

# THE OFFICE OF THE PROSECUTOR OF THE ICC - 9 YEARS ON

ANALYSIS OF THE PROSECUTORIAL STRATEGY AND POLICIES OF THE OFFICE OF THE PROSECUTOR (2003-2011)  
RECOMMENDATIONS TO THE NEXT ICC PROSECUTOR

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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





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# Introduction

The International Criminal Court (ICC) was created in 1998 to “put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole].”<sup>1</sup> The ICC Statute came into force in 2002. One hundred and twenty States are party to the Statute.

To date, the ICC has opened investigations on seven situations: the Democratic Republic of Congo (DRC) and northern Uganda in 2004, Darfur (Western Sudan) in 2005, the Central African Republic (CAR) in 2007, Kenya in 2009, Libya and Côte d’Ivoire in 2011.

The Court has issued 18 arrest warrants (including two for sitting Heads of State) and nine summonses to appear. Pursuant to this, five individuals have been arrested and nine persons have appeared voluntarily before the Court. Nine warrants of arrest are pending execution.<sup>2</sup>

The first ICC trial, against Thomas Lubanga Dyilo from the DRC, started in January 2009 and closing arguments were presented in August 2011. The first ICC judgment is expected to be handed down in late 2011/early 2012. Two other trials, against Germain Katanga and Mathieu Ngudjolo from the DRC, and Jean-Pierre Bemba, a Congolese national accused of crimes committed in CAR, are ongoing. Another case, against Sudanese rebel commanders Abdallah Banda Abaker Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo), is currently undergoing preparations for trial. Moreover, confirmation of charges hearings in three other cases – for crimes committed in the Kivus region of the DRC and in Kenya – have been conducted in 2011. If charges are confirmed, these three other cases will initiate preparations for trial.

In addition to investigations and prosecutions, the Office of the Prosecutor (OTP) is conducting preliminary examinations (or preliminary analyses) in relation to crimes committed in the following countries: Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria, Palestine and South Korea. The purpose of preliminary examination is to evaluate whether the conditions to open an investigation under Article 53(1) of the Rome Statute are met.

An increasing number of victims are participating in proceedings. Between 100 and 360 victims participated in the first two ICC cases, while over 1600 victims have been accepted to participate in the third ICC case against Jean-Pierre Bemba; nearly 3000 applications are still to be processed.<sup>3</sup> The ICC has indicated that it has received over 2000 applications for participation in the Kenyan cases.<sup>4</sup> The ICC Chambers have interpreted the rights of victims

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1. Preamble, Rome Statute of the International Criminal Court (Rome Statute), 17 July 1998, UN Doc. A/CONF.183/9\*. Entered into force 1 July 2002.

2. At least two ICC fugitives have died. The ICC has confirmed the death of Raska Lukwiya, who was wanted by the Court for crimes committed in northern Uganda and passed away in 2006. In addition, although confirmation of death and termination of proceedings have not yet been carried out by the ICC, it is public knowledge that Muammar Gaddafi was killed on 20 October 2011. Finally, there have been reports of the deaths of other fugitives, including Vincent Otti from the Lord’s Resistance Army. However, these deaths have not been officially confirmed by the ICC.

3. *Prosecutor v. Bemba*, Decision setting a timeline for filing observations on pending victims’ applications, 9 September 2011, ICC-01/05-01/08-1726, ¶3.

4. *Prosecutor v. Ruto et al.*, Decision on the Registrar’s “Request for instructions on processing of victims’ applications”, 28 June 2011, ICC-01/09-01/11-147, ¶3; *Prosecutor v. Muthaura et al.*, Decision on the Registrar’s “Request for instructions on processing of victims’ applications”, 28 June 2011, ICC-01/09-02/11-137, ¶3.

as defined in the ICC Statute, and set up a comprehensive regime for victim participation. Additionally, should Trial Chamber I issue a conviction in the first ICC case, the Court will conduct the first reparations proceedings and issue the first-ever ICC reparations award. Finally, the Trust Fund for victims is conducting assistance projects in Uganda and the DRC, and will soon initiate projects in CAR.<sup>5</sup>

The Court has reached out to affected communities, thus involving them in ICC activities related to investigations and trials that concern them. Outreach is a vital function of the Court to ensure that ICC proceedings have a direct impact in the communities it is due to serve, and thus promote justice and the rule of law in the countries concerned.

The Court's proceedings have contributed to fostering complementarity<sup>6</sup> in certain countries. For example, an international crimes division has been created within the High Court of Uganda. In the DRC, there have been discussions about the creation of a mixed court to try cases that will not be tried at the ICC. In Kenya too, there have been discussions about establishing a local mechanism for trying international crimes, although it would seem that latest efforts are directed at obtaining a deferral of ICC proceedings rather than at implementing the government's obligation to prosecute serious crimes. Finally, the OTP's preliminary examination in Colombia has contributed to national investigations and prosecutions of crimes committed by paramilitary structures and those associated with them. Nevertheless, national efforts remain insufficient: domestic legal and judicial systems need to be reinforced, including by the adoption of legislation implementing the Rome Statute into national law. Most importantly, States continue to show little willingness to prosecute those most responsible for serious international crimes. Clearly, much more remains to be done in the field of complementarity. National proceedings are key to securing justice for ICC crimes given their prevalence and the Court's jurisdictional, practical and budgetary limitations. While crimes under the Court's jurisdiction involve a large number of perpetrators, the ICC focuses exclusively on those most responsible and domestic prosecutions play a pivotal role in filling the "impunity gap". There is also a need to reinforce States' capacities and will to fight impunity for the most serious crimes, and thus strengthen the rule of law at the global level.

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During the first election of ICC officials, Mr. Luis Moreno-Ocampo was unanimously elected as the first prosecutor of this institution. His nine-year term will soon come to an end. Throughout the years, the International Federation for Human Rights (FIDH) has closely monitored the set-up of the OTP, as well as its activities. FIDH has noted several criticisms in relation to the work of the OTP under the mandate of the first Prosecutor. It has also regularly made recommendations in relation to both strategic and policy issues, as well as activities in certain countries where crimes under the Court's jurisdiction have been committed. This report assesses some of the most relevant developments, criticisms and achievements of the OTP during the Moreno-Ocampo term. Based on this analysis, the report makes recommendations for Mr Moreno-Ocampo's successor.

