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Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice

Dear Mr Moreno-Ocampo,

Thank you for inviting Amnesty International in the Office of the Prosecutor memorandum, Consultation Proposal on the Interests of Justice, 30 November – 1 December 2004, to comment on the powers of the Prosecutor of the International Criminal Court pursuant to Article 53 of the Rome Statute of the International Criminal Court. This letter provides below a brief summary of the organization's views. For convenience, we divide our remarks into two categories: first, with respect to the situations where suspensions of investigations are authorized under the Rome Statute and, second, the scope of the concept of "interests of justice" under Article 53 and the related matters outlined in the Office of the Prosecutor memorandum distributed in April this year.

I. The lack of power of the Office of the Prosecutor under the Rome Statute to suspend investigations for political reasons

Amnesty International understands from a number of press reports, which may not be entirely accurate, that you have concluded that you have both the power and the duty to suspend investigations pursuant to Article 53 in any situation where you determine that the investigation might interfere with political negotiations between warring factions to end an armed conflict. According to these press reports, you have also stated that such suspensions would not lead to impunity, but it is not clear whether that meant that the Prosecutor would defer to a national investigation or that the Prosecutor would at some point resume the investigation, either after the settlement negotiations were successful or if they failed, and what criteria would be used in determining success or failure.

The organization reviewed this question after the Rome Diplomatic Conference as part of its assessment of the Rome Statute and concluded that the Prosecutor does not have this power, a political power that the drafters intended to be exercised only by a political body, the Security Council, acting pursuant to Chapter VII of the Charter of the United Nations and Article 16. The criteria for determining the interests of justice under Article 53 indicate that the circumstances in which the Prosecutor was to decide not to investigate or prosecute were narrow and similar to those where police exercised their discretion not to investigate and national prosecutors exercised their discretion not to prosecute. Bearing in mind the maxim, "Justice delayed is justice denied", we also concluded that, even if the Prosecutor had the same power under the Rome Statute as the Security Council to suspend investigations for political reasons, he or she should not exercise it as it would demoralize and endanger victims and witnesses; seriously undermine any resumed investigation and the morale of investigators and prosecutors in the Office of the Prosecutor and staff in other organs of the Court;

damage the credibility of the Court; be inconsistent with the object and purposes of the Rome Statute and the spirit of the United Nations Guidelines on the Role of Prosecutors, other international standards concerning prosecutorial discretion and the law and practice concerning prosecutorial discretion by national prosecutors and investigating judges; weaken the Court's ability to be an effective deterrent and a catalyst for states to fulfil their complementarity obligations in other situations to investigate and prosecute the worst possible crimes in the world; and open the Court to permanent blackmail by warring factions implicated in crimes under international law.

There are only three provisions in the Rome Statute authorizing suspensions of investigations: Articles 16, 18 and 19. This approach demonstrates that the drafters did not intend that investigations could be suspended in other circumstances.

Political decision to suspend an investigation to influence political negotiations to end armed conflicts a matter solely for the Security Council. The drafting history and structure of the Rome Statute make it clear that the political decision whether to suspend an investigation on the supposition that it could impede international peace and security is one solely for the Security Council, a political body entirely outside the Court, under Article 16, not for the Court, which was designed to be an independent and impartial judicial institution acting to ensure that the most serious crimes of concern to the international community would not go unpunished and to put an end to impunity. Indeed, like the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, the Prosecutor of the Court is "an organ of international criminal justice", in the words of the Trial Chamber in *Prosecutor v. Kupreškić*, Decision on Communication between the Parties and their Witnesses, Case No. IT-95-16-PT, 21 September 1998, para. ii. Article 16 provides:

> "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

Amnesty International strongly opposed inclusion of this provision in the Rome Statute, both because it subjected the Court to impermissible political pressure, overriding the Court's independence, and because it was based on a false premise that international justice was incompatible with political negotiations to end armed conflicts. Indeed, Article 16 is a crude political compromise based on this flawed assumption, which is at odds with the recognition in the Preamble by states parties that genocide, crimes against humanity and war crimes "threaten the peace, security and well-being of the world". The organization's fears have been confirmed by the political decisions by the Security Council when it sought – in a manner contrary to the Charter of the United Nations and other international law - to invoke Article 16 in Resolutions 1422, 1487 and 1497 and by the attempt in Resolution 1593 to give nationals of states not a party to the Rome Statute impunity. Nevertheless, Article 16 is the only provision in the Rome Statute authorizing suspensions of investigations or prosecutions for political reasons. The power to request suspension of investigations or prosecutions under Article 16 for political reasons is not shared under the Rome Statute by the Security Council with the Prosecutor or any other organ of the Court.

