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Fédération Internationale des Ligues des Droits de l'Homme

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

INTERNATIONAL FEDERATION OF HUMAN RIGHTS

FEDERACION INTERNACIONAL DE LOS DERECHOS HUMANOS

الفدرالية الدولية لحقوق الانسان

To: Mr. Luis Moreno Ocampo
Prosecutor of the International Criminal Court

Object: **Comments on the Office of the Prosecutor's draft policy paper on « The interest of Justice »**

Dear Mr. Prosecutor,

The International Federation for Human Rights (FIDH) welcomes the opportunity to comment on the Office of the Prosecutor (OTP or Office)'s draft policy paper on « The interest of Justice » of 13 June 2006 (draft paper). As you know, FIDH has already participated in the consultation process led by the Office on this matter, and has communicated its position to you through its paper « *Reflexions sur la notion « intérêts de la justice » au termes de l'article 53 du Statut de Rome »* (enclosed to this letter). For FIDH's general position with respect to the issue of « the interests of justice » we kindly refer you to the enclosed document.

With regard to the Office's draft paper, FIDH would like to make the following comments:

First of all, FIDH welcomes the OTP's statement that the interpretation of the concept of « the interest of justice » should be guided by the objects and purpose of the Rome Statute, which include States Parties' resolution « to put an end to impunity », « to contribute to the prevention of [the most serious crimes of international concern] » and to « guarantee lasting respect for and the enforcement of international justice ». This means that when assessing the interests of justice, the Office will have to account for the inevitably negative impact that a potential decision not to investigate or not to prosecute could have for the end of impunity, the prevention of the most serious crimes of international concern, and the lasting respect for and

enforcement of international justice.

FIDH also believes, that the concept of « the interests of justice » must be interpreted in accordance with other provisions of the Rome Statute, and in particular with those of Article 53. In this respect, FIDH notes, as does the OTP, that before assessing the interests of justice, the Office will necessarily have already made a positive decision on admissibility, which means that it will be of the view that the case is of sufficient gravity to justify further action by the Court (Articles 53(3)(1) and 17(1)(d)). As a consequence, FIDH believes that once the gravity threshold has been met, a decision not to investigate or not to prosecute would contradict the Statute's most fundamental aim, i.e. to put an end to impunity for the perpetrators of most serious crimes of international concern.

Additionally, FIDH has noticed that under section 5.b) of the draft paper, the Office indicates that the provision in Article 16 (Deferral of investigation or prosecution) « *does not displace the obligation of the Prosecutor to consider the interests of justice under article 53* ». FIDH notes with great concern that this might result in the concept of « the interests of justice » being used on the basis of political considerations as an exception to the opening of investigations and/or prosecutions. FIDH reminds that, in its view, Article 16 is the only provision that allows for some kind of political interference in the judicial matters of the Court, and therefore, only the Security Council can request the suspension of investigations or prosecutions for political reasons such as diplomatic negotiations or peace processes.

FIDH also submits that articles 53(1)(c) and 53(2)(c) must also be interpreted within the context of the complementarity system created by the Rome Statute. As described above, before considering whether there are substantial reasons to believe that it is not in the interest of justice to initiate an investigation or to prosecute, the Office will have come to a positive view on complementarity, which means that the case at hand or the cases on which the office is likely to focus are not being investigated or prosecuted at the national level. By eventually deciding not to investigate or not to prosecute a case on the basis of the interests of justice, the complementarity system of the Rome Statute would be devoid of its very essence, since the case or cases that make the object of a decision not to investigate or prosecute will most likely not be investigated or prosecuted by the domestic courts of the State concerned either.

Moreover, FIDH notes that the draft paper does not address the potential adverse effects that any eventual decision to temporarily delay the opening of an investigation or prosecution[1] might have on the preservation of evidence.

