protection strategies that foster victims' rights to participate and obtain redress in accordance
with international law should be preferred over solutions that require victims to suffer in silence and without voice.

- ***Recognising the Reparative Mandate of the Court -*** Whilst the OTP's mandate is to
investigate and prosecute criminal suspects, it operates within an international environment in which its role is decidedly more complex. The OTP has a responsibility to see that justice is delivered respecting the interests of all parties, including victims. Reparation for victims includes as appropriate, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. A key component of reparation is the acknowledgement by a judicial instance of the harm done to victims. The implementation of the Prosecutor's case selection strategy and the breadth of charges will greatly influence the extent to which victims may
receive material and moral reparations, and *due consideration of this should be reflected in the OTP's forward looking strategy*.

- Equally, given the judicial phase of the Court, *the OTP should place a greater emphasis on locating, freezing and seizing assets for the eventual benefit of victims*, within its immediate strategy objectives.

Ms. Brigid Inder – Women's Initiatives for Gender Justice

Good morning Mr Prosecutor, Deputy Prosecutor and other colleagues. On behalf of the Women's Initiatives for Gender Justice I would like to thank you for the opportunity to address this hearing.

Gender Competence

The single biggest action the Court could take to ensure it develops as a gender competent institution is to appoint gender competent staff.

If, as mandated by the Statute, the OTP is obligated to ensure the prosecution of gender based crimes as an important component of universal justice, one of the most crucial strategies for assisting the Office with this task, is to appoint staff and the necessary number of staff with the gender analysis, competence, critique and framework, in each of the Divisions, to be able to implement the Statute in a gender inclusive manner.

We note in the Human Resources section of the Three Year Report, that the figures regarding the gender breakdown of appointments in the OTP have worsened since last year. In 2005 the figures were around 45% women and 55% men appointed to the OTP, a difference of 10%. This difference has more than doubled in the last year. The figures provided in the paper to 1 August 2006, show 39% of the appointments in the office are women; while 61% are men – a 22% gap in the appointments of women and men.

Unfortunately the figures still do not reflect the configuration of staff and the specific levels to which staff are appointed, but based on the data last year we would presume that women appointed are by and large clustered into the lower professional posts, although we do note a very slight increase in the number of women at the senior level.

Investigations

In 5 minutes we are unable to address each of the specific situations under investigation by the OTP as outlined in the paper. However we offer some over-arching reflections on the work to date:

There are at least three key strategies which we suggest would enhance the OTP's ability to effectively investigate gender based crimes.

Firstly, that the OTP's work is undertaken with the gender competence necessary to be able to direct, plan and conduct investigations into gender based crimes. We note that the position of Gender Legal Advisor, mandated by the Statute, has not been appointed - a position unquestionably needed by the OTP as a matter of urgency.

Secondly, the importance of establishing contacts and relationships with credible local women's and other community organizations through whom the ICC could access discrete networks to reach women victims/survivors. Genuine collaboration with local activists would enhance the

Court's access to information and documentation, facilitate access to victims and witnesses of gender based crimes, and support your ability to follow-up with victims/witnesses. It is our assessment that at this point the OTP has not established the necessary relationships with women's groups and activists in at least two of the current situations – northern Uganda and DRC. The work in Darfur is at a much younger stage and as such it is too early to be able to comment.

Finally, investigations into gender based crimes are founded on the underlying commitment to identify, recognise and pursue leads and information in relation to gender based crimes. Unfortunately this commitment has not been demonstrated sufficiently and we do not find in the papers, an outline of the strategies to address the current oversight.

Prosecutions

One of the principal functions of the ICC is to deter the commission of the crimes within its Statute by prosecuting those who commit them. In addition the principle of complementarity provides greater impetus for the ICC to investigate and prosecute gender based crimes – because of the unwillingness or inability of States to genuinely carry out the investigation or prosecution.

In many situations within which the ICC does exercise or could exercise its jurisdiction, the absence of relevant legislation, the requirement of corroboration in relation to rape and sexual violence, the issue of consent, prior or subsequent sexual behaviour the brutality of the rapist and the resistance demonstrated by the victim/survivor, the inadequate police investigations, the stigma associated with rape and the lack of support for women all conspire to a create state of unwillingness or inability to genuinely prosecute gender based crimes.

Complementarity enables and requires the ICC to be more proactive and focused in its investigations and prosecutions of these crimes. The OTP will not have a deterring effect on gender based crimes if it chooses to not prosecute them and it may in some circumstances send the signal that such crimes can continue to be committed with impunity.

