



NON C'È PACE SENZA GIUSTIZIA NO PEACE WITHOUT JUSTICE

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NPWJ Submission on the Draft OTP Policy Paper on Case Selection and Prioritisation

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Introduction

1. No Peace Without Justice (NPWJ) welcomes the consultations undertaken by the Office of the Prosecutor (OTP) on the draft Policy Paper on Case Selection and Prioritisation and the opportunity to provide written comments. We have participated in consultations on other draft 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 program 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. The overall objective of the International Criminal Justice Program is to ensure that whatever solution is adopted, it is shaped and implemented so that it can contribute to the restoration of the rule of law, it is responsive to the needs of stakeholders and it adheres to the strictest human rights standards. NPWJ has been working on the ICC since its inception; NPWJ participated in the Rome Conference and all subsequent Preparatory Committees and Assembly of States Parties sessions and works with



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No Peace Without Justice is an international non-profit organisation born of a campaign of the Transnational Radical Party and is constituent association of the Nonviolent Radical Party Transnational and Transparty, an NGO with General (Category I) Consultative Status at the United Nations ECOSOC.

Non c'è Pace Senza Giustizia è un'organizzazione internazionale senza scopo di lucro nata nel 1994 da una campagna del Partito Radicale Transnazionale ed è associazione costituente del Partito Radicale Nonviolento Transnazionale e Transpartito, ONG con Status Consultivo Generale di prima categoria presso l'ECOSOC delle Nazioni Unite.



N O P E A C E W I T H O U T J U S T I C E

stakeholders around the world, including with the ICC itself, to promote the principles of universality, effectiveness, efficiency and impact of the ICC.

3. This submission is divided into three parts. The first part concerns elements of the draft that NPWJ particularly welcomes and supports (“Positive elements”). This part highlights those elements and concepts that NPWJ believes should be retained and for which reasons. The second part concerns elements of the draft that NPWJ believes 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 NPWJ believes 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.

Positive elements

4. NPWJ welcomes the references in the draft policy paper to impartiality not equalling equivalence of blame, especially in paragraph 16. We agree that those people who bear the greatest responsibility are most suitable for prosecution before the ICC, as we first stated to the Office during its First Public Hearing in 2003.¹ We also agree that this does not mean an equal number of accused should be chosen from each faction or group that is participating in a particular conflict. Impartiality requires that no regard be had to a potential defendant’s membership in one group or another when deciding against whom to bring charges. To do otherwise risks creating an appearance of political motivation in respect of the selection of cases and individual defendants. Clarifying this at all opportunities can help avoid or at least defend allegations of bias on the part of the Office. We therefore support the approach taken by the draft policy paper and urge that it be retained.
5. That said, NPWJ has two suggestions that may help strengthen this principle. First, it would be useful to include a reference in paragraph 16 to the need for the Office to consider the crime base as a whole in making these decisions, which is reflected only in paragraph 41. Providing

¹ See the transcript of the First Public Hearing, available from https://www.icc-cpi.int/NR/rdonlyres/CACFFD14-FB51-4880-A1E3-58977412B28E/143782/030714_otp_ph1s3_Niccolo_FigaTalamanca.pdf. This statement also contains information relating to other recommendations contained in this submission.



N O P E A C E W I T H O U T J U S T I C E

clarity on this issue can also help promote understanding regarding its underpinnings. Second, it would be useful to refer back to this principle in the section on case prioritisation, especially in paragraph 47(h), which refers to pursuing cases involving opposing parties. It would be helpful, also for the purposes of consistency, to make it clear that the application of this criterion during any prioritisation process depends on whether any particular individual meets the criteria for selection outlined earlier in the paper.

6. NPWJ welcomes the stated aim in paragraph 44 of the draft policy paper to ensure representativeness of the charges that would be brought against any particular individual. This is important to ensure victims and communities can feel and see justice being done on their behalf. While we also welcome a focus on crimes that have been under-charged, as referred to in paragraph 45, it would be useful to have more clarity on what this means in practice and, in particular, how this fits with the investigative strategy of the Office. There are challenges of perception involved with “one-charge indictments”; if charges do not represent the experience of victims and communities, this may lead to disillusionment and challenges in terms of obtaining evidence relating to other crimes. A good communications strategy can help overcome some of this, as referred to in the last section of this submission.
7. NPWJ welcomes the statement in paragraph 41 of the draft policy paper that the Office will first focus on the crime base, that is, the totality of crimes committed in any particular situation. This is very important, as it lays the basis for all the decisions the Office will need to make; in order to decide the crimes and then the perpetrators on which the Office will focus, there is a need to know what happened and to understand the full extent and nature of the crimes that were committed. Paragraph 41 could usefully contain a reference to the Office’s investigative strategy, reflecting this as an important element of ensuring the Office has sufficient information on which to implement its case selection and prioritisation plan, highlighting also that this is an approach that will require sufficient resources to enable the Office to implement it.

