[Expert consultation process on general issues relevant to the ICC Office of the Prosecutor:]

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Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations

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Contribution to an expert consultation process on general issues relevant to the ICC Office of the Prosecutor.

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I. PROSECUTORIAL POLICY AND STRATEGY QUESTIONS

The Prosecutor will first need to define his goals in shaping the Office of the Prosecutor in the Court's first decade and his aims for its impact on the framework of international justice in that period. In seeking to achieve these goals, the Prosecutor will have to address a broad range of policy and strategy questions, including the principles of interpretation of the Rome Statute, the Elements of Crimes, the Rules of Procedure and Evidence and other supplementary instruments; guidelines for selecting cases for a preliminary examination or investigation, including for determining whether states are unable or unwilling genuinely to investigate or prosecute crimes; a complementarity strategy designed to encourage effective joint international/national solutions to impunity in given situations; guidelines for prosecution; guidelines for appeals; policy with respect to seeking a Security Council or state referral of a situation; policy with respect to requests by the Security Council for a deferral of investigations or prosecutions; policy with respect to ratification and implementation of the Rome Statute and the Agreement on Privileges and Immunities of the International Criminal Court; countering threats to the Court, such as Security Council Resolution 1422 and immunity agreements signed with the United States of America (USA), practices to ensure a fair trial and practices to ensure due regard to the interests and rights of victims with regard to security, participation and reparations.

Many of these issues, as well as the issues discussed below in Part II, overlap and the various headings are simply one way of trying to give some order to the topics. For convenience, some of these issues are discussed in the second part of this letter dealing with external relations of the Office of the Prosecutor.

A. The desired shape of the Office of the Prosecutor a decade from now

Of course, in developing policies and a prosecutorial strategy, the Prosecutor should have a clear idea of what sort of an institution he or she would like the entire Court, not just the Office of the Prosecutor, should look like in 2012 when his or her term of office ends. In building the institution, the following seem to be desirable outcomes a decade from now:

- The most highly qualified staff from all regions and legal systems of the world, with a fair representation of men and women, as the result of a recruitment policy that does not discriminate against persons because of irrelevant factors such as nationality, age, physical impairments or gender.
- A standard of excellence and probity that is a model for prosecution offices around the world.
- An approach to developing and implementing international criminal law and procedure that draws from the best in civil and common law systems the lessons learned from the four *ad hoc* international criminal tribunals, with a view to creating an effective and fair new international criminal justice system.

- An institution that has sufficient resources to carry out its program of work.
- An institution that is able to investigate promptly, thoroughly, independently and impartially the worst possible crimes committed in all regions of the world.
- An institution that is able to prosecute accused persons promptly, efficiently and fairly, with due respect for the interests and rights of victims.
- An institution that has a humane working environment for staff at all levels.
- Completion of the move to permanent headquarters that fully satisfy the needs of the Office of the Prosecutor, as well as the rest of the Court.
- Establishment of permanent and temporary field offices wherever needed.
- Public perception of the Court as an effective, independent, impartial and fair institution.

B. The desired impact on the system of international justice a decade from now

The overall policies and prosecutorial strategy should also be designed to strengthen the international framework of justice in the coming decade. I would hope that measurable goals for the Prosecutor, operating both independently and with the rest of the Court, would include the following:

- Successful investigations and prosecutions by the Prosecutor of a significant number of persons in several regions around the world responsible for the most grave crimes within the Court's jurisdiction.
- Substantial progress towards universal ratification of the Rome Statute and the Agreement on Privileges and Immunities of the International Criminal Court (Agreement on Privileges and Immunities).
- Adoption by the Assembly of States Parties of carefully selected amendments to the Rome Statute if certain flaws cannot be corrected through creative interpretation.
- Enactment by all states parties of effective implementing legislation for the Rome Statute and the Agreement on Privileges and Immunities.
- Effective and routine cooperation with states parties and other states in the investigation and prosecution of crime above and beyond that required by the Rome Statute and national legislation.
- Evidence of some deterrent effect in the form of adoption of new legislation, issuance of orders and changes in practice in armed forces and security forces designed to prevent and punish crimes at the

national level, and, although this will be much more difficult to document, some deterrence of crime.

- A reconceptualization of genocide, crimes against humanity and war crimes from political and diplomatic events to be resolved by politicians and diplomats to serious crimes like murder, abduction, assault and rape that deserve to be investigated and prosecuted with a sufficient proportion of the global resources devoted to all crime.
- A catalytic effect leading to increased investigations and prosecutions of crimes at the national and regional level.
- Public perception of the Court as a key, but not exclusive, part of a new system of international justice based on complementarity.
- A decline in hostility by states currently opposed to the Court having jurisdiction over their citizens and the beginnings of cooperation with the Court by such states in the investigation and prosecution of citizens of other states.

C. Principles of interpretation

An important part of the foundation for an effective and comprehensive prosecution policy and strategy should be a clear and consistent approach to interpretation of the Rome Statute and its supplementary instruments in all aspects of the work of the Prosecutor and the Office of the Prosecutor. As a treaty establishing an international organization, the Rome Statute should be interpreted teleologically to ensure that the Court is effective in achieving its purposes, and it will be important for the Prosecutor to identify in advance aspects of the Statute that are problematic where this approach can minimize or eliminate the problem rather than wait until these questions arise in individual cases. There are, of course, countless aspects of the Rome Statute and its supplementary instruments that will require such interpretation. There are far too many to even begin to identify them in a paper of this nature, but my organization has already identified a number of issues that I mentioned in my letter to you dated 14 January 2003 that it hopes to address in *amicus* curiae briefs. The Prosecutor and the Office of the Prosecutor should incorporate this approach in all aspects of their work and advance it in all external relations, in particular in all submissions to the Chambers. Of course, a considerable amount of discretion should guide the implementation of this approach. In some situations, it may be better simply to try to ensure that positions take by the Chambers on a particular point do not preclude a more expansive interpretation later, in different circumstances, when such an interpretation would more likely be accepted.

However, as the Statute itself makes clear, the Statute must be interpreted strictly in favour of the accused and consistently with human rights. How these two purposes – effectiveness and strict construction - can be harmonized will pose an important challenge for the Prosecutor and the Chambers, but prosecutors and judges resolve similar tensions at the national level all the time, so it should not be insurmountable to do so in the International Criminal Court.

1. The principle of effective interpretation of constituent instruments of international organizations

The starting point for the Prosecutor in developing a comprehensive interpretation strategy is that the Rome Statute is the constituent instrument of an international organization and, as such, must be interpreted not simply in accordance with the law of treaties, but primarily in a manner that will ensure the effective accomplishment of its purposes. As the International Court of Justice declared in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case,

> "[t]he constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realising common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organisation created, the objectives which have been assigned to it by its founder, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties." (I.C.J. Rep. (1996), para. 19)

Scholars, such as Malcolm Shaw, have emphasized

> "the special nature of the constituent instruments [of international organizations] as forming not only multilateral agreements but also constitutional documents subject to constant practice, and thus interpretation, both of the institution itself and of member states and others in relation to it. This of necessity argues for a more flexible or purpose-orientated method of interpretation." (*International Law* (4th ed. 1997), pp. 914-915)

He adds that the principle of effectiveness in Article 31 (1) of the Vienna Convention on the Law of Treaties of 1969

> "is of particular importance in the case of international organisations since such organisations, being in a state of constant and varying activity, need to be able to operate effectively, and this therefore militates towards a more flexible approach to interpretation." (*Ibid.*, p. 915)

2. Interpretive guidance in the Rome Statute

The Rome Statute provides some guidance to the Court in sources and principles to apply in interpreting the Statute, in particular in Articles 21 and 22. First, the International Criminal Court is required under paragraph 1 of Article 21 (Applicable law) to examine, if appropriate, three bodies of law. That paragraph provides:

> "1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

These three sub-paragraphs provide some opportunities for the Prosecutor. Sub-paragraph (a), together with Article 9 (3), make it clear that in the case of conflict the Rome Statute prevails over the Elements of Crimes. Although the Elements of Crimes instrument will be of enormous help to the Prosecutor in clarifying what must be proved and in narrowing the focus in evidence gathering, there are a number of elements of particular crimes, such as the contextual element of the crime of genocide, that would appear to be inconsistent with the definition in Article 6 of the Rome Statute and Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. It will be useful for the Prosecutor to undertake a review, in consultation with experts in international law and criminal law, to identify possible conflicts that will need to be addressed in investigating and prosecuting cases.

Sub-paragraph (b) will be an essential tool in addressing challenges by the accused on the ground of ambiguity in the wording of crimes in the Rome Statute and in the elements of particular crimes or based on a literal interpretation of those crimes and their elements. It will provide a fair and reasonable way to deal with many of the difficult questions of legality and *ne bis in idem* that are likely to arise in the early years of the Court. It will be useful in addressing in defining the scope of principles of criminal responsibility, such as command and superior responsibility, and defences, such as the defence of superior orders with respect to war crimes, where the Rome Statute departs from long-settled international law, particularly when faced with the countervailing principle of strict construction of definitions of crimes in Article 22 (2) (see below). Sub-paragraph (c), however, is more problematic. It leaves some room for arbitrary choices of applicable principles that could favour either the prosecution or the defence. Some further thought will need to be given to devising guidelines for applying this sub-paragraph.

In addition to the guidance in Article 21 (1), when applying and interpreting law under this article, the International Criminal Court is required to do so consistently with international human rights and without any adverse distinction. Paragraph 3 of that article provides:

> "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

A specific example of this rule is found in Article 22 (2), which provides:

> "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

Other articles in the Rome Statute provide guidance to the Court, including the Prosecutor, in interpreting and implementing the Statute, particularly in the difficult area of ensuring a fair trial while giving due regard to the interests and rights of victims.

D. Guidelines for preliminary examination, investigation, prosecution, appeal, revision and compensation, as part of a global anti-impunity complementarity strategy

The Prosecutor will need to develop clear, simple and workable guidelines to determine which crimes should be subject to preliminary examination or investigation, which cases to prosecute, when to appeal a judgment, when to seek or oppose revision and principles concerning compensation for miscarriages of justice. Such guidelines should be developed in consultation with civil society, as in this particular consultation before the Prosecutor takes office and in others afterwards. As in both civil and common law systems where prosecutorial discretion exists, to the greatest extent possible, such guidelines should be made public, where such publication would not undermine the effectiveness of the Office of the Prosecutor by subjecting it to micro-managing criticism from external sources.

The failure of the Prosecutors of the ICTY and ICTR to publish a comprehensive and regularly updated set of such guidelines has not helped public understanding of their work, particularly since prosecution strategy has undergone a number of important shifts over the past decade. Although there have been a number of articles and statements indicating that various internal guidelines do exist covering these areas, for example, the explanations in the report on NATO bombing in Kosovo, the adoption of the Rules of the Road and statements about the development of a completion strategy, they do not appear to have been pulled together in any one place publicly. Indeed, even some members of the Office of the Prosecutor have indicated on a confidential basis some doubts about the scope of the Prosecutor's guidelines or the consistency of their application on these matters.

A number of civil law jurisdictions have made their guidelines public. For example, the Belgian *Collège des procurers* publishes guidelines on prosecution policy on the Ministry of Justice website. In France, the Ministry of Justice issues official circulars on prosecution policy with regard to particular crimes and legal textbooks describe prosecution policy. In Germany, where there is some limited prosecutorial discretion, prosecution circulars at the level of the *Länder* have been published containing guidelines for prosecutors on when to close cases. In Italy, where the legality principle has run into the problem of insufficient resources to prosecute cases, there have been proposals for public guidelines for prosecutors in dropping cases, decisions that require court approval.

Some common law jurisdictions have made their prosecution guidelines public. For example, the Crown Prosecution Service in England and Wales has made the Code for Crown Prosecutors public:

> "The Code is also designed to make sure that everyone knows the principles that the Crown Prosecution Service applies when carrying out its work. By applying the same principles, everyone involved in the system is helping to treat victims fairly and to prosecute fairly but effectively."

Publication of Office of the Prosecutor guidelines will help ensure that public expectations are realistic and that judicial review of decisions not to investigate will be conducted in an appropriate manner. Such guidelines should be reviewed and amended in the light of experience. In developing and implementing these guidelines, they should be part of a global prosecution strategy based on complementarity designed to build a truly global system of international justice operating harmoniously at both the international and national levels (see Point I.F) below).

E. Guidelines for selecting crimes for a preliminary examination or investigation

Perhaps the most important challenge facing the Prosecutor will be determining which crimes to select for a preliminary examination *proprio motu* pursuant to Article 15 (1) and (2) of the Rome Statute, for an investigation pursuant to Article 15 (3) and for investigations based on referrals by the Security Council pursuant to Article 13 (b) or by a state party pursuant to Articles 13 (a) and 14. Although there will be significant differences between a preliminary examination and an investigation, the decision whether to conduct a preliminary examination or an investigation will usually involve most of the same considerations, so, to minimize duplication, the discussion treats the guidelines for both decisions as the same. In addition, although there will be a number of important differences between investigations based on the trigger for them, as Rule 48 makes clear, in determining whether there is a reasonable basis to proceed with an investigation under Article 15 (3), the Prosecutor shall consider the factors in Article 53 (1) (a) to (c), which apply to state or Security Council referrals.

The Prosecutor will face enormous pressures from the general public, the press, some national non-governmental organizations and some victims to investigate and prosecute every crime within the jurisdiction of the Court and many that are not within the jurisdiction of the Court. There will be calls for geographic balance in terms of the crimes investigated and prosecuted, regardless of the scale of the crime or other factors. Some sectors will continue to contend that this is a court of the North targeting the South. The Prosecutor will also face calls to act when particularly horrifying crimes are committed that capture public or press attention, even if they fall outside any guidelines previously enunciated, particularly if the crimes are committed by nationals of European or North American states or by members of United Nations peace-keeping forces. At the same time, the current US administration will persist in claiming that the Court is planning unfounded politically-motivated investigations and prosecutions of US nationals.

In determining whether to conduct a preliminary examination or investigation, the Prosecutor will have to determine:

> (1) In accordance with Article 53 (1) (a) of the Rome Statute, whether a crime, as defined in Articles 6, 7 and 8 was committed, taking into account whether thresholds for the crime were met.
>
> (2) Whether the Court can exercise jurisdiction over the crimes because they were committed in the territory of a state party or state that has made a declaration under Article 12 (3) or by a national of one of those states or because the Security Council has referred a situation to the Prosecutor pursuant to Article 13 (b).
>
> (3) In accordance with Article 53 (1) (b), whether the three non-discretionary factors in Article 17 (1) (a), (b) and (c) that make a case inadmissible were present.
>
> (4) Whether certain guidelines that the Prosecutor has developed have been met, including the largely discretionary factor in Article 17 of sufficient gravity.
>
> (5) Once admissibility has been determined, whether the somewhat duplicative factors listed in Article 53 (1) (c) are absent.

Finally, it is important to note that a state or Security Council referral can upset all the calculations concerning caseload in applying the Prosecutor's guidelines.

A recurring theme in the approach suggested below, consistent with the principle of effective interpretation suggested above in Section I.C, is to interpret the non-discretionary factors as broadly as possible to ensure that the Court will preserve the potential power to act in a broad range of situations, thus strengthening its deterrent effect. At the same time, the guidelines would be designed to ensure that the discretionary factors can be used to meet both the problem of limited resources in the coming decade in a principled way (the gate-keeping function) and the need to ensure that the Court is complementary to national courts, not a replacement for them.

1. The definition of crimes and the problem of thresholds

The scope of the definitions of the crimes in the Rome Statute and the Elements of Crimes, as well as of principles of criminal responsibility and defences, is outside the scope of this letter, apart from the general point made above about effective interpretation of the Statute. The subject is also covered in a number of commentaries. However, it would be useful in the context of developing the Prosecutor's guidelines for preliminary examinations and investigations to note that the threshold in Article 8 (1) for war crimes is a discretionary, not mandatory, one. It states that "[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." Although this threshold will necessarily inform the development of guidelines for the selection of war crimes for preliminary examination and investigation, the Prosecutor should ensure that states, armed political groups and the press and general public understand that the Court's

jurisdiction extends to *any* war crime in Article 8 and that he or she could examine preliminarily, investigate or prosecute any such crime if the case is admissible and it fits the Prosecutor's guidelines. Potential perpetrators anywhere in the world should understand that there is at least *some* risk of prosecution and conviction by the Court even if the war crimes were not part of a plan, policy or large-scale commission of such crimes. This point needs to be made publicly, as part of the press and outreach work of the Prosecutor and the rest of the Court, to ensure that the Court does not completely give up the deterrent effect of Article 8 (1), even though the Prosecutor's guidelines will for pragmatic and complementarity reasons seriously limit the number of crimes the prosecutor can investigate or prosecute.

