Transcript

Second public hearing of the Office of the Prosecutor

NGOs and Other Experts

New York, 18 October 2006

Chief Prosecutor Luis Moreno-Ocampo

Your excellencies, ladies and gentlemen,

Thank you for your attendance this morning. Thank you to the CICC for organizing this meeting. We are presenting our report on the last three years of activity of the Office of the Prosecutor and our Prosecutorial Strategy for the next three years. This Prosecutorial Strategy is part of the strategic plan of the court.

Today we launch a dialogue with states representatives in New York. We are also consulting civil society. We propose to use the same format that we used at the first public hearing, which was held when I had just taken office in June 2003.

We will present a brief summary of the documents after which we will take comments. This format allows us to respect your ideas as well as the independence of the Office of the Prosecutor.

At the end of October we will review our documents in light of the comments received. You will receive an amended version of the same documents in order to facilitate your deliberations at the ASP.

The process is designed to align expectations without compromising the independence of the Office of the Prosecutor.

The Three Year Report

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.

During these three years, the Office focused on the selection, investigation and prosecution of its cases.

The first challenge the Office faced was: how to begin ICC cases?

We had to dissipate fears that the Court would have no cases or that the Office would begin frivolous prosecutions.

There are two distinct aspects to consider:

- first, how to **select situations** to investigate, and
- second, what method to use to **trigger** the jurisdiction of the Court.

In selecting its situations and cases, the Office is guided by the standard of *gravity* as mandated by the Rome Statute. The situations in the Democratic Republic of the Congo ("DRC") and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court, and the situation in Darfur, the Sudan, also clearly met the gravity standard. The Office understands concerns about a geographic focus, but regional balance is not a criterion for situation selection under the Statute.

With regard to triggering cases, while the *proprio motu* power is a critical aspect of the Office's independence, we adopted a policy of inviting voluntary referrals from states to increase the likelihood of important cooperation and support on the ground.

The **second challenge** faced by the Office was how to conduct investigations into situations of on-going violence, where even traveling to the areas in question may be impossible, or where the territory suffers from a collapse of functioning institutions. The Office had to learn how to: approach the possible witnesses without exposing them; identify safe sites for interviews; and secure discreet transportation for investigators and witnesses. In addition, 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. In Northern Uganda there are four local languages, Acholi, Lango, Ateso and Kuman, and in Ituri district of the DRC there are three, Lendu, Linghala and local Swahili, while in Darfur there are four, Fur, Zaghawa, Massalit and local Arabic. Because there are few qualified professional translators, finding persons with the appropriate skills and background required exceptional efforts. Conditions on the ground for investigators are typically quite difficult.

Two **measures to meet** the challenges presented by these exceptional 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.

The office succeeded in collecting evidence of massive crimes in a short amount of time, and getting arrest warrants issued. It took the Office 10 months to file a broader but still focused arrest warrant request in the Uganda situation against 5 LRA commanders, while 18 months were needed for the more narrow arrest warrant in the Lubanga case in the DRC. The level of cooperation and the conditions under which the Office needs to operate impact heavily on the speed of the investigation.

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 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 in DRC. Therefore, after careful consideration of the evidence gathered, 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.

With regard to the Darfur situation, the Office has been able to successfully investigate the crimes allegedly committed in Darfur without going to Darfur.

In addition to a moral obligation, the Office is under a legal duty to protect victims and witnesses under articles 54.1 (b) and 68.1 of the Statute. The absence of a functioning and sustainable system for their protection continues to prohibit an effective investigation inside Darfur. The Office has therefore collected in more than 15 different countries evidence of crimes alleged to have occurred in Darfur.

It is the belief of the Office that effective justice should be delivered to the victims of the crimes in Darfur either at a national level, where the domestic authorities are genuinely prosecuting those most responsible for the most serious crimes, through the ICC, or via a combination of domestic and international mechanisms.

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. Arresting Kony and other LRA leaders is the biggest challenge for the States Parties.

The Office is now in the process of litigating numerous pre-trial issues and is ready to go to trial. The confirmation hearing of Thomas Lubanga Dyilo is scheduled for 9 November.

The Office is ready to transition to its next phase. The Court is becoming a more complex organisation in which judges will issue rulings, victims will participate in proceedings and, in due course may receive compensation, and States Parties' support will be needed in all areas, notably in securing suspects against whom arrest warrants have been issued.

Until this work has begun in earnest and several trials have been concluded, it will be too early to truly measure the impact of the Office. Instead, this report provides a comprehensive resource by which to follow what the Office has accomplished thus far.

Mr. Richard Dicker, Human Rights Watch

On behalf of my organization, Human Rights Watch, I want to express deep appreciation to the prosecutor for convening this public discussion on the practices and policies of his office. We believe the regular substantive exchange of views focused on the Office of the Prosecutor's (OTP) work is crucial in providing the office with necessary, constructively critical feedback. We think it is important for the office to engage the court's stakeholders in dialogue over its work and we are grateful to you, the prosecutor, for scheduling the time to allow us to weigh in. Human Rights Watch has worked hard for three years to assist the OTP in its investigations, and I will focus my remarks on policy issues raised in the prosecutor's activities paper with some reference to the situations where investigations are ongoing. These policy issues are anything but academic; they have real life consequences for lives on the ground. But before doing so, I want to offer three overarching comments.

1. Objective Difficulties

In assessing the OTP's work it is absolutely necessary to ground our appraisal squarely in the objective challenges the office has faced and will continue to face. Any assessment of the work of the OTP must be rooted in the realities of a fledgling system of international justice struggling to gain ground on a landscape dominated by the prerogatives of state sovereignty.

On page 7 the prosecutor's report vividly depicts some of those difficulties. I suspect this is only skimming the surface of the challenges the office faces daily, challenges that could easily consume a filmed version of Mission Impossible IV, V, and VI.

2. Maximizing Impact

A key lesson learned from the experience of three *ad hoc* tribunals over the last 15 years is that to fulfill its mandate, the OTP must, of course, conduct efficient investigations as well as fair and orderly trials. But as difficult as these objectives are, taken together, they are not enough for the office to be effective. Because the International Criminal Court (ICC) will be trying only relatively few cases in each country situation, we believe the OTP needs to maximize the impact of its cases among the communities most affected by the crimes. That means making the charges, the pre-trial proceedings, the participation of victims in the proceedings, the trial, the verdicts and any sentences understandable and meaningful in the communities where the crimes occurred. We know, for example, that people in the refugee camps in eastern Chad followed very closely the Security Council's decision to refer the situation in Darfur to your office. One crucial benchmark of the OTP's success is whether these same people sense the workings of the rule of law through the warrants you seek, the accused you charge, and the trials you lead.

Admittedly, this is new territory for an international criminal court seated hundreds, if not thousands, of miles from the communities where the crimes occurred, but it is a direction clearly dictated by the practice of the second generation of international criminal tribunals.

3. Accomplishments

During an occasional slow moment at the Rome Diplomatic Conference eight years ago, I remember discussions about whether after all the effort to create "a court worth having," the ICC would ever get any work to do. It is striking and impressive that a few years after the election of the prosecutor, the office is carrying on investigations in three situations that bear out the underlying rationale and necessity for creating the court. With the steep, ongoing challenge of obtaining cooperation from States Parties, some non States Parties, international organizations and agencies, the office has gone forward with investigations in situations scarred by the mass murder of innocent civilians, the widespread use of rape as a weapon of war or intimidation and the forced displacement of whole populations on the basis of their ethnicity. It has obtained six arrest warrants and taken custody of one accused. Moreover, the office is working out policies to guide its important and difficult work. This real progress bears out the expectations of those who worked so hard to create this court and those who look to it to help end impunity for the most serious crimes. Thank you.