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5. ICC Trust Fund for Victims Press Release: Le Fonds au profit des victimes ouvre ses programmes en RCA, 1 June 2011.

6. According to the Rome Statute, States retain primary responsibility to investigate crimes under ICC jurisdiction; the ICC can only intervene if the relevant State(s) do(es) not investigate/prosecute those crimes, or is/are unable or unwilling to carry out investigations or prosecutions. This is known as the "principle of complementarity". The ICC, and especially the OTP, have proactively encouraged domestic investigations and prosecutions for ICC crimes. For further information on the policy of "positive complementarity", see Section IV. B below.

The next ICC Prosecutor will be elected at the tenth session of the Assembly of States Parties to the Rome Statute, to be held in New York from 12 to 21 December 2011.

***The Office of the Prosecutor 2003/2011 in figures***

18 public arrest warrants (including 2 for sitting Heads of State)  
9 summonses to appear  
7 investigations opened  
3 State referrals  
2 Security Council referrals  
2 Investigations *proprio motu*  
6 arrests  
9 pending arrest warrants  
9 voluntary appearances  
8 confirmation of charges hearings  
3 cases at trial stage  
8 situations under preliminary analysis  
2 reports dismissing situations under preliminary analysis

**About FIDH**

FIDH is an umbrella organisation bringing together 164 human rights organisations from over 100 countries around the world. Its mandate is to contribute to the respect of all human rights, as defined in the Universal Declaration of Human Rights. FIDH aims at obtaining effective improvement in the protection of victims, the prevention of human rights violations, and holding perpetrators of serious violations to account. The fight against impunity for international crimes and the provision of assistance to victims of those crimes are among its main priorities. FIDH has been closely involved in following developments around the Rome Statute system. It has had a programme on international justice since the adoption of the Statute, and has had a permanent delegation in The Hague since 2004. It is an active member of the Coalition for the ICC (CICC), as well as of the Victims' Rights Working Group (VRWG). The observations made in this report are based upon FIDH's monitoring of the policies and activities of the Office of the Prosecutor, as well as the decisions and performance of the ICC as a whole, including its impact in the countries concerned, since the entry into force of the Rome Statute. Monitoring has mainly been carried out through the FIDH permanent delegation in The Hague.

# I. Setting up the Office of the Prosecutor

According to Article 42(4) of the Rome Statute, “[t]he Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties.” Luis Moreno-Ocampo, an Argentine national, was elected by acclamation on 21 April 2003, during the first session of the Assembly of States Parties. He took office on 16 June 2003.

Upon taking up the position, the Prosecutor’s first task was to design the structure of an office that had been mandated with the investigation and prosecution of those responsible for the most serious crimes of international concern. During his term in office, the OTP’s highest officials elaborated a series of key documents, including prosecutorial strategies, policy documents and an operational manual, which altogether document the vision and practices of the Office under the first ICC Prosecutor’s administration.

## A. Deputy Prosecutors

In 2003-2004, Moreno-Ocampo was joined at the head of the OTP by two Deputy Prosecutors, elected by the Assembly of States Parties, following nominations in accordance with Article 42(4).<sup>7</sup> Serge Brammertz (Belgium) was elected Deputy Prosecutor for Investigations, and Fatou Bensouda (Gambia) was elected Deputy Prosecutor for Prosecutions. Brammertz decided to leave the OTP in 2007<sup>8</sup> and his position has not been filled since. External actors, including non-governmental organisations (NGOs), have repeatedly recommended the election of a new Deputy Prosecutor for Investigations.<sup>9</sup> Indeed, the importance of investigation to the ICC’s functions makes it desirable that the Investigations Division be headed by an official elected by the Assembly of States Parties. Having accrued some experience in the management of the OTP and investigations, the Prosecutor reconsidered his decision to assign a Deputy Prosecutor for Investigations and decided that the Investigations Division would be headed by an OTP staff member. He later proposed the abolition of this Deputy Prosecutor position. The Assembly of States Parties, however, has noted “that this elected position was part of the original structure for the Office of the Prosecutor and had been the structure of the current Prosecutor’s office for several years. The Assembly considered that the new Prosecutor should have this same flexibility to decide on the composition of the Office of the Prosecutor. The Assembly, therefore, did not approve the abolition of the post of Deputy Prosecutor for Investigations.”<sup>10</sup>

As explained further below, questions and criticisms have arisen of the OTP’s policies and capacity in relation to investigations, including *inter alia* the selection of cases and charges,

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7. “The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled.”

8. Although his resignation was submitted in June 2007, Brammertz had been on leave since early 2006.

9. FIDH Recommendations to the Assembly of States Parties to the Rome Statute, Position Paper No. 13, November 2008, p. 9; see also: Human Rights Watch, *Courting History*, July 2008, pp. 48-49.

10. Official Records of the Ninth Session of the ICC Assembly of States Parties, ICC-ASP/9/20, Vol. I, Part II, ¶23.

the independence of investigations and the size of investigation teams. Key policy issues relating to investigations have a significant impact not only on the work of the Office, but also on the overall performance of the ICC and its impact in affected communities and countries of concern to it. Thus, given the major significance of investigations, FIDH reiterates that it is highly desirable that the Investigations Division be headed by an official elected by the Assembly of States Parties. The existence of a Deputy Prosecutor for Investigations would also strengthen the Office itself, whilst aiding it to counter allegations of political bias.

## **B. OTP Divisions: Creation of the JCCD**

The Prosecutor organised his office into three Divisions: the Investigations Division, the Prosecutions Divisions, and the Jurisdiction, Complementarity and Cooperation Division (JCCD). The JCCD was a new creation as there had been no similar division or department in previous tribunals. Its creation was justified by the unique features of the ICC: namely, its broad territorial mandate and the principle of complementarity. Over the years, the JCCD has proven to be a key component of the OTP. The JCCD is composed of two sections: the Analysis Section and the Cooperation Section. Although JCCD's activities are usually more visible in relation to situations under preliminary analysis, the Division is involved in all cases throughout different stages of the ICC's processes. In particular, the JCCD engages relations with national authorities and the execution of arrest warrants, among other relevant aspects of its cooperation mandate.

