



NON C'È PACE SENZA GIUSTIZIA - ETS NO PEACE WITHOUT JUSTICE - ETS

Via Costanza Baduana Vaccolini 5; I-00153 Roma
Rue Ducale 41; B-1000 Bruxelles

www.npwj.org

NPWJ Submission on the Draft OTP Policy on Complementarity and Cooperation

13 November 2023

Introduction

1. No Peace Without Justice (NPWJ) welcomes the consultations undertaken by the Office of the Prosecutor (OTP) on its draft Policy on Complementarity and Cooperation, both prior to and after the production of the draft, and the opportunity to provide written comments on the draft policy. We have participated in these consultations and others 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 in 1994 by Emma Bonino 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 on strengthening national, regional and international systems, mechanisms and standards that promote and protect human rights and deliver justice and redress for victims; and on promoting international justice and accountability, including through the International Criminal Court, to combat impunity for war crimes, crimes against humanity, genocide and ecocide, also by holding States to their obligations to investigate and prosecute crimes under international law. 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 stakeholders around the world, including the ICC, to promote the principles of universality, effectiveness, efficiency and impact of the ICC. NPWJ is in special consultative status with the Economic and Social Council (ECOSOC) since July 2022.
3. NPWJ adheres to the Joint NGO Comments on the “[Draft] Policy on Complementarity and Cooperation (September 2023)” submitted to the OTP as part of this consultation process and makes our own submission that covers additional areas. 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



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

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 very much welcomes the recognition of partnership and vigilance as being mutually reinforcing elements, rather than in tension with each other. We commend the Prosecutor and the Office for embracing this strategic vision, with which we fully concur. By doing so, the question becomes not *whether* the Office should use the principle of complementarity as a means of enhancing cooperation in both directions, but *how* to do so in a principled way that fully implements the Rome Statute including due process rights as described in paragraph 17. We agree that greater engagement with domestic authorities and proceedings based on those two pillars will help inform the development and implementation of the full range of the Office’s work, in which respect we especially welcome the reference to completion strategies in paragraph 32.
5. NPWJ fully supports the strategic vision of bringing justice closer to communities and the recognition that the starting point for this is the conduct of activities as close to affected communities as possible (paragraph 23). We particularly welcome the intention to establish more field offices and fully concur that staff should be based in field locations as close as possible to the locations of alleged crimes (paragraph 69), which we consider to be absolutely the correct approach, both conceptually and practically.
6. NPWJ welcomes the recognition running as a thread throughout the draft policy that the ICC will further enhance its collaboration with national experts. The focus the OTP places on cooperation with national judicial authorities is a useful way of improving the capacity and willingness of the States to ensure accountability using various tools, including domestic investigations and prosecutions, universal jurisdiction, regional approaches and, as a last resort, the International Criminal Court. The involvement of national experts is fundamental not only to harness their knowledge but to have an important impact on countries’ situations and in the resolution of critical issues. A deep knowledge of the internal situation, both challenges and opportunities, and the use of national institutional tools can coordinate effective effort towards closing the impunity gap for crimes under international law.
7. NPWJ strongly agrees that it is important that the ICC engage in direct dialog with local communities, victims and civil society actors in situation countries, especially during the phase of investigation and information collection. As such, it is important that the Office has a clear



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

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. A strong collaboration constitutes an opportunity to share expertise and jointly discuss and develop common standards for the investigation and prosecution of international crimes. Following similar operational standards and protocols or sharing information feeds the spread of best practices that can positively influence the investigation and justice efforts more broadly. NPWJ welcomes the intention to cooperate in such an inclusive way with a wide range of experts of various skills, as mentioned in paragraph 34, including investigators, criminal analysts, forensic specialists, financial investigators, country specialists, linguists, knowledge base managers, operational and protection strategies experts, as well as judicial cooperation specialists.