Other suspension provisions limited to admissibility challenges. The only other provisions in the Rome Statute authorizing the Prosecutor to suspend an investigation are found in Articles 18 and 19, which govern admissibility challenges. The Prosecutor has no discretion under either provision in determining whether to suspend the investigation, although he or she can seek judicial review before the Chambers. Article 18 (2) requires the Prosecutor to defer an investigation when he or she receives a notice by a state that it is investigating or has investigated its nationals or others within its jurisdiction with respect to the crimes being investigated by the Prosecutor, unless the Pre-Trial Chamber authorizes the investigation. Article 19 (7) requires the Prosecutor to suspend an investigation when a state with jurisdiction over a case or a state from which acceptance of

jurisdiction is required under Article 12 has made an admissibility challenge, pending a determination by the Court.

Article 53 not a basis for a suspension of an investigation or prosecution. Article 53 provides no basis for a suspension of an investigation or a prosecution. It governs decisions whether to "initiate an investigation" or, after an investigation, whether "there is not a sufficient basis for a prosecution". It is not designed to permit the Prosecutor to turn on and off criminal investigations or prosecutions to influence the pace or content of political negotiations to end armed conflicts. The scope of the exercise of prosecutorial discretion under this article is discussed below in the second part of this letter.

Safeguards inserted by drafters to mitigate risks to investigations of suspensions. The drafters of the Rome Statute were deeply concerned about the risks posed by suspensions of investigations or prosecutions to their effectiveness and included provisions that can limit the damage to an investigation caused by a suspension. For example, Article 18 (6) permits the Pre-Trial Chamber to authorize the Prosecutor, when he or she has deferred an investigation under Article 18, to pursue necessary investigative steps for the purpose of preserving evidence and Article 19 (8) provides that, pending a ruling by the Court on a challenge to admissibility pursuant to Article 19, the Pre-Trial Chamber or, in certain circumstances, the Trial Chamber, may authorize to the Prosecutor to take a range of investigative steps to protect the integrity of the investigation. The drafters also left open the possibility, if the Security Council lawfully invoked Article 16 to suspend an investigation, for the Prosecutor pursuant to Article 54 (3) (f) to apply to the Pre-Trial Chamber to take necessary steps to preserve evidence during the suspension. Similarly, the Pre-Trial Chamber may, on its own initiative, pursuant to Article 56 (3), mitigate the damage to an investigation caused by a suspension by taking measures "to preserve evidence that it deems essential for the defence at trial". Article 94 (2) provides that if a state decides to postpone execution of a request pursuant to Article 94 (1) in respect of an ongoing national investigation or prosecution, "the Prosecutor may, however, seek measures to preserve evidence pursuant to article 93, paragraph (1) [listing a wide variety of types of international cooperation]".

The risks of suspensions to victims, witnesses and the integrity of investigations. The concerns behind these safeguards in the Rome Statute are real. Suspension of an investigation on political grounds would demoralize victims and witnesses, particularly those that risked their safety and, indeed, their lives in cooperating with the Prosecutor's investigators. It would increase the risk to victims and witnesses who had cooperated and raise the cost of pre-trial support and protection as suspensions could last years or even decades. Victims and witnesses would have no way of knowing when, if ever, the investigation would resume as it would depend upon the very persons who were responsible for the crimes committed against them to reach an agreement. The suspension would create a sense of helplessness as the one court of last resort when no state was able or willing to investigate the most horrendous crimes informed them that it had suspended indefinitely the investigation that had previously given them hope of justice, truth and full reparations. Victims and witnesses, who often are particularly vulnerable, would be subject to intimidation by those responsible for such crimes, urging them to put pressure on the Prosecutor to delay indefinitely a resumption of the investigation, thus denying victims of their right to justice, truth and full reparations. Material evidence, such as bodies, weapons and documents would deteriorate over time. The announcement of the suspension would increase the amount of time available for those responsible to destroy such material evidence and to threaten, harm or even kill victims and witnesses. Moreover, even public knowledge that the Prosecutor had adopted a policy permitting him or her to suspend an investigation based on the status of political settlement negotiations could undermine the willingness of victims, witnesses, governments and non-governmental organizations to co-operate with investigators, knowing that the investigation could be suspended at any time.

Moreover, the suspension – even the prospect of a possible suspension - would be deeply demoralizing to many members of the staff of the Office of the Prosecutor, making it difficult to retain highly skilled, experienced and motivated investigators, prosecutors and other staff as they would never know whether or when their work would end or resume. A gap of years or even decades would mean that many of those who did the essential groundwork in developing the investigation, building up the trust and cooperation of victims and witnesses, would have left and might well be unwilling to return if the investigation resumed after the failure of negotiations, fearing that the investigation could be suspended again at any time if political negotiations were to begin again. Indeed, any decision to resume an investigation might not be taken until the Prosecutor and Deputy Prosecutors involved in the decision to suspend an investigation had left office. The suspension would have a similar effect on many members of the staff of the Registry, particularly in the Victims and Witnesses Unit and the Victims' Participation and Reparations Unit.

