



Fédération Internationale des Ligues des Droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO,
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INTERNATIONAL FEDERATION
OF HUMAN RIGHTS

FEDERACION INTERNACIONAL
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الفدرالية الدولية لحقوق الانسان

FIDH STATEMENT ON THE PROSECUTORIAL STRATEGY
OF THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

The Hague, 26 September 2006

Introduction

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

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

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

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

This strategy raises an important number of questions. FIDH has chosen to focus its analysis on three points that it finds particularly critical, namely:

- I.- Maximisation of the impact
- II.- Focused investigations and prosecutions
- III.- Victim participation

I.- MAXIMIZATION OF THE IMPACT

FIDH has long advocated for the Office of the Prosecutor to take into consideration the deterrent effect that its investigations and prosecutions could have on the commission of further crimes, both in the countries currently under investigation or preliminary analysis, as well as in other countries around the world. The deterrent effect is without any doubt at the heart of the creation of a *permanent* international criminal court.

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

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

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

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

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

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

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

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

II. FOCUSED INVESTIGATIONS AND PROSECUTIONS

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

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

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

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

Moreover, according to FIDH, it is essential that the Office publicly announces that it is possible to attain peace with justice in the context of the Ugandan conflict, that the arrest warrants issued against the commanders of the Lord's Resistance Army will be maintained, and that eventual amnesty granted at the national level cannot be invoked to stop the prosecutions that it has initiated.

III.- VICTIM PARTICIPATION

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

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

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

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

with victims, so that they can become stakeholders of the investigations.

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