Now I want to focus on three outstanding concerns from the paper.

4 .Voluntary Referrals

The activities report (page 7) states that "while *proprio motu* power is a critical aspect of the Office's independence, the prosecutor has adopted the policy of inviting voluntary referrals by

territorial states." Human Rights Watch is not troubled by the voluntary referral of situations where the other criteria of the Rome Statute are satisfied. There are, indeed, advantages associated with conducting investigations in situations which have been self-referred. However, to ensure consistency with the important criminal justice principles of independence and impartiality that are rightly emphasized in a draft policy paper on selection of situations and cases, we believe it is essential to see the real dangers in this emphasis – dangers to the perception of the independence and impartiality of the office. There is the risk that the OTP – and as a result the court as a whole – may be perceived as a tool in the hand of the referring government. This, of course, is linked to the weaknesses of the Rome Statute's cooperation regime. If the office is encouraging voluntary referrals, we urge making every effort to pre-empt distorted perceptions regarding your mandate and, as they arise, to address them effectively. This is one reason why the OTP needs an active, innovative communication strategy that is not low profile but rather smart and focused. Indeed, the failure to address these challenges at the early situation selection phase may have a detrimental, spillover effect on the perception of the OTP's independence and impartiality as it selects cases.

I want to say a word about the prosecutor's *proprio motu* authority. The reason that the like-minded states and NGOs fought so tenaciously for *proprio motu* authority in Rome is that it is essential in empowering the ICC prosecutor to fulfill his mandate. We understood at the time that without *proprio motu* authority the OTP would be little more than the executor of the wishes of states. In a word, the OTP would be merely a tap that states could turn on and of as they saw fit.

Proprio motu authority will be necessary to enable the prosecutor to fulfill his mandate where egregious crimes have occurred and where the other triggering mechanisms of the Rome Statute are not available. We believe this authority is a vital guarantor of prosecutorial independence. Moreover, the prospect of its use, which will, of course, raise cooperation problems of its own, will reinforce the OTP's actual and perceived authority. It will give muscle to the policy of positive complementarity. To foreswear its use as the report does on page 7 needlessly reduces the prosecutor's authority. And I might ask, to what end?

5. Sequencing

Our concerns about impartiality and independence also arise in conjunction with what the report describes on page 8 as a policy aimed at reducing the length and scope of the investigation: that is "the sequenced approach to selection." From the office's practice to date, we understand sequencing to mean that after completing an investigation of a particular case, it will then begin to investigate another set of individuals. We can appreciate that in some instances, for practical reasons, it may be necessary to conduct investigations sequentially. However, we are concerned that the formal adoption of this approach as a policy may have additional negative implications for the perception of the prosecutor's impartiality. For example, in the DRC, we note that while the office has executed an arrest warrant against the leader of the Union Patriotique Congolaise, a prominent Hema-based militia group, to date, no arrest warrants have been sought for the leaders of the Lendu-based militias, despite their suspected involvement in a number of serious crimes, nor against senior political figures in Kinshasa, Kampala or Kigali who backed the crimes. While we expect the office may soon seek

such warrants against Lendu leaders, our recent field research in eastern Congo indicates that the absence of warrants against the Lendu leaders has led to a strong perception within the Hema community and others that the ICC is carrying out "selective justice." In a word, we fear there is a price in elevating a necessity-driven approach—"sequencing" —into a policy and that price comes at the expense of the perceived impartiality of the OTP. Thus, we urge further consideration of the implications of a sequential investigative policy, and here, once again, I want to underscore the role of effective communications.

In this regard, we believe that sufficient, high-quality staffing is a pre-condition to achieving the desired results. Thus, we urge avoiding an *a priori* preference for investigative configurations. The determination of staffing needs, of course, should be rooted in what is actually necessary to carry out focused, but nonetheless extremely complex and difficult investigations in remote, insecure regions. In a word, there is no "one size fits for all" for investigative staffing – Congo is not Uganda which is not Darfur, nor Afghanistan nor Colombia.

6. Those Who Bear the Greatest Responsibility

As my last point I want to address the policy issue raised on page 7 – the focus on "those who bear the greatest responsibility" for the most serious crimes. The Rome Statute refers to "perpetrators of the most serious crimes of concern to the international community as a whole." The scope of potential accused is therefore broad and flexible. The term "those who bear the greatest responsibility," as we know, comes from the statute for the Special Court for Sierra Leone which faced a very different reality as a temporary court with a three year mandate. It's worth noting that the term "those who bear the greatest responsibility" is not mandated by the Rome Statute.

Having said that, I want to stress that we agree with the substantive gist of the paper's proposal – targeting those accused at the highest levels in government and among insurgent armed groups. In identifying suspects for prosecution, Article 27 of the Rome Statute gives the office the authority it needs. This provision states that official position is irrelevant and that "a person shall not be exempt from criminal responsibility based on his or her official capacity as a Head of State or Government, etc…."

What is the "value added" of proclaiming as a policy a power that the Rome Statute gives anyway? Practically, by announcing this limitation on the scope of your investigation, you lessen the potential deterrent effect of the OTP by signaling to other perpetrators that they needn't fear the ICC prosecutor. We believe it's crucial to underscore the statutory mandate to bring the most senior officials to justice in practice. Our thought, in agreement with your stated objective, is rather than announce *a priori* who will be investigated and who won't be, that you let the arrest warrants you seek speak for themselves. This is particularly important, given the questions that may arise about the perception of independence and impartiality in the selection of situations and cases given the preference for voluntary referrals.

7. Conclusion

Having followed the work of the office for three years, we note that important shifts in thinking have taken place. We have seen real changes in the conceptualization of the "interests of justice" provision in Article 52. OTP thinking over the "peace and justice" interface that has come to the fore in Uganda has evolved. The recent draft of the OTP's policy paper on this subject reflects a development which we welcome. The same developmental process occurred regarding OTP thinking about field presence. Early discussions with the OTP suggested that field offices were not envisioned as necessary. It was thought that it would be possible to conduct "drive through" investigations without having an ongoing field presence in the situation countries. There has been a welcome change in those views as well. We respectfully submit that to fulfill its mandate and mission the office needs to be continuously subjecting its approaches to close scrutiny and involving stakeholders in the process. As I have indicated this morning, we believe further evolution is needed in several areas. We look forward to working with the office to help bring them about.

Thank you very much.

Dr. Aryeh Neier, Director of the Open Society Institute

Thank you, it is a great pleasure to be here. I am an admirer of the work done by the Office of the Prosecutor during the past three years. I would like to put in perspective my own thinking on the subject. Many here like me were involved in the early stages in the effort to secure international justice to deal with great crimes. In 1992, when efforts were started to create the ICTY, we knew the effort to do justice internationally would be difficult, but I don't think any of us had an idea of the complexity. We had no idea of the competing considerations that would arise. Even those who followed the development of the *ad hoc* tribunals did not foresee the complexity that the work of the ICC would entail.