Inconsistency of suspensions for political reasons with prosecutorial duties. A suspension by the Prosecutor of an investigation on the political ground that it might facilitate negotiations to end an armed conflict would be inconsistent with the purpose of the Court, the spirit of the United Nations Guidelines on the Role of Prosecutors and other international standards concerning prosecutorial discretion and the law and practice concerning prosecutorial discretion by national prosecutors and investigating judges.

In contrast to the political role of the Security Council under the Charter of the United Nations, which is responsible for taking measures to address threats to and breaches of international peace and security, the Court was established, as the Preamble makes clear, as a judicial institution to ensure that the most serious crimes of concern to the international community would not go unpunished and to put an end to impunity. Although the Security Council has taken a number of important steps in the past decade to bring to justice persons responsible for genocide, crimes against humanity and war crimes, many of these steps have been seriously compromised on political grounds, including the attempt in Resolution 1593 to prevent the Court and national prosecutors from investigating these crimes when committed in Darfur by nationals of states not parties to the Rome Statute when serving in peace-keeping operations, similarly motivated resolutions (Resolutions 1422, 1487 and 1497) and the interference with prosecutorial decisions as part of the completion strategy of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

Article 43 (1) of the Rome Statute states that the Office of the Prosecutor "shall act independently" and be responsible "for conducting investigations and prosecutions before the Court" and that "[a] member of the Office shall not seek or act on instructions from any external source". Moreover, Article 43 (5) provides that "[n]either the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or affect confidence in his or her independence". Article 45 requires the Prosecutor and Deputy Prosecutors, before taking up their duties under the Rome Statute, "to make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously".

It is axiomatic that justice must not only be done, but be seen to be done. However, there is a serious risk that the decision to suspend an investigation could affect confidence of the general public with respect to the independence of the Prosecutor and Deputy Prosecutors from external diplomatic or political pressure. Although a decision to suspend an investigation pending the outcome of political negotiations to achieve a settlement of an armed conflict would not directly subject any member of the Office of the Prosecutor to "instructions from any external source", there is a serious risk that such a decision might create the appearance that, in effect, the decision of the Office of the Prosecutor whether to resume an investigation would depend entirely on the conduct of persons external to the Court. The Office of the Prosecutor would have to make difficult and sensitive determinations more appropriate for diplomats and politicians concerning the good faith or lack of it of the parties to the political negotiations. It could also create the appearance in the views of certain

members of the public – of course, unjustified - that the Prosecutor and Deputy Prosecutors were themselves involved in diplomatic and political negotiations with the parties to an armed conflict in a way that might interfere with their independence. Indeed, the Prosecutor and Deputy Prosecutors involved in the decision to suspend an investigation could be placed under intense political pressure by states associated with the parties to the conflict not to resume a suspended criminal investigation. Even more worrying, a decision whether to resume a suspended criminal investigation could easily become an issue during elections of a Prosecutor or a Deputy Prosecutor.

International standards concerning prosecutorial duties. Suspension of an investigation for political reasons would be inconsistent with the spirit of international standards governing prosecutorial duties and discretion, which are designed to exclude, minimize or mitigate political pressure on the exercise of such discretion, including the 1990 United Nations Guidelines on the Role of Prosecutors (UN Guidelines), the Council of Europe Recommendation REC (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, adopted 6 October 2000 (European Standards), and the International Association of Prosecutors Standards of professional responsibility and statement of the essential duties and rights of prosecutors, adopted 23 April 1999 (IAP standards). These standards make clear that prosecutors, where they have this role, have a duty to investigate serious human rights violations and, where grounds exist for a prosecution, a duty to prosecute such violations and to respect the rights of victims to justice. In carrying out these duties, prosecutors must take into account the personal interests of victims, which would necessarily include such considerations as the need to provide information about the conduct of the proceedings, to assist in participation in proceedings, to secure effective protection and obtain necessary support when participating in the proceedings, but there is not the slightest suggestion that prosecutors should decline to investigate grave crimes or to prosecute them because some victims personally opposed investigation or prosecution. Similarly, given the priority stated in these standards to the duty to investigate and prosecute serious human rights violations and other serious crimes, it is doubtful that the recommendation that prosecutors consider alternatives to prosecution – an exceptional approach, in any event - extends to such crimes.

- UN Guidelines. The UN Guidelines require prosecutors to "protect human dignity and uphold human rights" (Guideline 12); to "give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences" (Guideline 15); to "protect the public interest, act with objectivity, [and] take proper account of the position of the suspect and the victim" (Guideline 13 (b); and "[c]onsider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victim of Crime and Abuse of Power" (Guideline 13 (d)). These principles, which emphasize the duty of prosecutors to investigate (where they have that power) and prosecute those responsible for human rights violations, to take into account the views and concerns of victims when their personal interests are affected and to ensure that victims are informed of their rights, that the law governing discretionary functions (Guideline 17) and the consideration of alternatives to prosecution (Guideline 18) demonstrate suggest that the duty to investigate and prosecute human rights violations is paramount and that the discretion in individual cases not to investigate or prosecute is to be strictly construed. They do not suggest that a prosecutor can suspend an investigation or prosecution for political reasons.

