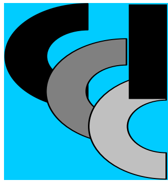

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Submission of The Redress Trust, the *Coalition Ivoiriènne pour la Cour Pénale Internationale* and Lawyers for Justice in Libya on

the Draft Policy Paper on Case Selection and Prioritisation of the Office of the Prosecutor of the International Criminal Court

April 2016

Background

The Redress Trust (REDRESS), the *Coalition Ivoiriènne pour la Cour Pénale Internationale* (CI-CPI) and Lawyers for Justice in Libya (LFJL) are pleased to provide these comments on the Office of the Prosecutor (the OTP)'s Draft Policy Paper on Case Selection and Prioritisation (the Draft Policy) as published on 29 February 2016.[1] On 9 March 2016, the OTP organised, in collaboration with REDRESS, a one-day consultation meeting with civil society on the Draft Policy. The OTP invited interested organisations to submit written comments on the Draft Policy. Our comments reflect recommendations made orally during the March 2016 consultation meeting and specifically account for discussions held during a one-day workshop organised by REDRESS and the *Coalition Ivoirienne pour la Cour Pénale Internationale* (CI-CPI) in Abidjan, Ivory Coast, on 15 March 2016 where local organisations working with victims provided comments on the Draft Policy. This submission includes general observations and comments on specific sections of the Draft Policy and recommends several additional areas that the Policy should address.

Impact of the OTP's selection of cases on victims and importance of the Draft Policy

The selection of cases, charges and their prioritisation, have important consequences for victims of crimes under the ICC's jurisdiction and for their perception of the Court: victims have an interest in seeing justice done. In addition, only victims of the cases pursued and of the charges brought will be able to participate in the proceedings and obtain reparation, in the event of a conviction.[2] When cases do not represent the full extent of the victimisation or present a skewed version of the crime patterns, justice may not be seen to be done and tension may arise between groups of victims who feel left out or between different segments of the society that feel unfairly targeted. In addition, a lack of information on why the OTP is pursuing one case over another, or only certain charges, can give the impression of a lack of transparency which can result in the Court no longer being perceived

[1] Draft Policy Paper on Case Selection and Prioritisation (the Draft Policy), 29 February 2016, available at https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf.

[2] *The Prosecutor v. T. Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, 3 March 2015, at 6, 10 and 11.

as an impartial and independent avenue capable of affording justice to victims and combating impunity.[3]

The Draft Policy thus presents an important opportunity for the OTP to clarify on which bases cases are selected and prioritised, and could play a positive role in building trust amongst the Court's key stakeholders.

We welcome the OTP's efforts to publish the criteria it uses to select and prioritise cases and charges. The publication of these criteria may help ensure that the Prosecutor's exercise of discretion is not perceived as arbitrary and is better understood. Ultimately, the Policy once adopted might help victims and affected communities to better understand the Prosecutor's choices.

Once the Policy is finalised, it will be important for it to be shared widely with victims and affected communities. Partners in Ivory Coast stressed that the Policy was a helpful tool to better understand how the Prosecutor's decisions were taken and to reduce misunderstandings concerning how the OTP operates. The Policy should also be made available in local languages in countries where the Court is active and its substance should be integrated into messages that the Court's outreach programme can relay.

Specific comments on the Draft Policy

Section 2: Case selection plan

The Draft Policy provides in Section 2 that decisions on case selection and prioritisation will be recorded in a case selection plan which will also "inform decisions on the appropriate number of cases to be pursued within any given situation, […] as well as to prioritise amongst several identified cases deriving from the different situations under investigation."[4] The plan will be "dynamic" and regularly updated but will remain confidential. It will be reviewed "at least once a year" with a view to "revisiting [the OTP's] decisions regarding selection and prioritisation of cases and to adjusting the Case Selection Plan to the current operational requirements as necessary."[5]

Recommendations:

- We encourage the OTP to provide a public version of the plan that is accessible and incorporates non-sensitive and already publicly available information, such as information contained in reports to the Assembly of States Parties, the OTP's budget and other reports that are not as easily accessible to victims.
- A template of the case selection plan should be attached to the Policy. This would make the practical implementation more transparent while at the same time respecting the confidentiality of investigations.
- As the case selection plan refers to the implementation of the Draft Policy, we propose that current section 2 be moved to the end of the Draft Policy.