Suggestions on specific elements

8. References in the draft policy paper to its implementation from a process perspective could usefully be spelt out in more detail. For example, paragraph 10 on review of the Case Selection Plan should contain more information concerning how decisions will be reviewed, when, how



N O P E A C E W I T H O U T J U S T I C E

often, subject to what triggers, what principles guide this decision-making and so on. Providing clarity and as much information as possible on this kind of process question – including on the review referred to in paragraph 19 of draft policy paper – would help promote accountability and a sense among stakeholders that the OTP is in fact accountable. This would result in criticisms of the Office as being unaccountable or “rogue” harder to make and easier to defend.

9. Paragraph 25 of the draft policy paper is unclear as to what jurisdiction is based on in the event of a United Nations Security Council referral, which could cause confusion, especially among those with limited knowledge of how the system works. The paragraph could be simplified by specifying that a referral by the Security Situation allows the Court to exercise jurisdiction within that situation and in this type of referral, the Court does not have to consider whether the territory is that of a State Party or if potential defendants are nationals of a State Party. Other than this difference, situations that are referred by the Security Council remain subject to the overall legal framework of the Rome Statute including temporal and subject matter jurisdiction.
10. In its current wording, paragraph 27 of the draft policy paper seems to suggest that the determination of admissibility only considers proceedings by the State where the crimes were allegedly committed or of which the defendant is a citizen. Pursuant to article 17 of the Statute, however, admissibility needs to be determined in respect of proceedings that may be being undertaken by any State with jurisdiction, which may not be either the territorial State or the State of nationality. This could be clarified simply by saying “the Office will determine whether any State is exercising jurisdiction” instead of “the Office will determine whether the State concerned is exercising jurisdiction”.
11. It would be useful to clarify the applicability of other OTP Policies, as a whole, to this Policy on Case Selection and Prioritisation. Paragraph 31 of the draft policy paper, for example, provides information from the Policy on the Interests of Justice only concerning the interests of victims and how that would apply in decision-making guided by this Policy. Paragraph 31 could instead state that the Policy on the Interests of Justice applies as a whole, expressly saying that the interests of victims is given as only one example of how that policy would be applied. This suggestion also applies to references to other policies, whether they have already been adopted or are in the drafting stage. Otherwise, there is a risk of creating an impression that there may be selective application of the OTP’s other policies, which could cause confusion and risk



N O P E A C E W I T H O U T J U S T I C E

misinformation about selectivity of which policy the Office applies depending on what might be considered convenient at any given time.

12. When considering which crimes to prosecute, the Office may be faced with two different cases where the crimes meet the gravity threshold, but where gravity as determined by the criteria set out in the policy is higher in one case than another case. Expressly including a comparative assessment from the perspective of gravity in paragraph 36 of the draft policy paper could help determine which case to prioritise in such a situation. In addition, prosecuting the gravest crimes, comparatively speaking, can be an aid to deterrence of the worst crimes, which may usefully also go under case prioritisation and be linked with issues relating to the crime base. In addition, having different gravity thresholds for admissibility and case selection may lead to an outcome where no case is selected for prosecution, or where different criteria are applied or give weight across different situations. Clarity on this issue would be welcomed.
13. The assessment of the gravity of the crimes should be undertaken without reference to the alleged perpetrators, in keeping with the approach mentioned in paragraph 16 of the draft policy paper and as referred to in the first part of this submission. As such, the reference to the degree of participation and intent of the perpetrators in paragraph 39 of the draft policy paper appears to be misplaced. This issue is not relevant to the gravity of the crimes, but instead goes under the degree of responsibility of the perpetrators. Retaining the reference here could raise a perception of bias and the other challenges outlined earlier.
14. As noted, NPWJ believes in general that international justice institutions like the ICC should focus on alleged perpetrators bearing the greatest responsibility for the crimes as a whole. We do, however, agree that there may be cases where focusing on lower-level perpetrators can have a positive impact on communities affected by the crimes, given the impact the crimes themselves have had, both in the past and in terms of future rebuilding of society. As such, the concept of impact on affected communities could usefully be reflected in paragraph 41 of the draft policy paper, referring to a possible decision by the Office to prosecute lower-level perpetrators whose conduct has been particularly grave or notorious.
15. The section on case prioritisation appears to focus on resource and practical cooperation issues as criteria that are relevant to which cases will be prioritised, particularly in paragraph 47 of the draft policy paper, with the exception of the impact in terms of deterrence, a concept we suggest could usefully be included also during the case selection process. Other policy considerations



N O P E A C E W I T H O U T J U S T I C E

could also be included in respect of prioritisation, such as the impact on a country's political or social life; and whether potential changes to that political or social life may affect the Office's ability to discharge its mandate (such as whether an alleged perpetrator will run for political office, which may have an operational consequence if they are elected). We fully agree that the Office is not and should not be a political actor per se, but the political and social environment are factors that may have an impact on whether to bring charges at an earlier or later stage.

