

NON C'È PACE SENZA GIUSTIZIA NO PEACE WITHOUT JUSTICE

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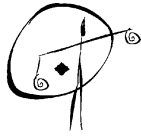


No Peace Without Justice and Human Rights Watch Joint Submission on the Draft OTP Policy on Situation Completion

21 April 2021

Introduction

1. No Peace Without Justice (NPWJ) and Human Rights Watch welcome the opportunity to provide written comments to the International Criminal Court (ICC) Office of the Prosecutor (OTP) on its draft Policy on Situation Completion. Over the years, we have participated in consultations relating to different OTP policies and continue to believe such consultations are important not just in terms of the content of submissions the OTP may receive, but also in terms of a concrete expression of the OTP's commitment to transparency and cooperation, including with civil society.
2. NPWJ is an international non-profit organisation founded by Emma Bonino and born of a 1993 campaign of the Transnational Radical Party that works for the protection and promotion of human rights, democracy, the rule of law and international justice. NPWJ's International Criminal Justice work focuses both on international and national efforts to restore the rule of law and provide accountability and redress for the victims of crimes under international law, be they through the International Criminal Court, or through ad hoc Courts or Tribunals, national prosecutions or other accountability processes. Human Rights Watch investigates and reports on abuses happening in all corners of the world. Our International Justice Program works to shape investigations, bring about arrests and advocate for effective justice mechanisms for serious international crimes, as an essential element of building respect for human rights. NPWJ and Human Rights Watch have



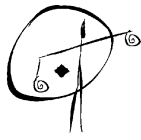
been working on the ICC since its inception; our organisations participated in the Rome Conference and all subsequent Preparatory Committees and Assembly of States Parties sessions and works with stakeholders around the world, including with the ICC itself, to promote the principles of universality, effectiveness, efficiency, independence and impact of the ICC.

3. This submission is divided into three parts. The first part concerns elements of the draft that our organisations particularly welcome and support (“Positive elements”). This part highlights those elements and concepts that our organisations believe should be retained and for which reasons. The second part concerns elements of the draft that we believe could usefully be clarified, amended or expanded (“Suggestions on specific elements”). This part focuses both on language and concepts, including some aspects that may seem less significant, but which could cause confusion. The third part concerns elements that our organisations believe should be included in the draft policy that are currently absent (“Suggestions for additions”). This part contains specific recommendations and the reasoning behind the suggestions.

1. Positive elements

4. NPWJ and Human Rights Watch strongly welcome the OTP’s efforts towards the adoption of a policy and initial strategy on situation completion and commends the Office, and the Prosecutor, for demonstrating leadership on this issue. We have been advocating for the adoption of such a policy for several years,¹ believing it is critical to enable the Court to be more strategic in defining and therefore achieving its mandate to

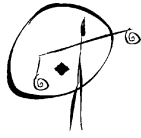
¹ This has included raising the issue in various fora, for example at the ICC-NGO Roundtables, and undertaking advocacy with States Parties, such as the side event convened by NPWJ at ASP11 on “Developing a Comprehensive Completion Strategy for the ICC”, the report from which is available at http://www.npwj.org/sites/default/files/documents/NPWJ_CompletionStrategyEventReport17NOV12.pdf. See also a chapter co-authored by Elizabeth Evenson (Human Rights Watch) and Alison Smith (NPWJ) on “Completion, Legacy, and Complementarity at the ICC” in Stahn C, ed, *The Law and Practice of the International Criminal Court*, Oxford University Press 2015, available from http://www.npwj.org/sites/default/files/ressources/ASmith_OxfordUniversityPress2015.pdf.



provide meaningful justice in each of its situation countries, to consolidate its legacy in those countries and to communicate clearly with its stakeholders in order to inform expectations, minimise disappointment and disillusionment, and maximise cooperation and support. The Independent Expert Review recommended the development of completion strategies from the outset of an investigation, as a component of a “wider and more comprehensive strategy for the ‘life-cycle’ of the OTP’s involvement in a given situation.”²