It will also be useful in developing guidelines for the preliminary examination and investigation of crimes against humanity to make clear to states, armed political groups, the press and general public that the threshold for crimes against humanity in Article 7 (1) does not require that the specific prohibited act, such as murder, have been committed on a widespread or systematic basis, but only that it is one of a number of acts, which could include other acts, such as torture or rape, that together were committed on a widespread or systematic basis. In addition, in developing such guidelines it is important to make clear to the targets mentioned above that ordinary persons who take advantage of circumstances to commit the prohibited acts – for example, a civilian who kills members of a neighbouring house for private gain – as part of a widespread or systematic attack, even if the persons are not state agents or members of organizations, can be prosecuted and convicted for crimes against humanity. These points need to be made publicly, as part of the press and outreach work of the Prosecutor and the rest of the Court, to ensure that the Court does not give up the deterrent effect of Article 7.

2. Jurisdiction

This subject is thoroughly covered in commentaries. However, the Prosecutor will have to make one very important and sensitive policy decision concerning temporal jurisdiction at an early stage. There are a number of continuing crimes which will have begun before 1 July 2002 or the date of entry into force of the Rome Statute for a relevant state. These include the crime against humanity of enforced disappearance, the crime against humanity of torture when the torture is the extreme mental pain and suffering inflicted on families of the victims of an enforced disappearance as long as the fate of the victim is unknown and the crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law. The Elements of Crimes would, if they are determined to be consistent with the Rome Statute, probably exclude an enforced disappearance where the victim was seized before the date of entry into force of the Rome Statute, but this matter is not entirely free from doubt and is likely to be the subject of a challenge. The other two examples present a stronger claim to be within the Court's jurisdiction.

These questions will have to be addressed with great sensitivity. On the one hand, if the Prosecutor adopts an expansive reading of the Court's jurisdiction over these crimes, this approach will upset some of the strongest supporters of the Court that thought they had achieved more restrictive reading in the Elements of

Crimes that provided the necessary reassurance to permit ratification to proceed. It could slow or prevent for a considerable time ratification by certain states, unless the Prosecutor's guidelines made it clear that such crimes would be a low priority. On the other hand, a narrow reading would upset many of the non-governmental organizations that have been among the Court's strongest supporters.

3. The preliminary question of admissibility

It is true that many of those involved in the drafting of Article 17 hoped that it would be read restrictively and many commentators have also read this article in an extremely restrictive way. For example, at first glance, it would appear that the Court could only exercise its jurisdiction in a situation akin to the situations in Cambodia in the 1970s, Rwanda in 1994, the former Yugoslavia in 1991 and Burundi, Democratic Republic of the Congo, Liberia and Sierra Leone in the 1990s, where the legal systems completely or substantially collapsed, but not in situations such as the one in Colombia today because, as one academic writer recently suggested, the courts in that country remain open, even though witnesses, prosecutors and judges are routinely the target of death threats. Such an interpretation should be resisted by the Prosecutor, even if the guidelines adopted by the Prosecutor for preliminary examination and investigation in the early years lead to preliminary examinations and investigations in only a few large-scale situations.

Three non-discretionary factors. The Prosecutor should make every effort to ensure that the Court gives an expansive reading in principle to the three non-discretionary requirements of unwillingness, inability and the exception to the *ne bis in idem* principle in Article 17 (1) (a), (b) and (c) to increase the long-term deterrent effect of the Court. However, even if for very pragmatic reasons of resources and complementarity, discussed below, the guidelines for preliminary examination and investigation will for a considerable length of time have to apply the fourth admissibility requirement of sufficient gravity (the scope of which is largely discretionary) restrictively.

The apparently contradictory approaches to the non-discretionary and discretionary factors suggested here can be justified. Potential perpetrators in the largest number of situations should understand before they decide whether to embark on a course of crimes that they risk prosecution and conviction by the Court, as well as by national authorities, even if current resource constraints limit that risk in practice given contemporary levels of crime. Once a non-discretionary factor is given a restrictive interpretation by the Prosecutor or a Chamber, it will be difficult to change it, but it will be easier to give a more expansive reading to a discretionary factor in the future if resources made available to the Court increase or the number and scale of situations decreases. The following discussion is not intended to cover all aspects of Article 17, but simply to note the possibilities that may exist for a more expansive interpretation than the one commonly accepted.

A non-exhaustive list of factors. Article 17 (1) (a) and (b) requires the Court to declare a case inadmissible where a case is being or has been investigated or prosecuted except when the state is unable or unwilling to investigate or prosecute genuinely. A number of factors that the Court "shall consider" are identified in Article 17 (2) and (3) when determining unwillingness or inability in a

particular case. Although it is mandatory for the Court to examine the factors listed in paragraphs 2 and 3, neither paragraph says that they are an *exclusive* list of factors that should be considered by the Court. In addition, neither paragraph says that a case is inadmissible if all of the factors that must be considered are missing. The drafters could easily have expressly stated that in making the determination of unwillingness or admissibility the Court *shall determine* that a state is unable and unwilling *only* when one or more of the listed factors is present. They did not. Indeed, the approach in paragraph 2 is the exact opposite of paragraph 1, where the drafters excluded any room for discretion by the Court and directed it to determine that a case was inadmissible when any one of four factors was present (although the scope of one of the four – sufficient gravity – is largely discretionary).

Possibility of an expansive interpretation of the factors. Finally, there is some room for an expansive interpretation of the factors listed in each of the paragraphs.

Article 17 (2) provides:

> "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice[.]"

Several points should be noted about the scope of these factors. First, the term "the national decision" would include an amnesty that precluded a judicial determination of guilt or innocence, the emergence of the truth or full reparations to victims or their families. As Amnesty International has explained elsewhere, see, for example, Chapter Fourteen of its paper, *Universal jurisdiction: The duty of states to enact and implement* legislation, AI Index: IOR 53/002-018/2001, September 2001, such amnesties for crimes under international law are prohibited by international law. Second, a "national decision" could also include the failure to define the crimes in the Rome Statute as crimes under national law, with principles of criminal responsibility and defences that are consistent with international law. Such amnesties and failures to enact necessary legislation could also be seen as evidence that the state was unable to investigate or prosecute (see below). Third, the concept of "unjustified delay in the proceedings" must necessarily include the complete absence of criminal proceedings and official statements that an investigation was underway, without any further evidence of such an investigation. Fourth, the concepts of independence, impartiality and manner of conducting

proceedings must include proceedings that nominally are continuing, but where the judges are routinely subjected to death threats or murder in cases involving crimes under international law or other serious crimes, such as drug trafficking or organized crime.

Article 17 (3) states:

> "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

This paragraph, like the previous one, has, unfortunately, received an extremely restrictive reading. From the perspective of effective interpretation of the Rome Statute, another reading is possible. With regard to collapse, a first point to note is that the requirements under the rule of law are strict, both with respect to the need for competent, independent and impartial courts, and for the conduct of criminal proceedings. Therefore, whether examined from the point of view of the accused, the victim or victim's family or the international community, it does not take much damage to a criminal justice system before one can speak of a substantial collapse. Second, this factor will be considered in the context of "a particular case". Therefore, if the national judicial system has collapsed in the region where the crime occurred and the rest of the national judicial system does not have – or cannot exercise - jurisdiction over the crime, this localized collapse should be sufficient to satisfy Article 17 (3). There are all too many states where the criminal justice system has ceased to function effectively in a particular region, generally in the context of internal armed conflict.

The concept of substantial unavailability (a natural reading would be that the term "substantial" applies to unavailability so that complete unavailability need not be demonstrated) should not be seen as the absence of a criminal justice system, but only its unavailability. There are different types of unavailability and collapse. First, the system could be functioning perfectly in a region or the state for the general population, but be unavailable to religious, ethnic or political groups or, on certain issues, women. Second, the system could be functioning perfectly well in a region or in the entire state for all crimes except the crimes in the Rome Statute. If the state had given amnesties for these crimes that prevented a judicial determination of guilt or innocence, the emergence of the truth or awards of reparations to victims (see below), its courts would be unavailable. If the penal code does not define the crimes with which the accused person is charged by the Court as crimes under national law, it would be impossible to say that the national criminal justice system is available. The examples of the consequence of collapse and unavailability cited in Article 17 (3) are relatively broad. If warrants for arrest, subpoenas for the production of evidence or subpoenas to witnesses to appear are not executed in a national criminal justice system, that confirms unavailability. Finally, phrase "or otherwise unable to carry out its proceedings" gives the Court scope to consider a range of other serious flaws in the system.

Inability to provide reparations. One factor that could be considered in determining whether a state was unable or unwilling genuinely to investigate or

prosecute is whether it was able and willing to provide reparations to victims, even if that factor alone might not be determinative. This suggestion is likely to be controversial, but there are a number of aspects of this issue that deserve further exploration. In some civil law systems, certain forms of reparations are awarded in the criminal trial itself, so it is perfectly possible to conceive of reparations as an integral part of the new criminal justice system now under construction. Given that Article 75 recognizes reparations as a fundamental component of the Court's work and provides that states are obligated to give effect to Court decisions under Article 75, it would not be unreasonable to consider that states parties, at least, are under a similar obligation to award reparations to victims, whether in the course of a criminal proceeding or otherwise. A number of other related aspects concerning reparations could also be taken into account on the question of inability is whether a state is able to locate, freeze and seize assets and on the question of unwillingness a refusal of a state to locate, freeze and seize assets of suspects and accused.

The exception to the ne bis in idem principle. Article 17 (1) (c), provides that a case is inadmissible if a person has already been tried for the conduct which is the subject of the complaint in the Court when a trial is not permissible under Article 20 (3). That provision contains two exceptions to this rule of *ne bis in idem*:

"No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

The principle of effective interpretation would suggest that these exceptions should be read broadly to avoid a situation of impunity when national courts fail to fulfil their responsibilities.

4. The preliminary question of admissibility – the discretionary factor of sufficient gravity

The concept of sufficient gravity can be examined both as an admissibility factor under Article 17 (1) (d) and as a separate question under Article 53 (1) (c), when deciding whether to investigate, and under Article 53 (2) (c), when deciding whether to prosecute. It is not contradictory to suggest that the Prosecutor use the final admissibility factor – sufficient gravity – in a restrictive manner in determining which crimes to examine preliminarily or to investigate for pragmatic reasons. An expansive approach to the first three factors could increase the deterrent effect of the Court by encouraging national parliaments and criminal justice systems to take stronger steps to avoid the Court exercising its jurisdiction. However, the Prosecutor will never have the resources to examine and investigate all the crimes within the Court's jurisdiction. In addition, it would be contrary to the fundamental principle of complementarity underlying the Rome Statute, which places primary responsibility on states to investigate and prosecute crimes, if the

Prosecutor were to try to investigate and prosecute every crime, even if the Prosecutor did have immense resources. Therefore, the concept of sufficient gravity will be a key component of the guidelines for preliminary examination and investigation (discussed below).

5. Developing guidelines for determining whether to conduct preliminary examinations and investigations

In deciding what are the appropriate guidelines for determining when the Prosecutor will conduct preliminary examinations and or investigations of crimes (as opposed to selecting individuals for prosecution, discussed below in Section I.G), the starting point will be considerably different from the starting point of most national prosecutors or investigating judges (where the investigations are prosecution led) or of police (where the investigations are primarily the responsibility of the police acting independently). In most countries, the criminal justice system will attempt to ensure that the majority of most types of crimes in the jurisdiction will be investigated. At the international level, the assumption will be the opposite. Most crimes under international law within the jurisdiction of the International Criminal Court will not be investigated by the Prosecutor of the Court, even if it is envisaged that under an effective system of complementarity the goal would be to ensure that most crimes not investigated by the international prosecutor would be investigated by national authorities (for suggestions on developing an effective complementarity strategy, see Section I.F below).

Given the above, the Prosecutor will need to have clear ideas about the desired caseload, in terms of numbers of crimes, numbers of suspects and accused and numbers and locations of situations where crimes occur that he wants to investigate each year. Once these difficult decisions are made about desired outcomes, various types of guidelines can be developed for deciding when to conduct preliminary examinations and investigations. This threshold issue is separate from the question of which individuals should be selected for prosecution by the Prosecutor, as opposed to national authorities (discussed below in Section I.G), the distinction is somewhat artificial, since often potential suspects and accused persons will be known with respect to particular crimes, but the distinction would appear to be a useful rough guide in addressing some of the issues.

For the sake of simplicity, I will focus on two possible model outcomes, although there are other possible variations.

The three very large situations model. One model, which I understand some advocate, is for the Court to focus primarily on investigating crimes committed in large situations at the scale of the current situations in the eastern part of the Congo and Colombia, or the past situations in the former Yugoslavia in the 1990s or in Rwanda in 1994, with the Court building its caseload slowly from beginning to investigate one situation of comparable scale in the first year, then two and finally at a maximum level of three such situations at any one time. There is much to be said for this model in terms of logic, simplicity and efficiency. However, experience suggests that it may not be politically feasible to sell such a limited model to the Assembly of States Parties or the general public over the long term, particularly given the unrealistic expectations and pressures the Court will face.

Multiple, variable size situations model. An alternative model that might be politically more acceptable, but more burdensome on the Court, would be to recognize that not every situation is of the same magnitude or equally difficult to investigate. Therefore, under this model, the Prosecutor could employ the same resources, investigate fewer crimes and prosecute fewer individuals in the same situations as in the first model, but would be able to act in more, but smaller, situations in different places or regions. Of course, situations, crimes and suspects are not fungible goods and one cannot simply say that if the Prosecutor were to reduce the number of crimes in Situation A that are investigated from ten thousand killings to five thousand and the total number of individuals prosecuted from 100 to 50 that the Prosecutor could then, shifting these same resources from Situation A to two other situations, investigate a total of five thousand other crimes in Situations B and C and 50 persons in those two situations. Even apart from the different types of resources that will be needed in each situation, there will be significant start-up and situation overhead costs for each new situation.

However, even if the Prosecutor could only investigate, with the same resources that would have been allocated in Situation A to five thousand killings and 50 persons, three thousand crimes and 35 persons in the Situations B and C, this shift in resources might well make a greater contribution to international justice. These benefits could occur when Situations B and C took place in small countries where the total number of crimes was smaller than in Situation A and the impact of investigations and prosecutions as a deterrent in both the territorial state and neighbouring states and as a way of helping to create a lasting peace might be greater. Other factors might also be present suggesting such an allocation of resources. Situations B and C might be in different regions of the world or involve victims from different cultures in the same region. It might be easier to investigate and prosecute in Situations B and C for a variety of reasons, including the size of the country, the existence of a cooperative successor government, easier access of outsiders to the region where the crimes occurred or better documentation from seized government files, as in Chad, or from international or government truth commissions, as in El Salvador, or non-governmental organization documentation, as in Chile and Guatemala. Court investigations might have a greater impact on complementary national investigations and prosecutions in the territorial state or in regional arrangements.

Although the following suggested guidelines for preliminary examination and investigation are based on the second model, they could be modified to be used to select situations in the first model. Although the suggested guidelines will require considerable judgement and discretion in their application, it is to be hoped that they would not be susceptible to arbitrary application. To help ensure that the guidelines are applied in a consistent manner, it will be necessary to have in place procedures that require decision-making to take place in a way that minimizes the danger that decisions will be taken by the Prosecutor on the basis of improper considerations. These improper considerations include widespread press coverage of one situation while others are ignored, public calls by states for investigations of particular situations or incidents (as opposed to formal referrals) or informal approaches by members of the Office of the Prosecutor outside the normal procedures. As stated above, they are designed to be used once the Prosecutor has

determined (1) that a crime has been committed, (2) that the crime is within the jurisdiction of the Court and (3) that states are unable or unwilling to investigate or prosecute the crimes genuinely (of course, these preliminary stages could be incorporated into the guidelines). They are also designed to permit the Prosecutor to defend publicly his or her decision to conduct a preliminary examination or investigation or not to do so to victims, their families, the press, the public and the Pre-Trial Chamber. They are simply guidelines and some could be modified or omitted in the light of competing considerations. Indeed, in some instances the individual guidelines could lead to contradictory conclusions. If the approach suggested of publishing such general guidelines is followed, they could be supplemented by internal guidelines in more detail that would not be public in the same way that the United Kingdom's Code for Crown Prosecutors is supplemented by confidential internal guidelines.

6. Suggested guidelines for determining whether to conduct a preliminary examination or an investigation

- The total number of the crimes committed in a particular situation should be on a large scale. Certainly, the priority for preliminary examinations or investigations should be situations where there were large numbers of victims of crimes. This is one way to interpret the sufficient gravity factor, both from the point of view of admissibility under Article 17 (1) (d) and investigation under Article 53 (1) (c). Such a priority would ensure that there were economies of scale in the work of the Office of the Prosecutor and would usually be the easiest choices to justify to international public opinion and the Assembly of States Parties and, if not examined or investigated, the hardest to justify. The limited international outcry that followed the killings of up to half a million ethnic Chinese in Indonesia in the 1960s would probably not occur again.

- The total number of crimes committed has had a major impact on the country, even if they did not reach the scale of other situations.. Examples of situations where the number of victims would be relatively small in comparison to other situations, but where the impact was devastating to the countries concerned include Côte d'Ivoire in the past few years (hundreds of murders of civilians and prisoners), Chile between 1973 and 1975 (approximately 3,000 deaths and enforced disappearances and many more cases of torture), Argentina in the 1970s and early 1980s (9,000 to 30,000 enforced disappearances) and Chad in the 1970s (40,000 murders). If the Prosecutor were to adopt the first model – a maximum of three situations – it is highly likely that the Prosecutor would never investigate such situations. However defensible the first model may be, the Prosecutor could face a credibility gap if the Prosecutor does not examine and investigate crimes committed in situations of this magnitude or does not have a convincing reason for not doing so.