While there is no question about whether the JCCD should be maintained and strengthened in the future structure of the OTP as it goes into a second administration, internal assessment and improvement of processes should also be undertaken.

## **C. Prosecutorial Strategy, Policy Papers and Operational Manual**

The requirement for transparency in the OTP's policies and activities was highlighted by external observers very early on. Over the years, the OTP has made efforts to publicise its strategies and policies. As early as September 2003, the OTP issued a Policy Paper containing policy views on matters such as complementarity and prioritisation of prosecutions.<sup>11</sup> An annex to that paper, dealing primarily with the Office's handling of referrals and communications, was released shortly after.<sup>12</sup> In 2006, the OTP issued a report on its activities during its first three years, where a number of strategic and policy considerations were outlined.<sup>13</sup> A prosecutorial strategy for 2006-2009 was released simultaneously.<sup>14</sup> A new three-year prosecutorial strategy was made public in 2009.<sup>15</sup>

In addition, policy papers on the following matters have been released: the interest of justice,<sup>16</sup> the OTP's position on victims' participation<sup>17</sup> and preliminary examinations.<sup>18</sup> The Office is

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11. OTP, Paper on some policy issues before the Office of the Prosecutor, September 2003.

12. OTP, Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications, *ibid.*

13. OTP, Report on the activities performed during the first three years (June 2003-June 2006), September 2006.

14. OTP, Report on Prosecutorial Strategy, September 2006.

15. OTP, Prosecutorial Strategy 2009-2012, February 2010.

16. OTP, Policy Paper on the Interest of Justice, September 2007.

17. OTP, Policy Paper on Victims' Participation, April 2010.

18. OTP, Draft Policy Paper on Preliminary Examinations, October 2010.

also in the process of finalising a number of additional policy papers, including a paper on selection of situations and cases for investigation and prosecution.

The process of drafting these documents has generally been open and transparent. Draft strategic and policy papers were shared with external partners, including civil society, who were invited to send contributions and recommendations. Although some comments have been taken on board, FIDH has observed that some critical recommendations were dismissed with no apparent serious consideration. It is the view of FIDH that some comments made by external actors deserved further attention. For example, the negative implications of a sequential approach have been raised repeatedly;<sup>19</sup> similarly, pitfalls in the selection of situations and cases do not seem to have appropriately been addressed.<sup>20</sup>

Questions have equally been raised as to the extent to which those strategies and policies, as written on paper, have been applied in practice. For example, although the Office emphasises that its focused investigations and prosecutions are to be representative of the entire range of criminality in a given situation, this policy does not seem to have been applied consistently.<sup>21</sup>

Under the first administration, the Office has also made considerable efforts to establish and document internal practices through the adoption of Regulations for the OTP<sup>22</sup> and an Operation Manual.<sup>23</sup> The process of consolidating internal proceedings and registering practice is important. In order for it to be fully successful, the process should include an assessment of difficulties and set-backs, as well as lessons learned.

The documentation of the Office's practices will undoubtedly contribute to ensure a smooth transition between administrations. Overall, documentation of strategies, policies and practices should nevertheless not preclude the development of new policies and internal procedures by a new Prosecutor. It is crucial that the newly elected Prosecutor conducts a critical assessment of the implementation and impact of the Office's policies and practices during the ICC's first nine years.

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19. FIDH Statement on the Prosecutorial Strategy of the Office of the Prosecutor of the International Criminal Court, The Hague, 26 September 2006, p.4; Human Rights Watch, *Courting History*, July 2008, pp.50-53.

20. FIDH, *Comments on the Office of the Prosecutor's draft policy paper "Criteria for selection of situations and cases"*, January 2007; Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 2011; REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, May 2011, pp.29-30.

21. See comments in section II.A below regarding charges and incidents selected in the Lubanga and Katanga & Ngudjolo cases.

22. ICC-BD/05-01-09, *Regulations of the Office of the Prosecutor*, entered into force 23 April 2009.

23. This document is currently at the drafting stage. FIDH understands that it will be an internal OTP document.

# II. The Evolution of Prosecutorial Strategy and Policies: Initial Criticisms, Progress Made and Challenges Ahead

## **A. Focused Investigations and Prosecutions: Representativeness of Charges**

Upon the establishment of the Office, Moreno-Ocampo announced that investigations and prosecutions would be conducted with a limited scope. He wanted to avoid long proceedings like those of the *ad hoc* Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), which had sought to conduct exhaustive investigations in order to demonstrate the guilt of the accused. In contrast to its predecessors, the ICTY and the ICTR, which mainly operated in post-conflict situations, Moreno-Ocampo asserted that the ICC's OTP would operate both during conflict and in volatile contexts. This raises implications for the security of both victims and witnesses, as well as the Office's staff. The Prosecutor therefore established a policy of focused investigations and prosecutions, whereby cases would focus on a "sample" of the crimes committed. In its 2006-2009 Prosecutorial Strategy, the Office stated: "This allows the Office to carry out short investigations and propose expeditious trials while aiming to represent the entire range of criminality. In principle, incidents will be selected to provide a sample that is reflective of the gravest incidents and the main types of victimisation."<sup>24</sup>

The issue of the representativeness of charges was very much the focus of criticism surrounding the first ICC case. Thomas Lubanga Dyilo, the first-ever accused to be tried before the Court, was charged *solely* with the conscription, enlistment and use of child soldiers. Both victims from the DRC as well as local and international civil society organisations have expressed serious concerns about this - the *Union des Patriotes Congolais* (UPC) headed by Lubanga, is suspected of having committed other serious crimes including rape, torture, murder and

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24. OTP, Report on Prosecutorial Strategy, September 2006, pp. 5-6. See also: OTP, Prosecutorial Strategy 2009-2012, February 2010, ¶20.

pillage.<sup>25</sup> Although the OTP had initially indicated that it would be adding further charges to the indictment, it subsequently informed the Chamber that it would not be in a position to do so.<sup>26</sup> It is striking that the OTP has never admitted that this was a serious mistake which has the potential to compromise the perception of justice with respect to crimes committed in the Ituri province of the DRC.