5. As the draft Policy notes (para 2), we agree there is a need for a Court-wide general protocol on situation completion, as well as Court-wide situation-specific strategies (on which we comment later). We likewise hope this draft Policy will help spur and shape those efforts, which we hope will also be the subject of broad consultations with stakeholders, including civil society broadly and particularly civil society in preliminary examination and situation countries, and welcome the Office’s stated commitment to participate in those discussions. We believe the Office’s participation in the development and implementation of Court-wide approaches is critical, both because of the one Court principle and the need to set a coherent vision for the ICC’s impact across its activities, but also because while different organs of the Court have different roles in relation to completion, implementation of any Court-wide strategy will of necessity be driven by OTP benchmarks and timelines.
6. We welcome the openness of the Office, as described in paragraphs 7, 46 and 47, to learn from the experiences from the ad hoc tribunals and incorporate them as appropriate, an approach that is sometimes lost due to the perceived uniqueness of the ICC. This carries the implicit recognition that from the perspective of affected communities and other actors in situation countries, the ICC is in many ways like its predecessors in nature, in that it is a justice mechanism that is intended to deal with a particular time in that country’s history, rather than a permanent institution. While the

² Independent Expert Review of the International Criminal Court and the Rome Statute System (IER), “Final Report,” 30 September 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf, R. 248.



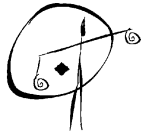
permanence of the ICC as an institution should offer a number of benefits to ensuring its completion strategies are insulated from inappropriate pressure to complete activities prematurely, this is nonetheless a particularly important perspective to keep in mind for the OTP's policy on completion, a Court-wide overall strategy and situation-specific strategies.

7. We note the reiteration of the notion that impartiality does not mean equidistance, which NPWJ had highlighted as an important approach that should be retained in our submission on the then-draft OTP Policy on Case Selection and Prioritisation.³ We therefore appreciate the statement in paragraph 14 that “the Office will not seek to create the appearance of parity within a situation between rival parties by investigating or prosecuting cases that would not otherwise meet the applicable criteria”. We believe this is an important demonstration that the law exists and must be applied absent political motivations, which we also believe is an important part of the OTP's legacy in its situation countries (see section 3 of this submission for a discussion on legacy). At the same time, this section would benefit from a stronger reiteration of the standard outlined in the case selection and prioritisation policy, that is that “[t]he overall aim of the Office is to represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished.”⁴ Meeting this aim may require the pursuit of multiple lines of inquiry and, when appropriate, bringing several cases against multiple actors in a given situation.⁵

³ NPWJ *Submission on the Draft OTP Policy Paper on Case Selection and Prioritisation* of 1 April 2016, para 4, available from <http://www.npwj.org/sites/default/files/ressources/NPWJSubmissionDraftPolicyCaseSelectionPrioritisation01A-PR16.pdf>.

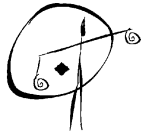
⁴ OTP, “Policy on case selection and prioritisation,” 15 September 2016, https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf, para. 8.

⁵ See *Human Rights Watch Comments on the ICC Office of the Prosecutor Draft Policy Paper on Case Selection and Prioritisation*, 3 May, 2016, <https://www.hrw.org/news/2016/05/03/human-rights-watch-comments-icc-office-prosecutor-draft-policy-paper-case-selection>.



2. Suggestions on specific elements

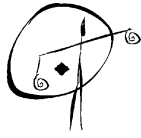
8. NPWJ and Human Rights Watch welcome the various references in the draft Policy to the need to communicate effectively with stakeholders (e.g. para 6) and as part of an overall tailored outreach and public information strategy (e.g. para 36). Transparency, engagement and clear communications are essential for the Court to discharge its mandate, including for the OTP to carry out its investigative and other work effectively and efficiently. We also believe it enhances the credibility of the OTP and the Court as a whole and enables it to protect more effectively what needs to remain confidential. We recommend a review of this draft Policy to see where similar references might usefully be incorporated, for example in paragraph 5 on benchmarks for the investigation phase, paragraph 27 on admissibility, paragraph 39 on encouraging national investigations and prosecutions, paragraph 75 on monitoring obligations, and elsewhere. In particular, we encourage the draft Policy to include an explicit reference to engaging the view not only of victims (which we welcome) but also of local communities to inform its assessment of relevant matters during the investigation (para 13). This is important both to promote understanding, and hopefully cooperation, but also to enable the Office to frame subsequent communications in a way that is already mindful of local expectations and hopes, so as to minimise unnecessary disillusionment and disappointment especially as the investigation and prosecution phases are concluded.
9. We welcome the section on the Office's obligation of independence (paras 11-13) and fully support the independence of the OTP, which we believe is critical for it to carry out its work effectively. We agree with the assessment that it is the Office that must make decisions relating to the opening, tactical conduct and conclusion of specific investigations, since only the Office is in possession of all the facts relating to those investigations. While completion of the work prior to the opening of the Prosecution Programme can and should be linked to benchmarks, as they are in this draft Policy and in other OTP Policies, it is important to highlight that they should not be linked to specific timetables. To do so would put the independence of the OTP at risk as it would require the Office to work to indicators that are external to the circumstances of each