The Prosecutor is likely to be challenged in particular on the resources analysis by non-governmental organizations and criminal justice experts. For example, lawyers and investigating judges who were involved in putting together the cases against Pinochet in Spain, against Habré in Senegal and Belgium and in Mali against the former ruler of that country, may well argue that the resources required to investigate a significant portion of the crimes committed by the three

former heads of state involved was far less than the resources estimated by the Prosecutor (even taking into account translation, transportation and salaries). Others may argue that the main problem in investigating and prosecuting leaders has been the restrictive approach of certain prosecutors and courts to command and superior responsibility and that the Court, with a carefully argued brief by the Prosecutor, may decide on a more expansive concept of such responsibility without far too loose approach in the *Yamashita* case. Therefore, if model one is chosen it will be essential for the Prosecutor to be able to document the resources needed carefully. In addition, if model one is chosen, it could be a wise move for the Prosecutor could offer to work with other jurisdictions to develop a complementarity policy for those jurisdictions to investigate and prosecute the crimes. Not only would it, to some extent, protect the Prosecutor from attack, but it would remind the international community that the Court is a key part of the system of international justice, but not the sole place to go.

- It is likely that it will be possible to obtain sufficient evidence about the crimes committed to mount successful prosecutions of those who bear the greatest responsibility, without at this stage focusing on particular suspects. It is likely that the ability to gather evidence about crimes in particular situations will vary greatly and will vary over time, for example, when there is a change of government or one side in an armed conflict is defeated. In some situations, there may well be vast amounts of essential intelligence information in a non-territorial state, but that state's current government may not be willing to provide that information to the Court. In other situations, a non-state party where persons who have fled the conflict are located may be unwilling to cooperate with the Court. Such problems may affect only the scope and timing of a preliminary examination or investigation, but they will have to be taken into account in allocating resources. If all other factors relevant to the decision were equal, the relative degree of difficulties in gathering evidence might be determinative in choosing which situation to examine or investigate first.

- The preliminary examination, investigation and eventual prosecutions would have a catalytic effect, both in the territorial state and in the region, on investigations and prosecutions by other jurisdictions. If all other factors were equal, this complementarity factor could be decisive.

- There is a possibility that the Security Council will refer the situation to the Prosecutor. If the Security Council is considering a situation under Chapter VII, the mere fact that the Prosecutor was conducting a preliminary examination or investigation might well prompt the Council to refer the situation to the Prosecutor, freeing up resources for other situations and increasing the authority of the Prosecutor in obtaining cooperation. While the Prosecutor should not let the Security Council set his examination or investigation strategy, the Council would have many, although not all, of the situations where crimes on a large scale are being committed under Chapter VII scrutiny and it would be prudent to bear that in mind, both when the Prosecutor receives information about crimes committed in the territory of a state party or by its nationals and in other situations. In addition, as noted below, the Prosecutor has some possibilities for urging, directly or indirectly, the Security Council to make a referral.

7. The impact of state and Security Council referrals

In developing the guidelines for selecting crimes for a preliminary examination or investigation, it must, of course, be borne in mind that the Prosecutor will not have complete control over his or her docket and that these guidelines will always have to take into account the possibility of state and Security Council referrals that will require substantial adjustments to previously decided strategy. However, even with regard to such referrals, the Prosecutor will not be entirely helpless. In most instances, it is likely that the Prosecutor will be aware of situations that would be likely candidates for such referrals and may even be approached directly or indirectly by a state contemplating a referral or planning to seek a Security Council referral, although such contacts may come after annual budgets and strategy for the year have already been determined.

In addition, the Prosecutor may well be able to encourage state referrals, publicly or privately, and Security Council referrals (see discussion below in Section II.E.2 on relations with the Security Council). The Prosecutor could encourage state referrals of specific situations that are under preliminary examination or even investigation as a way of giving greater political weight to an investigation and increasing the pressure on national authorities to cooperate effectively. However, in the early years it may well be better for the Prosecutor to proceed cautiously and discreetly to avoid criticism from certain quarters.

Referrals by the territorial state, something few drafters of the Rome Statute and subsequent commentators contemplated, may prove to be particularly valuable. Indeed, one territorial state has already indicated that it may make such a referral in the near future. Of course, it will be essential for the Prosecutor not to accept automatically the limits of a situation as referred by a state or the Security Council. First, the Prosecutor should, as a general rule, give the broadest possible interpretation to the situation referred. This approach is fully consistent with the intent of the drafters of Article 13 (b), who rejected the possibility of the Security Council referring "matters" as too specific for the independence of the Court and replaced it with the current term of a "situation", thus leaving it to the Prosecutor to select cases within a situation for investigation and prosecution. Second, it is entirely possible that states, or even the Security Council, might identify a situation in a particular region of a state, crimes committed by a particular group or crimes committed in a particular period that intentionally or inadvertently omitted very grave crimes that should be investigated or prosecuted. If the crimes were committed in the territory of a state party or by nationals of a state party, the Prosecutor could conduct a preliminary examination or obtain authorization for an investigation of other crimes, although it might be difficult to do so effectively without the added authority and power of the Security Council. If these omitted grave crimes were in the territory of a non-state party and committed by a national of a non-state party, it would be appropriate for the Prosecutor to draw this omission to the attention of the Security Council in the hope that the Council would broaden the referral to include these crimes to avoid the perception of the Court as acting in a manner that was not impartial.

F. Complementarity strategy designed to ensure joint international/national solutions to impunity

As suggested above in Section I.E, in determining which crimes should be preliminarily examined or investigated and in deciding which crimes and individuals should be prosecuted, the Prosecutor should consider what the role of national criminal justice systems will be in dealing with the crimes that are not investigated or prosecuted at the international level. Although the Prosecutor will not be able to investigate and prosecute every crime within the Court's jurisdiction, the Prosecutor's investigation and prosecution strategy should be seen as part of a global partnership in building and operating a new framework of international justice between the Court and national courts, including both courts in territorial states and courts in other states, and possible future regional criminal courts. Indeed, the success of the Court will be measured not only in the number of crimes the Prosecutor investigates and prosecutes, but also in its catalytic effect on other criminal justice systems, which are more likely to be able to investigate and prosecute much larger numbers of cases and at a much lower cost.

To ensure that this essential aspect of the Court's mission is successful, the Prosecutor should have both global and situational anti-impunity complementarity strategies designed to encourage efforts to bring all persons responsible for crimes under international law to justice. What I would hope occurs is that over the course of its first decade the Court would not simply be seen as a passive court of last resort, but also be considered as an integral part of an increasingly global framework of justice that will be playing a driving role in shaping and implementing that system.

1. A global anti-impunity complementarity strategy

At the global level, the Prosecutor should be urging states, whether states parties to the Rome Statute or not, to have effective legislation in place to permit their courts to try persons for crimes under international law, both on the basis of territorial and universal jurisdiction, and to implement it. In addition, the Prosecutor should press all states to have effective means to cooperate with the Court and other jurisdictions in the investigation and prosecution of these crimes. These particular points are discussed further in Part II under the relationship between the Prosecutor and states. In order to ensure that an effective global strategy by international, regional and national jurisdictions can be developed and implemented effectively, the Prosecutor could encourage non-governmental organizations to produce an annual global impunity survey to identify the gaps, both in terms of preventive measures, such as ratifications, legislation and security force training programs and regulations, and in terms of the crimes that are not being investigated and prosecuted by international, regional and national jurisdictions.

2. Situational anti-impunity complementarity strategies

At the situational level, the Prosecutor should always have in mind the total impunity problem in each situation. Currently, a great deal of thought is going into development of the guidelines for selecting cases for preliminary examination, investigation and prosecution, but it appears that insufficient thought has been devoted in many quarters to determining what should be done about the crimes that

will not be investigated or prosecuted in the Court in a particular situation. If none of those crimes are investigated or prosecuted by other jurisdictions, the Court's initial successes will be undermined. There is a serious risk that it will be begin to be portrayed by revisionists as a political court picking on leaders and perceived as ineffective by the press and general public because of the huge resources being devoted to a relatively small number of individuals.

It would be advisable if the Prosecutor, as part of his or her investigation and prosecution strategy for a particular situation were to mirror the global impunity survey suggested above by beginning with an assessment in each situation of the total crime problem and the number of potential perpetrators. After determining or at the same time as determining in the application of the examination, investigation and prosecution strategy which crimes the Prosecutor will address, the Prosecutor would work with national authorities and civil society to devise effective criminal justice solutions for the remainder of the crimes that would be developed and implemented in cooperation between the Prosecutor and the other jurisdictions. Of course, I am not suggesting that the Prosecutor get entangled in such solutions, or that the Prosecutor provide substantial resources to develop and implement the situational anti-impunity work of the other jurisdictions. These resources must come from both the international community, since the crimes are against the international community, and the territorial states, to the extent possible. Instead, what is being suggested is that the Prosecutor should be a catalyst for such solutions and, to the extent possible, that the Prosecutor and other jurisdictions should not work at cross-purposes. The Office of the Prosecutor of the ICTY has provided the expertise of its staff on a temporary basis to other jurisdictions, including East Timor and Sierra Leone, to assist them in setting up institutions to investigate and prosecute crimes under international law.

Options in situational strategies. In developing situational anti-impunity complementarity strategies a range of options could be explored, including:

- ***Rebuilding the criminal justice system in the territorial state.*** Even in states where the entire system has collapsed and armed conflict still rages, certain steps can be taken to lay the foundations for rebuilding effective and fair criminal justice systems. The sooner that these steps are undertaken, the better. Given that the crimes have no statute of limitations, the crimes can still be investigated and prosecuted as long as the perpetrators are still alive. As long as the criminal justice system in the territorial state remains incapable of affording prompt and fair trials for crimes under international law, the chances of lasting peace and reconciliation will remain elusive. Such rebuilding efforts should have a realistic schedule for substantial completion, which could be as long as a decade. Had the international community and Rwanda been able to agree on such a judicial reconstruction program with such a timetable, the cases of all or almost all of the more than 130,000 suspects detained in the past decade would have been completed by now.
- ***Exercising universal jurisdiction in countries where suspects are found***. Although universal jurisdiction based on *aut dedere aut*

judicare is a useful tool, it will be of limited value since not all states have universal jurisdiction legislation, such legislation varies in effectiveness, only a small percentage of perpetrators travel and it is often difficult to act quickly enough when they are discovered. Moreover, as soon as a state is perceived to have effective legislation that will be implemented, perpetrators will begin avoiding the state.

- ***Exercising universal jurisdiction by seeking the extradition of persons accused of crimes committed abroad when other states fail to investigate or prosecute.*** Although two states, Belgium and Spain, have used this technique, other states have not done so, even when their legislation does not preclude it. In addition, this technique has proved unpopular in both of these states. The Spanish Supreme Court recently declared – contrary to all the evidence – that international law prohibited such jurisdiction and Belgian appellate courts held that national law did not permit such jurisdiction, although those decisions were overturned by a panel of the *Cour de cassation*.
- ***Exercising universal jurisdiction by seeking the extradition of persons accused of crimes committed abroad when other states fail to investigate or prosecute on a shared expense basis or by setting up a regional criminal court.*** The model of the Europol and Eurojust with respect to multistate investigation, the European Prosecutor with respect to financial crime and the proposed Caribbean Community (CARICOM) Caribbean Court of Justice, with respect to criminal appeals from national courts, all suggest that regional criminal justice systems of cooperation, including the establishment of regional criminal courts, are feasible. This approach appears to be the most promising politically and in terms of effectiveness and one that my organization has advocated, most recently in the context of the situation in the Côte d'Ivoire in the paper, *Côte d'Ivoire: A succession of unpunished crimes*, AI Index: IOR 31/007/2003, February 2003.
- ***Strengthening regional and international extradition and mutual legal assistance regimes.*** One of the main barriers today to effective national anti-impunity efforts is the absence of effective bilateral and multilateral extradition and mutual legal assistance arrangements. For example, despite all the efforts to build new international criminal justice systems in East Timor and Sierra Leone, the failure or inability to negotiate effective extradition and mutual legal assistance arrangements with other states means that arrest warrants and requests for mutual legal assistance cannot be implemented in most countries.

G. Guidelines for determining which individuals to prosecute

In determining which individuals the Prosecutor intends to prosecute, as opposed to the questions of which crimes should be the subject of a preliminary examination or an investigation, national prosecutorial guidelines, whether those of civil or common law jurisdictions, will be of limited assistance. As a general rule, national prosecutorial guidelines simply address questions of whether to prosecute

particular individuals or not, what charges would be appropriate and what sentences should be sought. Exceptions from this general rule include guidelines applicable to federal prosecutors in deciding whether to assert concurrent jurisdiction over conduct that is criminal both under federal law and under the state, province or territory, or guidelines applicable to military prosecutors in deciding whether to assert concurrent jurisdiction over conduct that is also criminal under civilian law. In contrast, prosecution guidelines for international criminal courts and tribunals will look also at the separate, complementarity question whether the person suspected of the crime should be prosecuted by the Prosecutor or by national prosecutors. Thus, when deciding not to prosecute a person suspected of the crime, the Prosecutor will have to determine whether that decision means that the person should not be prosecuted by anyone for the crime or simply that the person should be prosecuted by another jurisdiction.

The Rome Statute also provides limited guidance in making these determinations. Article 53 (2) of the Rome Statute, which probably applies to all cases, regardless of the trigger for the investigation, although it only mentions investigations based on state or Security Council referrals, provides:

> "If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
>
> (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
>
> (b) The case is inadmissible under article 17; or
>
> (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;
>
> the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reason for the conclusion."

To ensure that determinations whether a suspect should be prosecuted at all or, if not prosecuted by the Prosecutor, prosecuted in another jurisdiction, are made in a fair manner, the Prosecutor will have to develop prosecution guidelines that build upon the Rome Statute and draw from national prosecutorial guidelines. The elements of such prosecutorial guidelines could take into account the following illustrative priorities, requirements and exceptions or interests of justice:

Priorities

The suspect was a commander or superior responsible on the basis of command or superior responsibility.

The suspect was a principal rather than responsible on an accessory principle of criminal responsibility or the intellectual author of the crime or the instigator of the crime, such as someone who directly and publicly incited genocide.

The suspect was responsible for a large number of deaths, enforced disappearances, cases of torture, rapes and other crimes of sexual violence or other grave crimes causing severe physical or mental suffering.

The particular crimes for which the suspect was responsible were widespread or systematic (in a non-technical sense), thus particularly threatening to the international community and the social fabric of the society where they took place. For example, the suspect was the commander of a chain of detention camps where torture or extermination took place.

If several crimes fit the third or fourth priority, the victims in one or more of the crimes were members of particularly vulnerable groups, such as children and mentally or physically handicapped, but this consideration should be used cautiously since all victims are equally entitled to justice.

A successful prosecution in the Court would be likely to inspire national authorities in the territorial state or elsewhere to investigate and prosecute others.

There is no realistic possibility in the foreseeable future that national authorities would prosecute the suspect.

Requirements

There is sufficient reliable and admissible evidence available so that there is a realistic chance of securing a conviction. This particular requirement is based on the evidential test in the United Kingdom's Code for Crown Prosecutors.

The legal basis for criminal responsibility is reasonably clear, although the Prosecutor should not be reluctant to address difficult legal issues.

It is unlikely that there is a sufficient defence to the charges. (the second and third requirements could also be seen as part of the realistic chance of conviction requirement).

Exceptions or interest of justice

The suspect is so old that he or she is unlikely to live to the end of the trial and final judgment, although this situation is likely to be rare and should be considered in the light of the recent successful prosecutions in the *Sawaniuk, Touvier, Papon* and *Preibke* cases.

The suspect is so infirm as to be unfit to stand trial, although this ground must be invoked only when all alternatives, including limits on the hours of the trial have been considered and rejected.

In applying the exceptions to prosecutions by anyone listed in Article 53 (2) (c), it will be important to bear in mind the Preamble to the Rome Statute. The basic presumption should be that it is always in the interests of justice to prosecute, absent a compelling justification. The two exceptions mentioned, restrictively read, are about the only legitimate ones for crimes in the Rome Statute. National amnesties, pardons and similar measures of

impunity that prevent judicial determinations of guilt or innocence, the emergence of the truth and full reparations to victims are contrary to international law and it would not be in the interests of justice for the Prosecutor to decline to prosecute on the ground that the suspect had benefited from one of these measures. Traditional interests of justice grounds in national prosecution guidelines for not prosecuting suspects, such as those listed in the United Kingdom's Code for Crown Prosecutors, are not helpful when considering crimes in the Rome Statute, although none of the public interest factors against prosecution listed would apply to genocide, crimes against humanity or war crimes.