This situation is further aggravated by a lack of proper consideration for the impact that the conduct of this case would have upon pre-existing ethnic tensions among communities in Ituri. The conflict in Ituri has drawn upon existing tensions between two ethnic communities: the Hema and the Lendu. The UPC was a Hema militia and engaged in combat mainly against the Lendu. Child soldiers recruited by the UPC were also Hema; thus, the Prosecutor's focus on this victim group means that the Hema have been the only victims able to participate in the Lubanga case. The *Forces de Résistance Patriotique en Ituri* (FRPI) and the *Front des Nationalistes et Intégrationnistes* (FNI), who fought against the UPC, were composed of Ngiti and Lendu, and victimised the Hema community. The charges brought against, Germain Katanga and Mathieu Ngudjolo -leaders of the FRPI and the FNI respectively- are broader in including charges other than conscription of children. Consequently, it is again mainly Hema victims who have been able to give testimony and participate in proceedings for the ICC's second case. Although it is yet unclear how reparations proceedings will unfold, it is likely that these prosecutorial decisions will impact on the Court's capacity to award reparations to all victims equally.

The narrow and unfair scope of the charges against Lubanga was raised by victims and their representatives at the outset of proceedings. There were several attempts to extend the charges.<sup>27</sup> The OTP has often been against motions of the sort and, in general, to discuss matters that go to the core of prosecutorial policy in the Chambers.<sup>28</sup> Overall, the OTP has been wary of victim participation especially during the situation phase, claiming that victim involvement could affect the independence of the Office and/or disrupt investigations.<sup>29</sup> The OTP has also perceived motions to extend charges as an attempt to jeopardise the implementation of the

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25. Avocats Sans Frontières, Center for Justice and Reconciliation, Coalition Nationale pour la Cour pénale internationale – RDC, FIDH, Human Rights Watch, International Center for Transitional Justice, REDRESS and Women's Initiatives for Gender Justice, Joint Letter to the Prosecutor of the International Criminal Court: Concern about temporary suspension of the investigation in respect of other crimes in the case against Thomas Lubanga, 31 July 2006; Women's Initiatives for Gender Justice, Reflection: Gender Issues and Child Soldiers – the case of Prosecutor v. Thomas Lubanga Dyilo, 25 August 2011; REDRESS, Justice for Victims: The ICC's Reparations Mandate, May 2011, p.32.

26. Prosecutor v Lubanga, Prosecutor's Information on Further Investigation, 28 June 2006, ICC-01/04-01/06-170.

27. In August 2006, the legal representatives of victims of the situation in the DRC - members of the FIDH Litigation Action Group - filed motions on behalf of those victims with respect to the narrow scope of the charges in the Lubanga case: document filed as confidential, ICC-01/04-213-Conf-Exp, referred to in *Situation in the DRC, Decision Concerning the Reclassification of Non-Public Documents in the Record of the Situation in the Democratic Republic of Congo*, 29 October 2008, ICC-01/04-543. In November 2006, Women's Initiatives for Gender Justice asked to file an *amicus curiae* brief on the same issue: *Situation in the DRC, Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae with Confidential Annex 2*, 10 November 2006, ICC-01/04-313. Finally, in May 2009 victims' legal representatives filed a motion under Regulation 55 of the Regulations of the Court to recharacterise the facts and thus include other crimes committed against child soldiers, including cruel and inhuman treatment and sexual slavery: *Prosecutor v. Lubanga*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, 22 May 2009, ICC-01/04-01/06-1891.

28. See, e.g., *Situation in the DRC*, Prosecution's response to the Request Submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Situation in the Democratic Republic of Congo, 5 December 2006, ICC-01/04-316. The Prosecution proved favourable to recharacterising the facts in accordance with Regulation 55 of the Regulations of the Court, following a submission of the victims' legal representatives in the Lubanga case: *Prosecutor v. Lubanga*, Prosecution's Response to the Legal Representatives' "Demand conjointe des représentants légaux des victimes aux fins de mise en oeuvre de la procédure en vertu de la norme 55 du Règlement de la Cour", 29 May 2006, ICC-01/04-01/06-1918.

29. See section II.E below on the Prosecutor's policy on victim participation.

Office's policy of focused investigations and prosecutions. FIDH regrets that the OTP did not take advantage of such initiatives, which could have contributed to the presentation of a more comprehensive case, fully representative of the spectrum of criminality and the main types of victimisation, as described in the OTP's own strategy documents. At no point in time, did these victims' motions seek to introduce numerous elements which would have disrupted the Office's policy of focused investigations. Rather, victims sought to highlight essential aspects and types of victimisation that had been overlooked or were not reflected in the charges selected by the OTP. It is also regrettable that the Pre-Trial Division did not apply a fairness test, in particular in the face of serious challenges by victims, in accordance with the Pre-Trial Chambers' role of exercising control over the Prosecution during pre-trial proceedings.

In the case against Katanga and Ngudjolo, the OTP pressed broader charges. However, the charges relate to only one incident: an attack on the village of Bogoro in February 2003. The limited scope of this case has been difficult to understand for victims, especially those who suffered crimes committed by the FNI/FRPI in other incidents, including during attacks that caused higher numbers of victims and a more significant impact.

The limited scope of charges has also been raised in respect of the case against Bosco Ntaganda. Ntaganda, who is still at large, was charged with the same crimes as Lubanga. His indictment was made public several years after it was issued. When the OTP decided to limit the scope of the Lubanga case, it argued that it was not in a position to add further charges to the indictment within the limited time available for preparation for trial; doing so could affect the rights of the accused in the case at hand, it argued.<sup>30</sup> Since Bosco Ntaganda remains at large, the justification for not extending the charges given in the Lubanga case is not applicable.<sup>31</sup> Yet, the OTP has not been able to explain why charges remain so narrow in this case too.

Charges brought in more recent cases have been broader and, in general, more representative of crimes committed.<sup>32</sup> Questions remain, however, as to how the mistakes made during the ICC's first cases will impact on the ability of victims to obtain reparations,<sup>33</sup> as well as on the credibility of the Court.

