



Fédération internationale des ligues des droits de l'Homme

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FIDH Comments on the draft Victims' Strategy

The International Federation for Human Rights (“FIDH”) is pleased to comment on the latest draft of the International Criminal Court's (“ICC” or “Court”) Victims' Strategy, which was circulated for consultation in late September 2009. We note that the time allocated for consultation is very limited and, therefore, these preliminary comments will focus on the most relevant portions of the document which have come to the attention of FIDH. These comments focus exclusively on the main document. Given the limited time, we have been unable to consider the updated version of the annex. We might send in further comments later on, should such an opportunity arise in the future. Some of these comments will be shared with States Parties in the context of the discussions around the Victims' Strategy within the Hague Working Group and the Assembly of States Parties.

FIDH has followed the development of the Victims' Strategy since the adoption of Resolution ASP/5/Res.2 in late 2006. We contributed greatly to the comments provided by the Victims Rights' Working Group prior to the drafting of the strategy, as well as after the first draft of the document was issued.¹

FIDH notes with satisfaction that the latest version of the document represents a major improvement with regard to the first draft. We have noted, in particular, that specific objectives have been set, as opposed to the description of current activities featured in the first draft. FIDH was particularly satisfied to read the introductory paragraphs which recognise that the ICC also has a restorative function and that “positive engagement with victims can have a significant effect on how victims experience and perceive justice”, as well as the broad principles (pages 3 and 4) which, in our view, set out a framework for the interpretation and implementation of the strategy.

We would also like to acknowledge the major coordination efforts among the different organs of the Court, as well as the different sections and divisions within the Registry, which the drafting of this document has implied. It is equally fair to take note of the important commitments made with regard to policies to be developed on intermediaries and psychological support to victims.

The comments set out hereinafter are provided in a spirit of constructive criticism and with a view to further contributing to the Court's process of setting out a strategy for victims which is fully respectful of the Rome Statute and the rights of victims under Public International Law.

¹ “A Strategy on the role of Victims”, November 2007, http://www.vrwg.org/Publications/01/VRWG_Victims_strategy_Nov07.pdf; Comments and Recommendations on the “Draft ICC Strategy in Relation to Victims of 18 August 2008”, November 2008, http://www.vrwg.org/Publications/05/VRWG_Victims_strategy_NOV%2008_FINAL.pdf

General comments

- In comments to a previous draft, we had noted that the Court was not speaking “with one voice” and that different portions of the document referred to different actions undertaken by different units or sections without reference to or connection with actions and activities undertaken by others. FIDH notes that the latest draft represents a major progress in this regard, as efforts have been made to identify obligations and commitments of the Court as such. However, some portions of the document continue to refer to some units, sections or organs. While internal division of labour is understandable given the different mandates of different organs and units, it would be preferable that objectives be set and commitments be made on behalf of the Court as a whole.
- As opposed to the previous draft, the latest version of the strategy is focused on objectives and is, in general, “future-oriented” as opposed to descriptive of current actions. FIDH finds, however, that the document is very much centred upon current challenges and current activities (with the exceptions of commitments made in relation to intermediaries, psychological support to be provided by the Victims and Witnesses' Unit and protection of victims from the moment an application is received). We understand that this will be a “living document” which will be adapted as the Court's activities as jurisprudence with respect to victims continue to evolve. However, it seems to us that a strategy must look beyond current activities, anticipate future challenges, and provide a vision for the medium and long-term.
- The balance between the rights of victims and the rights of the defence are mentioned several times throughout the draft document. While we agree that victim participation must operate in a way which is respectful of the rights of the accused (in accordance with article 68.3), we believe that it is the modalities of participation which must be conditioned upon respect of the rights of the accused and not the general right to participate. Our interpretation is consistent with the Rome Statute, the United Nations Basic Principles of Justice for Victims of Crime and Abuse of Power, and the United Nations Basic Principles and Guidelines on the Right to a Remedy.
- Overall, the document presents a view of how the Court “handles” victims and what the Court does for victims. However, the draft strategy fails to acknowledge what victims bring to the Court and to judicial proceedings, and how the Court should take that into account in order to implement “victim-sensitive justice” and to improve its policies so as to make them more “victim-oriented”.