H. Some general policy issues and other matters concerning the conduct of investigation and prosecution

There are a huge number of general policy issues concerning the conduct of investigations and prosecutions that could fill a handbook for prosecutors, some of which I have touched upon in my comments in my e-mail dated 13 February 2003 on the paper on speedy trial, which I will not repeat here. I simply note here a few miscellaneous points that could be further explored and developed. My organization hopes to address some of these many other issues in other submissions to the Court at later dates.

1. Challenges to admissibility and jurisdiction

The Prosecutor should develop an aggressive plan of action to deal with challenges to admissibility and jurisdiction under Articles 18 and 19 of the Rome Statute to prevent the Court from being undermined by deliberate delaying tactics or inefficiency and should urge the Court to take energetic steps to meet this danger. Given that under Article 53 (1) (b) the Prosecutor will, after a preliminary examination have determined that the case is admissible before opening an investigation, as will have the Court when the Prosecutor is acting under Article 15, the presumption in an Article 18 (2) challenge must be that the case is admissible. The Prosecutor should, therefore, always apply to the Pre-Trial Chamber to authorize an investigation in the face of such a challenge, absent compelling evidence presented by the state making the challenge that it is now investigating or prosecuting the case genuinely. If the Pre-Trial Chamber rules against the Prosecutor and the Prosecutor determines that the ruling is improper, the Prosecutor should always request an expedited appeal under Article 18 (4), unless the Prosecutor needs time to gather additional information that could be considered on appeal. When the Prosecutor has deferred an investigation, the Prosecutor should ask for regular, frequent and detailed reports, perhaps every month, in accordance addressing specific items requested by the Prosecutor about the investigation and prosecution, such as evidence gathered, witnesses interviewed, motions by parties and court rulings. The Prosecutor should seek to give the concept of "exceptional" in Article 18 (6) a broad reading in the interests of justice. The Prosecutor should urge the Court to make every effort to consolidate challenges by several states so that successive challenges cannot be used to delay proceedings and to consider on a summary basis subsequent challenges by the same or different states that do not present compelling new evidence.

The Prosecutor should also urge the Pre-Trial Chamber to apply the Rules of Procedure and Evidence governing proceedings pursuant to Articles 18 and 19 in a way that will ensure speedy determinations of challenges and a broad reading of the steps that can be taken to preserve evidence under both articles. Prosecution strategy should seek to have as many investigative steps under way as possible so that Article 19 (8) can be used to protect the inquiry pending the outcome of any admissibility or jurisdictional challenges. In certain cases, where the Prosecutor is fully confident that the Court has jurisdiction and the case is admissible, the Prosecutor might invoke Article 19 (1) at an early stage to obtain favourable rulings on these questions that would make it more difficult for a state to challenge jurisdiction and admissibility at a later date.

2. Powers and duties

The scope of the Prosecutor's powers and duties under Article 54 deserve a book and have been extensively covered in commentaries. I will simply note here that it will be essential for the Code of Conduct and practice directives to instil a basic respect among all staff for the right to fair trial, taking into account not only the express provisions of the Rome Statute, but also other international law and standards, as well as jurisprudence and interpretation by relevant treaty bodies and United Nations Special Procedures. A similar effort, discussed below, should be undertaken to ensure due respect for the interests and rights of victims.

I. Sentencing guidelines

It will be important to develop and articulate Prosecutor's guidelines for seeking sentences that the Prosecutor wishes the Trial Chamber to adopt as Trial Chamber sentencing guidelines and the Appeals Chamber to uphold. Neither Articles 77 (1) nor 78 of the Rome Statute nor the detailed Rule 145 of the Rules of Procedure and Evidence provide sufficient guidance to the Prosecutor, the defence or the Trial Chamber to predict with any certainty the number of years of a sentence for particular crimes.

J. Guidelines for appeals

No attempt will be made here to try to articulate detailed guidelines for determining whether to appeal an interlocutory order, a conviction or a sentence. Nevertheless, I will suggest a few straightforward principles that might be incorporated in any guidelines for such determinations and discuss a few policy issues.

1. Some general points about deciding whether to appeal

There is a natural impulse among prosecutors to appeal every adverse ruling on every legal issue. As representatives of the public, they have a responsibility to defend its interests vigorously and will sometimes feel that if they fail to appeal everything, particularly in the first cases, they will be criticized as betraying the public trust. Such feelings will only be accentuated at the Court, which acts on behalf of the entire international community.

Nevertheless, it may well better serve the public interest to take a somewhat selective, strategic approach over the long run. First of all, the Appeals Chamber

will welcome such an approach and if it is not taken, it may well develop techniques, such as summary disposition of certain appeals or other types of sanctions to deal with the workload. It may also pay not to exasperate the Appeals Chamber by failing to focus on key issues. If every conceivable adverse ruling is challenged, energy will be expended on marginal issues to the detriment of the most important ones. Sometimes the positions that are advocated by the Prosecutor may simply be incorrect or unwise. In the early years, it may make sense to appeal more issues when so much is new, but over the long run, selectivity is probably a better policy likely to give the Prosecutor greater credibility with the Appeals Chamber. Second, it may be better to forego an appeal in one case of an issue where it is better presented in another case. Judges are human beings and rulings on legal issues may well be influenced – consciously or unconsciously – by the particular facts of the case or even by a desire not to rule always in the prosecution's favour. Although the bad precedent will stand for the Pre-Trial Chamber or Trial Chamber concerned if it is not appealed, the Appeals Chamber will not yet have ruled and as the number of Pre-Trial and Trial Chambers increase, there will be chances to get better rulings at this level before going to the Appeals Chamber.

2. Appeals of acquittals

First of all, as you are well aware, Amnesty International strongly opposed giving the Prosecutor the right to appeal an acquittal as opposed to the right to appeal the legal rulings in a judgment of acquittal without adverse effects on the acquitted person. My organization believed that permitting such an appeal of an acquittal is inconsistent with the prohibition of *ne bis in idem* and that the interest of the international community in justice could be adequately addressed by permitting an appeal on a point of law only, as is the practice in certain countries, such as the United Kingdom. I certainly hope that if the Prosecutor avails himself or herself of Article 81 (1) (a) to challenge an acquittal that he or she will limit the relief sought to a ruling that the Trial Chamber erred as a matter of law and should not make such rulings in the future. Such a request is fully consistent with the Rome Statute since Article 83 (2) and Rule 158 (1) of the Rules of Procedure and Evidence give the Appeals Chamber a range of options if it finds that the decision appealed from was materially affected by error of fact or law or procedural error. It is not required to order a new trial under Article 83 (2) (b), but it may simply amend the decision under Article 83 (2) (a).

To the extent that the Prosecutor seeks to overturn acquittals, the public is likely to perceive the process as unfair and one in which the Prosecutor could endlessly try an individual again and again in the hope of securing a conviction, even if the resource implications and the burden on victims and witnesses would minimize or preclude this danger. Assuming that Prosecutor declines to follow this advice, it will still be necessary to develop guidelines for appealing an acquittal and for countering this public perception of unfairness. Such guidelines could be similar to the factors listed in Article 84 (1) (b) concerning revision and could include the introduction of forged evidence or perjured testimony that was crucial to the acquittal and improper conduct by a judge, all of which undermined the

integrity of the proceedings so much that they no longer deserved to be considered a real trial.

Second, although I have personal reservations based on the same considerations as those that underlie the *ne bis in idem* prohibition about the ability of the Prosecutor to appeal a sentence that is seen to be disproportionate to the crime, I realize that this view is not widely shared. However, it will be important to develop and articulate Prosecutor's guidelines for seeking sentences that the Prosecutor wishes the Trial Chamber to adopt as Trial Chamber sentencing guidelines and the Appeals Chamber to uphold. As noted above, neither Articles 77 (1) and 78 of the Rome Statute nor the detailed Rule 145 of the Rules of Procedure and Evidence provide sufficient guidance to the Prosecutor, the defence or the Trial Chamber to predict with any certainty the number of years of a sentence for particular crimes. Assuming that Trial Chamber sentencing guidelines are developed, the Prosecutor will have to establish internal guidelines for appealing sentences, since a minor deviation would probably not merit an appeal of the sentence.

K. The approach to revision of conviction or sentence

The grounds for seeking revision of a conviction or sentence identified in Article 84 of the Rome Statute are relatively straightforward. However, it will be important for the Prosecutor to instil a culture in the Office of the Prosecutor in the Code of Conduct and in practice that not only ensures prompt and impartial responses to requests for revision in line with the Prosecutor's powers under paragraph 1 of that article and the Prosecutor's duties under Article 54 (1) (a), but also ensures that all staff of the Office of the Prosecutor remain alert to any information that comes to their attention at any time that could conceivably form the grounds for revision of a conviction or a sentence. The Prosecutor should ensure that any such information is brought promptly to the attention of the convicted person, his or her counsel and the Appeals Chamber. Instituting and enforcing such a policy will not only ensure that justice is done, but seen to be done. The approach suggested will also strengthen the credibility of the Office of the Prosecutor as a fair and an impartial body.

L. Compensation to an arrested or convicted person

The Prosecutor should develop internal guidelines supplementing Rules 173 to 175 of the Rules of Procedure and Evidence to define the exceptional circumstances when the Court should award compensation when there has been a grave and manifest miscarriage of justice. There should be a presumption that compensation would be awarded in all cases, absent some extraordinary factors, such as the sole responsibility of the arrested or convicted person for his or her plight (of course, this would not include a false confession made as the result of torture or ill-treatment). Although the decision whether to award compensation will be that of the Chamber designated by the Presidency, the Prosecutor should propose compensation guidelines to the Presidency and the other judges long before any such situation arises so that the Prosecutor's approach to this question when it arises will be seen as entirely neutral.

Such compensation guidelines should address the question of grave and manifest miscarriages of justice that were the result of conduct of state authorities. Whether it is within the power of the Court to require states to award compensation is not entirely clear, but it would certainly be desirable if the Court had such power. Otherwise the person might be without any redress.

M. Other issues

1. Policy with respect to seeking a Security Council or state referral of a situation

This question is discussed below in Part II E.2.

2. Policy with respect to requests by the Security Council for a deferral of investigations or prosecutions

This question is discussed below in Part II E.2.

3. Policy with respect to ratification and implementation of the Rome Statute and the Agreement on Privileges and Immunities of the International Criminal Court

This question is discussed below in Part II D.2 and 7.

II. EXTERNAL RELATIONS OF THE OFFICE OF THE PROSECUTOR

The Office of the Prosecutor will face challenges and opportunities in external relations with the other organs of the Court; the Assembly of States Parties and its Committee of Budget and Finance; the Trust Fund for Victims; states, including the host state, other states parties, states that have made a declaration pursuant to Article 12 (3), states that have signed the Rome Statute, states that are formally cooperating with the Court and other states; the United Nations, in particular, the Security Council; other intergovernmental organizations; defence counsel and the International Criminal Bar; and civil society, including victims and their families, lawyers for victims, witnesses and their lawyers (if they are represented); international and national non-governmental organizations; independent experts and academic institutions; the press; and the general public. The following overview looks both at some of these interlocutors and at particular issues, such as Security Council Resolution 1422 and impunity agreements being signed with the United States of America (USA).

A. Other organs and components of the Court

1. Presidency and President

There are many issues facing the Prosecutor in which Presidency and the President will also play an important role. However, it will be essential for the Prosecutor on the one side and the Presidency and the President on the other to respect each

other's independence and to ensure that there is no appearance of improper contacts.

Although the Presidency is responsible under Article 38 (3) (a) of the Rome Statute for "[t]he proper administration of the Court, with the exception of the Office of the Prosecutor", Article 38 (4) provides that, "[I]n discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern." In addition to the administration of the Court, the Presidency has a number of other functions under the Statute that will necessarily be of interest to the Prosecutor and it will be desirable to consult with the Presidency. These include proposing an increase in the number of Court judges (Article 36 (2) (a)); proposing a reduction in that number (Article 36 (2) (c) (ii)); concurring with the Prosecutor and Registrar with regard to proposal of Staff Regulations; setting up of Trial Chambers (Article 61 (11)); and determining whether it is necessary to nominate alternative judges (Article 74 (1)).

There are also a number of responsibilities of the President under the Statute and supplementary instruments where consultation with the Prosecutor would be useful. These include addressing the Security Council pursuant to Article 4 (2) of the Relationship Agreement.

2.Other judges

Although there are a number of responsibilities assigned to the President or to the Presidency under the Rome Statute and supplementary instruments, it is unlikely that either will take particularly important decisions without close consultation with the other judges. There are also numerous activities of interest to the Prosecutor, where all the judges are likely to be involved, such as the drafting pursuant to Article 51 (1) (b) of the Rome Statute of proposed amendments to the Rules of Procedure and Evidence (other than proposals by the Prosecutor under paragraph 1 (c) of Article 51); the drafting of the Regulations of the Court pursuant to Article 52, which requires consultation with the Prosecutor; the drafting of the Headquarters Agreement; the drafting of certain supplementary agreements to the Relationship Agreement; preparation of the draft budget; and the selection of the permanent site for the seat of the Court and the design of the buildings. Therefore, the Prosecutor will need to develop a forum for regular dialogue with the judges with regard to such matters that are also of concern to the Prosecutor that fully respects both the formal role of the President and the Presidency and the independence of all concerned.

There are also numerous places in the Statute and in supplementary instruments where the term "Court" is used where it is not clear which organ of the Court is meant or whether the concurrence of all the organs is required, for example, with regard to reporting to the Security Council pursuant to Article 6 of the Relationship Agreement. In order to minimize confusion and potential tensions with the rest of the Court, it would be useful to discuss these provisions first with the judges (and the Registrar) to seek to clarify these questions ahead of time.

3. Registry

There are several areas in the relationship between the Prosecutor and the Registry that will be of particular importance, including: common administration matters, preparation of the budget, victims, defence counsel, court management, the detention unit and the library. Here, I will simply discuss a number of points relevant to the first three.

Common administration. Although the Registry will play a significantly more reduced role in the work of the Prosecutor than the Registries of the ICTY and ICTR do with the Prosecutor of those two Tribunals, the Registry will still perform certain common administrative functions for reasons of economies of scale and convenience, to be determined in consultation with the Prosecutor. It will be important to reach agreement on these common administrative tasks, even if only on a temporary basis, at the earliest possible stage. It will also be important to build a good working relationship with the Registrar from the very start to avoid some of the problems that have existed in the ICTY and ICTR. It will be important, however, to recognize that the Registry will be significantly different from the Registries of the two Tribunals and to build long-standing institutional relationships that will not depend unduly on the individuals holding posts in the Office of the Prosecutor and the Registry.

Preparation of the budgets. Some of the most important contacts with the Registry will be with respect to the preparation of the programme budget, prepared by the Registrar under Regulation 3 and Rule 103.2 of the Financial Regulations and Rules in consultation with other organs of the Court, as well as in preparation of supplementary budgets pursuant to Regulation 3.6 and maintaining regular contact over unexpected increases in expenditures and shortfalls in paid assessments.. Although the current process of drafting a budget reflecting the probable concerns of the future Office of the Prosecutor by the Division of Common Services appears to be working well, the procedure envisaged in Regulation 3 and Rule 103.2 is not satisfactory on paper, even though Regulation 1.4 seeks to provide an appropriate balance between the Registrar and the Prosecutor. It remains to be seen whether it will work smoothly when both the Prosecutor and the Registrar are in post and steps have been taken pursuant to Rule 101.1 (b) to establish appropriate institutional arrangements between the Registrar and the Office of the Prosecutor.

Victims. Many of the contacts with the Registry will be with regard to issues related to victims and witnesses, primarily with the Victims and Witnesses Unit and the Victims Participation and Reparations Unit. Some of the issues regarding victims are mentioned below in Section II.XXX, but most of these issues are covered in more detail in the recent paper produced by the Victims' Rights Working Group after its December 2002 meeting at Amnesty International's International Secretariat in London, so there is no point repeating all of them in this letter. The most important point is that the Prosecutor should have one or more persons in the Office of the Prosecutor with the overall responsibility to deal with the full range of victims' issues. Some of the other suggestions with regard to the role of the Prosecutor with regard to victims include the following:

- ***Establishing a respectful and compassionate attitude towards victims.*** In nearly all cases, investigators from the Office of the Prosecutor will be the first Court representatives to meet directly with victims and their families. From that point on, the Office of the Prosecutor will have contact with victims in a variety of roles – as victims of horrific crimes, as relatives of victims, as witnesses and as persons seeking reparations. The Office of the Prosecutor will also have contact with legal and other representatives of victims in relation to specific cases. To a large extent, the Office of the Prosecutor will be dependent on victims to conduct effective investigations and prosecutions. Therefore, from the outset, it will be essential for the Office of the Prosecutor to present itself as respectful and compassionate to victims. This approach should be addressed both in the Code of Conduct and practice directives to staff.
- ***Establishing an effective training program.*** One of the first priorities for the Prosecutor will be to establish an effective training program for all Office of the Prosecutor staff on dealing with victims as well as specific and focussed training for designated staff, such as investigators. Since the Budget for the First Financial Period does not expressly include funding for training, the Prosecutor should seek voluntary external and internal experts to organize initial training. In particular, the Prosecutor should work with the Victims and Witnesses Unit, which is mandated under Rule 17 (1) (a) (iv) of the Rules of Procedure and Evidence to provide training to all Court staff in issues of trauma, sexual violence, security and confidentiality. The Prosecutor should include sufficient funding for expanded training on working with victims for all Office of the Prosecutor staff in the Budget for the Second Financial Period.
- ***Appointment of special advisers.*** It is also essential, as provided in Article 42 (9) of the Rome Statute and anticipated in paragraph 50 of the Budget for the First Financial Period, that the Prosecutor appoint advisers with legal and practical expertise on particular issues, including, but not limited to, sexual and gender violence and violence against children. The immediate appointment of such advisers is justified as they will have an important role to play in advising and training members of the Office of the Prosecutor and in developing prosecution strategy regarding these issues. They may also be needed to accompany investigation teams to provide them with field assistance and supervision in the first preliminary examinations and investigations, as well as to work with the trial preparation teams.
- ***Role of investigators in first contacts with victims.*** As investigators are likely to have the first contacts with victims, the Prosecutor should consider what should be the role of those investigators in addition to traditional investigation. In particular, the Prosecutor, in consultation with the Registrar, the Victims and Witnesses Unit and the Victims Participation and Reparations Unit, should consider mandating investigators to provide victims with information in their own language

about the Court, security arrangements and the role of the victims in the Court. Materials are being developed by the Court for reparations applications and other materials are likely to be prepared in the near future. While providing such materials to the victims is not directly the role of the Office of the Prosecutor, it is a relatively simple task that will facilitate the work of the Office of the Prosecutor by encouraging victims and their families to cooperate.