Another question that remains unaddressed is the lodging of supplementary charges in cases where accused persons are at large and continue to commit crimes under the jurisdiction of the Court. The matter is relevant to cases currently pending before the ICC, in particular against Joseph Kony and other commanders of the Lord's Resistance Army (LRA), as well as the case against Bosco Ntaganda. Having left northern Uganda the LRA has conducted numerous serious attacks in neighbouring countries, including South Sudan, CAR and DRC. As far as Bosco Ntaganda is concerned, after his time with the UPC, he joined Laurent Nkunda at the *Congrès National pour la Défense du Peuple* (CNDP) where he continued to be involved in the commission of crimes under ICC jurisdiction.

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30. Prosecutor v Lubanga, Prosecutor's Information on Further Investigation, 28 June 2006, ICC-01/04-01/06-170, ¶¶ 8-9.

31. FIDH Press Release: Forth ICC Arrest Warrant in the DRC Situation, 30 April 2008.

32. Yet, in recent proceedings, victims from Kenya have claimed that key aspects of their victimisation have not been taken into consideration by the OTP. See: *Prosecutor v. Ruto et al.*, Final written observations of the Victims' Representative in relation to the confirmation of charges hearing, 30 September 2011, ICC-01/09-01/11-344.

33. See section II.E below on the impact of the policy of focused investigations on victims' participation and reparations.

## **B. Prosecuting “Those Most Responsible” - Criticisms around First Cases and Evolution**

The Prosecutor declared very early on that his Office would focus on prosecuting those bearing the greatest responsibility for crimes under the Court’s jurisdiction.<sup>34</sup> No such distinction as to who should be prosecuted by the ICC is contained in the Rome Statute. However, this policy declaration seems justified given the large number of perpetrators for crimes that the Court is mandated to investigate, and the difficulties faced by domestic courts in applying the principle of complementarity by targeting those in high-ranking positions, including members of the government.

Nevertheless, some have argued that the Prosecutor has not always been consistent in implementing this policy. Thus, when militia leaders Lubanga, Kataga and Ngudjolo were indicted, some contended that these defendants were “small fry”; in reality, those most responsible for the crimes committed in Ituri were those who had armed and supported the militia groups, including political and military figures in the governments of Uganda, Rwanda and the DRC.

However, later cases have targeted Jean-Pierre Bemba, Congolese Senator and former Vice-President of the DRC, Omar Al-Bashir, sitting President of the Sudan, and Col. Muammar Gaddafi, Libyan Head of State, among others. These indictments contributed to dispel doubts as to the OTP’s capacity to target those at the top of the chain of command. It is noted, however, that the Prosecution has yet to pursue higher levels in the chain of command in respect of crimes committed in the DRC.

The question which has since been raised is Court’s capacity to obtain the arrest of high-level personalities including sitting Heads of State, given that the ICC has no police force. In this regard, the responsibility of States Parties to arrest and hand over those targeted by arrest warrants must be recalled.<sup>35</sup>

## **C. Overcoming the “Peace v. Justice Dilemma”**

The interplay between peace and justice has attracted considerable attention in terms of the functioning of international tribunals in conflict and post-conflict situations. This matter has been all the more relevant to the ICC: unlike *ad hoc* tribunals, created by a political body balancing various considerations, the ICC is independent. Moreover, given its permanent nature, the ICC has the capacity, and is likely, to swiftly intervene in on-going conflicts.

During its first years, the OTP devoted considerable time and effort to studying of the concept of the “interest of justice”, a prerequisite to opening an investigation and initiating prosecutions under Article 53 of the ICC Statute. Under the relevant provisions, the Prosecutor is entitled not to proceed with an investigation or prosecution when s/he considers that the investigation/prosecution would not be in the interest of justice.<sup>36</sup>

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34. OTP, Paper on some policy issues before the Office of the Prosecutor, September 2003, Section 2.1.

35. Rome Statute, Part 9.

36. These discretionary decisions are subject to review by the Pre-Trial Chamber. See Article 53(3)(b).

In 2005, the OTP initiated consultations with external actors on the meaning and scope of the term “interest of justice”. FIDH made two submissions in this framework.<sup>37</sup> This issue became particularly relevant in 2006-2007 in the context of peace negotiations in northern Uganda, when Joseph Kony demanded the withdrawal of arrest warrants as a condition of signing a peace agreement with the Ugandan government.<sup>38</sup> Discussions ensued as to whether the Prosecutor should consider taking into account peace negotiations as one of the factors underlying Article 53.

At the time, FIDH argued “that the ‘interests of justice’ provision contained in Article 53 of the Rome Statute should not be interpreted as giving the Prosecutor the power to take into consideration the political context of a given situation in relation to a decision not to investigate or not to prosecute [...] such interpretation would be quite paradoxical considering the letter and purpose of Article 53.”<sup>39</sup>

The OTP finally adopted an official position on the interest of justice issue in a policy document issued in 2007.<sup>40</sup> The document proposes a balanced interpretation of the provision on the interest of justice, in light of the object and purpose of the ICC Statute. While it is acknowledged that “in situations where the ICC is involved, comprehensive solutions addressing humanitarian, security, political, development and justice elements will be necessary”, the Office recognises that “the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”

FIDH welcomes the fact that the OTP has maintained a firm position in this regard in the context of several situations under investigation, including in Kenya and Libya. Indeed, the interplay between peace and justice is a matter which is likely to arise in every situation before the Office. The OTP’s firm stance on the matter ensures that “the ICC [does not] become a tool of political manipulation.”<sup>41</sup>

## **D. Low Profile and Communication**

During its initial years of operations, the OTP adopted a “low profile” public stance which severely damaged the Office’s image. This policy, which implied little to no communication on prosecution cases, brought about questions, false rumours and misunderstandings about the work of the ICC. The reasons given for this approach, as communicated by the OTP, were based upon security considerations for witnesses and OTP staff: the Prosecution purported to ensure protection by not revealing information on cases. While this was a sensible approach as regards the content of the cases, timing of missions on the ground and related information, its damaging dimension flowed from the fact that it also extended to policy considerations and explanations about prosecutorial decisions.

