

THE INTERNATIONAL CRIMINAL COURT, 2002 - 2012

10 years, 10 recommendations for an efficient and independent International Criminal Court

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,



Introduction

The Statute creating the International Criminal Court entered into force on 1 July 2002, after having been ratified by 60 States. Today, 121 States from all regions of the world are Parties to this Statute. The ICC has opened investigations on seven situations and several cases against persons accused of being those most responsible for crimes against humanity, war crimes committed in Uganda, Democratic Republic of Congo, Central African Republic, Kenya, Libya, Cote d'Ivoire, and genocide in Darfur, Sudan.

The tenth anniversary celebration of the establishment of the ICC is taking place in a context of severe global financial crisis which is also affecting the Court. States Parties, in particular for the past two years, have refused any increase of the Court's budget over the last two years. This is affecting its ability to carry out new investigations and prosecutions, and affects the rules of due process (through the ongoing reform of legal aid granted to the accused and to the victims).

Beyond this budget issue, which has a direct impact on the activities of the ICC, the central issue concerns the role and place that States intend to grant the ICC and, more broadly, the international criminal justice, in the peaceful settlement of conflicts and the establishment of lasting peace, on an international scale.

In this sense, FIDH publishes its 10 recommendations for an effective and independent International Criminal Court.

1. Increased universality of the scope of the Court

Although the ICC Statute has been ratified by many States, efforts to reinforce its universality must be strengthened. Influential States, such as the United States of America, Russia and China have not ratified the Statute. Some regions, particularly the Middle East and Asia have few States Parties. This complicates, if not makes it impossible, for the Court to exercise its jurisdiction for crimes under its jurisdiction committed in countries such as Syria, Palestinian Territories, Sri Lanka, Russia (Chechnya). This limitation of its jurisdiction contributes to the misperception that the Court is not impartial, which is unfortunately further reinforced by the fact that all the current ongoing investigations are conducted on the African continent, where serious crimes have indeed been committed. Therefore, more States need to ratify the Statute in order to increase the scope of the Court's jurisdiction.

The ICC Office of the Prosecutor (OTP) should also conclude its preliminary analysis, still in progress, on situations such as in Colombia, where an investigation is warranted and necessary.

2. Enhanced support of States

States have an obligation to cooperate with the ICC as it does not have its own police force. The Court suffers cruelly from the insufficient cooperation of the States, which weakens its authority and efficiency. For example, in early 2012, only five out of 18 arrest warrants issued by the Court were executed. In addition to the necessary judicial and technical cooperation, States Parties should provide both political and diplomatic support. Individually, States should adopt public statements that support the repressive, but also preventive, mandate of the ICC. They should also refrain from meeting any person upon whom an ICC arrest warrant has been issued.

The adoption through a vote of a budget tailored to the Court's needs, as prepared and presented by the Court, as opposed to the current principle of zero growth defended by States Parties (especially over the past two years) would also express the commitment of States Parties to practical support of the work of the ICC. Without interfering directly in its operations, the Court's autonomy and independence would be preserved, thereby guaranteeing its effectiveness. States other than those on whose territory crimes were committed should also show increased and impartial support to the Court by referring situations of its jurisdiction, as provided in Article 14 of the Statute.

Support of the ICC must also be reflected in the priorities of intergovernmental organisations, such as the European Union and the African Union. The latter (of which a very large number of its Member States have ratified the Statute) should also work towards compliance with the Court's decisions, and strengthen complementarity in the prosecution for international crimes. The UN Security Council should continue to use, in an impartial manner, its power of referral to the ICC.