8. NPWJ welcomes the references throughout the policy to paying particular attention to transitional justice and encouraging the use of its various mechanisms, both judicial and non-judicial. NPWJ reiterates the potential for transitional justice processes to be effective tools to support the promotion of democracy and the protection of human rights, by fostering the population's involvement in various activities, promoting accountability, providing redress to the damaged parties, and promoting reconciliation, stability and the rule of law. Where the ICC is working in countries that have other transitional justice mechanisms operating concurrently, it will be critical to engage with those mechanisms and promote a common, coordinated approach to the respective mandates of each, in order to maximise the work and present consistent messages and methodologies to the people affected by the work of each mechanism.

Suggestions on specific element

9. To be accessible to the largest number of people possible, the draft policy should be easily understandable by a varied range of audiences. To support real dialogue and growth, the discussion needs to involve many experts and non-experts, avoiding terms that are too juridical or legal to be well understood by people unversed in the ICC's legal language. NPWJ believes that the involvement of the general public is a tool to make citizens not only more active but also more aware of the needs and shortcomings within the legal system, implementing already existing democratic tools for creating new structures and forms of dialogue. We therefore suggest a deep reading of the draft policy to avoid the use of technical or legal jargon that may pose a barrier to engagement and understanding of a broad audience.
10. We read the plans for the Complementarity and Cooperation Forum with great interest and believe this could be a beneficial forum to deepen engagement and demonstrate a real



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

commitment to complementarity as outlined in the draft policy. We agree that the ICC should be at the hub of international justice, not the apex; we have a long-term vision of the Court having a very small footprint because its very existence and the support it can provide has supported the development of willingness and capacity within national jurisdictions to investigate and prosecute crimes under international law themselves. We respectfully suggest that the Complementarity and Cooperation Forum include avenues for engaging civil society, much as the Genocide Network does, since civil society can be important actors in supporting the goals of the Forum, including through sharing evidence when appropriate to do so.

11. NPWJ appreciates the commitment of the OTP to the employment of highly qualified personnel and the fact that current budgetary allocations place restrictions on the Office's ability to hire a sufficient number of the types of experts the work demands. We recognise the impetus within the Office to find creative solutions to address this deficit, including through seconded personnel (paragraph 39) and innovative partnerships and voluntary financial contributions (paragraph 53). We must, however, respectfully caution against placing too much emphasis on these types of resource boosts in the policy. First, it gives States an alibi or an excuse to cut whatever budget the OTP will present on the grounds that the Office is adept at finding its own resources independently from the regular budget. Second, it risks compromising the perception of independence of the Office, as despite the Office's best efforts, such contributions can be framed as support for a particular situation at the expense of others, for political reasons of the contributor. Finally, it risks creating an imbalance between the Office and the rest of the Court. Since the OTP is the engine that drives much of the Court's work, an Office that generates extra work based on extra-budgetary resources risks creating an inability on the part of the other organs of the Court to be able to provide the support and other services such work requires.¹ We respectfully suggest that this element is included in the considerations relating to resources required for the Office to implement this policy and its other investigative and prosecutorial work and that the Office present a budgetary request relating to all of its needs, not just those needs for which it projects it will be unable to find additional resources.
12. NPWJ fully supports the reference in paragraph 46 to the implementation of ICC Legal Tools that would be compiled and available in open access. To promote the willingness of States to cooperate with the Office, it is important that they have access to the ICC's methodology and information. The draft policy, however, mentions the translation of the ICC Legal Tools only in four languages, Arabic, English, French and Spanish. We believe this is not sufficient,

¹ For more detail on these issues, see "Opening of Ukraine investigation should be a wake-up call to look again at ICC's budget", available from <https://www.coalitionfortheicc.org/news/20220307/opening-ukraine-investigation-icc-budget>.



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

especially since this policy recalls several times the ICC's commitment to the war in Ukraine, and given the range of other countries under preliminary examination or investigation at the ICC. We respectfully suggest that the ICC Legal Tools be translated at least in all the UN official languages, with the addition of Chinese and Russian, if not more.