In addition, FIDH has noticed that according to the draft paper « *the real situations the Office has so far*

1Article 53(4) states that « The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information »

encountered, including Uganda and Darfur, should provide a clear indication of the way in which these matters have been assessed in practice. However, since the fact and circumstances of each case will vary considerably, the Office does not consider it useful to speculate on the specific circumstances that would persuade the Prosecutor that an investigation or prosecution would not serve the interests of justice ». While FIDH understands that the question of « the interests of justice » is a very complex issue which requires case-by-case analysis, it believes that some more guidance could be provided in the policy paper. For instance, specific examples of matters the Court had to addressed when assessing the interests of justice in the Uganda or Darfur investigation could be listed and analysed. FIDH also believes that it should be stated that any case-by-case analysis will be guided by the principle that the interests of justice should not be used as an exception based on political grounds, to the opening of investigations and/or prosecutions, but that it should only be interpreted according to the principles and scope of the Rome Statute: the good administration of justice and the respect of the rights of the accused, the rule of law, international human rights law and, in particular, the rights of victims to see justice done and obtain reparations for the harm suffered as a result of the atrocities committed.

Comments with regard to the interests of victims

The draft paper states: « *The experience of the Court to date proves that understanding the interests of victims in relation to the decision to initiate an investigation is a very complex matter. While the wording of Article 53(1)(c) implies that the interests of victims will generally weigh in favour of prosecution, in practice it is conceivable that, for a variety of reasons, the interest of the victims may weigh against ICC action, especially when the victims themselves voice these concerns. For a variety of reasons, victims of crimes may not always be in favour of investigations and prosecutions. There is rarely a homogeneous reaction among victims to atrocities: reactions and priorities vary for many different reasons. This is particularly apparent in situations of divided societies by ongoing conflicts like the ones under investigations by the ICC* ». FIDH concurs with the Office in that victims' reactions to crimes may vary from one situation to another. However, it believes that the paper should also highlight that different groups of victims within a very same situation might react differently. Indeed, conflicts of interest will naturally arise in conflict or post-conflict societies. FIDH wishes to emphasise that when assessing the interests of victims, the OTP should seek the views and take into consideration the interests of *all* groups of victims involved.

The draft paper also states that « t*he Office considers that the « interest of victims » includes the victims' interest in seeing justice done, but also includes other essential interests such as their security and protection* ». FIDH would like to underline that the interests of victims in the prosecution of those responsible for serious crimes does not only include their interest in seeing justice done, but also in being heard through participation in proceedings as well as in obtaining reparations for the harm suffered. Consequently, a comprehensive assessment of the interests of victims should account for the fact that any

decision not to investigate or not to prosecute would result in a denial of justice, and will thus seriously affect victims' most fundamental rights.

Additionally, the draft paper indicates that « i*n attempting to ascertain the interests of victims, the Prosecutor will conduct, as far as possible, a dialogue with the victims themselves as well as representatives of local communities. For this purpose, « victims » should be interpreted broadly and may more accurately be understood as the pool of affected people in a given situation* ». FIDH wishes to stress that « victims » and « the pool of affected people in a given situation » are two different concepts. It has been explained[2] that the reason for the interpretation stated in the draft paper is the fact that at the preliminary analysis stage, victims are not yet known to the Court simply because the Office is not yet focusing on specific incidents. In this regard, FIDH would like to make two remarks.

Firstly, FIDH reminds that the issue of the interest of justice as discussed in this paper, arises not only in connection with a decision not to investigate (Article 53(1)(c)) but also in relation to a decision not to prosecute (Article 53(2)(c)). The latter refers to an act which takes place « upon investigation ». In FIDH's view, this investigation will have identified not only incidents, but also potential persons responsible for the atrocities as well as the victims of those serious crimes. There would therefore be no reason for victims' views to be replaced by those of the « pool of affected people » at this stage.