3. Strengthening investigations and prosecutions of the Office of the Prosecutor

The new ICC Prosecutor, Fatou Bensouda, should conduct a critical evaluation of the implementation of, and impact of, policies and practices of the OTP. The conduct of the OTP investigations has been questioned by ICC Judges, in particular in the Lubanga, Mbarushimana and Mudacumura cases. Accordingly, the policy of limiting the size of the investigation teams should be revised to recruit professional investigators. The OTP should take into account the negative consequences of the sequential approach, which is to focus on a group (a party to a conflict), then reallocate limited resources to another party to the conflict. This approach

perpetuates the perception of bias on the part of the Court, and leads to prosecutions that do not reflect the reality of the crimes committed, especially since in many cases, other groups in other regions/countries are not prosecuted (Uganda, Central African Republic, Cote d'Ivoire). The OTP should review its focused prosecutorial strategy, in particular taking into account the representativeness of charges and their impact on affected communities. If the OTP must continue to focus on prosecuting those who bear the greatest responsibility, it should also go up the chain of command in situations currently before the Court.

4. Systematic prosecution of crimes of sexual violence

Inspired in part by the innovative jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the instigation of NGOs working on women's rights, the Rome Statute for the first time defines rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity as crimes against humanity and/or war crimes. Yet this important innovation of the Statute has not been fully implemented.

Although we acknowledge the OTP's efforts to systematize the presentation of charges of crimes of sexual violence, they are inconsistent. Either charges of sexual violence are not among the charges brought by the OTP, because of insufficient investigation and evidence (*Prosecutor v. Thomas Lubanga*, *Prosecutor v. Bosco Ntaganda (DRC) before an extension in 2012*, *Prosecutor v. Ruto and others (Kenya)*, *Prosecutor v. Saif El Islam*, *Prosecutor v. El Senussi (Libya)*), or they are not confirmed by the Pre-Trial Chamber because of the lack of connection with the accused (*Prosecutor v. Katanga and Ngudjolo (DRC)*, *Prosecutor v. Muthaura and others (Kenya)*) or because of a restrictive interpretation of the definition of certain crimes, which are sometimes not even in compliance with international jurisprudence (*Prosecutor v. Bemba (CAR)*, *Prosecutor v. Muthaura and others (Kenya)*).

In all, one third of the charges for crimes of sexual violence are not confirmed and therefore do not reach the trial stage. Therefore, crimes of sexual violence should be given greater attention in all preliminary examinations and investigations of the OTP, and the investigators with special expertise should be utilised. Charges reflecting the reality of the crimes of sexual violence should be presented whenever a sufficient basis exists, and the interpretation of the qualification of crimes of sexual violence should comply with existing international jurisprudence.

5. Providing support to complementarity efforts at national level

The ICC has jurisdiction when national courts have neither the ability nor the will to genuinely investigate crimes within its jurisdiction and prosecute their perpetrators.

As the ICC prosecutes only those most responsible for crimes within its jurisdiction, the implementation of this principle, and the initiation of effective prosecutions at the national level, will effectively help to overcome the “impunity gap”. States retain primary responsibility for prosecuting the perpetrators of these crimes. They cannot discharge their obligations by referring situations to the ICC. On the contrary, States Parties to the Statute would need to adapt their domestic legislation in such a manner to enable the investigation and prosecution of perpetrators of international crimes at the national level, including with extraterritorial and universal jurisdiction proceedings.

FIDH welcomes the efforts of the OTP, which encourages the opening of investigations and initiation of effective and independent prosecutions at the national level, particularly in the framework of preliminary examinations and investigations before the ICC, and in application of the “positive complementarity” policy. These efforts, like many State and international programmes, are mainly focused on technical assistance. However, it is also important that the political unwillingness of States needs to be addressed and considered in terms of additional mechanisms and bilateral and multilateral negotiations.