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37. FIDH, *Réflexions sur la notion “intérêts de la justice” au terme de l’article 53 du Statut de Rome*, November 2005. FIDH, *Comments on the Office of the Prosecutor’s draft policy paper on “The Interest of Justice”*.

38. FIDH Press Releases and Open Letters: *Uganda: No Sustainable Peace without Justice*, 4 September 2006; *Open Letter to Luis Moreno Ocampo, Prosecutor of the International Criminal Court*, 4 December 2006; *Crimes committed in Uganda must not go unpunished*, 17 July 2007.

39. FIDH, *Open Letter to Luis Moreno Ocampo, Prosecutor of the International Criminal Court*, 4 December 2006.

40. OTP, *Policy Paper on the Interest of Justice*, September 2007.

41. FIDH, *Open Letter to Luis Moreno Ocampo, Prosecutor of the International Criminal Court*, 4 December 2006.

For example, the Prosecutor announced Uganda's referral to the Court at a joint press conference held together with President Yoweri Museveni. This act, coupled with the OTP's failure to stress clearly enough that the Ugandan government could also be held to account for abuses, created the misperception that the ICC was being instrumentalised by that government to target the LRA.

Later considerations, including the need to maximise the impact of ICC proceedings, led the OTP to change its policy by communicating its actions, policies and strategies publicly. Yet, concerns remain regarding policy decisions, especially the selection of cases in certain situations. For example, in Uganda, the OTP communicated over the years that it had not dropped a possible case against the Ugandan army (Uganda Defense Peoples Army – UPDF).<sup>42</sup> However, there has been no public follow up to this statement and judging by the size of the team (or its abolition)<sup>43</sup> and the little attention devoted to the case in recent OTP publications and public statements, it would seem that no serious attempt has been or is being made to pursue this case. The OTP has, nevertheless, failed to explain publicly its reasons for dropping or delaying a case against the UPDF. This has contributed to a perception that the ICC is not in a position to prosecute government forces, especially in cases where the government concerned refers the case to the ICC itself.<sup>44</sup>

Similarly, prosecution of only one side of the conflict in the situation in CAR requires further public explanation. During the presentation of evidence against Bemba, the Prosecution repeatedly stated that the accused had acted together with other persons, in particular, Ange-Félix Patassé. The OTP also indicated that investigations against persons other than Jean-Pierre Bemba, including for crimes committed by other groups, were under way.<sup>45</sup> No follow-up to that statement is known. This has contributed to the perception that Jean-Pierre Bemba's case is politically motivated and that there could be some type of arrangement between Congolese President Joseph Kabila and the Prosecutor himself, since Bemba is a key member of the opposition to Kabila's government.

Regardless of the merits of such allegations, what is to be noted is that the OTP's behaviour, specifically, the lack of clear communication and public explanation, have contributed to perceptions of manipulation and partiality. FIDH recommends that communication around selection of cases be enhanced.

The "low profile" policy also led to missed opportunities in ensuring the wider impact of preliminary analyses. During its initial years, the Office refrained from communicating publicly about preliminary examinations, unless the sender of communications to the OTP made the information public themselves. FIDH raised this matter with the OTP on numerous occasions:<sup>46</sup> we found that public communication about preliminary examinations could lead to greater impact in fostering national prosecutions for crimes under ICC jurisdiction and deterring the

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42. See *e.g.*, Luis Moreno-Ocampo, ICC Prosecutor, Address to the Assembly of States Parties, New York, 30 November 2007, p.4.

43. Considering the OTP's policy of shifting resources to focus on the Office's most prominent investigations and urgent actions, it appears that the Ugandan team has been considerably reduced, if not abolished. For a discussion of the OTP's policy of shifting resources, see section III.D below.

44. See section III.A below for further comments on the policy of self-referrals.

45. Information in possession of FIDH: discussions during ICC-NGO meetings.

46. FIDH Statement on the Prosecutorial Strategy of the Office of the Prosecutor of the International Criminal Court, The Hague, 26 September 2006, pp.2-3.

commission of further atrocities. Following this recommendation, the OTP shifted its policy in 2007. Since then, communication on situations under analysis has increased overall.

Concerns remain, however, because general communication on situations under analysis has not necessarily brought about greater transparency as to the way preliminary examinations are handled by the Office. Indeed, while some examinations “move very quickly” (eg. Kenya), others seem to stagnate for years (eg. Colombia and Afghanistan). It is also unclear why the Office conducts regular missions to some countries (eg. Guinea) and not to others. These are some of the inconsistencies in the policy of the OTP with respect to preliminary examinations, which we recommend the OTP addresses. We discuss OTP policy with respect to preliminary analysis in more detail below.<sup>47</sup>

## **E. Victim Participation and Taking the Interest of Victims into Account**

The OTP fiercely opposed victim participation in the ICC’s first proceedings where victims sought to participate. This was particularly the case concerning victims’ requests to participate in the “situation”<sup>48</sup> phase of investigations conducted in a certain country. Victim participation was perceived by the OTP as an attempt to endanger the integrity of the investigation, as well as the independence and impartiality of the Office.<sup>49</sup> When FIDH assisted Congolese victims to file the first-ever applications to participate in proceedings related to the situation in the DRC, the OTP argued that, “it would be inappropriate to grant the participation sought by the Applicants. Firstly, allowing for third party intervention at the investigation stage could jeopardize the appearance of integrity and objectivity of the investigation. Secondly, participation in an investigation could be seen as necessarily entailing disclosure of the scope and nature of the investigation. The Prosecution submit[ted] that it is inconsistent with basic considerations of efficiency and security to disclose these details to third parties during an ongoing investigation.”<sup>50</sup>

The OTP’s approach to victim participation has gradually evolved. In its 2010 Policy Paper on Victims’ Participation the Office stated: “The Office concurs that victims bring a unique and necessary perspective to the ICC activities and contribute to fair and efficient trials. There is no jury in the international criminal justice system and therefore victims are the only popular participant in proceedings. The provisions of the Statute in relation to victims’ participation embody a trend at the international level and in the practice of domestic jurisdictions from different legal systems of the world.”<sup>51</sup>

However, despite this seemingly open stance, the Prosecution has maintained a conservative approach. The OTP has consistently opposed victim participation in the situation phase,<sup>52</sup> and has generally been reluctant to allow victims’ legal representatives to access the confidential file of the case.<sup>53</sup> It must be remembered that in order for victim participation to be meaningful, it is

47. See section III.B below.

48. A “situation” (as opposed to a case) refers to the totality of crimes committed in a certain territory during a particular period of time. In contrast, a “case” is limited to specific crimes of which one or more persons are accused.