It has been many years since the call for the establishment of the ICTY, but only a blink of an eye in historical terms. The distance we have come in that short period is remarkable.

In specifically addressing the report, I'd like to make explicit what I see as some tensions between different goals of the Prosecutor as referred to in the report.

The Prosecutor rightly begins with the selection of cases according to gravity. To me there is no question that he has addressed cases of the requisite gravity. But in saying that there is no requirement for regional balance, the Prosecutor inevitably raises the question of the need for regional cooperation which is also referred to in the report. If the cases arise in Africa, it is crucial that African states should cooperate with the Office of the Prosecutor for the Prosecutor to be able to conduct investigations. Also, to be able to make arrests the Prosecutor has to have the cooperation of African states.

Even if there is no requirement of regional balance, it is important for the Prosecutor not to suggest by the selection of cases that there is special wickedness in Africa that makes the Prosecutor focus on them. The OTP has to address the manner in which the Prosecutor conveys to the public that there is no requirement for regional balance. The way he goes about this is crucial as he has to maintain the likelihood of cooperation from African states.

Another tension involves the importance of building the prestige of the ICC on a global basis. In the report, the Prosecutor refers to the importance of the preventive and deterrent impact which seem related to building the prestige of the ICC globally. It is possible that the Prosecutor could heighten the Court's impact in terms of prevention and deterrence if he is more outspoken with respect to cooperation by the various states where investigations are taking place, and if he would publicly demand access and cooperation in the manner that the ICTY prosecutor demands cooperation in making arrests.

Inevitably, however, this would create tension with the states whose cooperation is required. How do you simultaneously heighten the deterrent element and at the same time secure the cooperation that is particularly important during the infancy of the ICC?

I don't know if there are solutions to these tensions. I do think they are built into the work of the Office of the Prosecutor. However, I suggest that the fact that ICC has Darfur on the agenda may force a change in approach. I don't suggest that the situation in Darfur exceeds the gravity of the situations in the DRC or Uganda; I wouldn't want to rank those matters. But Darfur has symbolic significance as far as world public opinion is concerned. Darfur is at the top of everyone's agenda as the most extreme situation of gross human rights violations. Because of its symbolic significance, what the Prosecutor does in Darfur will shape opinion internationally of the Office of the Prosecutor and the Court.

The Prosecutor doesn't say so but as I read his report, when he says "effective justice may be delivered to the people of Darfur", it seems to me we are being told between the lines that he expects to issue indictments in the not too distant future. Security concerns prevent the OTP from going to Darfur but he thinks that he will be able to bring a case with evidence gathered externally. The world will be watching at the appropriate time. Will the Prosecutor publicly demand that the government of Sudan cooperate and turn over those who will be indicted?

My own suggestion is that the consideration about not antagonizing the African states should not apply in this case. It is not primarily African states that defend Sudan; it is China and Russia that are the principal apologists for Sudan.

I believe the Prosecutor should resolve those tensions by playing a more visible public role in demanding cooperation in apprehending those who may be indicted by the ICC. At the same time, I do not believe that there is one right answer to such questions. I believe there are considerations we must explore. My own opinion is we should be grateful for the thoughtfulness with which the Prosecutor is approaching these issues. We may differ in proposing solutions but it is clear they are being approached in a most deliberate and careful manner. This is the best guarantee that, over time, the ICC will fulfill our hopes and expectations. Thank you very much.

Dr. Benjamin Ferencz

Thank you Luis for inviting me to say a few words. As the oldest prosecutor in this business, let me make a few overarching remarks.

The ICC is a New Creation:

We are dealing here with a fundamental change in world affairs that has never happened before. The old notion of absolute state sovereignty is being replaced. A new international rule of law is being debated in the United Nations. The illusion that sovereign states can be above the law is being eroded by the creation of new international institutions that never existed before. The ICC seeks to hold accountable national leaders responsible for massive crimes against humanity and war crimes. Considering that we are doing something that has never happened before, the ICC is doing remarkably well for trying to make reality out of what had only appeared to be an unattainable dream. The fact that I am here now talking to the Prosecutor of the International Criminal Court is a miracle. Richard Dicker had it right, it was a mission impossible. The existence of the ICC proves that you can do the impossible; it just takes a little longer. (And a lot of patience!)

Prosecutorial Performance and Strategy

Aryeh Neier commented on some of the difficulties faced in trying to make the ICC really effective. I have read the Report on Prosecutorial Strategy and the plan seems reasonable. We must remember that many major nations of the world have not yet joined the ICC. This Court is operating under very different circumstances than Nuremberg. It does not have the power of an army to support it. In Nuremberg it was easy; you could convict in two days including a number of death penalty sentences. You can't do that anymore. The ICC is facing sovereign states that are saying: "This is our war, leave us alone. Don't interfere in our internal affairs." The principle of complementarity is written into the ICC Statute but that does not mean that any State can by-pass and render the international court subservient.

The most immediate problem is to show the world, including states that don't support it, that the Court is real and active and it is going to bring to justice the world's worst criminals. You have started with the child soldiers case. I would have hoped that Genocide or Crimes against Humanity or mass rapes would be put on the docket first but I realize that prosecutors must go with the evidence on hand and that speed is now important.

Only Limited Objectives are Attainable

I should add here that at Nuremberg we indicted only prisoners who were readily available. We selected only 22 defendants for what must seem the absurd reason that we only had 22 seats in the dock. Sometimes justice has to be limited. The ICC is not going to bring to justice all mass murderers. Today we will only take a sampling. But we can spread warning to all mass murderers that they could end up in the dock. The ICC sampling will illustrate that the world society of completely independent sovereign states is crumbling. No one is above the law. New

information technologies enable everyone to look at the "Blackberry" held in his hand and know immediately what is happening in China and elsewhere.

I welcome the news that there will be a trial in November. The public doesn't understand why it took 3 years to start the first trial. In fact, it didn't take 3 years, it has been 60 years in the making. Nations were not ready to relinquish sovereignty to any untried international tribunal. This is now a newborn baby but nevertheless the public doesn't understand. It's important to get going with the trials as soon as possible.

Conclusion:

NGOs need to recognize that the ICC is now doing all that is reasonably possible under difficult circumstances. You have to have confidence in ICC's dedication and ability. And you need patience. Top ICC leaders are having hearings all around to listen to your perspectives. I'm sure that all constructive communications will be reasonably considered and appreciated. Thank you.

Ms. Jutta Bertram-Nothnagel from Union Internationale des Avocats

I would like to make a short comment about the Prosecutor's considerations of the gravity of a case and ask a short question.

With regard to the evaluation of the gravity of the crimes, I would suggest a different matrix of thought. The OTP report on the past three years does not sufficiently differentiate between statutory reasons for the consideration of gravity and pragmatic reasons for the consideration of gravity. Looking for example at p. 7, 8, 10 of the report, one can gain the impression that the Prosecutor's selection of the "gravest" cases is required under the Statute. You speak of a "rigorous standard" under the Statute. Yet, Art.17 para.1 (d) of the Statute says only that a case is inadmissible if it is "not of sufficient gravity" [to justify further action by the Court]. Utmost gravity, - looking for the gravest cases -, and sufficient gravity are not the same. In a sense, the statutory inadmissibility standard of insufficient gravity is one of exception: The crimes listed under the Statute are already considered to be "the most serious crimes of international concern". If all the elements of the definition of a crime under the Statute are fulfilled, one can in general assume that this has been a most serious crime of international concern and a crime of sufficient gravity. Nevertheless, states did not exclude the possibility that there may be exceptional circumstances where sufficient gravity may be lacking. But again, sufficient gravity is not as rigorous a standard as utmost or greatest gravity. If you were to interpret Art.17 para.1 (d) of the Statute repeatedly in your reports as requiring the selection of the "gravest" crimes, you may over time establish this as the authoritative interpretation. Yet if utmost gravity comes to be seen as a statutory requirement, it would mean that the defense could apply the same interpretation and argue that the case is inadmissible because it is not the gravest.