6. Transparency and impact of preliminary examinations

The OTP conducts preliminary examinations of the situations in Afghanistan, Colombia, Georgia, Guinea, Honduras, Republic of Korea, Mali, and Nigeria, upon which it bases its decision whether or not to open an investigation. After the Palestinian Authority referred the situation to him, the Prosecutor has recently decided to not pursue its preliminary examination of the situation in the Occupied Palestinian Territories, arguing that he lacked jurisdiction to rule on the status of Palestine. In December 2011, the Prosecutor released a report on the activities conducted in relation to preliminary examinations. If the opening of a preliminary analysis may have a deterrent effect, it must then be conducted so as to encourage complementarity efforts at the national level and within a reasonable timeframe. It is therefore vital that the OTP communicate regularly on the status of its examinations in order to strengthen their impact at a national level, including their possible preventive effect. The OTP should address situations under preliminary analysis more consistently and rapidly, especially by submitting evaluation reports of the conditions for opening an investigation under Article 53(1) to the Pre-Trial Chamber, by informing the Pre-Trial Chamber of any decision to not proceed and/or

interrupt investigations, and by publicly explaining the reasons for its decisions. On this basis, the victims would have a legal ground to come forward and present their views.

7. Strengthening the impact of the ICC on affected communities

The ICC, based in The Hague, is far removed from situations under investigation and is governed by a unique and very complex legal system. The Court cannot hope to have an impact if it remains little-known, or even misunderstood, especially since it is easily subject to misinformation, a sign that its potential effectiveness is taken seriously.

It is therefore essential that the Court maintain and strengthen its outreach activities in the field. States should, in this sense, financially support relevant sections of the Registry.

Upon opening an investigation, the Registry needs to have access to the affected populations in order to give consistent information on the activities of the ICC and to strengthen their impact. These activities are often delayed by the cumbersome procedures for opening a field office. Alternatives should be found, such as renting temporary offices for outreach activities, thus facilitating the access to proceedings by victims. Various outreach activities could potentially better disseminate information regarding, and clarify, these very complex proceedings.

The Court should also be encouraged, in part through the financial support of *La Francophonie* and French-speaking States, to maintain the French translation (working language of the ICC) of the transcripts and Court decisions, especially regarding those francophone situations.

8. Support for the participation and effective representation of victims

The participation of victims in the Court proceedings is a major innovative component of the Rome Statute. The aim is to restore to the victims of crimes - who were ignored by the *ad hoc* Tribunals that only heard them as witnesses - the central position in the new system of international justice, thereby giving it true significance. This element strongly underlines the fact that it would be unthinkable for the ICC to judge mass crimes that offend the conscience of mankind without due consideration being given to the victims of the crimes.

The system for participation must be improved by allowing the Section for Victims' Participation

and Reparations of the Registry to undertake activities in the field and inform victims of their right to participate as soon as an investigation is opened, or a warrant of arrest or a summons to appear is issued. Additionally, States must allocate additional funds for the swift review of the requests for participation.

The form for collective participation used in the Gbagbo case needs to be evaluated before being used again in other cases, with a view to both the rights of the defence and the interests of victims.

Victims do not directly participate in court proceedings, but participate through their legal representatives. It is of prime importance that the current reform of legal aid should not render victims' participation before the ICC meaningless, but should take into consideration the specific nature of their legal representation. It is essential to guarantee that the representatives are independent of the Court, are lawyers from the situation country or who have special knowledge of the situation country, and who have a permanent link with a team in the field.

9. Guaranteeing reparation and support for victims and affected communities

The ICC is the first international criminal court with a mandate for reparation to victims. The first decision on the issue is due to be delivered in a few days in the Lubanga case. The ICC Judges must interpret the reparation measures, “in particular the restitution, compensation and rehabilitation”, fully taking into account the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and international human rights jurisprudence.

In this framework, the Court can order States to implement reparation orders pertaining to the freezing of the assets of the accused, and, in principle, States are obliged to cooperate. The Court needs to reinforce its procedures in this area, including through better coordination between its various bodies and enhanced exchanges with the States in order to press upon them the need for a better cooperation. The Court needs to be empowered to set up a mechanism for administering and monitoring seized assets to ensure that their value does not diminish, and States must give the Court precise information for seizing assets.