13. We welcome the recognition in paragraph 49 that testimonial evidence from witnesses and survivors remains an essential part of criminal investigations, noting there is also a wide range of potential evidentiary assets other than such testimonial evidence. We would, however, advise extreme caution when receiving information originating from private companies, even if they arrive at the Office via the national authorities, as described in paragraph 51. There are private companies, often hired by corrupt or autocratic regimes, whose purpose is to create misinformation and destroy the lives and reputations of individuals deemed to be “enemies” of those regimes.² Information from these kinds of sources carries the extreme risk of harming individuals and negatively influencing judicial processes. We respectfully suggest that the policy include a note of caution relating to such sources and consider whether there may be a benefit in creating common international policies, based on a rationalised and clear policy of intervention and other accountability mechanisms, to mitigate and avoid these risks.
14. There is a consensus that the ICC needs a comprehensive strategy and a range of innovative technological tools to deal with the challenge of digitalisation, not only to collect information and evidence relating to specific investigations and cases, but also to make the ICC's work more accessible and transparent to national experts and civil society actors. That said, given the speed of technological development and the complexity of some of the systems, we respectfully suggest that the discussion on the ICC new technological framework be shortened and simplified, for two reasons. First, technological advancements will likely mean much of the detail will soon be out of date, which limits the utility of those details being in a policy that by its nature is a long-term document. Second, the details will likely be confusing to many readers of the policy, which risks them missing essential points that can and should be made on this issue.
15. We welcome the recognition inherent in section IV that the wide variety of possibilities for transitional justice and the complexities in the situations in which the OTP operates means that the OTP must be flexible (within the bounds allowed by principle and applicable law) in devising approaches that will work given the facts and circumstances of each situation. That section, however, reads like a report – which as noted in the joint letter referenced earlier we

² See, for example, articles in the New Yorker Magazine (<https://www.newyorker.com/magazine/2023/04/03/the-dirty-secrets-of-a-smear-campaign>) and Nordic Rights (<https://nordicrights.org/2023/08/21/alp-services-constellation-plan-avsloja-qatargate-skandalen-som-riktar-sig-till-qatar-pa-uppdrag-av-uae/>) on such a company and the tactics it uses.



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

would welcome at this level of detail – rather than a policy to guide the work of the Office. We would therefore respectfully suggest this section remains limited to policy guidance distilled from the examples offered, rather than a description of how the Office approached those situations. We believe that this would streamline the report, making it more accessible and effective as a policy guidance tool.

Suggestions for additions

16. We welcome the description in paragraphs 58 to 60 of the ways in which the Office intends to enhance its capacity to respond to requests for information from the relevant national authorities. We believe this is an important part of the ICC’s work and will help breathe real life into the principle of complementarity, with the OTP playing its part in helping to build the capacity of domestic jurisdictions and to support them to conduct genuine investigations and prosecutions. We note that the draft policy refers to the sharing of information relevant to domestic proceedings, without specifying the type of information that would be provided nor to whom, although the current draft creates the impression that the entities to whom information would be provided would be State authorities, presumably law enforcement or public prosecution services. The question this raises is whether the Office intends to share information with the defence in domestic proceedings, given the Prosecutor’s obligation to disclose information they believe “shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence” in respect of proceedings before the ICC (Article 67(2)). If so, it could be useful to specify that in the policy; if not, we respectfully suggest it be considered as an additional element to include in the draft policy, thereby demonstrating the Office’s commitment to justice, to equality of arms and to supporting national jurisdictions to employ the same high standards that are applicable at the ICC.

Conclusion

17. 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. We would find it very useful to receive feedback on this submission, so we can tailor our contribution to future consultations to be as beneficial as possible. NPWJ stands ready to provide any further information or clarifications.³

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