[3] Comments to this effect were made during the workshop in Ivory Coast where participants stressed that the lack of information as to why only the 'pro Gbagbo' side was being prosecuted projected a perception of bias by the Prosecutor. The participants also expressed dissatisfaction with the lack of information as to how the incidents underpinning the charges against M. Gbagbo and M. Blé Goudé had been chosen.
[4] Draft Policy, para 9.
[5] Ibid, para 11.

Section 3: General Principles

In section 3, the Draft Policy sets out three principles according to which the OTP will conduct its case selection and prioritisation: independence, impartiality and objectivity.

We welcome the commitment to these core principles and that the commitment is clearly spelled out in the Draft Policy. However, there is also a need to set out how the OTP has applied these principles when announcing a new investigation. Increased information about compliance with and commitment to these principles in each investigation will increase knowledge of and transparency in regard to the OTP's motives in selecting and prioritising cases. It will also help to avoid misconceptions about the OTP's motives and counteract attempts to undermine the credibility of the OTP.

We suggest that two additional core principles are added to this list: transparency and accountability. An express commitment to those principles will assist to "avoid unrealistic expectations from the public and accusations of, for instance, political pressure."[6] A commitment to transparency and accountability would also instil greater trust in the OTP's commitment to the diligent implementation of the Policy.

Prosecutorial discretion should not be used to shield the Prosecutor from the scrutiny of the public, including those who have an interest in seeing proceedings started. It is not uncommon in domestic legal systems for victims to have a right to challenge the exercise of prosecutorial discretion whilst guaranteeing the prosecutor's independence.[7] As judicial oversight would go beyond the scope of the Draft Policy, we suggest that the OTP develop ways in which to afford specific opportunities to key stakeholders, particularly to victims and affected communities in countries in which the OTP is engaged, to raise questions with regard to compliance with the principles, and for the Prosecutor to commit to answering those questions.

The Draft Policy sets out that "[c]ase selection is an information-driven process [meaning] that the Office will select cases **only if the information available or accessible** to the Prosecution can reasonably justify the selection of a case for investigation and prosecution."[8] [emphasis added] We encourage the OTP to adopt a more proactive approach in which it affirms its role to seek out information from all possible sources. The Policy should thus also refer to the crucial efforts the OTP takes and its commitment to working creatively to obtain information which is not readily available, and to how it will seek to engage with victims and others who may be able to assist in that respect. We note that in the case concerning Dominic Ongwen, the Prosecutor made it known publicly that she was seeking information with a view to potentially adding new charges.[9] Her public request for information resulted in additional charges, suggesting that such an approach was successful. The

[6] Siri Frigaard, "Some introductory remarks", in Morten Bergsmo, ed., Criteria for Prioritizing and Selecting Core International Crimes Cases, FICHL Publication Series No. 4 (2010), at 2.

[7] REDRESS and Institute for Security Studies, The Practice of Victim Participation in Criminal Law Proceedings, Survey of Domestic Practice for Application to International Crimes Prosecutions, 2015, available at http://www.redress.org/downloads/publications/1508Victim%20Rights%20Report.pdf.

[8] Draft Policy, para 17.

[9] John Okot, 'Ongwen case: ICC warns Acholi over intimidation', in Daily Monitor, 20 June 2015, available at http://www.monitor.co.ug/News/National/Ongwen-case--ICC-warns-Acholi-over-intimidation/-/688334/2757948/-/14fmbcw/-/index.html.

Policy could specify that, when appropriate, the OTP will publicise its needs with regard to information about particular crimes to encourage those with relevant information to come forward.