Comments on specific sections

OBJECTIVE 1: COMMUNICATIONS AND OUTREACH

- This section focuses on the provision of information to victims on the Court's mandate on victims' issues. The section fails to address the Court's obligations to keep victims' informed of proceedings affecting their interests (for example, on the status of their applications to participate or on proceedings to which they participate). We understand that these matters go beyond the obligations of the Public Information and Documentation Section, but we believe that they are part of the Court's core mandate on communications and notification, and are essential to ensure that the right to participate can be exercised effectively.
- This section could also include information on how concerns heard by the Court in the two-way dialogue established with victims are taken into account in the development of Court's policies (including the Office of the Prosecutor's policies), be it on outreach or on other matters.

OBJECTIVE 2: PROTECTION

- The description of actions under this objective focuses mainly on current activities. According to the draft strategy, victims' protection relies on good practices and procedural measures. We note that the ICC-Protection Programme (“ICC-PP”) is not mentioned in the document. While we acknowledge that the ICC-PP might not be appropriate to address victims' protection needs in many cases, there could be exceptional instances where resort to such an extreme measure might be both necessary and appropriate.
- As expressed in previous occasions, FIDH believes that the current protection measures available are not fully adequate to address the number and variety of risks that both victims and witnesses face in the field. At a number of occasions, we have indicated that the Court should consider developing “intermediary” measures (going beyond good practices and falling short of the ICC-PP). We recommend that a commitment be made in the strategy to work on the development of such practices.
- We note with satisfaction the commitment made with regard to training of lawyers and intermediaries in good practices. Similarly, we have taken note of the fact that the draft strategy acknowledges that protection responsibilities are triggered by the receipt of an application to participate, according to current jurisprudence. We hope that the implementation of the strategy will contribute to developing specific policies in this regard.
- Recommendations with respect to the way certain sentences are drafted (we believe that certain statements can have adverse effects should the wording not be amended):
 - “This does not mean that the full range of protective measure will be either appropriate or available in each case”. This is a strong negative statement. We recommend that the same idea be captured in a sentence drafted in a more positive way. For example: *The range of protective measures available and appropriate in each case will depend on the relevant circumstances.*
 - “The OTP aims to minimise the number of victims who enter into contact with the Court and are thus exposed to risk”. While this sentence would make sense if it were to refer to victims the Office of the Prosecutor (“OTP”) is in touch with for the purposes of building its case (witnesses), such a general statement involving all victims could have negative implications and it could bring about, for example, OTP efforts to try to limit the number of participating victims. We recommend that the word “victims” be replaced by “witnesses”.
 - We recommend that the phrase “others who are at risk on account of testimony given by such witnesses” be replaced by “others at risk on account of interaction with the Court”, in accordance with the Appeals Chamber's Decision ICC-01/04-01/07-475.
 - It is stated that “Many victims live in areas of general insecurity and may be at risk, not as a result of their interaction with the Court, but also because they live in inherently insecure areas”. We recommend that it be further stated that the Court does have a mandate to protect them as far as the risks are caused as a result of their interaction with the Court.

OBJECTIVE 3: PSYCHOSOCIAL SUPPORT

- FIDH welcomes the following sentence “The VWU will ensure that mechanisms are in place [...] to respond to requests for support or assistance, including medical and psychological support or counselling”. We believe that it is essential that the Registry devotes time and effort to this area of work in the implementation of the victims' strategy. The rest of the activities described under this section and currently in place (mainly the OTP screening of witnesses before questioning and the measures put in place when witnesses come to testify in The Hague) are not sufficient to comply with the Court's obligations to provide psychological support to victims and witnesses. Undergoing questioning can be a traumatic experience and measures should be in place for the parties to be able to refer

witnesses for psychosocial support as of the first contact with the Court, throughout investigations as well as after giving testimony in court, where relevant.