- European Standards. Paragraphs 11 to 16 of the European Standards seek to insulate or minimize political pressure regarding the exercise of prosecutorial functions and paragraph 16 provides that "[p]ublic prosecutors should . . . be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognized by international law". Paragraph 24 (b) requires public prosecutors to "respect and seek to protect human rights" and paragraph 24 (c)

requires them to "seek to ensure that the criminal justice system operates as expeditiously as possible". Paragraph 33, echoing Guideline 13 of the UN Guidelines, requires public prosecutors to "take proper account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure". Paragraph 34 provides that victims "should be able to challenge decisions of public prosecutors not to prosecute"; it does not state that they have the right to challenge a decision to prosecute. Viewed as a whole, the European Standards strongly suggest that the primary duties of prosecutors include the prosecution of crimes under international law without delay.

- IAP Standards. Paragraph 1 of the IAP Standards states that prosecutors shall "always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights". These fundamental principles guide the interpretation of the rest of the IAP Standards. Paragraph 4.3 requires prosecutors when fulfilling these duties, "in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights". That paragraph also provides that "in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate". This paragraph appears to reflect national law and practice concerning the exercise of discretion by national prosecutors not to investigate and prosecute ordinary crimes. However, as discussed in Part II, a decision to suspend an investigation of a crime under international law for political reasons would be inconsistent with law and practice concerning discretion by national police to initiate an investigation and by national prosecutors to commence or discontinue a prosecution with regard to ordinary serious crimes under national law, as well as with the rights of victims to justice.

Harm to the Court's ability to deter crimes and its catalytic role regarding complementarity. Although proving the deterrent effect of criminal investigations and prosecutions is a difficult one, whether at the international or national level, it is clear that a suspension of a criminal investigation will not further the Court's object to contribute to the prevention of crimes under international law. In addition, a decision to suspend an investigation for political reasons would seriously undermine the Court's important function of acting as an effective catalyst to encourage police, prosecutors and investigating judges to fulfil their complementarity obligations in other situations to investigate and prosecute the worst possible crimes in the world. In nearly a hundred states parties and in other states where nationals of states parties are located, police, prosecutors and investigating judges today know that if they fail to fulfil their responsibilities, the Court as a court of last resort can step in. However, if a policy of suspending investigations were ever to be adopted, this innovative spur to action would be greatly weakened as it would be known that the policy of the Office of the Prosecutor would be to suspend investigations whenever warring parties entered into settlement negotiations.

Subjecting the Court to permanent blackmail by warring parties. If the Office of the Prosecutor were formally to announce a new policy to suspend investigations to facilitate political negotiations to end armed conflicts, it would open the Court to permanent blackmail by warring factions implicated in crimes under international law. Indeed, the Court would suddenly be held hostage with regard to situations now under investigation or which might soon be the subject of investigations to the outcome of prolonged and, possibly inconclusive negotiations over years or even decades to end conflicts, even though the Office of the Prosecutor has firmly resisted political pressure so far to suspend investigations in any of its current investigations. For example, political negotiations to end the 18-year conflict in northern Uganda continue to drag on with no end in sight. The African Union has recently launched a peace initiative under the leadership of Colonel Mu'ammar al-Gaddafi, the leader of Libya, with respect to the situation in Darfur. Similarly, negotiations to end the armed conflict in the Côte d'Ivoire, which has declared that it has accepted the

Court's jurisdiction, continue and the government in Colombia, one of the countries which is potentially the subject of an investigation by the Prosecutor, has indicated that it is open to resuming political negotiations with various armed groups.

Even if negotiations to end conflicts were successful, the parties could threaten to resume the armed struggle if the Office of the Prosecutor were to resume an investigation, thus leading to permanent impunity. Although there are no political negotiations now pending in the Democratic Republic of the Congo to end the continuing armed conflict with groups that have remained outside the peace process, it is possible that political groups now participating in the government of national unity could threaten to resume the armed conflict if their members were made subject to an investigation.

It would be impossible to establish neutral, non-political criteria to determine when negotiations were genuine and when they were unlikely ever to succeed. Inevitably, there would be a serious risk that the Office of the Prosecutor would become entangled in political and diplomatic discussions about the conflict and subjected to pressure to agree to amnesties and similar measures of impunity or other alternatives to prosecution for genocide, crimes against humanity and war crimes. Negotiations to end armed conflicts can take many years, even decades, as in Sri Lanka or in the negotiations between Israel and Palestinians. Even when, as in northern Uganda after 18 years of conflict, the negotiations break down, it will always be possible for one or both parties to assert that just one more chance will be sufficient to bring them to fruition.

