



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 « Criteria for selection of situations and cases »

Dear Mr. Prosecutor,

FIDH welcomes the opportunity to comment on the Office of the Prosecutor (OTP or Office)'s draft policy paper on « Criteria for selection of situations and cases » dated June 2006 (draft paper). In particular, FIDH shares the view that clear communication and explanation of the Office's approach in this regard is necessary in view of the transparency OTP's policies and practices must enjoy.

FIDH believes that the draft paper is well structured and clear in the description of both the selection process and the applicable criteria. In particular, FIDH notes with great satisfaction that the paper recognises that assessment of gravity is a complex process based not only on the number of victims but also on other very relevant factors, i.e. scale of the crimes, nature of the crimes, manner of commission of the crimes and impact of the crimes. FIDH especially welcomes the OTP's consideration, among other elements, of the impact of the crimes on the affected communities as well as on regional peace and security. It also wishes to highlight the importance of bearing in mind the potential impact of investigations as a deterrent element for commission of further crimes. With regard to the nature of the crimes, FIDH also shares the Office's view that deliberate death and crimes of sexual violence bear the highest level of gravity.

However, FIDH would like to voice its concern about a number of issues, with the aim to contribute to the Office's development of its policy and the assessment of its application in practice.

Multiple cases and limited counts

It is FIDH's understanding that in order to maximize the impact of investigations and trials the OTP will prioritise bringing multiple cases with limited counts and focused charges, as opposed to a rather small number of cases for numerous counts. However, FIDH notes that the draft paper states « *it is policy of the OTP to bring only a few cases from each situation* », which seems to be in contradiction with the policy of maximizing impact through multiple cases.

Representative charges

FIDH notes with satisfaction that one of the criteria taken into consideration for selection of cases is the selection of charges, and takes notice of the fact that « *the Office will in principle focus on considerations of: the most serious crimes, representation of major crime patterns, impact, and the need for focused and expeditious trials* ». However, in the light of recent developments, FIDH respectfully submits that this policy is not consistently applied in practice.

As noted in a previous occasion¹, FIDH remains deeply concerned that the nature of the charges brought against Thomas Lubanga Dyilo in the context of the case currently leading to a confirmation of charges, are not only extremely limited but also not representative of the range and seriousness of crimes committed by the *Union des Patriotes Congolais* (UPC) which he has been leading. As indicated above, FIDH shares the view of the OTP that willful killing and crimes of sexual violence are at the level of highest gravity. According to the United Nations, more than 60,000 have been slaughtered in Ituri alone in the past six years². While FIDH is aware that « *the policy of the OTP is to bring limited counts and focused charges* », it believes that it is imperative that those limited and focused charges are representative of the range of crimes committed, in order to render justice to victims and maximize the impact of the Court's trials.

FIDH understands that « *consideration of impact may [...] lead to charges on matters such as the use of child soldiers, since this is a prevalent crime that is not widely prosecuted; international prosecution and attention may help bring an end to the use of child soldiers* », and it believes indeed that recruitment,

1 Avocats Sans Frontières, Center for Justice and Reconciliation, Coalition nationale pour la Cour pénale internationale – RDC, Fédération internationale des ligues des droits de l'homme, Human Rights Watch, International Center for Transitional Justice, Redress and Women's Initiative for Gender Justice, *Joint letter to the Prosecutor of the International Criminal Court*, 31 July 2006 (hereinafter « Joint letter »)

2 Integrated Regional Information Networks, "DRC: UN agencies assist thousands displaced," July 12, 2006 [online], http://www.irinnews.org/report.asp?ReportID=54567&SelectRegion=Great_Lakes&SelectCountry=DRC (retrieved 11 September 2006)

enlisting and use of child soldiers to participate actively in hostilities is a crime of a very serious nature. However, it submits that charging Mr. Lubanga only for these limited counts is not representative of the experiences endured by the victims in Ituri.

Sequential approach

The draft paper indicates that the OTP adopts a sequential approach both in the global examination of situations and cases, and in the consideration of certain criteria such as regions or armed groups. FIDH submits that such an approach poses serious problems with regard to the preservation of evidence. As time goes by, the chances that witnesses of the events move away and be difficult to find increase; some might get confused or forget details of their experiences as they exchange information with others. Similarly, the passing of time might have adverse effects on documentary evidence, which might get lost or be purposefully destroyed.

While FIDH understands that the reason for adopting such an approach is the lack of sufficient resources and the need to reallocate them from one situation to another or from one case to another, it reiterates its deep concern with regard to the understaffing of the OTP investigation teams, and urges the Office to seriously consider enlarging the size of the teams and, if necessary, request allocation of additional funds to that end.

Additionally, FIDH believes that this approach poses serious difficulties in the long-term and, therefore, submits that another alternative should be found. Other problems that might be encountered should the sequential approach be pursued, are the time-limit imposed by procedural requirements and developments on the ground that escape the OTP's control. The OTP information document on the suspension of the investigation in respect of other charges against Mr. Lubanga³ provides a good example in this regard. Indeed, while the OTP is ready to go to trial in respect of some charges, investigation of other crimes (presumably commenced at a later stage, following a sequential approach) must be suspended in the circumstances, because of security constraints, the need to protect victims and witnesses, the requirement to comply with the date already established for the confirmation hearing, and the respect of the rights of the accused. In sum, the case at hand shows that the sequential approach bears inherent risks in practice, as it might lead to suspension of investigations and prosecutions, thereby contradicting other key components of the prosecutorial strategy, such as the « representation of major crime patterns » element. This contradiction between the announced policy and its implementation brings about nothing but confusion among those directly affected by the conflict and negatively impacts on victims' rights to access justice and to obtain reparations⁴.

³ Prosecutor's Information on Further Investigation, ICC-01/04-01/06-170, 28 June 2006

⁴ Joint letter, *supra note* 1

Evidence-driven approach

While FIDH understands that the OTP cannot open an investigation or decide to prosecute a case without attaining the required evidenciary standard, it is concerned that only those crimes for which evidence is more readily available will be prosecuted. FIDH has taken notice of the draft paper's statement « *as information and evidence is collected, the investigation may be further refined and focused, or new avenues of inquiries may arise* ». However, it fears that the OTP, faced with lack of sufficient resources, pursuing an evidence-driven approach and focusing on « *the need for focused and expeditious trials* », might give more attention to crimes for which evidence is easily collected (such as recruitment of child soldiers), leaving behind other crimes for which evidence is harder to obtain (such as crimes of sexual violence).

Application of Article 53(1) criteria

FIDH has taken notice of the Office's understanding that « *while the criteria and standards are the same for referrals and communications, there is one difference in that the starting points are reversed: for referrals the Prosecutor shall initiate an investigation unless there is not a reasonable basis; for a communication the Prosecutor may only seek authorization to proceed with an investigation if satisfied that there is a reasonable basis* ». However, FIDH notes with great concern that this approach seems not to be consistently applied in practice, in particular with regard to the referral of the Central African Republic (CAR). Indeed, although the government of the CAR referred a situation in January 2005⁵, no decision as to the opening of an investigation has been taken to date. The long time the preliminary analysis of the CAR situation has taken would indicate, in the view of FIDH, that the Office is not seeking to make sure that nothing signals that a reasonable basis does not exist, but is rather searching for a such a reasonable basis.

Done in Paris, on 15 September 2006



Sidiki Kaba

President of the International Federation for Human Rights

⁵ Press release, *Prosecutor receives referral concerning Central African Republic*, 7 January 2005, http://www.icc-cpi.int/pressrelease_details?id=87&l=en.html