



**Fédération internationale des ligues des droits de l'Homme**

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

International Federation  
for Human Rights

Federación Internacional  
de los Derechos Humanos

الغدرالية الدولية لحقوق الانسان

## **FIDH COMMENTS ON THE OFFICE OF THE PROSECUTOR'S POLICY PAPER ON VICTIMS' PARTICIPATION UNDER ARTICLE 68(3) OF THE ICC STATUTE**

The International Federation for Human Rights (FIDH) welcomes the opportunity to comment on the International Criminal Court (ICC) Office of the Prosecutor's (OTP) draft policy paper on the participation of victims before the ICC (draft policy paper).<sup>1</sup> As part of its mandate, FIDH supports victims in their search for truth, justice and reparations, and ensures that they have the necessary legal assistance to petition national or international tribunals. FIDH considers that the recognition of victims' rights in the Rome Statute is unprecedented, and that it follows from the increasing recognition of the role of victims of international crimes under international law.

FIDH has monitored the implementation of the Rome Statute provisions on victims' rights by the different organs of the Court, since the establishment of the ICC. The right to participate in proceedings contributes to victims' ownership of justice processes and, more broadly, to the involvement of victim communities in the establishment of the rule of law. Victims not only have a deep interest in the development and in the outcome of proceedings unveiling the truth about the crimes they suffered, but they can also bring a unique perspective on the violations themselves as well as on the context in which they were perpetrated. Victims' involvement in judicial proceedings can also have an empowering and healing effect, provided that the conditions to make it a meaningful experience are met.

FIDH welcomes the preparation of the draft policy paper which seeks to “ensur[e] a clear and consist approach of the Prosecution in its legal submissions and positions on victims' participation under Article 69(3)”. The comments in this FIDH paper will not address all elements of the draft policy paper, but only a selected number of issues on which FIDH has particular views which it would like to put forward. This paper is complementary to the FIDH comments on the Court's strategy on victims (October 2009).

### **1. General policy**

FIDH welcomes the OTP's policy to support victim participation generally, as this is a right recognised by the Rome Statute. FIDH believes that the debate as to whether victim participation should be allowed or not was overcome the moment a positive decision was made at the time the Rome Statute was adopted. This is also supported by inclusion of this right into other international

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<sup>1</sup> These comments are based on the version of the policy paper circulated for consultation in December 2009

instruments.<sup>2</sup> In FIDH's view, efforts must focus now on ensuring that that right is exercised effectively so that victims can participate actively in and contribute meaningfully to ICC proceedings. This presents a number of challenges for the Court, including the OTP. Any perceived “practical problem” must not be seen as an obstacle but rather as a call for creative solutions.

## **2. Link with the charges: focused investigations and prosecutions**

FIDH has repeatedly expressed the concern that the focused nature of investigations and prosecutions has a detrimental impact on the possibility for victims to participate in proceedings. The selectiveness of charges and incidents is not always well understood by victims, and it is a matter on which they have expressed numerous concerns. FIDH is fully aware of the current state of the jurisprudence of the Chambers on this matter. However, it submits that there should be a mechanism for victims not falling under the selected charges or incidents to participate in order to share their experience with a view to possibly questioning the limited character of the investigations and prosecutions, and demand that other charges and/or incidents be covered (see discussion below on the possibility to contest the scope of the case).

As far as the reparations phase is concerned, FIDH concurs that victims who have not participated in the trial could and should be allowed to participate in the reparations phase, as provided in the Rome Statute.

## **3. Victims' personal interests**

The draft policy paper states:

“[T]he OTP considers that the definition of 'personal interest' must be something more than the general interest of any victim in the progress and outcome of the prosecution [...] Under Article 54, the Prosecutor shall establish the truth, investigating both incriminating and exonerating circumstances. The Prosecutor does not purport to represent and express all the views and concerns of victims; the Statute acknowledges this through the key innovation of granting victims a separate and independent voice. However, establishing the guilt or innocence of the accused should not be confused with the interest of victims under Article 68. That crimes should be effectively investigated and prosecuted is the core of the Prosecutor's mandate. While it is also an overriding interest of the international community as a whole, and of the victims specifically, it is not one that should be the basis for victims' participation in specific proceedings under Article 68(3).”