Section 4: Legal Criteria

Admissibility

The Draft Policy provides that "the Office will determine whether the State concerned is exercising jurisdiction in relation to the same person for substantially the same conduct as that alleged before the Court, and if so, whether the national proceedings concerned are vitiated by an unwillingness or inability to investigate or prosecute genuinely. […] If the national authorities are conducting, or have conducted, proceedings against the same person for substantially the same conduct, and such proceedings have not been vitiated by an unwillingness or inability to genuinely carry them out, the case will not be selected for further investigation and prosecution."[10]

While the Draft Policy reflects the fact that the ICC's mandate is secondary to domestic jurisdictions, it does not explain how the Office decides whether to select a case that domestic authorities are already investigating (or where domestic authorities have indicated that they plan to do so). For example, in the Libya situation, a burden-sharing agreement was concluded in 2013 between the OTP and the Libyan authorities regarding investigations and prosecutions in Libya, in which the parties have reportedly agreed which cases should be pursued before the ICC and which at the domestic level. This agreement has not been made public nor has its rationale been explained, creating confusion. Victims and affected communities will not know why cases they believe should be pursued by the OTP have not been selected and whether the reason for such decisions is based on considerations of complementarity or on the other criteria set out in the Policy. The Draft Policy should include a provision setting out the OTP's procedure in arriving at a decision on which cases the OTP, and which cases the domestic authorities, will investigate. The OTP should also commit to making the content of burden-sharing agreements public, when possible.

Interests of justice

Interests of justice is one of the legal criteria the OTP will apply when considering whether to select a case. The Draft Policy refers to Article 53(2)(c) of the Statute which provides that the Prosecutor, upon investigating, may conclude that there is not a sufficient basis to proceed because it "is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime".[11]

The Draft Policy highlights that such decisions will be made "only as a course of last resort", which we welcome. However, we encourage the Prosecutor to set out her commitment in the Policy to indicating - specifically and publicly - when decisions are taken on that basis as required by the Statute. A similar commitment should be made to publicise all decisions not to select a particular situation or case, as appropriate. Indeed, we note that more often than not, no decision is issued

[10] Draft Policy, para 27 and 28.

[11] Draft Policy, para 30. We note that the OTP has also issued a separate policy paper on this issue: Policy Paper on the Interests of Justice, ICC-OTP-2007, 2007, available at https://www.legal-tools.org/uploads/tx_ltpdb/ICC-OTP-InterestsOfJustice_01.pdf.

with regards to cases that are 'not' selected, depriving victims and affected communities from the opportunity to understand on which ground(s) such a decision has been taken.

Section 5: Case selection criteria

The Draft Policy sets out the following case selection criteria:

1. Gravity which is to be assessed in light of
    - The scale of the crimes
    - The nature of the crimes
    - The manner of commission of the crimes and
    - The impact of the crimes
2. The degree of responsibility of alleged perpetrators
3. The potential charges that could be brought

Gravity

We support the proposed criteria. We propose, however, that the assessment of the gravity of crimes is set out in more detail, particularly regarding the nature of the crimes. The Draft Policy sets out that some of the crimes contained in the Rome Statute can be considered more grave than others and as a result justify that a case be selected/prioritised. There is no indication as to the basis on which one crime can be considered 'more grave' and the Draft Policy only provides a non-exhaustive list of crimes that can be considered as 'more grave' by nature. The Prosecutor must recall that all crimes listed in the Statute are "the most serious crimes" by nature.

The OTP has indicated that a higher threshold may be applied to assess gravity for the purpose of case selection than that which is required in order to open an investigation.[12] However, there is no indication of what that threshold will be or why a higher standard should apply in that context. Nor is there any clear or convincing rationale supplied as to why the OTP needs to develop its own threshold of gravity, separate from the Court's jurisprudence. The OTP should apply the Court's jurisprudence.

Charges

We welcome the statement that the OTP will aim to represent "the true extent of the criminality which has occurred within a given situation" and that "the charges chosen will constitute, whenever possible, a representative sample of the main types of victimisation and the communities which have been affected by the crimes in that situation."[13] The Draft Policy does not set out how the OTP will determine such a "representative sample," and whether and on what basis victims' views will be considered. Victims' views should play a central part in informing the decisions of the OTP with regard to what crimes should be considered the "most serious" and "representative […] of […] victimisation" in a given situation.

[12] Draft Policy, para 36 sets out that "Gravity of crime(s) as a case selection criterion is assessed similarly to gravity as a factor for admissibility under article 17(1)(d). However, to implement its strategic objective to focus, in principle, on the most serious crimes within a given situation, the Office may apply a higher threshold than that which is required for the admissibility test under article 17, when assessing gravity for the purposes of case selection and prioritisation."