With respect to pragmatic reasons for the consideration of gravity, i.e. thinking of all the difficulties you are facing on the ground and the constraints of time and budget, obviously, the

highest degree of gravity is a reasonable criterion for the necessary selectivity, but it is not the only one. For example, you are saying that geographical considerations are not required under the Statute. That may be correct in the literal sense, but the Statute is based on the principle of global deterrence. If you were to look for ten years only at cases on one continent, you would probably lose some of the deterrence on other continents. Similarly, deterrence is likely to diminish with regard to the crimes under the Statute overall, if again and again only certain types of crimes are selected for prosecution. In an ideal world, if you had all of the required finances and staffing and state cooperation, quite naturally you would not feel so pressed to select only the "gravest" crimes. Even with the constraints you are confronting, a priority goal must be deterrence against all the crimes under the Statute and deterrence in each corner of the world.

Apart from the difference between statutory and pragmatic reasons for the consideration of gravity, I have one question. On p. 13, the report on the last three years talks about the reduction of charges for Thomas Lubanga Dyilo due to time considerations. You say that you will "defer investigation of other crimes until after his first trial". As far as you may have been referring in this regard to crimes of Thomas Lubanga Dyilo, I was pondering the rule of specialty in Art.101 of the Statute. Article 101 para.1 says, in short, that "a person surrendered to the Court …. shall not be [prosecuted] … for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered." If you add in the future more charges, you may not necessarily run into trouble with Art.101, but it is possible. I was wondering did you have consultations with the state government before the reduction of the charges, about a possible waiver under Art.101 para.2 if you later pursue additional charges?

Ms. Jeanne Sulzer, Coordination of the FIDH Legal Action Group

The International Federation for Human Rights (FIDH) welcomes the opportunity given by the Office of the Prosecutor (OTP) to comment on the recent reports of the Office of the Prosecutor regarding the past three years and the planned strategy for the future.

FIDH was given an opportunity to give its views during the first public hearing of the Office organized in The Hague a few weeks ago. Transcripts of the statement made by Antoine Bernard, executive director of the FIDH are available online on the FIDH website (www.fidh.org) and I will therefore not repeat the issues raised but rather focus on some specific aspects of the strategy of the Prosecutor. My observations are both based on the practice of the Office in the last three years and the set of guidelines that are to be found in the recent policy paper for the future work of the OTP.

FIDH has a specificity amongst other very active actors of civil society that have an interest in the International Criminal Court (ICC). Like many others, FIDH works towards achieving the universality character of the ICC by promoting the Rome Statute in many countries, in particular where still under represented, such as in States of the League of Arab States and in Asia. FIDH also promotes the enacting of ICC national implementing legislation in order to

pursue the enshrined principle of complementarity between domestic courts and the ICC which transcends the philosophy of action of the ICC.

With its office in The Hague FIDH continues to actively monitor the work of all organs of the Court, participating in working groups of the Coalition for the ICC (CICC), taking part in experts meetings with different offices of the Court and closely following the work of the OTP and the Chambers in the current proceedings before the Court.

FIDH also uses the Court to promote the fundamental right of victims of the most serious crimes to have a judicial remedy before a fair and independent Court. To achieve that ambitious objective, FIDH uses all levels of possible participation of victims before the Court. FIDH has therefore been one of the first organizations to send information to the Prosecutor based on article 15 of the Rome Statute regarding the situation in the Central African Republic, the Democratic Republic of the Congo, Colombia and Ivory Coast. By doing so FIDH has been actively promoting the use by the Prosecutor of its *proprio motu* power to decide to seek the authorization of the Pre-Trial Chamber to open an investigation without the voluntary consent of the State of nationality of the presumed perpetrator or the State on which the crimes have been committed.

FIDH through its Legal Action Group has effortlessly supported the unprecedented rights of victims to participate, be represented and seek awards of reparation at all stages of the proceedings before the ICC. FIDH has purposely used rule 89.3 of the Rules of Procedure and Evidence to transmit the first six victims' requests for participation in the history of the Court. As many of you are aware, PTC I issued a landmark decision on January 17, 2006 authorizing those six Congolese victims to participate in the DRC proceedings at the investigation stage.

Members of the FIDH Legal Action Group registered on the list of the ICC counsels now represent, on a *pro bono* basis, those victims to make sure that their views and concerns are being taken into account.

By promoting, monitoring and using the ICC, FIDH is, we believe, in a good position to comment on the OTP reports submitted recently. The concerns expressed above seek to continue the positive and constructive dialogue with civil society that has been promoted by the OTP since the election of Luis Moreno Ocampo.

In that sense, FIDH welcomes the fact that many of the comments made in the last years have been successfully integrated in the work of the Prosecutor and therefore reaffirms that constructive criticism is seen has extremely important and valuable for the 141 member organizations that FIDH represents around the world.

Again, FIDH is grateful to the OTP for the transparency of the ongoing process of exchange.

On the issue of voluntary referrals by State Parties and the *de facto* creation of a hierarchy among the possible trigger mechanisms available to the Prosecutor

Voluntary referrals by States Parties (referrals by the government of States on the territory of which the crimes alleged have been presumably committed) before the ICC were not clearly foreseen as such in 1998 when States negotiated the Statute in Rome. On the contrary, the experience of regional courts such as the European Court for Human Rights led most States and NGOs to believe that the mechanism underlying article 12 would not often be triggered. Indeed most thought that it was uncommon at the international level to see some States triggering the ICC for crimes committed on the territory of other States. Few believed or could have predicted that article 12 would have been used to seek voluntary referrals to the Prosecutor by the States themselves on whose territory the crimes were committed. On the contrary, the last three years saw unexpected referrals by the governments of DRC, Uganda and the Central African Republic, seeking investigations on the situation of their own countries or at least regions of conflicts under their state's sovereignty.

FIDH believes, like the Prosecutor, that there may be some understandable positive aspects of giving priority to voluntary state referrals over article 15 referrals using the *proprio motu* power of the Prosecutor. One of the advantages is evidently the *prima facie* willingness of the State Party authorities to cooperate with your office and acknowledgment that domestic courts of these countries are either unwilling or unable to investigate and prosecute those crimes.