It is difficult to see how leaders of parties to armed conflict who face possible prosecution would be encouraged to reach a settlement of the armed conflict knowing that as long as the negotiations continue, the investigation of their crimes will be suspended. Indeed, a suspension could increase calls by the parties for a permanent suspension in the form of an amnesty or alternatives to prosecution. In contrast, when international justice is taken completely off the negotiating table by an international criminal court entirely outside the political process, as in the successful Dayton peace negotiations, negotiations will focus on the central political issues between the warring parties, rather than on the individual fate of those most responsible for crimes. Indeed, indictments by international criminal courts and national courts based on universal jurisdiction of leaders of the parties, as with the indictment of Slobodan Milosević, are likely to lead to the internal and international isolation, marginalization and eventual removal from power of those indicted.

In this connection, Judge Richard Goldstone, the former Prosecutor of the International Criminal Tribunal for the former Yugoslavia, concluded that indictments for crimes under international law, far from obstructing negotiations to end armed conflicts, can actually facilitate them. He stated:

> "There was also debate over whether the tribunal would make peace negotiations difficult. Around the time of the negotiations in Dayton, Ohio, I was criticised for indicting Karadzic. As it turned out, that indictment greatly facilitated an agreement at Dayton, by excluding him from the talks. If he had been free to represent Republika Srpska, the leadership of Bosnia and Herzegovina would not have been prepared to attend the meeting - it was, after all, barely three months after the terrible massacre Srebrenica.
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> But that was happenstance. The real lesson I learned from the Karadzic indictment is that prosecutors should not take any account of political considerations in issuing their charges. Apart from being professionally inappropriate, neither the prosecutors nor their advisors have the political expertise on which to base such decisions.
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> A similar argument erupted over the Milosevic indictment which was issued during the NATO bombing of Serbia. Some critics argued that Milosevic would not compromise, and

certainly never willingly stand down from office, in the face of the indictment. Both President Martti Ahtisaari of Finland and former Prime Minister Viktor Chernomyrdin, who negotiated an end of the bombing, informed me subsequently that Milosevic never mentioned the indictment to them." ('The Tribunal's Progress', available at http://groups.yahoo.com/group/balkanhr/message/2220)

II. The limited scope of Article 53

The grounds for the Prosecutor deciding not to "initiate an investigation" because he or she has determined pursuant to Article 53 (1) that "there is no reasonable basis to proceed under this Statute" and for concluding pursuant to Article 53 (2) that "there is not a sufficient basis for a prosecution" are very narrow. They do not include political factors such as the impact on negotiations to end armed conflicts, and, so far, the Prosecutor has opened investigations in three situations, in two of which peace initiatives were underway. The permissible grounds also do not include decisions by states to replace investigations or prosecutions of genocide, crimes against humanity or war crimes by alternatives to prosecution that would result in impunity. Such alternatives to judicial determinations of guilt or innocence would amount to an amnesty or similar measure of impunity for the worst possible crimes in the world and be prohibited under international law. The drafters of the Rome Statute did not intend that the Prosecutor could decline to prosecute crimes under international law in such circumstances. National law and practice indicates that police have little or no discretion not to investigate or prosecutors to prosecute the most serious crimes, which include murder, kidnapping, rape and other crimes of sexual violence.

Amnesty International's preliminary views on the scope of Article 53. More than two years ago, Amnesty International explained at some length its preliminary views on what should be the prosecutorial policy and strategy of the yet-to-be-elected Prosecutor within the legal constraints of Article 53 and other provisions of the Rome Statute in a memorandum entitled, Suggestions concerning International Criminal Court Prosecutorial Strategy and External Relations, 28 March 2003, submitted to the Registrar, which is now posted on the website of the Court (http://icc-cpi.int). The memorandum supported the concept of a dynamic anti-impunity complementarity strategy by the Prosecutor to address any impunity gap by encouraging states to investigate and prosecute crimes under international law. There is no need to repeat all of the extensive recommendations in that memorandum here, which continue to reflect the views of the organization, but it might be helpful to recall the factors and considerations which the organization stated could be taken into account under the "interests of justice" test, a term that would require a strong showing that it would be unjust to investigate or prosecute:

> "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 *Sawoniuk, Touvier, Papon* and *Preibke* cases.
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> 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.
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> 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 either judicial determinations of guilt or innocence, the emergence of the truth or 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 in that code would apply to genocide, crimes against humanity or war crimes."