Thank you once again for the opportunity to comment on the Three Year Report, we look forward to the next 3 years and to our ongoing engagement with the important work of the OTP.

Mr. Christopher Keith Hall – Amnesty International

Amnesty International participated in the first public hearing. We found that hearing, which led to the revision of the Prosecutor's policy paper, very useful.

I would like to highlight a few of the issues we addressed in our informal paper that is not for public distribution. With only two weeks to respond we have not been able to produce a detailed comment. Amnesty International plans to publish a revised version of our informal paper at a later date.

I would now like to identify a few points and say that we share the concerns of the previous speakers, as well as their positive comments, concerning the record of the OTP in the past three years.

I. Selection of cases. We recognize that careful thought went into the development of these criteria. Justice should not only be done, but seen to be done. In the application of these criteria, if the OTP has only conducted investigations and prosecutions on one continent and only of members of armed political groups, but not members of government forces, the legitimacy of the Court may be questioned. It is a serious challenge and the Prosecutor should give due consideration to how these criteria will be applied in the future.

We have serious concerns about the lack of cooperation from states and concerns about the OTP's reliance on cooperation agreements with states. For example, the cooperation agreement in which Sudan promised to arrest persons subject to Court warrants does not seem to have been implemented. Moreover, such cooperation agreements cannot replace national cooperation legislation.

Thomas Lubanga Dyilo was surrendered pursuant to a cooperation agreement by the Democratic Republic of the Congo, but there is a serious question whether that particular model could be applied to other arrest warrants. A legal challenge to the legality under national law of transfers based on a cooperation agreement instead of legislation might well succeed in other circumstances.

II. Arrests. It is disturbing that the members of the LRA who have been subject to arrest warrants have not been arrested, that the international community has not done more and that the three States involved have not taken effective steps.

We urge the Prosecutor to press the UN and other intergovernmental organizations to establish law enforcement teams. In the former Yugoslavia and Sierra Leone, expert teams were able to arrest persons, in some cases pursuant to sealed arrest warrants. The LRA warrants were sealed to protect witnesses and victims. However, the initial use of sealed arrest warrants by international courts was to ensure that people were arrested. In the future this technique should also be used to secure arrests.

III. Positive complementarity. The OTP should do an assessment on the impact of positive complementarity. Amnesty International is not aware of many domestic investigations or prosecutions, if any, of these crimes committed after 1 July 2002. Most of the investigations or prosecutions of crimes under the jurisdiction of the Court relate to crimes committed before the Rome Statute entered into force. In the light of that record, serious consideration should be given to whether positive complementarity is working and, if not, what steps should be taken to address that problem.

IV. Gender. With regard to gender, we share the concerns that the Women's Initiatives for Gender Justice expressed. I would like to highlight few other points: The concept of gender balance is not limited to whether members of staff are male or female, it must include the question whether individuals are homosexual, lesbian or transsexual. We note that the

proportion of women in the two top levels is 50%. However, the proportion at other levels is not mentioned and the gender breakdown is not reported for the past few years, but only for the current one. In addition, the report does not address or identify the reasons for not reaching the gender and geographical goals.

We plan to expand upon these concerns in the public report.

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 three 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 now 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 the 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 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.

Thank you for your attention

Mr. David Tolbert – ICTY

Thank you very much for your kind welcome. It is indeed a pleasure and an honour to be here among such good friends, many of whom worked so hard to establish this important court.

I would first like to congratulate you for devising a strategic plan, and I am pleased to be asked to make a few comments on it. I am a believer in making strategic plans and have engaged in strategic planning processes on several occasions. The challenges in a Prosecutor's office, particularly one that must do both investigations and prosecutions, in creating and implementing such a plan are particularly daunting, as the Office must react to events on the ground and to changing situations, both externally and internally. The nature of events makes strategic planning difficult. Nonetheless, in my view, the Plan addresses the principal issues that the Office will face, in spite of the shifting developments on the ground.

It is much more difficult to speak for 10 minutes than for a longer period. One must really get to the point and say something! In this short time, I will try to focus on just one or two points. I do think, as the strategic plan shows, much of this work is inter-connected, so my comments will hopefully be applicable to other areas as well. A key theme that emerges both from the strategic plan as well as the work of the ad hoc Tribunals and the ICC thus far is how to obtain the necessary cooperation from States to get the job done. In particular, how does the OTP persuade States and other actors to live up to their legal obligations, make arrests and provide access to documents and witnesses? At the ICTY, obtaining the necessary cooperation to execute arrests has been one of our most difficult issues, but we have made progress. Out of a total of 161 indicted persons, we have only 6 fugitives, although these include the most serious perpetrators, Karadzic and Mladic.