In that sense, FIDH understands that the OTP has been promoting voluntary State Parties referrals and believes that this policy contributes to the fight against impunity as it raises the issue of impunity at the highest level of the State. FIDH however recalls that the Rome Statute did not intend to create a hierarchy of importance and priority amongst the three trigger mechanisms that are available to the prosecutor. Indeed articles 12, 13, 14 and 15 of the Statute distinguish the trigger mechanisms by the origin of the referral (i.e. States Parties, Security Council of the United Nations or any source). Nowhere can one find in the Statute an obligation or even an incentive for the Prosecutor to prioritize or prefer one mechanism over another. FIDH recalls that given the universal and permanent nature of the ICC, contrary to the *ad hoc* international tribunals, States negotiated actively for the independence of the prosecutor, particularly by giving him the unprecedented power to open investigations on his own behalf. This power is a historic revolution, a very important new mechanism in the hands of the Prosecutor. The *proprio motu* power is essential for the independence of the prosecutorial strategy, but it is also a unique tool for victims of war crimes, crimes against humanity and genocide to seek a judicial remedy. Article 15 created a space of hope, a forum, a direct path of communication between victims and the ICC to refer their sufferings and seek justice in cases where national courts have been governed by impunity.

The OTP Report of its Three Years of work indicate clearly that voluntary State Parties referrals have been given a degree of greater importance in the decision to open an investigation over article 15 referrals: *"While propio motu power is a critical aspect of the Office's independence, the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court."*
Meanwhile, the report indicates that*: "Through to the end of June 2006, the Office received 1918 communications from individuals or groups in at least 107 different countries. (...) Of the approximately 20% of communications warranting further analysis, 10 situations have been subjected to intensive*

analysis. Of these, three proceeded to investigation (the DRC, Northern Uganda, and Darfur), two were dismissed (Venezuela and Iraq), and five analyses are ongoing."

The Report does not go into any detail about the treatment and status of nearly 190 communications that appeared to be in the "approximately 20 % of communications warranting further analysis." FIDH believes that it is crucially important to balance your prosecutorial discretion and independence with the right of those who have sent communications to know the status of their referrals. FIDH encourages the OTP in the near future to be more transparent in the treatment of article 15 communications. Letting those at the origin of the communication know the status of their complaints would on the one hand contribute to the outreach obligation of the Court as it would clarify the reasons and motivations underlying the choices of the OTP in refusing or accepting article 15 communications and as a multiplier effect would contribute to the understanding of the jurisdiction of the Court and the policy of the OTP.

By doing so, the OTP would clearly avoid widening the so called "expectation gap" that may exist in victims' communities vis-à-vis the Court. It would also on the other hand allow victims the opportunity to judicially challenge a decision of the OTP not to prosecute and to do so on legal rather than political grounds.

Over the years, the silence of the OTP with respect to the status of article 15 communications may be perceived as if the ICC, as a whole, was indifferent to the alleged crimes referred to in those communications. In the case of the Central African Republic, victims have been awaiting a decision of the OTP for more than three years.

FIDH believes that the OTP would gain credit by establishing a transparent process of the treatment of article 15 communications and by deciding on guidelines, such as those that may exist at the national level, that would include for example the right of victims to know the status of their case where there is an undue delay.

I would like to make a few follow up points. On the topic of maximizing the impact of the Court's activities, the report makes the important point that even monitoring a situation and the announcement of an investigation could have a deterrence effect.

FIDH believes that there may be a difference between the objectives you underline and the practice of the Court in the last few years. FIDH suggests that the Court and in particular the OTP needs to make higher-profile and more public announcements in order to avoid the possibility that the public, the press and even alleged perpetrators could be unaware that situations are under analysis..

Unless the OTP makes public announcements, the media cannot denounce the situations investigated. I would like to stress that this was particularly true in the case of the letter to the president of Colombia. The letter you sent, when made public, had a very significant impact. Unfortunately it should have been followed up in a very public way.
Finally, FIDH recalls that the ICC is the only Court today where victims have the right to request participation and reparation. The Office should aim at implementing those enshrined

historic rights and improve the ways it interacts with victims in order to reinforce the legitimacy of the Prosecutor's actions.

Deputy Prosecutor Fatou Bensouda

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 3 years, the Prosecutor has identified five key areas in which we aim to achieve further tangible progress is an aim: prosecutions, investigations, cooperation, victims and impact. Please allow me to 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 litigation.

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 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 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 needs 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 rise 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 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.

Mr. Jonathan Fanton, President, MacArthur Foundation

Thank you for inviting me to participate in the conversation between the ICC and leading NGOs working to prevent and alleviate human suffering related to civil conflict.

Today we are likely to address many of the issues we talked about in March and June of 2005, when MacArthur facilitated a dialogue between the Prosecutor and some of the organizations represented here on the situations in Northern Uganda and Darfur.

As most of you know, MacArthur has a long-term interest in helping develop a system of international justice with the ICC as the centerpiece. Starting with a grant to bring NGOs from the South to Rome during the Conference that gave birth to the Court, MacArthur has supported 29 organizations working on various pieces of the challenge. Some examples:

- The International Coalition for the Court to speed ratification;
- Phillipe Kirsch's preparatory Commission planning the Court;
- Groups like Human Rights Watch and Global Rights, which gathered evidence helping prepare the first cases (in the DRC);
- The Ugandan Coalition for the ICC and the Institute for War and Peace Reporting to help educate the public about the court;

- Redress, Avocats Sans Frontières, and Women's Initiatives for Gender Justice for their work with victims and witnesses; and

- The International Center for Transitional Justice and Berkeley Human Rights Center for pioneering efforts to give a voice to victims through population surveys.

While we strongly support the Court, we believe the public interest is served by facilitating independent evaluations of the Court free to make critical or challenging commentary. Hence our support for the International Bar Association's project monitoring and evaluating ICC procedures and its outreach programs in the developing world. And we will do more.

I was very pleased to see the paper on future prosecutorial strategy for two reasons. First, I have been urging the Court to articulate its plan and establish reasonable expectations. Others have more ambitious expectations - or perhaps fears - and it is useful to have a point of reference to judge. Second, by laying out the plan, there can be a healthy debate about the scope and limits of the Court's strategy. This meeting is an essential part of that discussion and I commend the Prosecutor for reaching out to NGOs in this spirit of partnership.

While NGOs must always be free to criticize the work of the Court, I do think they have a responsibility to explain what the Court is doing. Not endorse it, but build an accurate factual record with people in affected countries who deserve to learn about the Court's work from a trusted source.

With that said, I believe the Report on Prosecutorial Strategy is clear and compelling. The objectives of completing two separate trials and opening 4 - 6 new investigations in three years seem reasonable. The emphasis on helping accelerate arrests of those indicted and sensitivity to the role of victims and witnesses is right. As I understand it, the Registry is responsible for developing the Victims Trust Fund, but it would be good to hear more about that today.

I like the reference under part VI to positive complementarity and to documenting instances where the existence of the Court has improved national justice practices - both in modifying laws to conform with treaty obligations and in spurring more vigorous prosecutions of those just below the level of the ICC's focus. It may be that a new form of hybrid Court will be necessary for those too hot to handle by existing national courts.

I also like the goal of documenting instances where the existence of the Court might have a deterrent or modulating effect. It may take years to build a record that is persuasive, but the effort should start now.

Given how busy the Court is, I would think the documentation of the Court's impact on national judicial systems and the preventive dimension would best be done independently.

Let me close with a few concerns:

1. The first is obvious: not all the cases should come from Africa. More time may be needed for investigations in other parts of the world, or for issues like human or arms trafficking that involve actions in many places. These new cases may be more likely to come through the *proprio motu* powers of the Prosecutor.