OBJECTIVE 4: PARTICIPATION

- This section is heavily focused on the application process, but falls short of addressing other major areas of concern such as security and participation; notification obligations; and most importantly, ensuring effective participation. It presents a very “administrative” view of victim participation. We believe that it is possible to present a more “visionary” analysis of the role of victims in proceedings without encroaching on the judges' mandate.
- FIDH has raised concerns with regard to the weak status of intermediaries (in particular, those working in the area of victim participation) for many years and has followed with much interest the consultations launched by the Court on this matter in late 2008. We have taken note of the fact that “the Court will identify and provide training and support to intermediaries who decide to assist victims in relation to their participation in ICC proceedings” and we will be following with much interest the development of policies in this regard.
- Recommendations with respect to the way certain sentences are drafted:
 - “It is also hoped that participation will contribute to the justice process at the Court” (first paragraph). We believe that it would be more consistent with the rest of the strategy to affirm that “Victim participation will contribute to the justice process at the Court and will make proceedings more 'victim-sensitive' with the view to achieving 'victim-sensitive justice'.”
 - We recommend that the phrase “making the right to participate effectively” (third paragraph) be replaced by “ensuring effective participation”.
 - With respect to the acknowledgement that victims “must be assisted to apply to participate”, we recommend to add “and throughout the participation exercise”.

OBJECTIVE 5: ASSISTANCE & REPARATIONS

- References to reparations under this section are very general and the more detailed statements relate -almost solely- to assistance. Although we are aware of the difficulties in setting out more detailed plans in respect of reparations given that the Court has not yet made any reparations awards, we believe that there are a number of areas on which the Registry and other organs could plan ahead. Given the limited time allocated for consultation on this document, we are unable to provide more detailed comments at this stage but would be happy to contribute further at later on.²

OBJECTIVE 6: LEGAL REPRESENTATION

- The second paragraph states “For many victims it is also important to have a lawyer of their choice or at least from their own community or country to represent them”. We believe it is important to differentiate the *right* to have a lawyer of the victims' choice from the *preference* to have a lawyer from the victims' community or country. We recommend that it be stated: “Victims have a right to appoint a lawyer of their choice. In most cases, victims might prefer to appoint a lawyer from their community or country to represent them, given their knowledge of the context in which crimes were committed and the conditions in which they live”.
- With respect to the statements made in relation to the Office of Public Counsel for Victims, FIDH considers that further elaboration is needed. For example the statement “The Office will be available to represent victims directly” should indicate “in exceptional cases/with respect of specific issues/when the Chambers so decide” in accordance with the Regulations

² For more elaborated recommendations, see: Amnesty International, International Criminal Court: Establishing an Effective System for Reparations – Recommendations on the Development of the Court-Wide Victims' Strategy, January 2008, <http://www.amnesty.org/en/library/asset/IO/40/018/2007/en/IO/400182007en.html>

of the Court.

- The importance of regular contact between victims and their lawyers is recognised within the framework of legal aid. FIDH considers that this is an essential matter relevant to all legal representation-related issues and not solely to legal aid. Therefore, we would recommend a more general statement at the beginning of this section rather than a reference simply in relation to the legal aid scheme.
- With respect to common legal representation (last paragraph), we believe that the strategy could elaborate further on the role of the Registry in the appointment of common legal representatives. It is also of paramount importance to state that the appointment of a common legal representative follows a decision by the Chambers and that any decision in this regard must avoid conflicts of interest. We recommend the following wording: “Where there are a number of victims, the Chambers may ask them to choose a common legal representative in order to ensure the efficiency of the proceedings, and taking into consideration the need to avoid conflicts of interest among victims or groups of victims. When a decision to appoint a common legal representative is made, the Registry will assist the victims in the organisation of common legal representation, including through consultation with the victims themselves, their intermediaries and legal representatives. In assisting in the organisation of common legal representation, every effort will be made to ascertain and respect the views and interests of the victims.”