16. It would be useful to group the criteria outlined in paragraph 47 of the draft policy paper into specific categories, as an aid to clarity and understanding. For example, they could be grouped into policy factors (such as deterrence and political and social stage of the situation country); external factors (such as international cooperation and judicial assistance); internal factors (such as quantity and quality of evidence in the possession of the Office); and operational actors (such as resource and security issues). This order should reflect the priority given to each category, as opposed to their having no hierarchical order to one another as the policy currently states, while also acknowledging that specific weight given to each individual criterion will also be guided by the circumstances of each case, as is currently stated. Having no hierarchical order may open the Office to the criticism that it is guided mainly by operational or resource issues, which would almost certainly arise if those issues are listed first notwithstanding disclaimers to the contrary, or that the Office is making excuses for not wanting to pursue cases that may be difficult politically.

Suggestions for additions

17. Aside from mentioning the interests of victims in paragraph 31, the draft policy paper contains little to no information on the role of victims, the impact of victims' rights on decision-making and consultations with victims on case selection and prioritisation. Given that victims are at the centre of the Office being able to achieve its mandate, these issues could usefully be reflected, in particular the impact of decision-making on victims and their access to justice and redress.
18. The draft policy paper contains no information on how the Office intends to consult with civil society in general and in situation countries in particular, whether on the implementation of the policy, as appropriate, or in subsequent reviews and revisions of the policy once it is adopted. As mentioned, NPWJ both welcomes and values the practice of the Office to consult civil society



N O P E A C E W I T H O U T J U S T I C E

and others on its draft policies and during any review process. It would be useful to highlight this in the draft policy paper and provide information on the Office's commitment in this respect.

19. The draft policy paper contains no information on how the Office intends to communicate issues surrounding this policy and its implementation to victims and affected communities. Aside from the many varied reasons why it is important for the Office to undertake this kind of communication and outreach,² it is from within these groups that witnesses can be found. To promote their willingness to cooperate with the Office, it is important that they understand how the Office selects and prioritises its cases. As such, it is important that the Office has a clear strategy for how to communicate information on the policy and its implementation with victims and affected communities and that this strategy is clearly reflected within the draft policy paper.
20. NPWJ understands and for the most part agrees with the reasons why a case selection plan may need to be confidential, in particular in terms of revealing information that may damage investigations and cases. Nonetheless, the confidential nature of the Case Selection Plan lacks accountability, which opens the Office to the kinds of criticisms referred to in paragraph 8 of this submission. The kind of review mentioned in paragraph 19 of the draft policy paper concerning an evidence review by staff external to the team investigating or prosecuting a case is a welcome way to ensure accountability in respect of implementation of the policy and of the Office's work in general. To promote the same kind of accountability – and perception of accountability – in respect of the Case Selection Plan, the Office could undertake a review of the case selection plan by external experts, subject to the same conditions of confidentiality as OTP staff, to ensure the plan itself is good and adheres to the principles set out in the policy. This would also help the Office address any potential allegations of bias or bad practice.
21. In the same vein, and again with understanding about why details of the case selection plan may need to be confidential, there is a need to communicate information about the Case Selection Plan to victims and communities affected by these issues. Unless those groups understand what the plan is, at least in broad terms, and how it came to be developed, there is a risk of

² See, for example, the letter to the ICC Prosecutor from the CICC Communications Team on 24 November 2014 on “Increasing communications around ICC-OTP Preliminary Examinations” and various CICC Communications Team Papers over the past decade, available from <http://www.coalitionfortheicc.org/?mod=communications>. See also NPWJ's Policy Paper on “Outreach and the International Criminal Court” of September 2004, available from <http://www.npwj.org/sites/default/files/documents/File/NPWJOutreachPolicyICCSep04.pdf>.



N O P E A C E W I T H O U T J U S T I C E

misunderstanding and misinformation being allowed to circulate, which has an impact both on cooperation and on the ability of the Office to discharge its mandate of providing justice and redress. If information is not provided on the grounds of “blanket confidentiality”, this risks reducing or obviating the faith of these communities in the OTP and its work, which as noted can also affect people’s willingness to provide information to the OTP and to testify before the Court.

Conclusion

22. NPWJ remains committed to supporting the work of the International Criminal Court, and the Office of the Prosecutor, including through participating in consultations such as these. It would be useful for us to receive feedback on this submission, so we can tailor our contribution to future consultations in as useful a way as possible. NPWJ stands ready to provide any further information or clarifications that may be useful.³
23. 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.

³ Please contact Alison Smith, NPWJ Director for International Criminal Justice, on asmith@npwj.org.