2. I would like to hear more about the options for Sudan. At the moment it stands alone as the only situation referred by the UN Security Council where the government is hostile to outside intervention and perhaps complicit with the crimes under investigation. Winning a case or two in the Congo, but making no progress in Sudan, would weaken the Court.

3. Among the unresolved issues that might be addressed in the period ahead is how the Court interacts with the peace process underway in the some situations. Uganda has been a case in point. Reasonable people will differ in their views on how the peace/justice balance can be struck. I know you have been sensitive to the larger context when pursuing a situation. But it would be useful to understand under what circumstances it might make sense for the Security Council to suspend a case through the mechanism provided for in Article 16 of the Rome Statute.

4. For the Court to achieve its goals, the gap between the Court's headquarters in The Hague and communities where crimes occurred must be bridged. I would like to hear more about the possibility of opening field offices in situation countries and holding *in situ* hearings.

Let me conclude by reaffirming the broad vision underlying the strategic plan: all of us here are engaged in an historic opportunity. The world is on the cusp of having an integrated international system of justice -- and I underscore the words "integrated system."

The ICC has rightly defined itself, setting norms and standards and limiting itself to a few leaders in the most serious situations where national courts are unable or unwilling to act. But an integrated system of international justice will be a seamless web encompassing the ICC, national courts, traditional justice and reconciliation processes, and perhaps a new form of hybrid court. And let us not forget regional Human Rights Commissions and Courts, which are playing an increasingly important role in pushing back arbitrary and illegal practices in Europe, Latin America, and in Africa. Respect for norms, laws and rules are an indivisible concept - respect begets respect. The reverse is also true: relatively minor violations of human rights are the building blocks for gross abuses later on.

So I conclude by thanking the Court and the Prosecutor for your vision of an integrated system of international justice. You can count on MacArthur to help you, other regional courts and commissions, and the civil society organizations that are playing such an indispensable role.

Mr. Juan E Méndez, President International Center for Transitional Justice

It is a pleasure to speak here and give our reflections on the Strategies of the OTP as carried out in the first three years and going forward. I do so mainly from the in-country perspective of ICTJ programs in Uganda, DRC and Sudan, and in the latter case also from my experience as the Special Advisor to the Secretary General on the Prevention of Genocide.

It is now clear that all three situations are enormously instructive in terms of how an institution like the ICC should function in the real world. Operating a global Court is a complex exercise and all the challenges we are facing may not have been anticipated at the outset. It is a learning exercise for all of us.

The situation in Uganda has revived a debate which some of us may have hoped was more settled. To those who have followed the evolution of human rights in the last 25 years, the debate rings of earlier discussions as to whether fragile democracies could really afford to investigate and disclose – let alone prosecute – the major crimes of the preceding era. Always implicitly, but on a couple of occasions very explicitly, the citizens of those young democracies were asked to choose between justice and democracy (or between justice and the rule of law, to paraphrase a famous threat by Augusto Pinochet) because they could not have both.

The creation of the International Criminal Court in 1998 was the high point of an evolution in policy and practice, accompanied by emerging norms in international law, signaling that accountability for war crimes and crimes against humanity was from now on paramount and that the international community would not countenance impunity for such atrocities. But the Rome Statute was not only the culmination of a clear trend that had started in the early 80s in the context of transitions to democracy: it was also the means to establish an instrument that made justice possible even when the national state was unable or unwilling to afford it. And yet, for each situation in which the ICC has acquired jurisdiction we hear voices calling for amnesty, withdrawal of indictments or other forms of exercising discretion and avoid prosecutions, supposedly in the name of peace. As in the 1980s, with the best of intentions, some are urging measures that implicitly give in to the blackmail of the parties to the armed conflict: peace can only come if those accused of atrocities are given guarantees that they will not be touched.

In Northern Uganda, there is a broad recognition that the indictments have assisted in bringing the LRA to the negotiating table, but some now portray the ICC indictments as obstacles to progressing further with the peace process. There are calls for the Prosecutor to exercise his discretion and suspend investigations and withdraw the indictments "in the interest of justice" (Art 53.2.c). We were pleased to see a policy document from the OTP that ensures that Art. 53 will only be invoked in highly exceptional circumstances.

Others have suggested that Uganda should make a challenge under the complementarity principle (Art. 18.2), but to date it is unclear whether Uganda is willing to exercise criminal jurisdiction (although options here may not have fully been explored.) There are some who urge the Security Council to request a suspension of the proceedings for one year at a time

(Art. 16). That may well be within the Security Council's powers, but I think it would be a very bad precedent for the Security Council to be seized of the Northern Uganda situation only for the purpose of suspending ICC investigations; it would be an unwarranted interference by a political organ with the independence and impartiality of the Court. That the Statute contemplated this variety of procedural norms to accommodate shifting situations is proof that its framers were well aware that the interests of justice and the interests of peace should not be divorced.

In any event, in the case of Uganda these proposals are all premature. The parties to the peace process have the burden of showing that the ICC is no longer needed, a burden of which the government of Uganda is aware. If an alternative for criminal justice, in the form of traditional justice and an element of truth-seeking and reparations, as currently under discussion in the form of Mato Oput, is put forward, it would be for the ICC judges to evaluate whether it is sufficient under Art. 17. And there is a risk that it will fall short.

Also still in question are the true intentions of the LRA. For now, there is as yet no real indication that LRA leaders intend to reverse their practices amounting to international crimes (e.g. by releasing forcibly recruited child soldiers and kidnapped girls subjected to sexual slavery) until they are given assurances that they will never be brought to justice.

It is important to remember that there is a broad and general amnesty on the table in Uganda. It applies to all those who wish to give up their arms and rejoin their families and communities. It will be hard to accept that a number of those who benefit from it may also be guilty of atrocities, but as long as they did not bear the greatest responsibility for the crimes, and as long as their communities are satisfied with the measures put in place for their reintegration, perhaps we should all be ready to accept the absence of formal justice in those cases for the sake of peace. But asking the Ugandan victims and the international community at large to accept a total, blanket amnesty covering even those who planned, ordered and covered up those crimes, without a measure of accountability is too much to ask. Experience also shows that it might not lead to a durable peace. In any event, the case of Northern Uganda also shows the importance of conducting meaningful victim consultation at all stages of the process.

This links to the fact that the Court is still little known and understood in many of the areas where it is operating. In Northern Uganda people have little exposure to formal justice, and it may be too much to expect for them to fully grasp and support the complexities of the ICC upon first contact. The Court as a whole must seek more pro-actively to fill this knowledge gap and to build its own legitimacy in affected regions, so as to build its own relevance in the lives of those most affected.

Likewise, however, those of us who support the Court should learn to identify its impact and successes in ways that go beyond the strict confines of the judicial process. The pressure applied by the ICC assisted in bringing the LRA to the negotiating table. If it were not for the ICC, possibly the debates around accountability in and around Juba would never have reached the same stage. Uganda will benefit for years to come from having a national debate on what forms of accountability are necessary. This should be contrasted with the Comprehensive Peace Agreement between North and South Sudan, concluded recently but without the influence of

the ICC. Due to that ICC absence, debates on accountability were very cursory and an agreement was quickly reached by both sides to take it off the negotiating table.