- ***Security for victims that have been in contact with Office of the Prosecutor staff.*** The Prosecutor, together with the Victims and Witnesses Unit, before any preliminary examination in the field or investigation should conduct a security analysis and establish procedures for each situation to ensure effective protection for victims, their families, witnesses and others who are in contact with the Office of the Prosecutor and may face threats based on contact with investigators. Each situation will require a somewhat different approach, which may need to be regularly readjusted in the light of circumstances, including the level of cooperation and effectiveness of protection that can be provided by national authorities.
- ***Measures to avoid retraumatization or further traumatization of victims.*** The Prosecutor should make every effort to ensure against the retraumatization of victims at all stages of the proceedings. For victims appearing before the Court, the Prosecutor will obviously obtain substantial assistance from the Victims and Witnesses Unit. However, it is not yet clear what support this unit will be able to provide to the Office of the Prosecutor away from the seat of the Court. As well as training mentioned above, effective practices need to be developed to address this problem.
- ***Measures to avoid traumatization of Office of the Prosecutor staff.*** Office of the Prosecutor staff, in particular those who take part in investigations, are at some risk of traumatization from their work. Procedures, including monitoring of staff and counselling, must be set up within the Office of the Prosecutor to minimize this risk and to provide effective and continuing treatment, where necessary, to staff.

B. The Assembly of States Parties, its Bureau and the Committee on the Budget and Finance

The Prosecutor or representatives of the Prosecutor under Rule 34 of the Rules of Procedure of the Assembly of States Parties "may participate, as appropriate, in meetings of the Assembly and the Bureau in accordance with the provisions of these Rules and may make oral or written statements and provide information on any question under consideration". Needless to say, the Prosecutor should take full advantage of this right to ensure that the Assembly has a thorough understanding of the issues from the point of view of the Prosecutor, as well as a clear idea of the Prosecutor's long-term policy and prosecution strategy. The outline of such policy and prosecution strategy will need to be conveyed to the second session of the Assembly of States Parties in September 2003.

C. The Trust Fund for Victims

Although the Prosecutor does not have a formal link to the Trust Fund for Victims, it will be useful for the Prosecutor to be in regular contact with the Trust Fund from the earliest stages of establishment of the fund.

The scope of the work of the Trust Fund for Victims and its degree of independence from the Court remain to be decided by the Assembly of States Parties. However, the Prosecutor should consider the impact of an effective Trust Fund for Victims on the Court. For example, a Trust Fund for Victims with sufficient resources that could meet the shortfall of Court reparations orders will increase the perception of the Court as an effective institution and the willingness of victims and their families to cooperate with the Prosecutor. Furthermore, if mandated to do so, the Trust Fund for Victims may provide assistance to those victims of crimes committed in a situation that has been investigated by the Prosecutor where the person suspected of those particular crimes is not prosecuted. These considerations should be taken into account by the Prosecutor when deciding whether to support applications by victims or their families or to make his or her own application for cooperation and protective measures for the purpose of forfeiture under Rule 99 (1) of the Rules of Procedure and Evidence.

D. States

The Prosecutor is likely to have contact with all or almost all states at one time or another. The nature of that contact will vary, depending on such factors as whether that state is the host state, another state that has ratified the Rome Statute, a state that has made a declaration under Article 12 (3), a signatory of the Rome Statute, a state that is cooperating the Court pursuant to Article 87 (5), a state that has not yet ratified the Agreement on Privileges and Immunities, a state that is not a party to the Rome Statute or a state that has signed an impunity agreement with the USA. The following discussion focuses on the content of any contacts, but the Prosecutor will have to devise a variety of effective ways of raising these issues, depending on the issues and the states concerned, in meetings with embassy officials in The Hague, meetings with government officials when travelling, phone calls, correspondence and public documents.

1. The host state

The Court will have to face a number of issues with regard to the host state, many of which will be of concern to the Prosecutor, including arrangements for the current headquarters and detention facilities, the design and location of the permanent headquarters building if the Court stays in The Hague and drafting the Headquarters Agreement. Many of these issues have been or are being addressed in papers issued by the CICC Secretariat in detail, so I will not repeat the points made elsewhere.

Dealing with the host state will require close cooperation with the other organs of the Court and, on certain issues, such as the text of the Headquarters Agreement and the location of the permanent seat of the Court, the Assembly of States Parties. Consultation with non-governmental organizations will also be

advisable to ensure that these valuable sources of information and advice will be able to operate effectively in the host state.

2. Other states that have ratified the Rome Statute

This is a particularly broad topic, but I will simply note here that it is essential for the Office of the Prosecutor to maintain and strengthen the work now being done in the Division of Common Services on compiling and monitoring the drafting and enactment of legislation to implement the Rome Statute. Regardless where in the Court this work is conducted after the Prosecutor takes office, the Prosecutor should take a leading role in addressing the question of implementation of the Rome Statute.

An active role for the Prosecutor on implementation. In particular, the Prosecutor will need to urge states that have not yet enacted comprehensive implementing legislation to fulfil their complementarity and cooperation responsibilities to do so as soon as possible. The Prosecutor should work to develop temporary agreements on cooperation pending enactment of implementing legislation and supplementary agreements to address gaps or ambiguities in implementing legislation. In pressing for implementing legislation, the Prosecutor should work closely with other organs of the Court, the Assembly of States Parties and non-governmental organizations to maximize impact and minimize duplication of effort. It will also be crucial for the Prosecutor to identify problems that are emerging in draft and enacted legislation regarding both complementarity and cooperation obligations.

Cooperation with Amnesty International and other members of the Coalition for the International Criminal Court. Amnesty International has made enactment and implementation of effective implementing legislation a priority since Rome and its International Justice Project has published a paper in a number of languages (including English, Arabic, French, Spanish and Portuguese) outlining obligations of states parties under the Rome Statute and other international law, as well as suggesting other steps to make the Court effective, *International Criminal Court: Checklist for Effective Implementation*, AI Index: IOR 40/15/00. It has sent copies of this paper to government officials in all states and it has distributed it widely among other non-governmental organizations to use in lobbying. The organization has embarked upon an ambitious program of commenting on draft and enacted implementing legislation and provides information about this effort on a regular basis to the Division of Common Services. It has been urging states to contact the Director of Common Services for advice in drafting legislation and non-governmental organizations to invite representatives of the International Criminal Court to conferences on implementation. Other non-governmental organizations in the Coalition for the International Criminal Court have been involved in similar efforts. It will be particularly important for the Prosecutor to be in close contact with non-governmental organizations that are involved in lobbying states to enact effective implementing legislation and to participate in conferences on this subject. The International Justice Project will look forward to coordinating efforts by Amnesty International with the Office of the Prosecutor in ensuring that states enact the most effective implementing legislation possible.

3. States that have made a declaration under Article 12 (3)

States that have made a declaration under Article 12 (3) accepting the exercise by the Court of jurisdiction over crimes will be in a similar situation as state parties. Like them, states making such a declaration will need to enact implementing legislation or enter into agreements to cooperate without any delay or exception in accordance with Part 9 of the Rome Statute. These agreements would need to be made in accordance with Article 87 (5) and entail all the consequences provided for in that provision. The Prosecutor will almost certainly wish to be consulted in the drafting of such agreements and may wish to develop model agreements in advance (see discussion below in Section II.D.6). It will be important to emphasize to those states the need for implementing legislation since agreements may well be insufficient in national law to permit full police and judicial cooperation.

4. States that have signed the Rome Statute

As of 25 March 2003, there were 40 states that have signed the Rome Statute, but not ratified it. Although 38 of these states are bound under international law not to do anything to defeat the object and purpose of the Statute pending a decision whether to ratify it, implementing legislation will be needed when they ratify the Statute. The Prosecutor will wish to urge those states to speed up ratification of the Statute and to offer advice with regard to drafting implementing legislation so that work on such legislation can begin before ratification. The special situation of the two signatory states that have since repudiated their signatures is discussed below in Section II.D.5).

5. States that have repudiated their signatures of the Rome Statute

Two states, the USA and Israel, have repudiated their signatures of the Rome Statute. Although the USA has campaigned to prevent the Court from exercising jurisdiction over its nationals through bilateral impunity agreements and for the Security Council to adopt Resolution 1422, it would be a mistake to think that even under the current US administration some cooperation would be impossible.

First of all, the American Servicemembers Protection Act expressly permits cooperation with the Court when it is investigating and prosecuting non-US nationals. Second, there may well be a range of situations not involving US nationals as potential accused persons where the USA would not veto a referral to the Court sought by one or more other permanent members of the Security Council. Indeed, as the recent statement by Mr Grossman suggests, the USA may even support the use of the Court to investigate and prosecute persons from certain states. There may well be situations involving governments perceived as hostile to the USA where elements of the US electorate on the right might call for the Court to act. It should always be borne in mind that despite the lukewarm support of the previous administration and the hostility of the current administration to the Court, polls demonstrate that there is fairly strong support for the Court in the American public. Although the impact of recent events remains to be seen, it would be unwise for the Prosecutor and the Court to assume that there are no possibilities for cooperation with the USA in the coming decade or in future decades.

Nevertheless, the US role in pressing states to sign impunity agreements and its likely attempt to persuade the Security Council to renew the request in

Resolution 1422 will pose serious problems for the Court. Although there is little that the Prosecutor can do in the short term to convince the current administration to desist from these efforts, over the long term, the Prosecutor's policy, prosecution strategy and reputation for professionalism, independence and impartiality will begin to have an impact on the American public and reduce the irrational fears of the Prosecutor and the Court. It would be better to focus the Prosecutor's efforts to counter these threats on other states. To the extent that the Prosecutor does decide to engage the current administration in a dialogue on these issues, it will be extremely important not to fall into the trap of doing so on its terms. For example, instead of saying, as some defenders of the Court now do, that no US national will ever come before the Court, it would be better to emphasize the Prosecutor's prosecution strategy, so that the general public will quickly draw its own conclusions that unless the USA plans to commit genocide, crimes against humanity or war crimes on a considerable scale, US nationals are likely to be investigated and prosecuted for such crimes only in national courts.

Second, instead of saying that US courts now can conduct fair trials, so there will be no possibility that the Court would ever find a case involving a US national admissible, it would be better to say that if the USA provides that crimes in the Rome Statute are defined as crimes in US law, with principles of criminal responsibility and defences that are consistent with international law, and it conducts prompt, thorough, independent and impartial investigations and trials of persons suspected of these crimes that are consistent with international law and standards, there is no chance that the Prosecutor would consider investigating or prosecuting crimes committed by US nationals. By doing so, the Prosecutor will not give up the important catalytic role of pressing states to enact effective legislation and to investigate and prosecute such crimes. It would be wise not to go beyond generalities such as that the Prosecutor has every confidence that should any US national be suspected of such crimes that it would investigate and, if there is sufficient admissible evidence, prosecute. This course is advisable since the US does not have the necessary legislation in place, its record of investigating such crimes by its own nationals is uneven and its procedures for investigating and prosecuting some of these crimes, such as by military commission, do not satisfy contemporary international law and standards for fair trial.

6. States that are cooperating with the Court under Article 87 (5)

As far as I am aware, no state has yet entered into an Article 87 (5) agreement with the Court. The Prosecutor will almost certainly wish to be consulted in the drafting of such agreements and may wish to develop model agreements in advance. It will be important to emphasize to those states the need for implementing legislation since agreements may well be insufficient in national law to permit full police and judicial cooperation.

7. States that have not yet ratified the Agreement on Privileges and Immunities

As of 25 March 2003, only two states had ratified the Agreement on Privileges and Immunities of the Court of the 25 states that had signed it. I need not emphasize how important it will be to make signature, ratification and implementation of the

Agreement a priority to ensure that the Office of the Prosecutor can operate effectively outside the host state. I would just make the following points. First, it is important to press for prompt ratification to ensure that the Agreement enters into force as soon as possible. Second, officials and staff of the Court will have to operate or travel through most states at some point and will require the protection provided by the Agreement in certain states immediately. Third, since ratification of the Agreement is likely to take some time, the Prosecutor and the rest of the Court should seek to obtain as many signatures as possible as rapidly as possible. A large number of signatures is important for at least two reasons. It demonstrates broad commitment to making the Court an effective institution. It also obliges states that have signed the Agreement not to take any steps that would defeat the object and purpose of the Agreement pending a decision on ratification. Since most serious infringements of the Agreement, such as arresting investigators or seizing correspondence or evidence, would defeat the object and purpose of the Agreement, signatures would give the Office of the Prosecutor at least some protection pending ratification.

Fourth, it is important to press for the prompt enactment of effective implementing legislation for states that ratify the Agreement. The Prosecutor should review any non-governmental organization checklists and guides to determine if they will provide appropriate guidance to states in drafting implementing legislation.

Fifth, given the lengthy time for ratification, interim solutions need to be developed, such as memoranda of understanding with states. As with implementation legislation for the Rome Statute, such memoranda of understanding could address gaps and problems in the Agreement, such as provisions concerning telecommunications.

8. States that have signed US impunity agreements

As of 25 March 2003, 24 states were known to have signed impunity agreements with the USA under which they agree not to surrender US nationals and certain other persons to the Court. For the reasons explained in detail in Amnesty International's papers, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, AI Index: IOR 40/027/2002, and *International Criminal Court: The need for the European Union to take more effective measures to prevent members from signing US impunity agreements*, AI Index: IOR 40.030/2002, October 2002, such agreements are contrary to the Rome Statute. Not a single one of these agreements has been ratified by a parliament. However, in a number of states, ratification of international agreements by parliament is not necessary, although it may be possible in some states for parliament to negate such agreements by subsequent legislation. It is to be hoped that the Prosecutor will make clear that such agreements are contrary to the Rome Statute and that the Prosecutor will still seek the surrender of an accused even if that person happened to be covered by an impunity agreement, leaving the legal status of the agreement to the appropriate Chambers to decide.

9. All, or nearly all, states

There are a number of issues that the Prosecutor may wish to raise with all, or nearly all, states, including US impunity agreements (where the state has not signed one), renewal of the request in Security Council Resolution 1422 (discussed below in Section II.B.2) and the acceptance of sentenced persons. Under Article 103 of the Rome Statute, any state may be designated as a state willing to accept persons sentenced by the Court. The number of states that have agreed to accept persons sentenced by the ICTY and ICTR has been disappointingly small, despite major efforts by those two Tribunals to persuade states to do so. Similarly, only a limited number of states parties so far have indicated a willingness to accept sentenced persons. It will be important for the Court to have persons serving sentences in a variety of regions in the world to demonstrate its global nature, but it will also be important to try to ensure that persons serve their sentences, where possible, in places that are accessible to their families. It will be important for the Prosecutor to work together with the Presidency, the Registrar and the Assembly of States Parties to devise an effective strategy to encourage a large number of states to accept sentenced persons.

E. The United Nations

The Prosecutor is likely to have contact, directly or indirectly, with a number of United Nations organs and subsidiary bodies, including the Secretary-General, the Security Council, the General Assembly, the High Commissioner for Human Rights, the Commission on Human Rights and its Special Procedures and treaty bodies for which the United Nations acts as Secretariat. In addition, peace-keepers in United Nations operations may well have contact with the Court as witnesses or accused. Many of the contacts between the United Nations and the Court will be governed by the Relationship Agreement between the Court and the United Nations (Relationship Agreement). It may be useful to have one or more persons in the Office of the Prosecutor assume responsibility for oversight of the overall relations with the United Nations to ensure that there is a degree of consistency in approach and that common problems can be addressed in an appropriate and timely manner.