The interests of victims in the prosecution of crimes under international law. The interests of victims of genocide, crimes against humanity, war crimes and other crimes under international law, such as rape and other crimes of sexual violence, concerning the investigation and prosecution of these crimes have been clearly defined in international law and standards developed and adopted after lengthy struggles by victims, their families and organizations working one their behalf and require no additional research. In this connection, it is important to recall that the term "interests of justice" was first inserted in the August 1997 session of the Preparatory Committee in what became Article 53 at the initiative of groups working on behalf of victims, including the Women's Caucus for Gender Justice, and Like-Minded Countries which were concerned that prosecutorial decisions, according to the language of the August 1996 report of the Preparatory Committee report and compilation of proposals, *not* to investigate or prosecute crimes under the "interests of justice" ground would overlook the interests and rights of victims to justice. Those who insisted on including the term "interests of victims" were not seeking to ensure that the Prosecutor decided to prosecute only when victims did not object. Indeed, the structure of Article 53 (1) (c) confirms that this phrase was intended to ensure that victims would be a brake on prosecutorial decisions not to investigate, not a brake on investigations. It states that "[t]he Prosecutor shall . . . initiate an investigation unless he or she determines that there is no reasonable basis to proceed" and, in making that decision that there is no reasonable basis to proceed, take into account "the interests of the victims" before concluding that "nonetheless" there are "substantial reasons to believe that an investigation would not serve the interests of justice". Although Article 53 (2) (c) is not so clearly worded, the function of "interests of victims" in the decision under that provision that there is not a sufficient basis for a prosecution, necessarily must be the same, an interpretation that is consistent with the intent of the drafters, noted above.

For example, more than two decades ago, the 1984 UN Declaration on Victims of Crime and Abuse of Power, in an important first step, recognized at the national level the rights of all victims to prompt justice and reparations without distinction of any kind. It provides that victims "are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered" and that "[j]udicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible". States must avoid "unnecessary delay in the disposition of cases".

Two months ago, in two important reaffirmations of existing international law, the Commission on Human Rights recognized the same right of victims under international law anywhere in the world to prompt justice, without any conditions. Neither set of principles suggested that some victims would be entitled to second-class justice or could be denied justice entirely for political reasons**.** The Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (Van Boven/Bassiouni Principles), adopted by the Commission on Human Rights on 19 April 2005 in Resolution 2005/35, reaffirm the principle enunciated in the Declaration on Victims that the right of victims to access to justice and redress mechanisms be "fully respected". The Van Boven/Bassiouni Principles repeatedly emphasize that there is a duty to investigate and, without any qualification other than sufficiency of the evidence, to prosecute. The Preamble states that "international law contains the obligation to prosecute perpetrators of certain international crimes" and that "the duty to prosecute reinforces the international legal obligations", that states are required to ensure that "adequate, effective, prompt, and appropriate remedies" exist in their national law.

Principle 3 (b) recognizes a duty to: "Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law". Principle 4 states, without exception:

> "In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."

Justice must be provided to all on an equal basis: Principle 3 (c) states that victims must be provided "with equal and effective access to justice" and Principle 12 declares that "[a] victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law." Justice must also be "prompt" (Principle 14).

Similarly, the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Joinet Principles), endorsed by the Commission on Human Rights in Resolution 81 on 21 April 2005, repeatedly emphasizes the absolute nature of the obligation to investigate and prosecute crimes under international law. Principle 19 requires all states to "undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law" and to ensure that "those responsible for serious crimes under international law are prosecuted, tried and duly punished". Principle 24 (a) prohibits perpetrators of serious crimes under international law from benefiting from amnesties or similar measures of clemency "until such time as the State has met the obligations to which principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction – whether international, internationalized or national – outside the State in question" and Principle 24 (b) provides that "[a]mnesties and other measures of clemency shall be without effect with respect to the victims' right to reparation . . . and shall not prejudice the right to know".

The duty to investigate and prosecute crimes against women. There are numerous declarations and statements by UN bodies reaffirming the right of women who have been the victims of crimes under international law and other human rights abuses to justice; none of which suggest that there are any acceptable alternatives to prompt justice in criminal proceedings. For example, Article 4 of the 1993 UN Declaration on Violence against Women states that women are entitled, "without delay", to have states take the following steps, in addition to others:

> "(c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons; [and]
> (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms[.]"

In his report on women, peace and security submitted to the Security Council on 14 October 2004, the Secretary-General recommended that the following steps be taken: "End impunity for genocide, crimes against humanity and war crimes, including sexual and gender based violence, and ensure that international and national courts have adequate resources . . . in order to more effectively prosecute those responsible for such crimes". On 28 October 2004, the Security Council issued a presidential statement welcoming this report and, in contrast to some previous positions, declaring

without any qualification: "The Council stresses the need to end impunity for such acts [crimes of sexual violence committed during situations of armed conflict] as part of a comprehensive approach to seeking peace, justice, truth and national reconciliation".