Our experience in obtaining arrests is directly relevant to the 3rd Objective of the strategic plan. In this regard, paragraph 5(a) of this Objective, which provides that while the Court itself does not have the power to effect arrests, it "should deploy substantial efforts to gathering information on the whereabouts of suspects", is particularly important. Moreover, it is important to note that this point is then linked or should be linked to "galvanizing support and cooperation for arrests and surrender" and this in turn is linked to a 3rd point of the objective, that is to promoting cooperation among "national and international parties"

If we analyze these elements in the context of our experiences at the ICTY, we see that there are two elements in which that the Tribunal or the Court must develop expertise. We are all familiar with one aspect, which might be referred to as political or diplomatic efforts to obtain arrests. These include using diplomatic means to persuade States to fulfil their legal obligations. In this regard, various diplomatic carrots and sticks, such as in the ICTY's case conditionality concerning potential membership in the European Union (EU), have been particularly effective. Others include conditionality of foreign aid and other diplomatic and political measures. A second element is the gathering information itself regarding the fugitives and their networks. This element is often overlooked in discussions related to effecting arrests, but the diplomatic and political efforts are made much more effective by having in-house expertise. At the ICTY, we call this unit the "Tracking Team", and it deploys in the region as needed and analyses information to determine where fugitives might be as well as the networks

supporting them. It is very important technical expertise to have in the Office and complements diplomatic efforts. I would liken it to two hands working together, one without the other is a bit like one hand clapping.

I will give a few examples to illustrate the importance of these two hands working together. In the case of Ante Gotovina, a Croatian fugitive, the OTP had EU support and the EU had imposed conditions on the Croatia to the effect that it would not be able to move further down the track towards accession to the EU unless the Prosecutor assessed Croatia's cooperation with the Tribunal to be "full". After the suspension of the talks between Croatia and the EU as a result of the Prosecutor's assessment that Croatia was not in full cooperation, the Prosecutor was finally able to make a finding of "full cooperation". The Prosecutor was able to make these assessments only because of our ability to evaluate the reliability of the information that the Croatian Government provided to us. Without the OTP's own technical expertise, the Prosecutor would not have had the ability to assess the information. Thus, for example, the key information which resulted in Gotovina's arrest in the Canary Islands could only be properly assessed because the OTP's "tracking team" could evaluate it. We are right now in a similar situation vis-à-vis Serbia and Mladic, although it is looking more like the other side of the coin at this stage – lack of full cooperation. Nonetheless, the point is the same, the Office needs "eyes and ears" of its own.

Another example was in the matter of Goran Had`i when our tracking team was able to locate him and passed on information to Serbian authorities, but he was tipped off by them (we photographed him getting the tip-off call), thus embarrassing the Serbian authorities and leading to tighter controls on their side and to other arrests (Had`i is, unfortunately, still at large).

Because we had gathered our own intelligence/expertise from the field, we were able to test Croatia in the Gotovina case when the authorities come forward with information. Thus, the Prosecutor had the tools to test the information submitted by the Croatian government. When the crucial information came that Gotovina was possibly in the Canary Islands, we were able to check this information. Thus, although we were in the fortunate position that the EU had conditioned the accession talks on full cooperation with the ICTY, having our own information was critical in being able to utilize the EU conditionality, i.e., making the most of the diplomatic strategy.

These are a few examples of how a tracking team or similar internal assets can be used – together with diplomatic efforts and pressure from other States and the international community at large – to achieve results.

I also note that very concrete and practical cooperation is also needed, including the use of airplanes and other transport, as noted in 5(b) of the strategy document. However, I think these matters can be addressed relatively easily, if big picture issues on cooperation – internal intelligence ability, support of the international community and active NGO support - are present. The principal lesson from the ICTY is that there must be carrots and sticks plus internal information-gathering by the OTP itself for diplomatic and political strategies to work. It is

indeed the Prosecutor's own intelligence gathering that shows whether a State is, in fact, cooperating, thus making these carrots and sticks much more effective.

I will close with a final comment on something that I think is very important and that is Goal V on management. I think nothing is more important than getting well-qualified staff (perhaps not from the ICTY OTP!), not only for the usual reasons, that good staff are essential for the work, but also because in international organisations like the UN, it is often difficult to deal with staff who are not performing and they quickly can cause endless burden to operations.

I have overburdened my time so I will stop here. Thank you.

Mr. Antoine Bernard - International Federation for Human Rights (FIDH)

Introduction

The International Federation for Human Rights (FIDH) welcomes the opportunity given by the Office of the Prosecutor (Office) to the civil society to comment on its Prosecutorial Strategy.