I can also offer other examples of how the implied threat of an ICC prosecution has had beneficial impact on the ground. In Colombia, the law on demobilization of the paramilitary groups would have been much worse than it is if it were not for the need to offer a semblance of compliance with the international standards set forth in the Rome Statute. In Côte d'Ivoire, the prospect of prosecuting those who use hate speech to instigate and incite to commit crimes under the ICC's jurisdiction has kept those actors under some level of control. Obviously, wrongdoers on the ground quickly adjust to shifting situations, so in the future it will not be enough simply to invoke the threat of prosecution. More will be needed, and more will also be needed in terms of international cooperation with the ICC.

More stark are some of the lessons we are learning on state cooperation in terms of securing arrests. This general lack of cooperation does not affect only the ICC but also, to worrisome extents, the other international criminal courts. New approaches will have to be explored as States Parties learn to accept responsibility under the Rome Statute.

In Darfur, the ICC faces challenges of a different nature. In my role as Special Advisor to the Secretary General on the Prevention of Genocide I visited Darfur in 2004 and 2005 and was able to see how impunity for the massacres of 2003 and early 2004 was in itself a factor of instability and a hindrance to prevention of future crimes. That is why early on I joined those who called for a referral of the case to the ICC by the Security Council, a measure of historic significance that was adopted on April 1, 2005.

It has now been eighteen months since that decision, and the Khartoum regime has repeatedly stated that it does not recognize it and that it will not cooperate with the OTP's investigations. In that long period, the Security Council made no effort to remind the Government of Sudan that this was a decision adopted under Chapter VII of the Charter, and therefore binding on all States. Instead, we have let the regime get away with defiance of a resolution adopted in furtherance of international peace and security. Even if the Security Council was unwilling to address this failure to cooperate, it should have been incumbent on other important international actors, particularly member States interested in Darfur and in the ICC, to press Khartoum on this issue. It would also have been important for UNMIS on the ground, and for high-ranking officials in the UN Secretariat, to include this agenda item in their relations with Khartoum.

As far as I can see, only the High Commissioner for Human Rights and my office of Prevention of Genocide have raised this point from time to time. The result is not only that we do not offer the ICC and the OTP the support they need; it is also that we have given away cards that we could have used in negotiating with Khartoum to better protect and assist the 3 million Darfuris, who are now totally dependent on international assistance. It is, unfortunately, not the only mistake that the international community has made along this path that has rendered it all too weak and has strengthened the hand of the regime responsible for the 2003 massacres in Darfur. But lack of follow up on the referral to the ICC certainly contributes to our seeming inability to stem the downward spiral into more violence in that region.

Paradoxically, there are views that recommend precisely the opposite: for the Security Council to suspend investigations under Art 16 of the Statute of Rome, or to persuade the Prosecutor to declare a unilateral suspension. Presumably that would offer Khartoum some carrots that would let President Bashir back off from his belligerent stance and accept the UN military deployment approved last August 31 by the Security Council (subject to Sudan's acceptance). Indeed, in the debate preceding that resolution, and also subsequently, representatives of the countries most interested in Darfur have made it clear that the UN force would have no mandate to execute ICC arrest warrants. It may be too much to ask that such an order be made an explicit part of the mandate in any case. So silence on the matter would be acceptable, in my view. I doubt, however, that it is necessary or appropriate to repeat assurances that arrests will never be conducted.

A final point about prevention and the ICC in Darfur is the question of security for witnesses, victims and the OTP's own investigative teams. These are important concerns and we should not be pushing the Prosecutor to take risks with other people's lives. At the same time, we should not forget that it is the Khartoum regime and its agents that are threatening those lives and many others, and therefore we should apply pressure on the Sudanese government to guarantee the lives and physical integrity of all those linked with those investigations.

In the meantime, our lack of follow-up and of action to support the integrity and independence of the ICC allows a rogue regime the space to institute a policy that effectively shields its agents and other potential defendants from the reach of international justice. One way to break this impasse is to reverse course and apply the necessary political pressure to restore the ability of the ICC to do its prosecutorial and judicial work; another is for the Prosecutor to file charges on the basis of the evidence at his disposal and gathered in Chad and elsewhere, to demonstrate to Khartoum that this bullying policy will not perpetuate impunity. The Prosecutor should also find ways to signal to the people of Darfur that their plight is under continuous consideration, and that silence does not mean inaction.

In terms of complementarity, the Prosecutor's three year report refers to "respecting genuine efforts at the national level", but I think that there is broad agreement that the activities carried out by the Special Court for Darfur to date do not constitute such a genuine effort.

A few final remarks. On the DRC, we welcome the taking into custody of Thomas Lubanga Dyilo, and think that his initial appearance will have a tremendous impact on the Court itself and the world at large. We also appreciate why the decision was made to request for his transfer, and why he was charged with only a narrow set of charges at that particular time. We hope that the charges either in his case or in other cases arising from DRC will be representative of the many horrific incidents of violence committed in the DRC since 2002. We also hope that the OTP will commit the necessary resources to investigations in both DRC and Darfur in order to achieve a comprehensive set of charges. While we generally support the approach of the OTP to focused and narrow investigations, it may be true that different situations of different levels of complexity may require variations on that approach.

In that respect, while we generally also agree with the OTP's interpretation of the gravity threshold, we think that the OTP should not hesitate in opening investigations in situations that may not be equivalent in scale to DRC, Sudan and Uganda, but where there are other considerations of gravity, including manner of commission and victim impact. What matters is "sufficient" rather than "comparative" gravity, in our view. Likewise, we think that there could be a measure of discretion in terms of sequencing cases on grounds other than gravity, based on a thorough assessment of all the circumstances.

Mr. Richard Goldstone

I am happy to participate in this most welcome meeting.

I shall use the few minutes available to me in considering, from my own experience, some of the problems that arise in setting up a new international criminal court or tribunal.

The process is necessarily complex and time-consuming. A competent international staff is essential, and it takes time to find competent people who, inevitably, are not waiting around for new employment in The Hague. They have to leave their present employment and have to relocate, often with families, to the seat of the court. It is also inevitable that in the early years, the judges feel frustrated at the lack of court work to keep them occupied. This leads to inevitable tensions between the judges' chambers and the Office of the Prosecutor. In these respects, the experiences of the ICC mirror problems experienced in the *ad hoc* tribunals.

I turn to consider some of the ways in which, at the start the *ad hoc* tribunals enjoyed advantages that helped ease my work and that are not available to the ICC.

a. The *ad hoc* tribunals were given discrete investigations into particular situations. The work of the Prosecutor was thus directed by the Security Council. There was a clear mandate and brief. This is obviously not the case with the ICC where potentially there are situations on the territory of any member of the United Nations. The canvas is a huge one;
b. The *ad hoc* tribunals had full support and cooperation from the United States Government. This included financial and human resources that during the start-up period were crucial. We derived benefits from having access to useful intelligence information. It considerably reduced the burden on our investigative and analytical staff. It assisted in directing our attention to areas of investigation. Then, there was the political and economic muscle of the United States that led to senior people who had been indicted ending up on trial. I would refer in particular to the Croatian generals who "voluntarily" stood trial and to Slobodan Milosevic who was arrested and delivered to The Hague by his successor to avoid the US withholding over $1 billion of aid.
c. The freedom to indict people who were called "small fish" by the media. This was not inconsistent with giving priority to the leaders who were the guiltiest. But it did enable us to get out quick indictments and so provide the Court with work, and so build its

credibility. The Tadic trial is the most important illustration of this. It helped lay an important foundation for the jurisprudence that has come from the ICTY. As I understand the position, this is not open to the Prosecutor of the ICC.

d. The availability of witnesses. In the case of both the ICTY and ICTR, there was no serious problem in finding necessary witnesses. The Government of Rwanda, to its great credit, cooperated with the ICTR, and our investigators were able to travel in that country. It the case of the ICTY, the Government of Serbia failed to cooperate but there were literally hundreds of thousands of witnesses who were refugees in nearby European countries. They constituted a crucial pool of important witnesses to the crimes we were investigating.