1. The Secretary-General

The Secretary-General will play two important roles with respect to the Court, both of which will be of interest to the Prosecutor. First, the Secretary-General can be an effective supporter of the Court. Second, the Secretary-General has a number of responsibilities under the Relationship Agreement.

Supporting role. The current Secretary-General has been a strong supporter of the International Criminal Court since he first took office. He has encouraged the work of the Preparatory Committee, the Diplomatic Conference, the Preparatory Commission and the Assembly of States Parties. He was present in Rome at the close of the Diplomatic Conference, spoke on the occasion of the 60th ratification and the entry into force of the Rome Statute, defended the Court against threats to its independence on 3 July 2002 and attended the inauguration of the first 18 judges. It would be a wise move for the Prosecutor, as well as for the President of the Court, to keep the current Secretary-General, as well as his successors,

regularly informed, publicly or privately, of developments and potential threats to the Court's independence. Indeed, it would be useful for the Prosecutor to ensure that all persons who are likely to be in the running to succeed the current Secretary-General are informed of the work of the Office of the Prosecutor to assist them in understanding the importance of that work for the United Nations. Some of those likely to put themselves forward for this position do not have the same enthusiasm for or understanding of the Court or its importance and do not have the same eloquence.

Role under the Relationship Agreement. Under the Rome Statute and the Relationship Agreement, the Secretary-General will play an important role in a number of respects with the Court, some of which will be directly relevant to the Prosecutor, although in most instances they will not be nearly as important as the role of the Secretary-General as supporter and defender of the Court and the role of the United Nations Secretariat, in particular, the Office of Legal Affairs. In a number of cases, the role is simply a ministerial one of transmitting or receiving information or decisions by others, with little or no discretion. The following overview of relations between the Secretary-General, the Secretariat and other components of the United Nations, on the one hand, and the Prosecutor, on the other, is based on the somewhat artificial divisions of the Relationship Agreement and entails some duplication with other parts of this paper. Despite efforts of non-governmental organizations, certain states and members of the ICTY and ICTR, the Relationship Agreement contains a number of potential roadblocks to cooperation between the United Nations and the Court, in particular, the Prosecutor that should be identified and efforts made to address them in negotiations with the United Nations in advance of problems arising in specific cases.

Exchange of information. Article 5 sets out a number of mutual obligations on the United Nations, in particular, the Secretary-General, and the Court with regard to the exchange of information, some of which are of special interest to the Prosecutor. Article 5 (1) establishes the general rule that, "[w]ithout prejudice to other provisions of the present Agreement concerning the submission of documents and information concerning particular cases before the Court, the United Nations and the Court shall, to the fullest extent possible and practicable, arrange for the exchange of information and documents of mutual interest". This general obligation is supplemented by the obligation in Article 5 (2) to avoid duplication in the field of information. Article 5 (1) (a) (i) requires the Secretary-General to "[t]ransmit to the Court information on developments related to the Statute which are relevant to the work of the Court", which will be a useful principle to invoke in many situations, even if the specific examples cited are of a public nature. Although there is a general obligation in Article 5 (1) (b) (i) on the Registrar to keep the United Nations informed on its request about proceedings, there is a more general obligation on the Court, presumably including the Prosecutor, to keep the United Nations informed about proceedings in which the United Nations is involved. Which organ will be responsible for fulfilling this obligation will need to be sorted out.

Article 15 contains a number of crucial provisions regarding cooperation between the United Nations and the Court that establish a general rule, but subject

to conditions, the scope of which may cause problems. Paragraph 1 of that article, which is mandatory, provides that,

> "[w]ith due regard to its responsibilities and competence under the Charter and subject to its rules, the United Nations undertakes to cooperate with the Court and to provide to the court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute."

It will be a priority for the Prosecutor to identify potential roadblocks with regard to fulfilment by the United Nations of this cooperation obligation and to try to negotiate solutions before they cause problems. Paragraph 2, which is discretionary, has fewer limitations:

> "The United Nations or its programmes, funds and offices concerned may agree to provide to the Court other forms of cooperation and assistance compatible with the provisions of the Charter and the Statute."

The Court and the Prosecutor should encourage these bodies to give this provision the broadest possible reading.

Under Article 16 (2) of the Relationship Agreement, "[t]he Secretary-General may be authorized by the Court to appoint a representative of the United Nations to assist any official of the United Nations who appears as a witness before the Court." Under Article 17 (1) of the Relationship Agreement, once the Security Council has decided to refer a situation to the Prosecutor pursuant to Article 13 (b) of the Rome Statute, the Secretary-General " shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council", and "[i]nformation provided by the Court to the Security Council in accordance with the Statute and the Rules of Procedure and Evidence shall be transmitted through the Security Council". Under Article 17 (2), when the Security Council decides to request a deferral of an investigation or a prosecution, "this request shall immediately be transmitted by the Secretary-General to the President and the Prosecutor". Although the Prosecutor is not directly involved in the transmission to and from the Security Council through the Secretary-General of information concerning the failure of states to cooperate under Article 87 (5) and (7), this particular tool will be one of great importance to the Prosecutor (see discussion below concerning the Security Council). Requests by the Prosecutor for information pursuant to Article 15 (2) from the United Nations shall be addressed "to the Secretary-General who shall convey it to the presiding officer or other appropriate officer of the organ concerned".

Laissez-passer. Under Article 12, the Prosecutor, Deputy Prosecutor and staff of the Office of the Prosecutor are entitled, in accordance with special arrangements as may be concluded between the Secretary-General and the Court, to use the laissez-passer of the United Nations as a valid travel document where such use is recognized by states. The Prosecutor will have to ensure that any special arrangements provide for prompt issuance of such travel documents in accordance with simple procedures and on an equal basis with others entitled to this travel document.

Supplementary arrangements with the Court. Although the Secretary-General has no express role in negotiating the terms of the Relationship Agreement, Article 21 provides for such a role with regard to supplementary arrangements to implement the Relationship Agreement. It provides: "The Secretary-General and the Court may, for the purpose of implementing the present Agreement, make such supplementary arrangements as may be found appropriate." The Prosecutor should begin reviewing the Relationship Agreement, in cooperation with other organs of the Court, with a view to deciding what supplementary arrangements, independent of the cooperation arrangements or agreements with the Prosecutor expressly provided for in Article 18 (1) (discussed below), are likely to be needed to implement the Agreement. It is likely that there will be a need for many such arrangements covering a wide range of activities, including cooperation arrangements with various peace-keeping operations.

Cooperation arrangements or agreements with the Prosecutor. The role of the United Nations Secretariat in cooperation with the Court, in particular with the Prosecutor, is too broad a topic to go into any detail here, but it is worth noting the following areas of cooperation which will have an impact on the work of the Prosecutor and where it will be important to develop policies and practices, as well as supplementary arrangements, to ensure that such cooperation is as effective as possible. Article 18 (1) provides for the United Nations to enter into such cooperation arrangements or agreements with the Prosecutor, subject to a number of conditions:

"With due regard to its responsibilities and competence under the Charter of the United Nations and subject to its rules, the United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article".

This provision will be particularly important given that in many situations there will be United Nations operations present. However, the Prosecutor will need to be particularly vigilant to ensure that the references to Charter responsibilities and competence and United Nations rules do not restrict essential cooperation. The Prosecutor should urge the United Nations to view full cooperation with the Court as completely consistent with the such responsibilities and competence and to amend any United Nations rules that would restrict such cooperation. A review of practice of cooperation by the rest of the United Nations with the ICTY and ICTR to identify possible problems and solutions would be advisable.

The United Nations as trigger for preliminary examinations. As noted above, given the likely presence of United Nations operations, including peace-keeping and humanitarian operations, in many of the situations where the Prosecutor is likely to be operating, the United Nations will be an important source of information under Article 15 (1), (2) and (6) of the Rome Statute. Article 18 (2) of the Relationship Agreement provides, subject to conditions, that the United Nations undertakes to cooperate with the Prosecutor in providing such information:

> "Subject to the rules of the organ concerned, the United Nations undertakes to cooperate in relation to requests from the Prosecutor in providing such additional information as he or she may seek, in accordance with article 15, paragraph 2, of the Statute, from organs of the United Nations in connection with investigations initiated *proprio motu* by the Prosecutor pursuant to that article. The Prosecutor shall address a request for such information to the Secretary-General who shall convey it to the presiding officer or other appropriate officer of the organ concerned."

The same concerns as mentioned above concerning the limits on cooperation, subject to United Nations rules, in Article 18 (1) of the Relationship Agreement exist with respect to Article 18 (2). In addition, it will be advisable for the Prosecutor to seek to enter into supplementary arrangements or agreements with the United Nations as soon as possible, either pursuant to Article 18 (1) or (4) (see below) to avoid delays in obtaining information from United Nations staff that are certain to occur if all requests for such information have to go through the Secretary-General. In addition, the Prosecutor will wish to interview United Nations staff in full confidence in certain sensitive investigations and, in some situations, such staff will not wish that others in their office are aware that they are providing information to the Prosecutor.

Provision of information on a confidential basis. The provision for agreements in Article 18 (3) of the Relationship Agreement for the United Nations to provide information to the Prosecutor on a completely confidential basis could pose a number of problems, particularly if it were to become the norm for cooperation. That paragraph states:

> "The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations."

First, as with the provision of national security information pursuant to Article 72 on a confidential basis, there is a risk that information that is exculpatory or relevant to mitigation will be unavailable to the relevant Chamber. The Prosecutor will have to devised effective internal mechanisms to ensure that such information is identified as soon as possible (in some cases this aspect of the information may only be known at a late date in the proceedings or, in a few situations, after proceedings have terminated, for example, when the information concerns an investigation into matters different from the case that has closed). There must be effective procedures in place so that once the exculpatory or mitigating nature of the confidential information is known, steps are taken to deal effectively with the problem.

The easiest situation is when the nature of the information is discovered before an investigation begins, charges are confirmed or a trial commenced. However, if the nature of the information is learned at a later stage in the proceedings, the Prosecutor will be in the awkward situation of having to return to the United Nations and ask for the confidentiality restriction to be removed. It is

not clear what steps would be open to the Prosecutor should permission be refused, as it will be difficult to obtain revision without disclosing the information. To avoid this problem, in the - one would hope rare – situation where the only way to obtain such information from the United Nations was through such a confidentiality agreement, the Prosecutor should insist on a provision in the agreement that the United Nations will waive the confidentiality restriction whenever the Prosecutor determines that such information is exculpatory or mitigating. However, such a provision might not be seen as a completely satisfactory one from an objective point of view, since it leaves the Prosecutor as the sole judge of whether the information should be disclosed. Another possibility would be, in the rare instances when the United Nations provides information on a confidential basis, for the information to be made available to the relevant Chamber *in camera* to decide what should be done.

The Prosecutor will wish to take advantage of Article 18 (4) of the Relationship Agreement, which authorizes the United Nations, its programs, funds and offices to enter into cooperation agreements with the Prosecutor. It provides:

> "The Prosecutor and the United Nations or its programmes, funds and offices concerned may enter into such arrangements as may be necessary to facilitate their cooperation for the implementation of this article, in particular to ensure the confidentiality of information, the protection of any person, including former or current United Nations personnel, and the security or proper conduct of any operation or activity of the United Nations."

Although this paragraph provides for implementation of Article 18, it may provide some flexibility to avoid some of the problems identified above with respect to the other paragraphs of this article.

Asserting jurisdiction over United Nations officials. Article 19 makes it clear that if any person alleged to be responsible for a crime within the Court's jurisdiction who enjoys privileges and immunities under international law with respect to his or her work for the United Nations, "the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities". This means that the United Nations will assist the Court in making that person available in all cases, even if that person is a senior United Nations official. The drafting of Article 19 proved extremely difficult and states wished to avoid any suggestion that there were any privileges or immunities applicable to crimes within the Court's jurisdiction. The final text ensures that the United Nations will waive any privileges and immunities that it believes exist, and therefore permit the individual's surrender to the Court, but it is carefully worded so that it does not acknowledge that any such privileges and immunities do exist with regard to these crimes.

Confidentiality of information provided to the United Nations. Article 20, which permits non-states parties and intergovernmental organizations to provide information to the United Nations that can be concealed from the Court, should be a matter of concern to the Prosecutor. Although that article was justified by its proponents as necessary in the light of existing confidentiality agreements with the

United Nations, that justification cannot apply to agreements entered into or renewed since 1 July 2002. Article 20 states:

> "If the United Nations is requested by the Court to provide information or documentation in its custody, possession or control which was disclosed to it in confidence by a State or an intergovernmental organization or international organization, the United Nations shall seek the consent of the originator to disclose that information or documentation. If the originator is a State Party to the Statute and the United Nations fails to obtain its consent to disclosure within a reasonable period of time, the United Nations shall inform the Court accordingly, and the issue of disclosure shall be resolved between the State Party concerned and the Court in accordance with the Statute. If the originator is not a State Party to the Statute and refuses to consent to disclosure, the United Nations shall inform the Court that it is unable to provide the requested information or documentation because of a pre-existing obligation of confidentiality to the originator."

The Prosecutor should urge the United Nations not to enter into any future agreements with states that permit the donor of information or documentation to prevent the Prosecutor or the Court from having full access to that information when it is necessary to do justice and to seek to renegotiate any existing agreements that contain this restriction.

2. The Security Council

There are a number of different ways in which the Prosecutor will be involved with the Security Council, most of which I am sure are covered in great detail by your other correspondents, and cooperation and exchange of information between the Prosecutor and the Security Council pursuant to Article 17 have already been mentioned above. I will just mention here a number of opportunities for the Prosecutor that could be explored, even if it is decided not to exploit them in the early years of the Court. These include encouraging referrals of situation, discouraging requests and renewals of requests under Article 16, challenging the legality of Security Council Resolution 1422 or any renewal of that resolution, minimizing the obstruction of justice caused by Article 16 requests and invoking the assistance of the Security Council to enforce orders of the Court and to compel states to provide information that the Court had decided is necessary after following the procedure outlined in Article 72. Of course, given the sensitive nature of the relationship between the Court and the Security Council, the pros and cons of the suggestions made below will have to be weighed very carefully before deciding to implement any of them. However, in the light of recent events, many previous conclusions about the likelihood or unlikelihood of the Security Council taking particular actions regarding the Court will have to be reassessed.

Encouraging referrals of situations. The Prosecutor could use the opportunity provided in Article 4 (2) of the Relationship Agreement between the International Criminal Court and the United Nations to address the Security Council to make available information that would assist the Council in deciding whether to refer a situation to the Court under Article 13 (b) of the Rome Statute. Article 4 (2) of the Relationship Agreement provides:

> "Whenever the Security Council considers matters related to the activities of the Court, the President of the Court or the Prosecutor may address the Council, at its invitation, in order to give assistance with regard to matters within the jurisdiction of the Court."

Although this provision is somewhat narrowly drawn, and may reflect the intent of some of the drafters to prevent the Prosecutor from taking the initiative to request a Security Council referral, there is some room for effective interpretation. For example, if the Prosecutor is conducting a preliminary examination or investigating crimes committed in a situation that is being considered by the Security Council under Chapter VII (a not infrequent occurrence), simply informing the Council in writing about the scope of the crimes committed could encourage the Council to refer the situation to the Court, thus giving the Prosecutor greater powers to obtain cooperation from the territorial state and other states. The Prosecutor could use Article 6 of the Relationship Agreement to inform the Security Council indirectly about these matters by informing the United Nations generally through the Secretary-General. That article provides that "[t]he Court may, if it deems appropriate, submit reports on its activities to the United Nations through the Secretary-General." In addition, the Court may propose agenda items to the United Nations under Article 7 of the Relationship Agreement. That article provides:

> "The Court may propose agenda items for consideration by the United Nations. In such cases, the Court shall notify the Secretary-General of its proposal and provide any relevant information. The Secretary-General shall submit the proposed item to the General Assembly or the Security Council, and also to any other United Nations body, as appropriate."

Both provisions could prove cumbersome and might require the concurrence of all the organs of the Court before submission of a report or a request for an agenda item. It would be useful, however, to explore how the possibilities of these two articles could be developed. Reports could be made on a relatively frequent basis to the Security Council and to other United Nations bodies and the Court could agree that each organ could submit separate reports or that organ's part of the Court report separately. The Court could also propose that the Security Council and other United Nations bodies include a standing agenda item on the International Criminal Court to encourage frequent contributions by the Prosecutor and other organs of the Court to their work.

In any event, seeking an invitation to address the Security Council could have even greater impact than any written report. The Prosecutor could during such a presentation, in response to a question by an interested member of the Security Council, outline the advantages such a referral would have in conducting investigations and in obtaining surrenders of accused. Of course, this technique would have to be carefully used to ensure that the Prosecutor does not become involved in political determinations.