In particular, FIDH welcomes the Office's initiative to report on the activities conducted in the last three years and to establish a prosecutorial strategy for the coming three years.

As a criminal tribunal and a public institution, the International Criminal Court (ICC) must conduct its activities in an independent and transparent way, in particular vis-à-vis the communities affected by the crimes that will be tried before it. FIDH thus welcomes this exercise to listen and exchange views between the Office and the representatives of civil society.

FIDH notes with satisfaction that the prosecutorial strategy provides an answer to concerns that FIDH and other human rights organisations have drawn to the attention of the Office of the Prosecutor for many years. However, FIDH believes that there is a fundamental difference between the strategy that is announced and the implementation of the outlined principles. According to FIDH, the Office must yet do a lot to effectively achieve the objectives announced in this strategy.

This strategy raises an important number of questions. FIDH has chosen to focus its analysis on three points that it finds particularly critical, namely:
I.- Maximisation of the impact
II.- Focused investigations and prosecutions
III.- Victim participation

I.- MAXIMIZATION OF THE IMPACT

FIDH has long advocated for the Office of the Prosecutor to take into consideration the deterrent effect that its investigations and prosecutions could have on the commission of further crimes, both in the countries currently under investigation or preliminary analysis, as well as in

other countries around the world. The deterrent effect is without any doubt at the heart of the creation of a *permanent* international criminal court.

As described in the prosecutorial strategy, the monitoring of a situation and the announcement of an investigation could have a significant deterrent effect. As the Office has noted in several occasions, the Court does not have the capacity to operate in all parts of the world where crimes falling under its jurisdiction are committed. This is why its impact as a deterrent factor for the commission of the gravest international crimes is a fundamental principle.

However, FIDH notes that there is a fundamental difference between the policy announced by the Office and the practice of the Office in the latest years.

In order for the Office to seriously maximize its impact, it is imperative that it adopts much of a higher approach in its communications and relations with the media. One can difficultly imagine how the Court could constitute a deterrent factor, if those planning the massive crimes over which the Court has jurisdiction, are not aware of the Office's activities, if these activities are not more widely supported by the relevant national community and the international community.

According to the prosecutorial strategy, the mere "monitoring of a situation" is a preventive factor for commission of further crimes. However, FIDH notes that the Office of the Prosecutor has repeatedly explained that only those situations under analysis which have been made public by the senders of communications would be made public by the Office. As a result of this, the monitoring of certain situations by the Office -which should have a deterrent effect on commission of further crimes- remains however unknown.

Further, even in those cases where it has been made public that a particular situation is under preliminary analysis, FIDH believes that the Office should adopt a much more proactive role.

The situation in Colombia clearly illustrates what this means. When in March 2005 a the letter sent by the Prosecutor to the Colombia President was made public, the Court became a strong instrument to fight against impunity in that country. Unfortunately, this dialogue has not been followed up in a public way, which has minimized any preventive impact of the ICC.

The prosecutorial strategy also highlights the potential impact that the announcement of the opening of an investigation could have. In this regard, FIDH wishes to highlight the failure of the Office of the Prosecutor concerning the Central African Republic. Indeed, a genuine call for action by the Office was launched several years ago. Firstly, FIDH has transmitted communications under article 15 since February 2003. Secondly, the government of the Central African Republic itself referred the situation to the Office in December 2004. Thirdly, decisions of the Central African tribunals (the last of which was issued by the *Cour de cassation* in April 2006) confirmed the inability of the Central African judiciary to genuinely carry out investigations and prosecutions for crimes committed between October 2002 and March 2003. These decisions explicitly defer to the ICC. Nonetheless, almost two years after the State's referral, the Office has not yet announced whether it will open an investigation. For several months now, the Central African Republic has been plagued by a growing conflict which causes

numerous international crimes, and impunity continues to prevail. The victims who counted on the ICC, express their disappointment.

These victims are thus three times victims: victims of the serious crimes they have suffered; victims of social stigma because most of them have been victims of the use of rape as an arm of war and are infected with HIV/AIDS; and victims of the total impunity those responsible for the crimes enjoy. Large number of these victims suffering from AIDS will die before obtaining justice. The Office remains in silence, a silence that carries a message, a message of indifference. The Office of the Prosecutor clearly misses here the opportunity to "maximize its impact".

II. FOCUSED INVESTIGATIONS AND PROSECUTIONS

Investigations and trials are also instruments that the Office can use to maximize its impact, as they send a clear message to the international community that those who commit serious crimes will be tried and convicted.