Justice as the essential foundation for a durable peace. As Carla del Ponte, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, stated on 29 June 2001, on the arrival at the Tribunal of Slobodan Milosević, the former President of Serbia, "I firmly believe that there can be no lasting peace in a society unless the criminal justice system is allowed to take its course." Investigations and prosecutions of genocide, crimes against humanity and war crimes by the International Criminal Court do not threaten international peace and security; it is the failure of national and international justice systems to do so promptly, thoroughly, independently and impartially that does so. Indeed, the failure of criminal justice systems to investigate and prosecute such crimes for years and even decades in the Central African Republic, Côte d'Ivoire, Democratic Republic of the Congo, Sudan and Uganda, as well as in Afghanistan, Burundi, Colombia, the former Yugoslavia and Rwanda, that has fuelled both the conflicts and the crimes under international law committed in those countries.

Although security concerns may make it temporarily difficult or impossible to use particular investigative techniques, such as visits to a particular geographic location where an armed conflict is taking place, that does not mean that investigations or prosecutions should cease during the hostilities. Indeed, the International Criminal Tribunal for the former Yugoslavia continued to carry out investigations effectively and to obtain indictments throughout the periods of armed conflict when access to particular countries or regions was difficult or even impossible for investigators. It is in this context that the remarks of the Secretary-General at the inauguration of the judges of the International Criminal Court on 11 March 2003 must be understood:

> "There are times when we are told that justice must be set aside in the interests of peace. It is true that justice can only be dispensed when the peaceful order of society is secure. But we have come to understand that the reverse is also true: without justice, there can be no lasting peace."

The prohibition of amnesties and similar measures of impunity for crimes under international law. Amnesties and similar measures of impunity for genocide, crimes against humanity, war crimes and other crimes under international law are prohibited under international law, as demonstrated in Amnesty International's studies on this subject, including: *Sierra Leone: Special Court for Sierra Leone: Denial of the right to appeal and prohibition of amnesties for crimes under international law*, AI Index: AFR 51/012/2003, 1 November 2003. As the UN Secretary-General stated in the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, para. 22 (footnote referring to Article 6 (5) of Protocol II omitted),

> "[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."

The Rome Statute does not authorize the Prosecutor to give any effect to national amnesties and similar measures of impunity for genocide, crimes against humanity or war crimes. Indeed, an amnesty or similar measure of impunity would clearly demonstrate that the state that had issued it would be, within the meaning of Article 17, unable and unwilling to investigate or prosecute genuinely such crimes. Despite intensive lobbying by the United States of America, including the circulation of a non-paper in the Preparatory Committee urging that the Prosecutor be permitted to

take into account amnesties for genocide, crimes against humanity and war crimes granted by democratically elected governments, the drafters of the Rome Statute declined to incorporate this provision after other governments and non-governmental organizations pointed out that such measures of impunity for these crimes were contrary to international law. International courts have also concluded that amnesties for such crimes are contrary to international law. For example, the Trial Chamber of the International Tribunal for the former Yugoslavia declared in *Prosecutor v. Furundzija*, Judgment, 10 December 1998 that amnesties for torture were prohibited under international law (para.155). Similarly, the Inter-American Court of Human Rights in its judgment in *Barrios Altos vs. Peru*, Judgment of 14 March 2001 (para.41), concluded that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations". The Appeals Chamber of the Special Court for Sierra Leone recently confirmed in *Prosecutor v. Kallon*, Case Nos. SC5L-04-15-PT-060-I and SC05-04-15-PT-060-II, Decision on Challenge to Jurisdiction (Lomé Amnesty Decision), 13 March 2004 that national amnesties for such crimes could not bind international courts. National courts, such as the Supreme Court of Argentina in the *Poblete* case on 14 June 2005, have also concluded that amnesties for such crimes violate international law. Given that the very purpose of the Rome Statute is "to put an end to impunity", it would be contrary to the Rome Statute for the Court to accord any effect whatsoever to a national measure of impunity such as an amnesty for genocide, crimes against humanity or war crimes.

Absence of alternatives to prosecution of crimes under international law. It follows from the prohibition in international law of amnesties and similar measures of impunity for genocide, crimes against humanity, war crimes and other crimes under international law, that there is no alternative to investigation and, if there is sufficient admissible evidence, to prosecution. These are crimes against the international community and have no statutes of limitations. As such, the international community will continue to have the responsibility to fill any impunity gap, either by using criminal justice systems in territorial states, in other states based on extraterritorial jurisdiction or in international or internationalized courts, as long as the persons responsible are alive. A continuing lack of political will in certain states to expend sufficient resources to ensure that these fora investigate and prosecute these crimes does not mean that the international community can ever escape this responsibility. Of course, no one of these national or international courts will be able to investigate and prosecute all of the crimes on its own and the Preamble of the Rome Statute recognizes that it will be essential to enhance international cooperation to do so. Each institution will have to make choices of which cases it will make a priority and each institution should call upon the international community to find the resources to investigate and prosecute the crimes that it cannot do itself. However, none of these judicial institutions should yield to a counsel of despair and call upon the international community to cut costs at the expense of victims by skipping prosecutions in favour of alternatives to judicial determinations of guilt or innocence that result in impunity.