individual investigation, some of which may be clearer and concluded more quickly and others of which may be more complex and require longer time periods to complete. We therefore suggest for the Office's consideration the inclusion in this draft Policy that the independence of the OTP requires that it be held to certain identified benchmarks, which may evolve over time, rather than to specific timelines.

10. We welcome the reference in paragraph 39 to the encouragement of national authorities and partners in the international community to investigate and prosecute outstanding cases that will not be included in the Prosecutorial Programme. The paragraph notes that the Office will evaluate whether material in its possession could assist in any national proceedings and paragraph 55 refers to consulting national authorities or other competent investigative bodies to promote genuine domestic proceedings. We believe this is an important element of the OTP's potential legacy in its situation countries and welcome reflection on how this may be developed further in this draft Policy and in situation-specific strategies, including any future Court-wide strategies. For example, the draft policy indicates that public notification of completion of the investigation phase may help to advance efforts to support domestic capacity (para. 6). Yet, this may be too late. One of the lessons learned from the ad hoc tribunals, such as for the ICTY where closure resulted in insufficient time to invest in capacity to undertake such domestic proceedings,⁶ is that there is a need for forward-planning to ensure that national jurisdictions are ready to investigate and prosecute cases that will not form part of the ICC's docket. While NPWJ and Human Rights Watch recognise there is ongoing debate on positive complementarity and the role of the Office in respect of capacity-building, the OTP is nonetheless well-placed through its interactions with national justice system actors⁷ to identify potential capacity gaps that may hinder the investigation and prosecution of cases they will not take further. The draft Policy could usefully address this issue, if only to flag the need for those potential gaps to be filled for other actors

⁶ See K Heller, 'Completion' in L Reydamas et al. (eds), *International Prosecutors* (Oxford: Oxford University Press 2012) pp 900-6.



who may be able to provide capacity-building support from an early stage, as a concrete tool to enable full implementation of the draft Policy and of any future situation specific strategies. The Independent Expert Review recommends a role for the Assembly of States Parties in this regard as an element of completion strategies.⁸

11. We welcome the inclusion of archiving as a topic within the draft Policy, which has been an important and complex issue for the ICTY, ICTR and SCSL. While less complicated for the ICC, which as a permanent institution already houses its own archives and is therefore well placed to carry out the task of preservation of evidence and sharing that with national authorities as appropriate (para 86), there are nonetheless some lessons to be learnt. Chief among those are questions of the ownership of the archives and their potential impact in terms of the legacy of the Court in each situation country. Ninety percent of the ICTY's public archives are co-held with the Humanitarian Law Centre, including documents presented as evidence at the ICTY, which increases accessibility to those records for people in the region.⁹ Likewise, a complete copy of the SCSL archives is held at the Sierra Leone Peace Museum, including physical and digital copies of documents, digitised video tapes of the trials, outreach activities and other events, audio tapes and related records.¹⁰ We encourage the Office to consider a similar approach in respect of its archives, where they are not confidential, to maximise their accessibility and to avoid potential charges of the ICC "stealing" memories and property from the local populations.¹¹ Particular consideration should be given to situations concerning multiple countries.

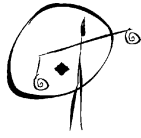
⁷ This includes in particular law enforcement officers, investigators, State prosecutors, lawyers, investigating magistrates and others, but also includes the broader range of justice system actors including prison authorities, witness protection agencies and others.