In order to prevent further commission of the most serious crimes of international concern, it is essential that the Office's focused investigations and prosecutions are representative of the range of criminality. The single current case is in this sense alarming. FIDH is convinced that that recruiting, enlisting and using child soldiers to participate actively in the hostilities are crimes of a very serious nature. But FIDH also deeply regrets that the charges for which Thomas Lubanga will be tried are neither representative of the crimes committed by the *Union des Patriotes Congolais*, which he has been leading, nor reflective of the victimisation suffered by the communities.

FIDH has expressed its concerns regarding other elements of the investigation strategy in several occasions. It has for example explained the difficulties posed by the sequential approach. Firstly, this approach presents serious risks in terms of preservation of evidence. As time passes by, more it is difficult to find the witnesses of the events, more they forget details of their experiences, more chances there are that documentary evidence get easily destroyed or be rapidly made disappeared. We have no indication on whether the Office has taken these adverse effects into consideration and, if so, on which mesures have been adopted to avoid these negative consequences.

Secondly, the sequenced approach poses a serious challenges in terms of perception of impartiality. It is the policy of the Office to investigate crimes committed by one group after the other. As a consequence, arrest warrants for leaders of one armed group will be issued before other groups are investigated. This is why FIDH believes that it is imperative that the Office publicly annonces not only that it is preparing other charges in the Lubanga case, but also that other groupes are targeted by the investigation. Otherwise, the Office will lost the trust of the relevant communities, the non-governmental organisations and all those who work for the effectiveness of justice.

Moreover, according to FIDH, it is essential that the Office publicly announces that it is possible to attain peace with justice in the context of the Ugandan conflict, that the arrest warrants issued against the commanders of the Lord's Resistance Army will be maintained, and that eventual

amnesty granted at the national level cannot be invoked to stop the prosecutions that it has initiated.

III.- VICTIM PARTICIPATION

Finally, FIDH would like to draw the Office's attention to the issue of victim participation. FIDH notes that in the coming three years the Office aims to continuously reinforce and improve the way it interacts with victims and addresses their concerns.

Provisions for victims' participation and reparation are at the very heart of the Rome Statute, and constitute, without doubt, a historical achievement for victims of the most serious crimes. As a consequence, the Court's legitimacy will be intrinsically related to its capacity to address the victims' concerns.

FIDH has repeatedly highlighted that the terms "victims", "witness" and "community affected by a certain conflict" must not be interchanged, and it invites the Office to address to victims themselves, i.e. those who have suffered harm as a result of the commission of the crimes.

In order for the victims to participate in the trial and to obtain reparations, it is necessary that those responsible for the crimes they have suffered are effectively prosecuted. Moreover, it is important that Office make serious efforts to forge closer communication with victims, so that they can become stakeholders of the investigations.

A policy of the Office more favourable to victim participation would also be necessary in the framework of improving communication with them. Contrary to the Prosecutor's expressed fears, victim participation does not jeopardize his independence, but on the contrary it reinforces the legitimacy of his action. The scope of victims' rights in the Rome Statute is inherent in the recognition of their new position in international criminal law. They do not intend to get involved in a process to which they are strangers, but they are, on the contrary, the main stakeholders of these actions that aim at convicting those responsible for the atrocities that they have endured and at compensating them for the harm they suffered as a result of the commission of such crimes.

Ms. Alison Smith -- No Peace Without Justice

Mr Prosecutor, Madam Deputy Prosecutor, Ladies and Gentlemen,

Thank you very much for organising this second public hearing on the OTP's Three Year Report and the Prosecutorial Strategy over the coming years. As you know, No Peace Without Justice always welcomes the opportunity to exchange views with you and your Office. We believe these are very important issues not only for the work of the ICC but also for international criminal justice and the international community as a whole.

As time is limited, we will confine our intervention to two areas that we feel are most critical for your work and for your legacy in terms of the impact you will have in the countries in which you do investigations, namely the selection of cases and public perceptions about the ICC.

No Peace Without Justice strongly supports the policy of your office to focus on "those who bear the greatest responsibility" for the alleged commission of crimes. What do we mean by this and how is it different from "those most responsible"? The UN Secretary-General has made a distinction between the two terms and the UN Security Council has done so as well. The Secretary-General has said that "those who bear the greatest responsibility" is intended to be a reference to the command authority of the alleged perpetrator as well as to the gravity or scale of the crime. As such, it refers to those who are at the top of the chain of command: those who are in a position to devise policies for how to conduct warfare and who are in a position to have those policies implemented. By contrast, "those most responsible" goes further down the chain of command, past responsibility for the crime base to responsibility for individual atrocities.