[13] Draft Policy, para 44.

Section 6: Cases prioritisation criteria

Section 6 lists the criteria the OTP will consider with regard to prioritising some selected cases over others. The Draft sets out that "[F]or the prioritisation of cases, the Office will make a comparative assessment across the selected cases, based on the same factors that guide the case selection and consider them together with [a list of] operational criteria."[14]

In addition, the operational criteria as currently set out in the Draft Policy are phrased as limits/challenges and the Policy does not set out how the OTP will seek to address those challenges. As highlighted during the March consultation meeting, the Draft Policy should also set out how the Prosecutor will seek to address these challenges. Indeed, while current paragraph 46 notes that a "case that is temporarily not prioritised is not thereby deselected", we are concerned that the Policy's failure to explain what steps the OTP will take to ensure that current non-priority cases have the potential to become priority cases can create an impression that low priority cases will effectively be deselected or remain indefinitely dormant. This concern could be addressed by including a commitment to prioritise cases that have previously been deprioritised based on positive operational developments.

Specifically in the context of the Libya situation for instance, the Draft Policy appears to legitimise the status quo. In its reports to the UN Security Council, the OTP already refers to limited resources and security concerns to explain why no new cases have been opened within the last five years despite the assessment that ICC jurisdiction *prima facie* extends to contemporary crimes committed on the territory of Libya. To ensure that low priority cases are not effectively deselected, we suggest that the operational criteria be broadened to include a criterion that takes into account the amount of time for which a case has been deprioritised. The fact that a case has been deprioritised for a long time would thus be a criterion justifying prioritisation.

Suggestions for additional areas to be included in the Policy

Communication and outreach regarding decisions not to select/prioritise a case and the grounds for the same

The Draft Policy lists various criteria informing the OTP's decisions to select but also not to select a particular case. However, it currently does not indicate how victims and affected communities as well as other interested stakeholders will be able to 1) know when such a decision has been made; 2) understand how the criteria set out in the Policy have been applied in that particular instance; and 3) raise concerns, as appropriate, with regard to how the criteria set out have been applied.

The OTP should explain in the Policy how it will communicate decisions to select or not select cases, and how the criteria set out in the Policy have been applied concretely in that particular case. This additional layer of transparency would help ensure that decisions are better understood and perceived as legitimate, thereby also likely to play a positive role in strengthening and creating

[14] Ibid, para 47.

support for the OTP and the Court as a whole.[15] Similar considerations apply to decisions relating to prioritisation.

Indeed, while the OTP has been providing regular reports on its activities relating to Preliminary Examinations (which are available online), there is no such equivalent once an investigation has been opened. We note that the OTP already provides some information to States Parties and others on its investigation activities. For example, the OTP has indicated on several occasions that budget constraints meant it would have to postpone investigations in one or more situations. In other instances, it has clarified that further investigations in relation to a particular geographical location in a situation country were unlikely to be pursued as the focus had shifted to other areas.[16] However, such information is not necessarily accessible to victims and affected communities, nor is it always conveyed fully or formally, which limits the ability of such communications to serve the goals of transparency and accountability, which, as already indicated, we see as core goals. The OTP should commit to articulating decisions it has taken, especially when those decisions trigger the very limited review procedures that exist under the Statute. We suggest that, should the case selection plan remain confidential, a yearly report on the status of investigations in each opened situation be provided by the OTP, which could help clarify whether investigations are ongoing in a particular situation and - to the extent that such information would not endanger victims/potential witnesses of the cases that are being investigated.

[15] Rolf Einar Fife, 'Criteria for Prosecution of International Crimes: The Importance for States and the International Community of the Quality of the Criminal Justice Process for Atrocities, in Particular of the Exercise of Fundamental Discretion by Key Justice Actors', in Morten Bergsmo, ed., Criteria for Prioritizing and Selecting Core International Crimes Cases, FICHL Publication Series No. 4 (2010), at 19.

[16] For example, the OTP has indicated that it was no longer investigating crimes committed in Ituri during the 2002-2003 period; however, there is no formal finding to that effect which would open an avenue for victims to challenge such a decision.