Although FIDH agrees that victims' personal interests go beyond the general interest in the progress and outcome of prosecutions, it is concerned that the draft policy paper seems to suggest that their interest in the guilt or innocence of the individual possibly responsible for their victimisation would not be enough to justify their participation in specific proceedings. The issue of the guilt or innocence of the accused goes to the core of victims' interest that justice be done for the crimes they suffered. Suggesting that this is not sufficient to warrant participation could lead to excluding them from proceedings where they would have valuable contributions to make on the manner and context of commission of the crimes from their perspective.

## **4. Participation at the preliminary examination and investigation phases**

FIDH concurs with the statement that communications under Article 15 and representations to the

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<sup>2</sup> See United Nations' Declaration of Basic Principle of Justice for Victims of Crimes and Abuse of Power, Internal Rules of the Extraordinary Chambers in the Court of Cambodia, and Statute of the Special Tribunal for Lebanon.

Prosecutor on matters pertaining to investigations and situations under preliminary analysis is one way to express their views in OTP processes, albeit not the type of participation foreseen in Article 68(3). Victims also “participate”<sup>3</sup> in such processes through consultations undertaken by the OTP in order to ascertain the interest of victims under Articles 53(1)(c) and 53(2)(c).

In relation to participation in Court proceedings at the investigation stage, we note that the quote of the relevant Appeals Chamber's decision<sup>4</sup> in the draft policy paper is incomplete,<sup>5</sup> as it omits to recall and take into consideration that the said decision did indicate that victims could participate in specific proceedings at the investigation stage. The fact that the manner of implementation of this aspect of the decision is yet to be determined, does not justify ruling such participation out.

As for other forms of participation at the preliminary analysis phase, we note that there is yet little practice on this matter. The Chambers have not yet had the opportunity to rule on victims' right to petition the judges during this early phase. This might well be addressed by the Court in future decisions. It must also be recalled that victims can participate, among others, in the following specific proceedings: request for authorisation to open an investigation;<sup>6</sup> the proceedings related to jurisdiction or the admissibility of a case<sup>7</sup> and the review of a decision of the Prosecution not to investigate.<sup>8</sup>

## 5. Modalities of participation

This is an area of jurisprudence where further development is needed. That will come naturally with the evolution of cases, the presentation of new cases, and the practice of the Court and all participants. FIDH submits that this is a topic on which much creativity is necessary to ensure meaningful participation by victims in the Court's proceedings.

### *a. Submission of evidence*

FIDH notes that the the state of the jurisprudence at the pre-trial and trial phases differs on this point of law. FIDH recommends that interpretation of the provisions concerning the possibility to introduce evidence be harmonised. Victims should be afforded the same possibility to submit pieces of evidence both at the pre-trial and trial stages. The pre-trial phase, in particular the confirmation of charges hearing, is of paramount importance as it is key to determine the scope of the case. As advocated above and below, FIDH believes that victims should be allowed to express their views on that matter and thus to present the evidence necessary to support their submissions.

As far as the larger question of submission of evidence by victims is concerned, we note that the draft policy paper suggests that presentation of evidence by victims should be the “rare exception”. FIDH agrees that the main responsibility for proving the case lies with the Prosecution. However, although presentation of evidence by victims will not always be the rule, FIDH submits that that should be allowed whenever victims are in possession of a meaningful piece of evidence that could

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3 The term “participate” should be understood here in its ordinary meaning, not its legal one.

4 Situation in the Democratic Republic of Congo, “Judgement on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December”, ICC-01/04-556, 19 December 2008, para. 56

5 A reference is only made in a footnote.

6 Article 15(3). See *Situation in the Republic of Kenya*, Order to the Victims Participation and Reparations Section Concerning Victims Representations Pursuant to Article 15(3) of the Statute, ICC-01/09-4, 10 December 2009

7 Article 19(3)

8 Rule 92(2)

contribute to help establish the truth of the facts, contextualise the case or address issues not covered by the evidence submitted by the parties, and as long as that is not prejudicial to or inconsistent with the rights of the accused.