We believe the OTP should focus on those who bear the greatest responsibility for the crime base as a whole, for three reasons. First, it locates responsibility with the people who actually make the decisions. Second, it is the best chance for deterrence, as the planning of these crimes occurs at the highest level of decision-making, where the likelihood of criminal prosecution can be a deterrent factor. Third, it is the best chance of reaching the greatest number of victims, as these people are responsible for multiple crimes, not just for individual atrocities.

The question, then, is how do you find out who bears the greatest responsibility? It would be easy to think that the person who bears the greatest responsibility for the most horrific crimes will also bear the greatest responsibility for the crime base as a whole, but this is not always true. Based on our field experience documenting and analysing crimes under international law, the leader of the faction that commits the worst massacre may or may not coincide with the person who bears the greatest responsibility for the totality of crimes. When you look at the gravity or scale of a crime, you should not stop at individual atrocities, however horrendous, but look beyond that to the plan to conduct warfare in violation of the laws of war. That's your crime base: the totality of the crimes committed in a situation. It is the sum of thousands of stories, from petty humiliation, through deportation, to torture and murder. And that's the starting point.

We would like to make a recommendation. First, identify your crime base. Then identify those who bear the greatest responsibility for the totality of the crimes, irrespective of who they are (on this we support your policy of impartiality not equidistance). Only when you have identified those who bear the greatest responsibility do you have the luxury of selecting the most representative crimes to prosecute. This will increase the effectiveness of your investigations and prosecutions and you will provide justice for more victims than you otherwise could; people who lived under policies to violate the laws of war and who can recognise their stories in your indictment, rather than only those who suffered the worst atrocities. That is not to say that their suffering should be overlooked, far from it. But if those incidents do not fall under the control of those who bear the greatest responsibility for the crime base as a whole, it may not be a job for you or for the ICC. As you say in your policy paper,

and with this we very much agree, the success of the ICC will not lie in how many cases it tries but in how many it does not try.

Before concluding, we would like to touch upon the issue of perceptions of the ICC, particularly in the situation countries. In this respect, we are not speaking about outreach, although outreach is critical for framing the ICC in public opinion in the situation countries, which in turn is vital to how it is portrayed in the outside world. While you have your own outreach responsibilities, the primary responsibility for engaging local populations lies with the Registry and so it is with the Registrar that we would have these in-depth discussions. The only conceptual issue we would mention here is that outreach can help you do your job investigating crimes and connecting with victims. And the more outreach that is done, the more people interact with the ICC, the less unusual it is and the more you can offer protection to those with whom you interact. One leaflet in a village that has none is cause for comment; one leaflet in a village that has been inundated with information is simply par for the course.

Of course, you do have a role to play in shaping perceptions about the ICC, which has a major impact on how your efforts can contribute most effectively to promoting accountability and promoting peace. Recently, the ICC has been portrayed as being an impediment to the peace process in Uganda, rather than being an integral element in bringing people to the negotiating table. Your messages should be framed to claim victories and deflect criticism: the peace deals are a result of the ICC's work and any ongoing difficulties are despite the ICC's work. A clear and strong message claiming victories and deflecting criticism is necessary to promote your work, to strengthen your ability to do your work and to promote international criminal justice as an integral part of reaching and maintaining peace.

Thank you.

Mr. Nick Grono - International Crisis Group

Like the other speakers I would like to thank the Prosecutor and his office for their remarkably transparent and consultative practices.

My organisation, the International Crisis Group, works to prevent and resolve deadly conflict, so my comments will be focussed on the conflict prevention role of the ICC's prosecutions.

The ICC's success is critically important if we are, in the words of the Rome Statute's preamble, to put an end to impunity and thus to contribute to the prevention of atrocity crimes.

But the Prosecutor is in an invidious position. Each of his current prosecutions involves ongoing conflicts or their recent aftermath. In each the Prosecutor has to confront claims that his investigations are, or will become, an obstacle to peace.

In an ideal world, the Prosecutor would only investigate past atrocities, not current conflicts. He would deal with situations in which the hostilities had been resolved and robust peace

processes were in place. But that won't be the case for many years, as he is only mandated to deal with crimes committed since 1 July 2002. Even then he will be repeatedly asked to intervene in live conflicts.

That being the case, the ICC is frequently going to find itself in the middle of peace processes. So what considerations should guide him in such situations?

The starting point is to recognise that prosecution by the ICC is one of the few credible threats faced by leaders of warring parties. But to ensure that this continues to be the case, the ICC must secure convictions to ensure its credibility and effectiveness.