49. Situation in the DRC, Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 23 January 2006, ICC-01/04-103.

50. Situation in the DRC, Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6dp, 15 August 2005, ICC-01/04-84.

51. OTP, Policy Paper on Victims’ Participation, April 2010.

52. Situation in the DRC, Prosecution’s Document in Support of Appeal against the 24 December 1007 Decision on the Victims’ Applications for Participation in the Proceedings, of 18 February 2008, ICC-01/04-454.

53. See, e.g., *Prosecutor v Ruto et al.*, Prosecution’s Observations on the “Request by the Victims’ Representative for access to confidential materials”, of 22 September 2011, ICC-01-09/01-11-139.

essential that victims' legal representatives are in a position to identify the documents that affect their clients' interests. FIDH submits that the OTP's general statements of support on victims' participation rights are meaningless if they are not followed by practical and concrete steps to facilitate the exercise of those rights.

But beyond the specific issue of victim participation, the more comprehensive issue of the OTP's consideration of victims' interests in making key decisions, including on selection of cases and charges, arises. For example, victims have raised questions about the non-prosecution of Bemba for crimes committed in the DRC.<sup>54</sup> Victims in CAR have also questioned the lack of investigation into crimes committed by Bozize's forces as well as the non-indictment of Ange-Félix Patassé.<sup>55</sup> In addition, victims of situations under preliminary analysis do not understand why the OTP has taken so long to make decisions on its examination of countries like Colombia, Afghanistan and Georgia, among others, while other examinations, like Kenya, have moved relatively quickly. Altogether this raises the question of the extent to which the OTP consults with victims and factors their interests into decisions affecting them.<sup>56</sup>

Furthermore, as described above, victims have questioned the restrictive charges brought in the Lubanga case. The narrow scope of charges has a direct detrimental impact on victim participation, since -as established by ICC jurisprudence- only victims of charges and incidents selected for prosecution can be admitted to participate in proceedings.<sup>57</sup> This is likely to also have an impact on court-ordered reparations.<sup>58</sup>

Some policy changes have been made following criticism by victims; for example, following the perception of partiality brought about by the "sequential approach" adopted in the DRC, the OTP endeavoured to lodge its two cases in respect to the situation in Kenya simultaneously. Nevertheless, some of those changes seem to be random and do not consistently take into account the interests of victims. Recent developments exhibit other examples of inconsistencies: the OTP acted swiftly in opening an investigation and issuing arrest warrants in Libya.<sup>59</sup> Swift action of this sort chimes with victims' expectations that the Court help deter the commission of further crimes. In another situation, however, the OTP has not adequately involved and consulted victims; for example, the Prosecution recently opposed meaningful consultation with victims in Côte d'Ivoire in accordance with their rights to participate in proceedings under Article 15(3) of the Statute.<sup>60</sup>

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54. Situation in the DRC, Demande du représentant légal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l'article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri, 28 June 2010, ICC-01/04-564.

55. Patassé died in April 2011.

56. OTP practice seems to contrast with the following statement in the OTP Policy Paper on Victims Participation, April 2010, p. 3: "The third principle of the Prosecutorial Strategy is to systematically address the interests of victims in the work of the Office, seeking their views at an early stage, before an investigation is launched, and continuing to assess their interests on an on-going basis".

57. On the impact of OTP policy on victim participation and for general comments by FIDH on the OTP's policy on the matter, see: FIDH Comments on the Office of the Prosecutor's Policy Paper on Victim Participation under Article 68(3) of the ICC Statute, January 2010. For comments on the interest of victims, see FIDH, Comments on the Office of the Prosecutor's draft policy paper on "The interest of Justice", January 2007.

58. REDRESS, Comments on the OTP Policy Paper on Victims' Participation Under Art. 68(3) of the ICC Statute, February 2010.

59. The investigation was opened only five days after the Security Council referral, and a request for arrest warrants was prepared in two months.

60. Situation in Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, 23 June 2010, ICC-02/11-03, 173ss.

# III. Outstanding Issues

## A. Encouraging Self-Referrals, Cooperation and the Perception of Impartiality

The OTP has introduced a policy of encouraging referrals by States on whose territory crimes under the jurisdiction of the Court have been committed: “The Prosecutor adopted a policy of inviting voluntary referrals from states to increase the likelihood of important cooperation and support on the ground.”<sup>61</sup> The Office also initially refrained from requesting authorisation to open investigations *proprio motu*, in accordance with Article 13(c) of the Statute. This tendency changed with the requests submitted for authorisation to open investigations in Kenya and Côte d’Ivoire.

The OTP encouraged self-referrals from the DRC, Uganda and Kenya.<sup>62</sup> It also sought to encourage referrals from other states on the situation in Côte d’Ivoire.<sup>63</sup> While the need for cooperation and support is a legitimate concern, encouraging referrals may lead to a perception of partiality.

In Uganda, for example, although the OTP has affirmed that all parties to the conflict could be subject to investigations which would be conducted impartially,<sup>64</sup> in practice arrest warrants have only been issued for LRA commanders. The OTP has not investigated - or at least its investigations have not yielded results on - crimes committed by DRC and Ugandan government actors. Similarly, there has been no investigation of crimes committed by the forces of François Bozize, current President of CAR. This raises questions as to whether self-referrals and/or forthcoming cooperation from national governments conditions the OTP and limits its actions in investigating crimes committed by members of, or forces close to, the government.

Among affected communities and civil society in countries that are the subject of OTP investigations, this situation has created a perception that the ICC sides with the government (“victor’s justice”) or has been instrumentalised to target non-state actors. This has been the case in Uganda and the DRC, both with respect to the investigation of crimes committed in DRC, as well as in relation to the prosecution of Jean-Pierre Bemba.