I would suggest that it is important to appreciate the huge new problems that face the ICC, and especially its Prosecutor. They find themselves in uncharted and difficult waters. The problems to which I have referred, and many others, and especially those with regard to the enforcement of its orders and cooperation with its officials, should be borne in mind in evaluating the progress of the ICC. They make it all the more important to press for increased cooperation from the members of the United Nations.

Mr. Suliman Baldo from International Crisis Group

I want to make a comment that will have an impact on strategies for the Prosecutor and the level of cooperation the OTP should expect from states in Africa. In all three ICC investigations on the continent there is a strong organic link between state actors and non-state actors, between government armies and militias responsible for committing massive human rights violations. This is well known of the Janjaweed militiamen in Sudan who were trained and armed by the Sudanese army. But there is less acknowledgement of the roles of the Ugandan and Rwandan armies in Congo during their presence in that country. As occupying powers in eastern and northeastern DR Congo between 1998 and 2002, these two national armies trained many equally abusive militias. The Ugandan People's Defence Force (UPDF) trained both Hema and Lendu militiamen in the strife torn Ituri region, thus stoking the deadly ethnic conflict there. The UPDF continued supporting and manipulating these militias in Congo even after the end of the war, when the Ugandan army had withdrawn from the country in 2003. UN investigations have established links between the highest powers in Uganda and militias in the Congo. The Rwandan's army's support of the mainstream faction of the rebel Congolese Rally for Democracy (RCD-Goma) and several local militias affiliated with the RCD should receive equal attention from the Prosecutor.

We have a situation where States extend only selective cooperation to the ICC. The Ugandan government cooperates fully with the ICC investigation of the northern Uganda case, but would not be inclined to cooperate on its own role in Congo during 2002/2003 and to date. The Congolese government is willing to share information on Uganda's role in eastern Congo but not on national rebel and militia leaders who rose to prominence during the transitional period and are poised to play prominent roles in national politics in the post electoral period. Likewise, the Sudanese government is willing to go out of its way to facilitate the northern Uganda

investigation, but is not at all cooperating with the Darfur investigation. The close connection between Sudan's national army and the LRA should also be investigated.

The ongoing ICC investigations should therefore take into account the duplicity of the national actors in these cases. Investigators should subject the conduct of national armies and power structures in all three countries to close scrutiny, particularly in relation to events on which they are less inclined to cooperate.

Mr. William Pace, Coalition for the International Criminal Court

Welcome to the Church Center of the UN. On behalf of the CICC, I would like to express our appreciation to the Prosecutor and his staff for holding this meeting. We will look back on these hearings, the OTP papers, the responding documents and speeches as both very important documents and as a very important process. The other international tribunals, I hope will consider the Prosecutor's example.

Today marks the completion of 4 hearings, two with governments and civil society in The Hague in September and two here at UN headquarters in New York. I believe these hearings were substantial, high-level and significant.

The CICC is in its 12th year in existence and, like the McArthur Foundation (see earlier speech by Jonathan Fanton), we are in it for the long haul -- in The Hague, New York, and capitals and provinces in every region of world, and in the countries where these horrific crimes have occurred.

Non-governmental organizations of global civil society are and will be the strongest supporters of the ICC, but we will also be strong and constructive critics of the Court and the extraordinary system of international justice enshrined in the Rome Statute. The support of the UN, all UN Member States, and other international organizations are crucial and vital in our minds, which is why we support the Prosecutor's decision to hold the hearings at the UN headquarters.

This is one of the most turbulent, divisive, and difficult times for the UN system and governments in the last 20 years. However, during the last two weeks the General Assembly unanimously appointed a new Secretary General nominated unanimously by the Security Council. The CICC worked hard during the last year to ensure that whoever the Council elected was someone who would support the UN Charter, international law and justice, and the Rome Statute; and we are encouraged that the South Korean Foreign Minister, Ban Ki-Moon has expressed strong support for the ICC.

The support of States and the UN are equally vital. We are very pleased with the emphasis on state cooperation stressed here and in The Hague. The role of states is perhaps the biggest gap we face have in making the system work.

We are all dedicated to working with the Court and we look forward to continuing our semi-annual consultations with ICC officials; these are crucial and very important meetings held at the seat of the Court in The Hague. In this way, too, the ICC and OTP are demonstrating 'best practices' unique among international judicial institutions.

Thank you Chief Prosecutor Luis Moreno-Ocampo and Deputy Prosecutor Fatou Bensouda. We are happy to have assisted in organizing these hearings, and to have extended our consultative comments, and we look forward to further opportunities.

Closing remarks, Chief Prosecutor Luis Moreno-Ocampo

Thank you. This discussion has been very interesting. We started this process in 2003, and this year it is time to present our plans for the future and take stock of what we have done in the last three years. We have hired highly competent people, the cases are operational, and we are learning how to get more cooperation.

Yesterday we had a great discussion at the UN. Some Ambassadors proposed the idea of holding workshops around cases or around issues like arrest and that will be very important. In addition to the ideas we received, we have to explore the different aspects of how to incorporate the work of States Parties and civil society.

I would like to thank you for your contribution. We took notes on the main topics. . I would like to propose at the February meeting with civil society that we integrate a discussion of specific topics such as how to work with the UN and the African Union. We are delighted to receive your comments on two major issues:

1. Northern Uganda: The Pre-trial Chamber issued the warrants and we are engaged in a dialogue with the government of Uganda who has assured us that though it is premature to define the outcome, whatever outcome is reached will be compatible with the ICC statute. I want to be clear. We don't think that is incompatible: there cannot be amnesty, but it is also our official position that it is premature to think about outcomes.

2. Darfur: The fact that we are not investigating inside Darfur doesn't mean we are not actively collecting evidence and investigating Darfur. Each case is different but we are collecting evidence and we have a clear plan. And we want to clarify what we are doing. I have to balance different duties. I wake up in The Hague and think how different my life is in The Hague from what is happening in some of our cases. We are collecting our evidence, we have clear plans, and we are on track.

   To be fair to Sudan, we have to show respect for victims and the law but also respect for territorial states. Regardless of opinions, the government of Sudan is primarily responsible for protecting victims and we must respect them even if we have to investigate them. To be fair, note we have received their cooperation; we requested a few things and we received some of what was requested and we are on track with the

rest. We have conducted four missions, some were missions to assess admissibility, the last mission involved important steps on the investigation side. It is very complicated but we are doing it. We like that you mentioned the need to focus on outcomes and let us manage the style. It has not been perfect but we are on track with cooperation.

Thank you very much for this meeting, it is not a beginning but an important landmark to see what we have done and see where to go from here. During our next meeting I hope we can hold a more in-depth discussion of some of the topics presented here.