The mandate of the Trust Fund for Victims is not only to implement the Court's reparation orders, but to also carry out, on its own initiative, medical and psychological assistance programmes. FIDH encourages the Fund to continue to develop its support activities, which are complementary to the Court's reparation mandate. FIDH welcomes the efforts made towards greater transparency in the management of the Fund, and the fact that it will soon be able to receive contributions from private corporations and organisations, in addition to voluntary contributions from States. FIDH calls upon States to regularly make voluntary contributions to the Fund, and to present independent candidates with expert knowledge of such matters for the election of the next Board of Directors of the Fund, to be held during the eleventh session of the Assembly of the States Parties next November in The Hague.

10. Support the protection of witnesses, victims and intermediaries

The ICC conducts its investigations in ongoing conflict areas. To facilitate the progress of its proceedings, and also because of limited resources, the ICC uses many intermediaries. Although they cannot always replace a direct intervention of the Court (in particular for investigations, as pointed out by Judges in the Lubanga and Mbarushimana cases), the involvement of intermediaries is essential given their access to local populations, their understanding of local languages and context, and the delicate security situation, which enables them to interview victims and witnesses without bringing attention to them. FIDH welcomes the efforts for formalisation of this cooperation and the drafting of guidelines on the cooperation between the Court and intermediaries. These guidelines should be adopted shortly. It is vital that their implementation be flexible and governed in such a manner that tasks are not made more complex, and that results in the establishment of a transparent and efficient procedure for the protection of intermediaries.

In order to contribute to the protection programme of the ICC, States must sign relocation agreements with the Court, which are often the only possible form of protection considering the context of conflict in the situation countries. The need to maintain an effective and independent system of protection must be at the heart of the upcoming discussions of the Court - as well as those of States Parties - in relation to the ICC completion strategy, for situations where investigations will be closed and cases concluded.

Useful links

- **FIDH, “The Office of the Prosecutor of the ICC - 9 years on”**, December 2011 <http://www.fidh.org/The-Office-of-the-Prosecutor-of>
- **CICC Legal Representation Team, “Comments and Recommendations on the Discussion paper on the Review of the ICC Legal Aid System”**, February 2012 <http://fidh.org/Comments-and-Recommandations-on>
- **FIDH Position paper for the ICC Review Conference “Renewing Commitment to Accountability”**, May 2010 <http://fidh.org/FIDH-Position-Paper-for-the-ICC>
- **FIDH Comments on the ICC victims strategy**, October 2009 <http://fidh.org/FIDH-Comments-on-the-draft-ICC>
- **FIDH, “Guide for Victims, their Legal Representatives and NGOs on Victims’ Rights before the International Criminal Court”**, April 2007 <http://www.fidh.org/Victims-Rights-Before-the>
- **Colombia: FIDH-CCEEU, “Colombia: The war measured in litres of blood – “False-positives”, crimes against humanity: the impunity of the most responsible”**, May 2012 <http://fidh.org/FIDH-and-the-Coordinacion-Colombia>
- **Guinea: FIDH-OGDH, “Guinée : La commémoration du massacre du 28 septembre 2009 confisquée par la tension politique”**, September 2011 <http://fidh.org/Guinee-La-commemoration-du>
- **Israel / OPT: FIDH, “Shielded from accountability : Israel’s unwillingness to investigate and prosecute international crimes”**, September 2011 <http://fidh.org/Shielded-from-accountability>
- **FIDH, Questions and Answers on Libya and the ICC**, May 2011 <http://fidh.org/Libya-and-the-ICC-FIDH-Questions>
- **FIDH, Questions and Answers on the Bemba case before the ICC**, November 2010 <http://fidh.org/The-Bemba-Case-Questions-and>
- **FIDH, Questions and Answers on Kenya and the ICC**, October 2009 <http://fidh.org/Questions-Answers-Kenya-and-the>
- **FIDH, Questions and Answers on le Darfur and the ICC**, March 2009 <http://fidh.org/The-International-Criminal-Court,5733>

“International Criminal Court Section” of the FIDH website <http://fidh.org/-International-Criminal-Court-ICC->

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Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

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FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.

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inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

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FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 164 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

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Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

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