

FIONA MCKAY: Thank you.

I'm Director of the international justice programme at the Lawyers Committee for Human Rights in New York.

First of all, I'd like to congratulate you on your appointment and add my voice to those who welcome the spirit in which this public hearing has been organised. I think, as others have said, signalling from the outset that transparency and consultation will be the hallmarks of your tenure will do an enormous amount to enhance the credibility of your Office and of the Court itself.

I'd like to address two topics. First of all, I'd like to say a few words about the question of interaction of NGOs in relation to the work of your Office. When the Court's investigators go out to carry out investigations, very often NGOs will have been there before them. The human rights movement that's grown up in recent decades in almost every country of the world has developed its methodologies and practices for monitoring and documenting human rights violations. Often they work in very difficult and dangerous circumstances to collect and disseminate information, aiming to focus the world's attention on these abuses and of course to put an end to those abuses.

As has been said already, that the role of NGOs will often be invaluable to your Office because of their on-the-ground knowledge of the situation, the fact that they may have been able to document violations perhaps very soon after their occurrence and perhaps before people scatter or evidence is lost, and indeed, of course, NGOs are likely to be one of the sources that draw your attention to situations where crimes under the Rome Statute may have been committed in the first place.

But as has been said, human rights monitors and activists are not trained criminal investigators, and even if they did have such training, their role in documenting human rights violations is and should remain

very different to that of investigators of the ICC or indeed of any other court, whether a national court or an international court. NGOs may carry out in-depth interviews with individuals who turn out to be key witnesses before the Court, or may become involved in collecting forensic evidence which could have a very serious negative impact on any criminal investigation that follows. So in other words, there's a possibility that totally unintentionally NGOs could harm a prosecution or even a defence case. This is not an issue limited, of course, to the Prosecution.

In order to avoid this situation, I suggest that you consider developing guidelines as early as possible that will assist NGOs and the Court to define an appropriate role for NGOs in relation to investigations. I think that such guidelines should be developed in consultation with NGOs and should be disseminated as widely as possible. So I suggest that this process be at least started as early as possible.

The second topic I'd like to address very briefly returns to the question of complementarity and in particular this question of assessing whether or not a national system is able to exercise jurisdiction. Of course such decisions will be among the most difficult that you'll have to take, but of course also the most crucial.

If you take on a case and circumstances where the national system could have done so, that would be to waste a valuable opportunity to promote State action and to use the Court's limited resources unnecessarily as well as having other consequences. But what I'd really like to stress is if, on the other hand, you defer a case to the national system inappropriately, that too could be extremely harmful, and I think that this is something above and beyond the factors and criteria that you've outlined in your paper.

I would ask for perhaps a more flexible and contextual approach

when assessing whether or not a State is able to act. And just to give a couple of examples of the kinds of things I mean, if a case is deferred to a national system, it could have consequences for putting victims at risk, for example, and other consequences for victims. If they're ongoing crimes, they could also be particularly dangerous.

Finally, of course, if it is a situation where there is already a lack of confidence in the domestic legal system, the domestic justice system, then also a deferral can have consequences in perhaps further damaging that situation.

Thank you very much.