There are two issues here. The first is the bigger picture one that if the ICC is unable to convict perpetrators of atrocity crimes because its prosecutions are consistently trumped by peace processes, then its value as a deterrent will be compromised. The threat of prosecution will only be credible if it is regularly and consistently carried out. Perpetrators will not fear the ICC if they know that they will invariably be able to secure actual or de facto immunity in a peace deal, regardless of the atrocities they have committed in the past.

The second issue is the practical one that until it gets some convictions under its belt, the ICC's deterrent value will be more theoretical than actual.

Hence in the Congo investigation, where the Prosecutor has an alleged perpetrator, Thomas Lubanga, in custody, it is critically important that this case proceed to trial as expeditiously as possible. Lubanga has been charged with offences relating to the recruitment of child soldiers. Of course, ideally, he would also have been charged with responsibility for systematic rapes, torture and summary executions. However, while it is essential that the Court demonstrate in time that perpetrators of such heinous crimes will be brought to account, the short-term imperative must be for the Court to demonstrate its effectiveness by getting its first conviction. The Prosecutor is right to proceed against Lubanga on those charges for which he has the strongest evidence – even if that means that other appalling crimes aren't added to the charge sheet for now. Additional charges can and should be brought against Lubanga later. And other parties to that conflict should be charged soon, at which time more broad-ranging charges can be laid.

As the Prosecutor increasingly gets drawn into middle of peace – i.e. political - processes, it is vital that he make it clear to all that his role is to prosecute. While that may appear to be self-evident, the position is not so straightforward when those he is prosecuting are engaged in peace talks. As has been starkly demonstrated in Uganda, in such situations the Prosecutor will face vociferous calls to abandon his investigation or prosecution to enable a peace deal to be made.

But if such political decisions have to be made, they should generally be left to the UN Security Council, which has explicit authority under Article 16 of the Rome Statute to put ICC investigations and prosecutions on hold for a 12-month renewable period. That way the Prosecutor, an officer of the court, can fulfil his judicial mandate, and – in the rare

circumstances that intervention is required – the UN Security Council can carry out its peace and security mandate.

In any event, perhaps fortunately for the Prosecutor, his options in such circumstances are somewhat constrained. Under Article 53 of the Rome Statute, the Prosecutor can stop a prosecution if it is in the interests of justice to do so. As the Rome Statute evidences a very strong presumption that the kinds of crimes under the Court's jurisdiction require effective criminal punishment, the fact that negotiations are underway would not in themselves be sufficient for the Prosecutor to stop his prosecution. At very least he would likely require a peace deal with robust accountability mechanisms for the individuals under prosecution. Robust accountability here almost certainly does not mean customary reconciliation ceremonies. In the event that a state goes further, and exercises its own criminal jurisdiction, in the form of genuine domestic prosecutions of the perpetrators, then the ICC would no longer have the jurisdiction to proceed, as such prosecutions would take precedence under the principle of "complementarity".

Hence in the northern Uganda prosecutions, peace talks are underway, and may provide an opportunity to end a conflict which has exacted a horrendous toll on the people of northern Uganda over the last 20 years, with some twenty-five thousand children having been kidnapped to become child soldiers, porters or sex slaves, and some 1.7 million Ugandans forced to live in squalid IDP camps.

Strong justice and accountability mechanisms must be central to any agreement that can win domestic acceptance and broader international support. Because of constraints on the ICC Prosecutor, an agreement that calls for the LRA warrants to be put on hold would probably require a UN Security Council resolution to this effect, made pursuant to Article 16 of the Rome Statute. The prosecutions would remain alive, though the Security Council would have the option to renew suspension annually.

And then there is the Darfur investigation. The horrific conflict there – which has claimed more than 200,000 over the last three years - has recently just got even worse. The Sudanese military recently launched a renewed military campaign in the region, and its aircraft bombing towns and civilians, backed up on the ground by Janjaweed and some forces of the former rebel leader Minni Minawi.

And unfortunately for the Prosecutor the international community is utterly divided, with the UN, NATO, the African Union and the Arab League all having different policies and often conflicting policies. Even those states ostensibly strongly in support of a tough international response have competing interests at stake. The US for instance, while taking the lead in calling for action, continues to have a strong intelligence relationship with Sudan, last year flying the head of Sudanese military intelligence, and one of the architects of the Darfur campaign, out to the US for intelligence consultations.

The Prosecutor has been thrust in the middle of this extremely challenging situation. There are no easy options for him as he proceeds with this investigation, as all his choices are constrained.

