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Fédération Internationale des Ligues des Droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO, ET DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

INTERNATIONAL FEDERATION OF HUMAN RIGHTS

FEDERACION INTERNACIONAL DE LOS DERECHOS HUMANOS

الفدرالية الدولية لحقوق الانسان

FIDH Statement on the Prosecutorial Strategy of the Office of the Prosecutor of the International Criminal Court

New York, 18 October 2006

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

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

FIDH has a specificity amongst other very active actors of the civil society that have an interest in the International Criminal Court (ICC). Like many others FIDH works towards achieving the universality character of the ICC by promoting the Rome Statute in many countries, in particular still under represented like in States of the League of Arab States and in Asia. FIDH also promotes the enacting of ICC national implementing legislation in order to pursue the enshrined principle of complementarity between domestic courts and the ICC which transcends the philosophy of action of the ICC.
With its office in The Hague FIDH continues to actively monitor the work of all organs of the Court participating in working groups of the Coalition for the ICC (CICC), taking part in experts meetings with different offices of the Court and following closely the work of the OTP and the Chambers in the current proceedings before the Court.

FIDH also uses the Court to promote the fundamental right of victims of the most serious crimes to have a judicial remedy before a fair and independent Court. To achieve that ambitious objective

FIDH uses all level of possible participation of victims before the Court. FIDH has therefore been one of the first organization to send information to the Prosecutor based on article 15 of the Rome Statute regarding the situation in the Central African Republic, the Democratic Republic of the Congo, Colombia and Ivory Coast. By doing so FIDH has been actively promoting the use by the Prosecutor of its *proprio motu* power to decide to seek the authorization of the Pre Trial Chamber to open an investigation without the voluntary consent of the State of nationality of the presumed perpetrator or the State on which the crimes have been committed.

FIDH through its Legal Action Group has effortlessly supported the unprecedented rights of victims to participate, be represented and seek awards of reparation at all stages of the proceedings before the ICC. FIDH has purposely used rule 89.3 of the Rules of Procedure and Evidence to transmit the first six victim's requests for participation in the history of the Court. As many of you are aware the PTC I issued a landmark decision on January 17, 2006 authorizing those six Congolese victims to participate in the DRC proceedings at the stage of the investigation. Members of the FIDH Legal Action Group registered on the list of the ICC counsels now represent, on a *pro bono* basis, those victims to make sure that their views and concerns are being taken into account.

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

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

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

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

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

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

countries are either unwilling or unable to investigate and prosecute into those crimes.

In that sense FIDH understands that the OTP has been promoting voluntary State Parties referrals and believes that this policy contributes to the fight against impunity as it raises the issue of impunity at the highest level of the State.

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

The OTP Report of its Three Years of work indicate clearly that voluntary State Parties referrals have been given a degree of greater importance in the decision to open an investigation over article 15 referrals :

> *"While propio motu power is a critical aspect of the Office's independence, the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court."*
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> Meanwhile, the report indicates that *:*
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> *"Through to the end of June 2006, the Office received 1918 communications from individuals or groups in at least 107 different countries. (...) Of the approximately 20% of communications warranting further analysis, 10 situations have been subjected to intensive analysis. Of these, three proceeded to investigation (the DRC, Northern Uganda, and Darfur), two were dismissed (Venezuela and Iraq), and five analyses are on-going".*

The Reports does not get into any details about the treatment and status of nearly 190 communications that appeared to be in the "approximately 20 % of communications warranting further analysis".

FIDH believes that its crucially important to balance your prosecutorial discretion and independence with the right of those who have sent communications to know the status of their referrals. FIDH encourages the OTP in the near future to be more transparent in the treatment of article 15's communications.

Letting those at the origin of the communication know the status of their complaints would on the one hand contribute to outreach obligation of the Court as it would clarify the reasons and motivations underlying the choices of the OTP in refusing or accepting article 15's communications and as a multiplier effect would contribute to the understanding of the jurisdiction of the Court

and the policy of the OTP.

By doing so the OTP would clearly avoid to widen the so called “expectation gap” that may exist in victim's communities vis-à-vis the Court.

It will also on the other hand allow victims the opportunity to judicially challenges a decision of the OTP not to prosecute and to do so using legal rather than political grounds.

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

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

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

FIDH believes that there may be a difference between the objectives you underline and the practice of the Court in the last few years. FIDH suggests that the Court and in particular the OTP needs to conduct higher-profile and more public announcements in order to avoid that situations that are under analysis remain unknown both by public, the press and even by the alleged perpetrators. Unless the OTP make public announcements, the media cannot denounce the situations investigated. I would like to stress that this was particularly true in the case of the letter to the president of Colombia. The letter you sent, when made public had a very significant impact. Unfortunately it should have been followed up in a very public way.

Finally, FIDH recalls that the ICC is the only Court today where victims have the right to request participation and reparation. The Office should aim at implementing those enshrined historic rights and improve the ways it interacts with victims in order to reinforce the legitimacy of the Prosecutor’s actions.