Various techniques can be used to supplement, rather than replace, criminal investigations and prosecutions, provided that they are fully consistent with the right of suspects and accused to fair trial and victims to justice, truth and full reparations. For example, an effective truth commission can sometimes go a long way to satisfying a state's obligation to respect the right to truth, but it can never be a substitute for a judicial determination of guilt or innocence.

Little or no discretion for national police to decline to investigate or prosecutors to prosecute serious crimes. National law and practice does not support a policy of deciding not to investigate or prosecute the most serious imaginable crimes, which include conduct that would amount under national penal codes to the ordinary serious crimes of murder, kidnapping, torture and rape and other crimes of sexual violence. The Prosecutor of the International Criminal Court operates under the "expediency" or "opportunity" principle. This principle is typical of common law jurisdictions, such as England and Wales, Canada and Australia, but it also applies to differing

extents in some civil jurisdictions, such as France, Netherlands, Germany, Belgium, Austria, Finland, Brazil and Chile. According to this principle, where "sufficient evidence" exists, but factors of "public interest" outweigh the interests of prosecution, the prosecutor has discretion to discontinue proceedings. This contrasts to the 'legality principle', under which prosecution is compulsory whenever there is sufficient evidence and considerations of public interest are irrelevant.

An in-depth review of national prosecution guidelines in countries around the world conducted by Amnesty International since it submitted its preliminary views to the Registrar two years ago confirms that the criteria applicable under the "public interest test" are generally limited to narrow considerations bearing on the *individual* offence or offender. The seriousness of the offence is usually emphasised as the principal factor, overriding all other considerations, including: the age and the mental and physical ill health of the offender; the past history of the offender; the impact of prosecution on the mental and physical health of the victim; and delay. Factors affecting seriousness include the degree of responsibility of the offender; *mens rea*; the degree of harm caused; the position of the defendant in relation to the victim; and the type of victim. In relation to offences which may be less serious in isolation, considerations of prevalence and the need for deterrence militate in favour of prosecution. National guidelines stress that even when the mental or physical health of the offender is significantly impaired, or the offender is very elderly or a juvenile, the seriousness of the offence can outweigh any public interest in diverting the individual from the criminal justice system.

A major factor, and indeed a reason for the existence of discretion, in all systems is the finite nature of resources. Like the other factors noted above, this factor requires that prosecution of the most serious cases receive priority. The interests of victims must be taken into account, but guidelines emphasise that the prosecutor acts in the interests of the public generally (which necessarily include the interests of victims), and not on behalf of individual victims. Indeed, one of the major advances in criminal law was the shift from seeing crimes of violence as crimes against the public, to be prosecuted by the state, rather than private matters to be resolved by the families of the criminal and the victim, who could easily be intimidated into settlement. Other considerations include: national security, public confidence in the criminal justice system and alternatives to prosecution. In all systems examined, except the Netherlands, alternatives to prosecution should be considered only where the offence is not of a serious nature.

Given that the International Criminal Court will only ever be considering the prosecution of the worst crimes known to humanity, most of these criteria are inapplicable or militate in favour of prosecution. In this context, it can only be in the most extreme circumstances that, *in individual cases*, factors such as the severe ill-health of the accused, may be able to justify a decision that it would be in the 'interests of justice' not to prosecute persons suspected of genocide, crimes against humanity or war crimes.

Rejection of political considerations in exercise of discretion by other international prosecutors. Other international prosecutors have repeatedly and firmly declared that they refused to take into account political considerations, such as the impact on negotiations to end armed conflicts, when deciding whether to investigate or prosecute. For example, Judge Richard Goldstone, the first Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, stated in his article, *Le Tribunal des tragedies*, in *Politique Internationale* in 1995 : *"C'est pourquoi nous avons à juger les responsables quels qu'ils soient et quelles que soient les conséquences politiques qui pourraient s'ensuivre. Ces éventuelles consequences ne sont pas notre souci."* His successor, Louise Arbour, made clear that it is wholly inappropriate for an international prosecutor to take into account such political considerations when determining whether and when to investigate or prosecute genocide, crimes against humanity and war crimes:

> "I don't think it's appropriate for politicians – before or after the fact – to reflect on whether they think the indictment came at a good or bad time; whether it's helpful to the peace process.

This is a legal, judicial process. The appropriate course of action is for politicians to take this indictment into account. It was not for me to take their efforts into account in deciding whether to bring an indictment, and at what particular time." (Institute for War and Peace Reporting, Tribunal Update, No. 128, 5 June 1999)

For all of the above reasons, Amnesty International hopes that the Office of the Prosecutor will neither seek to suspend an investigation or prosecution nor decide against initiating an investigation or prosecution on the ground that either step is supposedly necessary to ensure successful political negotiations to end armed conflict and that the Pre-Trial Chamber will never approve such a step.

Yours sincerely,

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