Discouraging the making of requests or renewals of requests under Article 16. The Prosecutor could take advantage of the ability under Article 4 (2), if invited, to address the Security Council whenever it is considering the possibility of invoking Article 16 of the Rome Statute in a particular case. In these

circumstances, the Prosecutor should consider seeking such an invitation as a way of trying to prevent obstruction of an investigation or a prosecution and to minimize the damage to international justice caused by such requests. Of course, it would be almost inconceivable for the Security Council not to respond favourably to a request by the Prosecutor or the President to address the Security Council to provide it with all necessary information relevant to a decision to request a deferral of a prosecution or investigation of crimes within the jurisdiction of the International Criminal Court. It is to be hoped that once the President and Prosecutor have been elected, they will make a standing request to the Security Council to be invited to address the Council well before it makes any request citing Article 16 or a renewal of such a request. Indeed, one of the first requests by the Prosecutor and the President to address the Security Council could be when the Security Council begins considering a proposal to renew the request made in Resolution 1422 in May or June 2003 so that the Prosecutor can explain why a renewal of the request would be in excess of the Council's powers and inconsistent with Article 16 and the President can note that the decision on it lawfulness is one that the Court alone can make. Admittedly, the issue of a renewed request could pose a major test for the Prosecutor and the Court that would best be avoided as long as possible until it is presented in an actual case where the Court has asked for the surrender of a person covered by the request. Whether it can be completely avoided in June 2003 is another matter. One possible way to avoid a premature confrontation would be for the Prosecutor and the President to make it clear that this is an issue that can only be addressed by the Court in a concrete case before it.

Security Council Resolution 1422 (2002) was adopted without the benefit of input from the Prosecutor or the President. Had either official been in post in July 2002 they would have been able to explain with great authority that Article 16 was intended to be used only in exceptional circumstances on a case-by-case basis when the Security Council had determined that an investigation or a prosecution could impede its efforts to maintain international peace and security and then to be used only for a limited period of time. They could also have explained the consequences for international justice if the Court were to grant such a request. Faced with such explanations, the Security Council might have decided not to adopt the resolution.1 Similarly, an explanation by the Prosecutor of the consequences for international justice if certain states were to seek at some future date to have the Security Council invoke Article 16 in a particular case under investigation or prosecution, as well as presentation of some of the evidence concerning the nature of the crimes committed and their impact on the victims, could convince the Council not to make request under that article, particularly if that information were also made available to the general public around the world. The Prosecutor could follow the same approach with regard to an attempt to renew a request.

Limiting the damage caused by an Article 16 request. Of course, one hopes that the Security Council will never again seek to invoke Article 16.

1 Amnesty International intends to publish in April 2003 an analysis of the legal status of Security Council Resolution 1422 (2002). A copy will be provided to the Prosecutor when it is published.

However, there are a number of damage limitation exercises that the Prosecutor could consider if he or she thinks that the Council might invoke Article 16 to preserve the ability of the Prosecutor or a national prosecutor at a future date to investigate or prosecute crimes within the jurisdiction of the Court, including prolonging and expanding the scope of the preliminary examination and taking other steps after the Court grants the request or renewed request or asking states if they were able or willing to investigate and prosecute the crimes. The following discussion suggests a number of possible steps that could be explored.

Extending the scope of an Article 15 preliminary examination. The Prosecutor could extend the scope of an Article 15 examination as one way to preserve crucial evidence and open lines of inquiry for a future investigation by the Prosecutor after a lawful request has expired. A lawful request under Article 16 has no application whatsoever to any preliminary inquiry by the Prosecutor under Article 15 (2) of the Rome Statute, which permits the Prosecutor to analyze information received pursuant to Article 15 (1), to seek information concerning crimes within the jurisdiction of the International Criminal Court and to receive oral and written testimony at the seat of the Court concerning such crimes.[2] That provision states:

"The Prosecutor shall analyse the seriousness of the information received [pursuant to Article 15 (1)]. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court."

The clear distinction between steps that may be taken by the Prosecutor during a preliminary examination and during an investigation is analogous to the clear distinction between steps that the Prosecutor can take pursuant to Article 18 (6) during a deferral of an investigation during a challenge to admissibility, pursuant to Article 19 (8) and (11) during a challenge to jurisdiction or admissibility or the representations that victims may make pursuant to Article 19 (3)

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[2] Condorelli & Villalpando, in Antonio Cassese, Paola Gaeta & John R.W.D. Jones, eds, 1 *The Rome Statute of the International Criminal Court* 650 (Oxford: Oxford University Press 2002) (noting that, Asince Art. 16 refers only to >investigations= and >prosecutions=, nothing prevents the Prosecutor from continuing to gather information that would prove useful in future proceedings, after the period of deferral@). Assuming that the Security Council has made a lawful request for a deferral under Article 16,

> A[t]he Prosecutor should then be entitled to conduct those examinations following an authorization by a Pre-Trial Chamber: he or she could, in particular, gather information and take all the appropriate steps to analyse its seriousness. Moreover, the administrative duties of the Court linked with the deferred cases should be completed. It could be asked whether some exceptional judicial activities can still be pursued after the deferral. That should certainly be the case for those measures considered appropriate by the Court for the protection of witnesses and victims, since it would be unacceptable for their safety and well-being to be affected by the deferral of the Security Council.@

Ibid., 652 (footnote omitted).

during such a challenge.[3] Presumably, if a deferral of an investigation pursuant to these provisions had occurred - at least if the deferral occurred before a proper deferral under Article 16 - the Prosecutor may continue to take such steps.

Representations by victims to the Pre-Trial Chamber pursuant to Article 15 (3). The Prosecutor could suggest to victims and their representatives that they could make representations before the Pre-Trial Chamber in the form of testimony and presentation of material and documentary evidence. Of course, such representations and presentations should be carefully prepared so as not to undermine an effective prosecution by the Prosecutor after the term of a lawful request and any renewal expires. A proper request by the Security Council to defer an investigation or prosecution cannot prevent victims from making representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence, pursuant to Article 15 (3) of the Rome Statute. That provision states:

> "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence."

Requesting a Pre-Trial Chamber hearing under Article 15 (4). The Prosecutor could request the Pre-Trial Chamber to hold hearings pursuant to Article 15 (4). The Security Council cannot prevent the Pre-Trial Chamber from holding such hearings to determine whether an investigation should be opened. That paragraph states:

> "If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case."

It is only when the Pre-Trial Chamber has reached a decision to authorize an investigation that a proper request by the Security Council pursuant to Article 16 can be granted by the Court. Presumably, the Pre-Trial Chamber and Appeals Chamber could consider challenges to jurisdiction and admissibility during the pendency of a proper request for a deferral pursuant to Article 16 as a way of ensuring that valuable time is not lost during a deferral.

Requesting the Pre-Trial Chamber to take steps under Article 57. The Prosecutor could request the Pre-Trial Chamber to take a number of steps before an

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[3] Similarly, under Article 15 (6) even if the Prosecutor decides after a preliminary inquiry that an investigation is not warranted, the Prosecutor can consider further information in the light of new facts or evidence:

> AIf, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.@

investigation is opened that could continue in effect after a lawful request under Article 16 was granted by the Court. The Pre-Trial Chamber may take a number of steps to preserve evidence and to protect victims and witnesses under Article 57 of the Rome Statute even before an investigation has begun.[4] It was certainly not intended by the drafters of the Rome Statute that measures commenced before an investigation, such as preservation of evidence and protection of victims and witnesses and their families, would come to an end whenever the Security Council made a lawful request under Article 16 to defer temporarily an investigation or a prosecution. If such a perverse interpretation were to be accepted, the Prosecutor could be faced the inability to conduct a successful investigation or prosecution once the deferral came to an end. Evidence would have been lost, damaged or destroyed and witnesses identified, threatened or killed.

Thus, the International Criminal Court can take a broad range of preliminary steps before a proper request by the Security Council pursuant to Article 16 can interfere with the pursuit of justice. This conclusion is confirmed by the leading commentary on that article:

> "It may not be concluded, however, that by referring to both 'investigation' and 'prosecution', article 16 extends the Security Council's deferral power to the totality of activities of the Prosecutor. The Statute clearly states that steps taken by the Prosecutor prior to the Pre-Trial Chamber's authorization of an investigation only constitute a 'preliminary examination', not the beginning of an investigation. Indeed, the purpose of the authorization is to enable the Prosecutor to start an investigation. Among the steps which the Prosecutor can take before an investigation starts are seeking 'information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate', receiving 'written or oral testimony at the seat of the Court', as well as analysing the information received. The Security Council cannot prevent the Prosecutor from taking these steps on the basis of article 16."5

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[4] Article 57 (Functions and powers of the Pre-Trial Chamber) provides that the Pre-Trial Chamber make take a number of steps at the pre-trial stage - including before a formal investigation has begun - such as the preservation of evidence. These powers are in addition to the Pre-Trial Chamber=s other statutory powers and, therefore, are not limited in scope to the period of investigation or by other express provisions authorizing it to act after an investigation has begun (except where clearly limited to the period of an investigation, as in Article 57 (3) (a)). In particular, paragraph 3 (c) of that article provides that

> "In addition to its other functions under this Statute, the Pre-Trial Chamber may:
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> . . . .
>
> (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information[.]"

[5] Morten Bergsmo & Jelena Peji□, Article 16 - Deferral of investigation or prosecution, *in* Otto Triffterer, ed., *The Rome Statute of the International Criminal Court: Observers= Notes, Article by Article* 376 (Baden-Baden: Nomos 1999).

The scope of an Article 16 request is limited to suspending temporarily the ability of the Court alone to investigate or prosecute crimes. Therefore, if it became apparent that the Security Council was planning to make endless, successive requests, contrary to the intent of the drafters, and that the Court was likely to grant these requests, the Prosecutor could inform states of the situation and ask if the initial determination that states were unable or unwilling to investigate or prosecute genuinely the crimes was still correct. If not, and a state was able and willing to investigate and prosecute the crimes, the Prosecutor could then cooperate, with that state, within the constraints of the Rome Statute and its Rules of Procedure and Evidence, to avoid a situation in which persons responsible for the worst possible crimes would obtain impunity.

Requesting assistance of the Security Council pursuant to Article 87 (5) and (7). There are at least two instances when the Prosecutor will wish to seek the assistance of the Security Council when states fail to cooperate with the Court. Although it is not entirely clear from the Rome Statute which organ of the Court can contact the Council in this situation, it appears that one of the Chambers was intended. Under Article 87 (5) (b) of the Rome Statute:

> "Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform . . . , where the Security Council referred the matter to the Court, the Security Council."
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> Similarly, under Article 87 (7):
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> "Where a State fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter . . . , where the Security Council referred the matter to the Court, to the Security Council."

It remains to be seen how effective these provisions will prove in practice. Requests by the Prosecutor of the ICTY and ICTR to the Security Council to take action when states failed to cooperate with orders or requests for assistance have not met with the most effective response.

3.The General Assembly

Although the role of the General Assembly in work of the Court of direct interest to the Prosecutor is likely to be limited, it may play a role in a number of areas that would warrant further study and the Prosecutor should ensure that Court reports to the United Nations under Article 6 of the Relationship Agreement include information of interest to the General Assembly and should propose pursuant to Article 7 of that agreement that the General Assembly have a regular agenda item on the Court to facilitate consideration of issues of common concern. Article 4 (1) of the Relationship Agreement provides that the Court may participate as an observer in the work of the General Assembly and, upon invitation, to attend meetings and conferences convened under the auspices of the United Nations where observers are allowed and matters of interest to the Court are under discussion.

Article 115 (b) provides that part of the expenses of the Court shall be provided by "[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council." Although opposition by non-states parties may limit or preclude funding by the United Nations of Court activities not involving a Security Council referral, in the long run the General Assembly will almost certainly fund such activities and it will have to approve the budget covering Security Council referrals.

4. Human rights bodies

The Prosecutor will wish to be in regular and, occasionally, frequent contact with the various human rights bodies of the United Nations, including the High Commissioner for Human Rights, the Commission on Human Rights and its Special Procedures and treaty bodies serviced by the Office of the High Commissioner for Human Rights.

The second High Commissioner for Human Rights was, like the current Secretary-General, a strong supporter of the Court. It will be important for the Prosecutor, together with other organs of the Court, to urge the current High Commissioner, who is considered by some to be a potential successor to the current Secretary-General, to take a similarly bold and energetic role, both publicly and in meetings with senior government officials. The Commission on Human Rights can adopt useful resolutions in support of the work of the Court. Several of its Special Procedures, including the Special Rapporteur on torture and the Special Rapporteur on the independence of judges and lawyers have been strong supporters of the Court. These two Special Procedures, as well as others, such as the Special Rapporteur on violence against women, the Special Rapporteur on extra-legal, summary or arbitrary executions and the Working Group on enforced or involuntary disappearances, address matters of direct concern to the Prosecutor and could be valuable sources of information, either pursuant to Article 15 (1), (2) and (6) or at a later stage of proceedings. They will also be cited by the Court, defence counsel and representatives of victims for authoritative interpretations of international law and standards of direct concern to the Prosecutor, including issues related to fair trial and reparations.

It will also be important for the Prosecutor to monitor developments in treaty bodies of serviced by the Office of the High Commissioner for Human Rights, such as the Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child and the Committee on the Elimination of All Forms of Discrimination against Women, concerning a wide range of issues, including the right to fair trial, definitions of torture, children in armed conflict and violence against women, since their interpretation on these matters is almost certain to have a strong impact on the views of the Chambers of the Court.

Although regular contact with these bodies probably would not be necessary, it might be useful to ask them to invite the views of the Prosecutor when issues related to the scope of the duty of states to investigate and prosecute crimes, the content of the right to fair trial or the definitions of crimes or defences under international law arise. Although it would not be cost-effective for the Prosecutor to express his or her views on such issues in more than a handful of cases being

considered under optional protocols or other complaint mechanisms, in certain exceptional cases it might be a useful strategy for the Prosecutor to do so, both with a view to influencing the Chambers in a future case and, as part of a broader complementarity strategy, to develop the law applicable in national courts. For example, such treaty bodies have interpreted the scope of obligations of states to investigate crimes, the relevant factors in determining whether a trial is prompt and definitions of crimes under international law, such as torture and "disappearances".

F. Other intergovernmental organizations

In addition to the United Nations, the Prosecutor will have to develop relationships with a number of other intergovernmental organizations. With some of these organizations, these relations will involve regular, day-to-day contact, and with others, the contact will be relatively infrequent. Relations with such organizations will be important both as sources of information pursuant to Article 15 (1), (2) and (6) and in the context of cooperation. Article 87 (6) provides:

> "The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate."

The most important relationships will be with criminal justice organizations (Interpol, Europol, Eurojust). It would be useful for the Prosecutor to maintain contact with subsidiary bodies of other intergovernmental organizations that deal with criminal justice issues, such as the Council of Europe Steering Committee on Crime Problems, that monitors implementation of the Rome Statute by member states. Such bodies could provide a forum for conveying concerns about emerging problems about implementing legislation. It will be important for the Prosecutor to monitor developments in treaty bodies of regional human rights organizations, such as the European Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights and the future African Court of Human and Peoples' Rights, concerning the right to fair trial since their interpretation of this right are almost certain to have a strong impact on the views of the Chambers of the Court.

Although regular contact with these bodies probably would not be necessary, it might be useful to ask them to invite the views of the Prosecutor when issues related to the scope of the duty of states to investigate and prosecute crimes, the content of the right to fair trial or the definitions of crimes or defences under international law arise. Although it would not be cost-effective for the Prosecutor to express his or her views on such issues in more than a handful of cases, in certain exceptional cases it might be a useful strategy for the Prosecutor to do so, both with a view to influencing the Chambers in a future case and, as part of a broader complementarity strategy, to develop the law applicable in national courts. For example, such regional courts have spelled out in their jurisprudence the duty of states in conducting investigations of crimes, the relevant factors in determining

whether a trial is prompt and definitions of crimes under international law, such as torture and "disappearances".

G. Defence counsel and the International Criminal Bar

The procedures in the Rome Statute and the Rules of Procedure and Evidence are designed to ensure a more cooperative and constructive relationship between the Office of the Prosecutor of the Court and defence counsel than the relationship that has existed between the Office of the Prosecutor of the ICTY and ICTR. Whether that will expectation will be realized is another matter. One way to increase the chances of that happening will be for the Prosecutor to meet regularly with defence counsel outside the context of pending proceedings to discuss issues of common concern, such as how to implement disclosure provisions of the Rome Statute and the Rules of Procedure and Evidence, how to protect witnesses and how to make the unique investigative opportunity procedure of the Pre-Trial Chamber operate smoothly. The International Criminal Bar may provide one forum for such regular meetings, but it may not be the only one or even the best one. The organization of the International Criminal Bar is still underway and it is not yet clear whether a number of important issues remain unresolved following the Berlin organizational meeting, including the role of lawyers who represent other clients, including victims and their families, witnesses, states making admissibility or jurisdictional challenges and lawyers representing persons involved in disciplinary proceedings before the Court.

However, regardless which venue or venues prove to be the most effective, the main point is that the Prosecutor should at the earliest possible stage begin meeting with counsel who have represented accused persons before the ICTY and ICTR, counsel who have indicated an interest in doing so before the Court and representatives of the International Criminal Bar to identify issues of common concern with a view to developing solutions in advance of the first cases, as well as establishing a long-term constructive relationship.