Secondly, with regard to the difficulties to identify victims at the preliminary analysis stage (in respect of a decision under Article 53(1)(c)), FIDH highlights that although the actual incidents on which prosecution will focus might not yet have been established, the OTP will nevertheless be in a position to identify potential incidents on which the Office will likely focus at a latter stage. This notion of « incidents on which the Office will likely focus » is indeed used by the OTP to conduct other assessments which are mandatory under the Rome Statue, such as fulfillment of the complementarity requirement[3]. FIDH suggests that the same approach could be adopted with regard to identification of victims at this stage. This means that at phase of the preliminary analysis, the OTP would taken into consideration the views of the victims of crimes on which the Office will most likely focus for prosecution. In sum, FIDH submits that the idea of resorting to the views of the pool of people affected by a certain conflict not only is not in line with the requirements of the Rome Statute[4] but it is not necessary in practice either.

2 At the occasion of the discussion of the draft policy paper on Interests of Justice, NGO-OTP semi-annual meeting, 6 July 2006

3 See for example, *Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council on 29 June 2005, pursuant to UNSCR 1593 (2004)*, page 4

4 Both paragraphs 1(c) and 2(c) of Article 53 refer clearly to « the interest of victims »

Some remarks regarding communication with victims

The draft paper indicates that « *the Office of the Prosecutor considers that seeking the views of other actors involved in the situation will also be crucial in order to assess the impact for the interest of victims of investigations and prosecutions [...] It may be important to seek the views of respected intermediaries and representatives, or those who may be able to provide a comprehensive overview of a complex situation. This may include local leaders (religious, political, tribal), other states, local and international intergovernmental or nongovernmental organisations. Victims, their representatives and other [...] intermediaries are encouraged to be proactive in providing the Office with their views* ». In this respect, FIDH notes that in order for the victims to express themselves it is imperative that they be informed about the matter on which their views are sought. It has been explained[5] that the Office does not have a mandate to do outreach at the preliminary analysis stage. FIDH would like to remind that the issue discussed in this paper covers also a later stage, i.e. the investigation phase with regard to a potential decision not to prosecute. But not matter what the specif mandate of the Office is at each stage of the analysis or investigation process, FIDH points out that a dialogue is a two-way process and that it would simply have no sense to seek victims' views without previously informing them about the matter on which their views are sought. It is imperative that this information provides clear explanation on what the mandate of the Court as well as on the Prosecutor's policy, including information on the types of crimes and the degree of participation of the persons the OTP's investigations focus on.

According to the draft paper, the Office encourages victims, their representatives and other intermediaries to be proactive in providing the Office with their views. Bearing in mind distance and other difficulties that victims might have to access the Court and Court officials, FIDH also respectfully encourages the Office to be proactive in approaching victims' communities and associations in order to seek those views.

Finally, FIDH wishes to underline that although it understands that an analysis on victims' interests will have to be made on a case-by-case basis, the Office's decisions should be guided by internationally recognized human rights. In particular, FIDH would like to draw the OTP's attention to the following instruments:

- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly resolution 40/34 of 29 November 1985:
    - Victims « are entitled to access to the mechanisms of justice and to prompt redress » (principle 4).

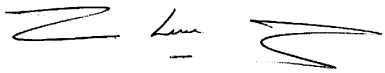
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations

5 At the occasion of the discussion of the draft policy paper on Interests of Justice, NGO-OTP semi-annual meeting, 6 July 2006

of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the United Nations General Assembly resolution 60/147 of 16 December 2005:

- ❖ Victims have a right to be provided with « fair, effective and prompt access to justice » (principle I.2.c).
- ❖ « Victims of a human rights or humanitarian law violation » have a right to « equal and effective access to justice » (principle II.c).
- ❖ States, as well as international organisations created to that end, « have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations » (principle III.4).

Done in Paris, on 14 September 2006



Sidiki Kaba
President of the International Federation for Human Rights

Annexe I : FIDH paper, *Reflexions sur la notion « intérêts de la justice », au terme de l'article 53 du Statut de Rome*, 20 June 2005
Annexe II : List of member organisations