

DAVID SCHEFFER: Thank you, Mr. Prosecutor.

One general remark. The International Criminal Court is, above all, about justice, but it is also about power. Your most challenging moments will be the management of your own considerable power, not only in the courtroom but also in the halls of government, around the world, and at the United Nations.

Now, I've submitted a longer written statement so I'm just going to point to a few of the points that are set forth in my written statement.

First, proprio motu power. That power stands in contrast to the referral power of a State Party or of the UN Security Council, neither of which can trigger an investigation of a single atrocity crime that stands apart from a situation. Our intent in the negotiations was to focus the Court's work on the commission of large-scale atrocities; namely, situations of that character, and not bog down the Court in an isolated criminal act by an individual.

Yet the proprio motu power suggests a far more narrow investigative power if you so choose to exercise it. I strongly encourage you to avoid that temptation and to focus your proprio motu power on situations where atrocity crimes have allegedly occurred. Governments will be far more cooperative if they know that your focus is on the big picture, on the situations that clearly demonstrate the magnitude of atrocity crimes.

Second, the draft policy paper does not examine Article 18, which could generate some of the most contentious powerplays between you and national governments. How you manage your power of deferral and of review under Article 18 will require intensive diplomacy with national governments. You have the opportunity to help avoid chaos in the investigation and prosecution of atrocity crimes, as suggested earlier by

Judge Cassese.

Third, there almost certainly will be cases where the initial admissibility review under Article 17 gives rise to a finding of admissibility by the Court, yet many months, if not years, may elapse between that initial finding of admissibility and the actual surrender of the suspect from a national jurisdiction to the Court in The Hague. During that period of time a state may have taken extraordinary steps to investigate and even prosecute the suspect. There should be a demonstrated willingness on the part of the Prosecutor and of the judges to review the admissibility of a case at the time the suspect is being surrendered to The Hague, and perhaps even thereafter if information is obtained showing that a credible, national investigation is well under way.

Fourth, a dominant concern about the Court within the United States' government and perhaps within certain other governments is the final decision of complementarity that rests with the ICC judges. That, of course, is correct. There would have been no complementarity procedure without the ultimate escape clause that brings the case back to the ICC judges under certain circumstances. But you could diminish this concern greatly if you exercise your power of review under Article 18(3) and your power to seek a ruling under Article 19(3) in a manner that recognises the evolving character of national criminal law, and to develop a constructive role for the Security Council under Article 16.

Fifth, there is another primary concern among skeptics of the ICC that a nation's foreign policy would be the real target of the prosecution. In some cases this is exactly what the Court should do. It is the ultimate powerplay. If a nation's foreign policy is designed and implemented to commit atrocity crimes on foreign territory, then that foreign policy needs to be shut down. But in other cases you may need to

focus more on prosecuting the individual leaders who exercised the greatest responsibility for the atrocity crimes, as reflected in the draft policy paper, and focus less on trying to build a case by scrutinising public policy or searching for a political conspiracy to commit atrocity crimes. If your work remains focused on individual culpability, then fears about the Court's potential to launch political assaults on a nation's foreign policy should diminish over time.

Sixth, the External Relations and Complementarity Unit will need to develop significant diplomatic clout with other governments to best assist and enable you to focus on your Office's investigations and prosecutions.

Finally, the draft policy paper addresses the need for an adequate analytical capacity to monitor relevant crisis in a timely manner. This function can become an extremely important part of the Office of the Prosecutor, particularly in its relations with governments and international organisations. Your ability to identify emerging threats of atrocities in sufficient time to alert relevant governments

and the international community not only will provide a much needed service in the cause of humanity and thus may result in a reduction of atrocities requiring investigation, but it also will strengthen your influence under Article 18 with those states that should be investigating and prosecuting atrocity crimes if they then occur despite your early warning.

Thank you, Mr. Prosecutor, for the opportunity to address you and your staff.