In addition, although security might be an issue in some cases, this will not always be the case. Introducing evidence does not always imply collecting evidence; in many cases, victims will be presenting pieces of evidence that they already possess. Therefore, potential security problems should not be an excuse to preclude presentation of evidence by victims. An assessment should be made on a case-by-case basis.

As for practical considerations such as disclosure, FIDH submits that those are matters for which creative solutions -which are fully respectful of all parties' rights and obligations under the Statute- can be found.<sup>9</sup>

FIDH strongly recommends that whenever submission of evidence by victims is allowed, there be dialogue and cooperation -with due regard to each participant's independence- between the OTP and victims' legal representatives, in accordance with OTP Regulation 52.

#### *b. Access to records and evidence*

The draft policy paper states:

“Victims do not have statutory right [*sic*] to access evidence in the Prosecution's possession. Granting victim participants such a right goes to the heart of the Prosecution's independence and its right to exercise control over its evidence [...] Access to confidential portions of the record by Legal Representatives should only be granted in highly exceptional situations when an applicant has established a compelling case that the material in question directly affects his or her interests.”

FIDH is slightly concerned that there seems to be some mistrust about the victims' Legal Representatives' need to access the the record of the case and evidence of the Prosecution. We fully understand and agree that such materials must remain confidential and must be protected, but we are worried that the OTP's very strict approach fails to take into consideration the great importance that access to those files has for victims and their legal representatives. Legal representatives must show on several occasions how their clients' interests are affected by certain facts, documents, acts, hearings or portions of the case, in order to participate in specific proceedings. Access to the record of the case and evidence is essential for them to be in a position to argue and duly present before the relevant Chamber their reasons for requesting to participate in such proceedings. It must also be noted that victims' lawyers are bound by an obligation of professional secrecy and confidentiality in respect of confidential materials, in accordance with the Code of Professional Conduct for Counsel.

In short, access to the record of the case and evidence is crucial for victims and their legal representatives to be able to participate meaningfully in proceedings before the Court.

### **6. Contesting the scope of the case as defined by the Prosecution**

This matter is not addressed by the draft policy paper. However, it is an area where, according to FIDH, there should be further developments. The question is whether, and if so under which

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<sup>9</sup> See, for example, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the request by victims a/0225/06, a/0229/06 and a/0270/06 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032-Anx, 26 June 2009, para. 43

circumstances, victims can contest the choice and extension of charges and incidents selected by the Prosecution.

FIDH believes that the Rome Statute puts in place a system of checks and balances, where the Prosecution is independent in making its choices, but where those choices are, nevertheless, subject to control by the judges, in particular, when it comes to the definition of the scope of cases, by the Pre-Trial Chamber. That control should not be seen as jeopardising the Prosecutor's independence in any way. FIDH submits that the Pre-Trial Chamber has not fully explored possibilities to exert such control to date.

This matter goes to the core of the right of victims to access justice and to enjoy a fair trial. FIDH considers that victims should be allowed to participate in the definition of the case by petitioning the judges so that they exert control over the Prosecution's selection of charges and incidents. Contesting the scope of a case and/or requesting the extension of the charges or consideration of other incidents, where appropriate, does not necessarily undermine the policy of focused investigations and prosecutions. It is submitted that, at the very least, victims should be allowed to question the definition of the case when charges and/or incidents selected by the Prosecution are not representative of scope of criminality or the main types of victimisation.

FIDH is aware of the judgement of the Appeals Chambers on the matter of the re-characterisation of the facts in the Lubanga case,<sup>10</sup> and respectfully disagrees with portions thereof. FIDH hopes that this matter will be revisited in future cases, especially with respect to victims' involvement in the definition of the case at earlier stages of the proceedings.

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<sup>10</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Judgement on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”, ICC-01/04-01/06-2205, 8 December 2009