⁸ IER, "Final Report, R.247.

⁹ See Fond za Humanitarno Pravo ('Humanitarian Law Centre'), http://www.hlc-rdc.org/?page_id=17468&lang=de.

¹⁰ See <http://rscsl.org/archives.html>.

¹¹ See generally P Manning, 'Governing Memory: Justice, Reconciliation and Outreach at the Extraordinary Chambers in the Courts of Cambodia' (2012) 5 *Memory Studies* 165, 166.

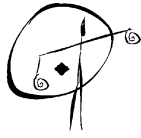


3. Suggestions for additions

12. As mentioned above, we note that the draft Policy explicitly states it does not address legacy initiatives (para 2), apparently suggesting these are issues for other organs of the Court. We believe this misses a valuable opportunity to identify what legacy the Office of the Prosecutor wishes to leave in its situation countries and, in so doing, identify clearly how the Office intends to get there. While both the OTP’s legacy and the broader Court-wide legacy will vary according to the situation, thus necessitating detailed treatment in situation specific strategies, it would nonetheless be important for this draft Policy to provide guidance as to what types of legacy issues are relevant to the OTP itself as distinct from other organs so they might be dealt with appropriately in specific strategies. In this respect, “legacy” does not refer to a set of activities *per se*; rather, it refers to a vision of what difference the OTP would like to achieve in situation countries from when it starts a preliminary examination to when its work is completed, and, potentially, differences in its own practices and policies delivered by engagement in the situation. It is this vision, developed in close consultation with relevant stakeholders in the situation country, that should drive the situation specific completion strategies for the OTP and for the Court as a whole. They should include details on archives, capacity-building, exchange of experiences between the national and international levels, strengthening the rule of law and other areas specific to each situation.

13. We note that the draft Policy refers to “Situation Strategies”, which are confidential, that provide a framework for “mapping out and evaluating the number and variety of cases selected for investigation” and that should guide the Prosecutor in the exercise of discretion for the Prosecutorial Programme (para 18). This is consistent with recommendations made by the Independent Expert Review, including to improve strategic decision-making when it comes to case selection.¹² Indeed, in its response to the review, the Court has acknowledged there is need for improvement and cited, to that

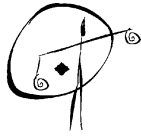
¹² IER, “Final Report,” paras. 679-683; Rs. 240-242.



end, the inclusion of reference to situation strategies in this draft policy.¹³ We believe these Situation Strategies to be a useful tool in helping the Office navigate its investigative and prosecutorial work, although further clarification as to how this relates to the improved use of the existing “Case Selection Plan” tool would be helpful. At the same time, we consider that a completion of the OTP’s work and mandate, and that of the Court as a whole, is broader than those two areas, as outlined above. The draft Policy provides a useful framework within which completion can be considered and, as mentioned, makes an important reference to the need for a Court-wide general protocol on situation completion (para 2). The draft Policy is silent, however, on situation-specific completion strategies, which should be developed for each situation country individually depending on each country’s needs, strengths and challenges and what the Court wishes to have achieved when it completes its work. Those situation-specific completion strategies should be based on the overall completion frameworks, but delve into greater detail and should also be the subject of broad consultations, especially with stakeholders in the situation country, particularly civil society and victims. We respectfully suggest that this concept be included in the draft Policy, also as a means to encourage other organs of the Court to adopt a similar approach in their consideration of completion strategies.

14. We note that unlike other Policies, this draft Policy does not refer to the Office monitoring implementation of the Policy. We encourage the OTP to include this concept within the draft Policy and to include engagement with relevant stakeholders, both in that monitoring and in a regular review of the policy after a period of years of operation, also through the type of broad consultation this draft Policy has undergone.

¹³ Overall Response of the International Criminal Court to the “Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report: Preliminary Analysis of the Recommendations and information on relevant activities undertaken by the Court,” 14 April 2021, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%202014April21.pdf, paras. 431-436.



Conclusion

15. NPWJ and Human Rights Watch remain committed to supporting the work of the International Criminal Court, and the Office of the Prosecutor, including through participating in consultations such as these.

16. We conclude as we began, by thanking you again for this opportunity and for your willingness to consult with civil society on these issues of mutual importance and concern.