But it is a critically important investigation, and as such will proceed under very close scrutiny. Like Bill Pace, the convenor of the CICC, I note that the Prosecutor has not publicly complained of any non-cooperation from the Sudanese authorities, so I hope that that means that his team are receiving genuine cooperation on all fronts.

In light of the renewed military campaign, the Prosecutor may also want to consider coming out publicly and warning all parties, government and Janjaweed and rebels alike, that future atrocities fall within the scope of his investigation and those responsible will be held accountable for such crimes.

Of course, the most important objective here should be a speedy investigation and expeditious issuing of warrants against those most responsible for the atrocities in Darfur. That will demonstrate to all concerned the effectiveness of the investigation.

In terms of international criminal investigations it doesn't get more difficult than Darfur. I sincerely hope that when we next meet to review the previous three years that we will do so with the perpetrators of the Darfur atrocities on trial before the Court.

Thank you.

Ms. Géraldine Mattioli – Human Rights Watch

Thank you for giving me the floor again. As promised to Mr. Prosecutor, I will be very short. I would like to briefly come back to two of the OTP's guiding principles for the Prosecutorial Strategy, specifically the notions of 1) maximizing impact and 2) positive complementarity.

1) Maximising impact:

First, in terms of the notion of maximizing impact, I am interested in the question posed by Mr. de Smedt as to how we can evaluate the impact of the OTP. This is an enormously difficult question that all stakeholders will have to wrestle with. It is particularly important for the OTP because having a clear understanding of what impact it wishes to achieve will determine some of the actions it undertakes. In this regard, we are concerned that the OTP does not bite off more than it can chew. It was mentioned in the presentation that the OTP wants to have an impact on the global fight against impunity. As such, Mr. de Smedt asked whether the passing of implementing legislation in a country could be considered when evaluating the impact of the Office.

From our perspective, the OTP should prioritise certain aspects when considering how to maximise its impact. Antoine Bernard of the FIDH has already mentioned how important it is for the OTP to seek and maximise its "preventive" or "deterrent" effect in situations which are *not* under investigation but where serious crimes are or could be committed. Another aspect that is particularly important to HRW is how to maximize impact within the local communities most affected by the crimes in situations that *are* already under investigation. The Court as a whole has a responsibility to ensure that proceedings at the ICC are meaningful to the communities where the crimes have been committed. The Court must ensure that these communities know and understand what is happening at the Court. This is key to ensuring that they have a sense that justice is being done. The OTP has a key role to play, through the selection of cases and charges and by working with the other organs of the Court to reach out to communities in the field.

2) Positive complementarity:

As mentioned earlier this morning, the concept of positive complementarity has been a pillar of the OTP's strategy as presented in 2003. However, the OTP's exact understanding of this policy as well as steps taken to implement it remain vague. In our view, the OTP has the responsibility to lead by example through fair and effective trials and prosecutions. On the basis of these exemplary trials, the OTP must then encourage further action at the national level. In country situations where there are investigations, the Office could be more ambitious in closing the impunity gap by, for example: sharing information and evidence with the national judicial system, as appropriate, hiring national staff to promote capacity building, or organising training on specialised matters. The ICTY, which has taken numerous initiatives to encourage domestic war crimes trials in the Balkans, could make an important contribution in terms of lessons learnt in this respect. In situations that are not under investigation but monitored by the Office, the OTP could take some proactive steps to encourage national prosecutions; for example by

making public declarations, sending private or public letters, or organising analysis missions to the countries concerned.

Chief Prosecutor Luis Moreno Ocampo -Closing Remarks

As many of you mentioned, this meeting is the continuation of the meeting we had three years ago. It shows how much we have worked, and worked together. We received from you both recognition, and some criticism. I am very grateful for both. We agree on the importance of starting cases, investigating and going to trial. **We agree that the Security Council referral in Darfur has been of critical importance.** The Court is managing two cases. It is an achievement. Your criticism also shows your interest in justice.

When I was a prosecutor in Argentina I basically did my investigations through the NGOs. At the International Criminal Court, I also want to have a strong relationship with NGOs. I will always respect your independence. But I want to be your Prosecutor. I need to understand your views and try to present them in Court or in my own policy. When I cannot do it, I will be frank with you.

Another area where you are important actors concerns the impact of the ICC's work.

You also need to help us. On gender issues, I would like to have better gender crimes expertise.

Finally, how we can increase your level of participation? We are planning, as you saw in our objectives, to have clearer procedures for victims' participation. We would like to encourage victims to participate. We like the idea of including in the agenda for the next meetings discussions on a framework to allow victims to participate with us, at different moments, keeping in mind that doing the investigation is my job. Thank you very much.