H. Civil society generally

Far more than any national prosecutor and probably more than the Prosecutor of the ICTY and ICTR, the Prosecutor will need to develop effective relationships with many sectors of civil society. These include: victims, their families and lawyers for victims and their families; witnesses and their lawyers (if they are represented); international and national non-governmental organizations; independent experts and academic institutions; press; and the general public.

1. Victims, their families and lawyers for victims and their families

The Prosecutor will be involved with victims, their families and lawyers for victims and their families in a wide variety of ways at all stages of the proceedings and it will be crucial to an effective prosecution strategy to move early to develop an effective relationship with regard to participation and submission of information. I would identify the following as some of the most important aspects of that relationship: developing effective practices concerning the participation of victims in pre-trial, trial, reparations, appellate and revision proceedings; clarification of the division of responsibility between the Prosecutor and victims with regard to

reparations; working with victims and the Victims and Witnesses Unit; ensuring that issues that are not expressly assigned to this unit are addressed elsewhere in the Court; and developing guidelines for submitting information to the Prosecutor pursuant to Article 15 of the Rome Statute (the latter issues are discussed below with issues applicable to relations with non-governmental organizations generally).

The provisions of the Rome Statute and the Rules of Procedure and Evidence providing for participation of victims in the proceedings are a landmark in international criminal procedure and my organization worked hard to ensure that they were included. However, insufficient thought has gone into the question of how these provisions will work in practice, particularly from the point of view of the Prosecutor, who will have a particular interest in ensuring that the proceedings are prompt and efficient, and defence counsel, who will face two opposing parties which may not take consistent positions with each other. The Prosecutor should seek to address this question as a matter of priority, both to ensure a speedy and effective prosecution that fully respects the rights of the accused and to ensure that the relationship with victims is a harmonious one. It will be important to develop a prosecutorial position in time to affect decisions by the Pre-Trial Chambers and Trial Chambers are made on these matters.

As soon as the Prosecutor has been appointed, it would be advisable to follow up the excellent work of the Division of Common Services, which took the initiative to meet members of the Victims' Rights Working Group of the CICC on a regular basis to identify issues of common concern related to victims and to devise solutions. One way to do this would be to consult, individually and in groups, a range of persons with experience in *partie civile* proceedings, including judges, prosecutors, defence lawyers, lawyers for victims and victims and their families to identify problems and possible solutions. It could seriously undermine the credibility of the Court if the first trial adopted the same approach as in the *Touvier* and *Papon* trials. Devising appropriate procedures will require the greatest possible sensitivity to the needs and rights of victims.

2. Witnesses and their lawyers (if they are represented)

In some legal systems, it is unethical for a lawyer to have direct contact with a witness of an opposing party outside of the civil or criminal proceedings. The Prosecutor will need to determine what rules or guidelines he or she wishes the Court to adopt in regard to contact outside court proceedings with witnesses being called by the accused, by victims or by the Court. These rules and guidelines would be in addition to protective measures for witnesses under threat.

3. International and national non-governmental organizations

Some of the most important external relations of the Prosecutor and the Office of the Prosecutor will be with non-governmental organizations. Certain issues for the Prosecutor specific to non-governmental organizations dealing with the role of the defence, such as the International Criminal Bar, and victims' security, participation and reparations, such as the Victims' Rights Working Group, have been mentioned above. Some of the issues applicable to relations of the Prosecutor with non-governmental organizations generally include: guidelines for compiling and submitting information to the Prosecutor pursuant to Article 15 (1), (2) and (6);

identifying issues of interpretation of the Rome Statute and its supplementary instruments where it would be helpful to have non-governmental organizations or independent experts submit *amicus curiae* briefs, and informally soliciting such submissions from particular organizations and experts; identifying other problems that could be usefully addressed by non-governmental organizations, such as flaws in national implementing legislation or lack of cooperation by states; clarifying the Prosecutor's position concerning confidential sources; and contractual relations with non-governmental organizations.

The Coalition for the International Criminal Court and its Secretariat. It is useful to mention first the umbrella organization, the Coalition for the International Criminal Court, which has well over one thousand members around the world, including my organization, which is both a founding member and a member of its Steering Committee. Since the first discussions in November 1994 to plan the formation of the Coalition, the Coalition has played an increasingly important role in the establishment of the Court, particularly its widely admired Secretariat, which has produced a wide range of analytical documents on the Court and, in particular, on the supplementary instruments to the Rome Statute and on steps needed to make the Court operational. It plays the major role in identifying issues that its members need to address and in mobilizing them on issues of common concern. Almost all non-governmental organizations working on issues related to the Court are members of the Coalition. Its members have also organized into regional networks and thematic groups, including the Women's Caucus for Gender Justice, the Faith Based Caucus, the Victims' Rights Working Group and the Universal Jurisdiction Caucus.

There a variety of ways in which the Prosecutor can relate to non-governmental organizations. On certain matters common to all such organizations, the main point of contact would be with Secretariat of the Coalition, but in most instances, such contacts would not be exclusive of contacts with individual organizations. The Secretariat will be an excellent place to start in seeking technical analysis of matters, such as the interpretation of supplementary instruments or comments on draft instruments. Draft regulations of the Office of the Prosecutor, including a Code of Conduct, are examples. The Coalition Secretariat will often help to coordinate non-governmental organization lobbying on topical issues, such as on Security Council Resolution 1422 and the US impunity agreements. It plays an important role in coordinating the work of non-governmental organizations on ratification and implementation of the Rome Statute and the Agreement on Privileges and Immunities (see below). Staff of the Office of the Prosecutor will want to participate in many of the conferences on the Court being organized by non-governmental organizations around the world on a regional or national basis and to suggest topics for such conferences, as well as places where they are needed.

The possible advantages of a liaison officer. The staff of the Office of the Prosecutor will be inundated with requests by representatives of non-governmental organizations in the first year to meet and it will be important to devise procedures that ensure that the representatives feel that their concerns are being considered seriously, but avoid swamping the staff with marginal or even frivolous matters that will detract staff from essential work. It would be useful to work with the

Secretariat of the Coalition to develop such procedures, together with guidelines on relations with the Office of the Prosecutor. It might be useful to have a liaison officer that deals with requests for meetings by non-governmental organizations. In some instances, particularly initial meetings, the liaison officer might be the only contact. In others, the liaison officer would simply arrange for meetings with relevant staff, at their convenience. In some instances, the non-governmental organization would have built up a long-standing relationship with one or more staff members that would allow direct contact for certain issues without going through the liaison officer or, in particularly sensitive matters, without informing the liaison officer.

Guidelines for compiling and submitting information to the Prosecutor pursuant to Article 15 (1), (2) and (6). As a review of the submissions made to the Court so far will quickly demonstrate, there is an urgent need to clarify for non-governmental organizations, as well as individuals, basic guidelines about what information should be submitted to the Prosecutor under Article 15 (1), (2) and (6), as well as clarification about the scope of the Court's jurisdiction. Some of these guidelines will be relatively straightforward. However, one particular problem that appears to be emerging is that some non-governmental organizations are trying to prepare extremely large, extensively documented submissions that may duplicate and, possibly, undermine the work of investigators if the Prosecutor decides to undertake a preliminary examination, investigation and prosecution. In addition, such efforts could, if not carefully done, endanger victims and witnesses and their families, as well as their legal representatives, and could also lead to destruction of evidence. It will be a matter of priority to address this issue and to review the experience in the ICTY and ICTR with respect to the compilation of information by non-governmental organizations, both done independently and under the supervision of the two International Criminal Tribunals, such as the collection of statements by non-governmental organizations about crimes committed in Kosovo and the use of forensic experts in exhumations of graves.

Soliciting submissions on legal and practical issues. One particular area where non-governmental organizations can assist the Prosecutor is in making formal submissions to the Court, in particular *amicus curiae* briefs pursuant to Rule 103 of the Rules of Procedure and Evidence. It would be in the interest of the Prosecutor to identify issues of interpretation of the Rome Statute and its supplementary instruments where it would be helpful to have non-governmental organizations or independent experts submit *amicus curiae* briefs, and then to solicit them from particular organizations and experts. Of course, the Prosecutor would need to respect the independence of those organizations and be careful to avoid any misunderstandings that the organizations were being expected to draft briefs that had to be vetted by the Prosecutor (even if many organizations would show drafts informally to the Prosecutor to benefit from the Prosecutor's experience). Indeed, not all such briefs, even those informally solicited by the Prosecutor, will be in accordance with the views of the Prosecutor, who has the right to reply to them under paragraph 2 of that rule. However, in many cases, such submissions can provide useful commentaries on issues of substantive or procedural law. Such submissions played an important role in the *Blaskić* case in the ICTY.

As you will recall from my letter to you dated 14 January 2003, my organization believes that such submissions can play an important role in the development of international criminal law and procedure in the fight against impunity and it has already identified a number of issues that it is considering addressing in *amicus curiae* briefs and it will actively seek leave to make such submissions when relevant to a case. In addition, my organization intends to press for an amendment of the rule to permit submission of such briefs on issues not directly related to a particular proceeding or for a regulation of the Court that would permit submissions analogous to *amicus curiae* briefs to Chambers that were not directly related to a particular proceeding.

Cooperating with non-governmental organizations on areas of common concern. In addition to the issues related to defence counsel and to victims mentioned above, there are many areas where informal cooperation with non-governmental organizations would be invaluable. The Prosecutor should consider identifying other problems that could be usefully addressed by non-governmental organizations, such as flaws in national implementing legislation for the Rome Statute and the Agreement on Privileges and Immunities or lack of cooperation by states. The area of implementation is one where non-governmental organizations have been extremely active, but so far without being able to draw upon the experience and views of the Prosecutor. Given the numerous conferences and extensive lobbying organized by non-governmental organizations on this issue and the varying approaches to this question in the materials produced by non-governmental organizations, from minimalist recommendations by some to recommendations that states do more than required by the Statute by others, such as my organization, it will be important for the Prosecutor to be in close contact with non-governmental organizations on matters related to implementation. The Prosecutor is likely to be concerned about the emerging problems with such legislation and will wish to convey those concerns to non-governmental organizations so that they can raise such matters with governments.

Contractual relations with non-governmental organizations. Although most relations with non-governmental organizations will be at arms length, there is at least one exception which should be noted that involves completely different considerations from those outlined above. In a number of instances, non-governmental organizations will enter into contracts with the Office of the Prosecutor to perform specific tasks, such as to conduct forensic examinations. In those instances, both the Prosecutor and the non-governmental organization will be in a somewhat awkward situation, since the organization will often have a range of organizational concerns that will be different from those arising from the contractual relationship. For example, a non-governmental organization that furnished a team of forensic experts under a contract with the Office of the Prosecutor to conduct exhumations of graves and forensic examinations might have a different perspective from the Office of the Prosecutor on how such examinations should be conducted with respect to the families of victims. It will be important to draw from the experience of the ICTY and ICTR in such contractual relations with non-governmental organizations to minimize potential problems.

Clarifying the Prosecutor's position concerning confidential sources. Another matter of vital importance to non-governmental organizations will be

protecting their ability to investigate and documenting crimes freely and impartially, including protecting their confidential sources. Although these sources would appear to be fully protected by Rule 73 of the Rules of Procedure and Evidence, it will be up to the judges to interpret the scope of the protection of confidential sources and they will be particularly interested in the views of the Prosecutor on this question. Given the different positions of each of the three Prosecutors of the International Criminal Tribunals on the question of confidential sources of non-governmental organizations, the International Committee of the Red Cross and the press and the ambiguities in the balancing test adopted by the Appeals Chamber of the ICTY in the Jonathan Randall matter, non-governmental organizations will face considerable uncertainty in investigating and documenting crimes within the jurisdiction of the Court.

The Prosecutor should clarify his or her policy with regard to this question at the earliest possible date to ensure a harmonious relationship with non-governmental organizations, whose public reports will be a major source of information about crimes committed and the response of the criminal justice systems to those crimes, particularly when deciding whether to conduct a preliminary examination or an investigation. It is to be hoped that the Prosecutor will adopt a policy of not seeking to compel the disclosure of the identity or the testimony of persons who provided information to non-governmental organizations on a confidential basis about crimes within the jurisdiction of the Court and will argue that Rule 73 should be interpreted to protect such sources.

I. Press

Of course, there is no need to emphasize the importance of effective relations between the Prosecutor (in addition to the other organs of the Court) and the press and I am sure that this will be a priority for the Prosecutor. Although a harmonious relationship of mutual respect would be desirable, it is inevitable that the press, if it is doing its job properly, will be critical of many aspects of the work of the Prosecutor. The primary aim of a good press policy would be to encourage accurate and fair reporting by the press of the facts and the law, regardless of the criticism of the Prosecutor or the Court. Success should be measured by the accuracy and fairness of reporting, not the number of stories that appear in the press. I would just emphasize a few cautionary notes.

First, the quality of reporting of the work of the two International Criminal Tribunals has been uneven at best and sometimes is appallingly bad. Some of the press reporting on the work of the two International Criminal Tribunals and on the establishment of the International Criminal Court simply do not understand – or quickly forget – basic facts and law. For example, reporters working in the former Yugoslavia and their editors routinely talk about national constitutional bars to "extradition" of nationals to the ICTY. Other problems are conceptual. For example, the progress of the ICTY in investigating and prosecuting crimes is rarely compared to the lack of progress in doing so at the national level, whether based on territorial or extraterritorial jurisdiction. Similarly, both the ICTY and ICTR are portrayed as expensive without setting them in the broader context of the cost of investigating crime worldwide, including crimes under international law, other crimes of international concern (such as "terrorism") and ordinary crimes.

It will be important for the Prosecutor to develop effective training manuals and training programs, in cooperation with the Registry, wherever possible, for the press, including both reporters and editors. In addition, the press office of the Prosecutor should take the initiative and be assertive in seeking as a routine matter to inform reporters and their editors of erroneous or misleading press reports, such as the continued confusion between extradition and surrender, and to enter into a dialogue that could encourage a more accurate understanding of the work of the Office of the Prosecutor and the rest of the Court. Any attempts to correct press reporting should be done in a very sensitive manner so as to avoid any suggestion of a threat to reporters.

A second cautionary note is that the Prosecutor should ensure that press officers, as well as all staff of the Office of the Prosecutor, fully respect the right of suspects and accused persons to be presumed innocent until proven guilty beyond a reasonable doubt in a fair trial. The Prosecutor should not indicate publicly that a particular individual is likely to be indicted and care should be taken when announcing indictments to make it clear that the accused person is presumed innocent. Announcements of indictments should be made in a forum that reflects the dignity and independence of the Court. It will be important for the Prosecutor not only to set an excellent example, but also to ensure through appropriate regulations and directives that press officers fully respect the rights of suspects and accused to the presumption of innocence. As stated above, the Code of Conduct should be consistent with the UN Guidelines on the role of Prosecutors. Those Guidelines require prosecutors to "[c]arry out their functions impartially" and to "act with objectivity". In implementing press policy, it will help if the Prosecutor tries to convey a lower key image of a prosecutor working seriously and impartially as a prosecutor than some prosecutors and investigating judges at the international and national level have done in the past.

A third matter of vital importance to the press will be protecting its ability to investigate and report freely and impartially, including protecting its confidential sources. Although these sources would appear to be fully protected by Rule 73 of the Rules of Procedure and Evidence, it will be up to the judges to interpret the scope of the protection of confidential sources and they will be particularly interested in the views of the Prosecutor on this question. Given the different positions of each of the three Prosecutors of the International Criminal Tribunals to the question of confidential sources of non-governmental organizations, the International Committee of the Red Cross and the press and the ambiguities in the balancing test adopted by the Appeals Chamber of the ICTY in the Jonathan Randall matter, the press will face considerable uncertainty in investigating and reporting crimes within the jurisdiction of the Court. The Prosecutor should clarify his or her policy with regard to this matter at the earliest possible date to ensure a harmonious relationship with the press, whose reports will be a major source of information about crimes committed, particularly during the preliminary examination. It is to be hoped that the Prosecutor will adopt a policy of not seeking to compel the disclosure of the identity or the testimony of persons who provided information to the press on a confidential basis about crimes within the jurisdiction of the Court and will argue that Rule 73 should be interpreted to protect such sources.

J. The general public

One of the major failings of the two International Criminal Tribunals was the failure to establish effective outreach programs in the former Yugoslavia and Rwanda at the outset. It is certainly to be welcomed that the Division of Common Services has begun work on developing outreach programs to reach the general public around the world. My organization hopes to make a number of specific recommendations in this regard, but here I would simply emphasize how important it is for the Prosecutor to be closely involved in developing such programs to ensure that they accurately reflect the law, deflate the unrealistic expectations noted above and, although this will have to be done with great sensitivity, encourage effective pressure on national authorities to fulfil their obligations under the Rome Statute and international law.

It is important to note that the understanding by the general public of the jurisdiction of the Court and how it works is still minimal almost five years after Rome. Every few days there are reports in the press of persons in all walks of life, including lawyers, who think that the Court can exercise its jurisdiction over crimes committed in the territories of non-states parties by their nationals in the absence of a Security Council referral or declaration under Article 12 (3) and that it can exercise jurisdiction over crimes committed before 1 July 2002.