Concerning UPDF crimes, the OTP indicated at one point that these crimes were not “as serious” as the ones committed by the LRA.<sup>65</sup> Similarly, in relation to the situation in Libya, the Prosecutor stated that crimes committed by Gaddafi’s forces were more serious than attacks

61. OTP, Report on the activities performed during the first three years (June 2003-June 2006), September 2006, p.2.

62. Uganda and DRC referred situations in December 2003 and April 2004, respectively. Following reluctance by the Kenyan government to refer the situation to the OTP, the Prosecutor requested authorisation to initiate an investigation on his own initiative in November 2009.

63. OTP Statement, Widespread or systematic killings in Côte d’Ivoire may trigger OTP investigation, 6 April 2011.

64. “In December 2004, I received a referral from the Government of Uganda [...] In the referral letter the government specifically mentioned the case of the Lord’s Resistance Army, the LRA. We notified Uganda that we would interpret the referral as concerning all crimes under the Statute committed in Northern Uganda and that our investigation would be impartial. In a July 2004 report to the Parliament, the Government of Uganda confirmed their understanding of this interpretation,” OTP, Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague, 14 October 2005.

65. Information in possession of FIDH: discussion during ICC-NGO meetings.

committed by rebels against those perceived to be African mercenaries.<sup>66</sup> It is acknowledged that gravity is a primary criteria in the selection of cases.<sup>67</sup> However, it must be noted that crimes under ICC jurisdiction generally reach a high gravity threshold, and that groups normally engage in fighting to attack or respond to attacks by other groups. This was acknowledged by the OTP in the Darfur situation, where it brought charges not only against the government but also against rebel commanders. Similarly, in the situation in Kenya, charges have been brought against members of the Orange Democratic Movement as well as members of the Party of National Unity. However, this same pattern has not been followed in the situations in Uganda, DRC, CAR and Libya.

Lack of investigation into certain groups raises the question of whether the OTP is able to collect evidence against certain groups, especially those close to a government or emerging government. The perception of impotence in collecting such evidence or else a striking lack of impartiality, is reinforced by the OTP's failure to give clear explanations of the factual considerations or reasoning behind decisions not to prosecute certain groups.

## **B. Situations under Preliminary Examination: Justice without Unreasonable Delay?**

According to information publicly available, there are currently eight situations under preliminary analysis: Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria, Palestine and South Korea.<sup>68</sup> The Office also conducted preliminary examinations into the situations in Iraq and Venezuela. Reports dismissing both situations were issued in 2006.<sup>69</sup>

FIDH has taken a particular interest in the OTP's policy on situations under preliminary analysis. The adoption of the Rome Statute and the Court's potential universal reach has raised hopes at the global level that genocide, crimes against humanity and war crimes will no longer go unpunished. The OTP has, to a certain extent, failed to meet the expectations of victims in many countries around the world. It is acknowledged that some expectations of the ICC are unfounded given its limited temporal and geographical jurisdiction. Yet, the handling of situations under preliminary examination raises some concerns.

The OTP's policy in respect of situations under preliminary examination has evolved over the years. As explained above, the OTP initially decided not to communicate about situations under preliminary analysis publicly; in FIDH's view, this led to missed opportunities regarding crime deterrence and complementarity. FIDH advocated strongly for a change of policy in this regard; this recommendation was taken on board. Under its "positive complementarity" policy,<sup>70</sup> the OTP has engaged in dialogue with concerned governments in order to encourage investigations and prosecutions at the domestic level. FIDH has welcomed this step and believes that the approach has yielded some, albeit few, positive results. For example, the ICC's preliminary analysis was a relevant factor in the adoption of the so-called Justice and Peace Act in Colombia,

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66. Press Conference by Prosecutor, Luis Moreno-Ocampo about three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi issued by Pre-Trial Chamber I, 28 June 2011.

67. In accordance with Article 17 of the Rome Statute.

68. For crimes committed by North Korean forces on the territory of the Republic of Korea. The Republic of Korea is a State Party to the Rome Statute.

69. OTP response to Communications received concerning Iraq, February 2006; OTP response to communications received concerning Venezuela, February 2006.

70. For further comments on the "positive complementarity" policy, see section IV.B below.

which set up special tribunals and proceedings to try demobilised paramilitary members. Nevertheless, FIDH believes that the Justice and Peace process in Colombia has not been successful, especially considering the extradition of paramilitary commanders to the United States which in practice halted national proceedings for crimes against humanity.<sup>71</sup> The Office has also taken an active stance to encourage domestic prosecutions in Guinea,<sup>72</sup> following the crimes committed during the 28 September 2009 events.<sup>73</sup> The Guinean judiciary opened an investigation in February 2010. This has raised significant expectations among numerous victims who have applied to become civil parties in the proceedings.<sup>74</sup> The Office has made positive remarks with respect to those national proceedings;<sup>75</sup> however, FIDH believes that the information available makes it difficult to conclude at this stage that there is a strong will and capacity within the Guinean government to support the investigations under way and prosecute those most responsible.

When encouraging prosecutions at the national level, it is important that the Office still assesses national complementarity efforts in an objective manner. Bilateral discussions with governments and other activities to promote complementarity should not pre-empt the OTP eventually deciding to open an investigation into a relevant situation.

Another aspect which has raised concerns is that some situations have been kept under preliminary analysis for prolonged periods, with no apparent justification. This constitutes a breach of victims' rights to obtain justice without unreasonable delay. It is also unclear why certain situations have moved particularly fast through this stage (for example, the situation in Kenya, and the situation in Côte d'Ivoire after the crimes committed following the elections in late 2010), while others remain under monitoring for years. In general, there seem to be inconsistencies in how different situations are handled in terms of the number and regularity of missions undertaken, prioritisation and analysis of complementarity issues.

Situations under preliminary analysis undoubtedly present an opportunity for the OTP to contribute to crime deterrence and to encourage national prosecutions. However, the powerful effect of the "ICC threat" is likely to diminish over time if the preliminary analysis process does not lead to any palpable outcome or is perceived as not leading to anything concrete. Little and only sporadic communication about ICC involvement in the countries concerned has led victim groups and others to believe that the ICC had decided "to drop the case".

According to information FIDH has gathered through its monitoring activities, the reasons for lengthy preliminary analyses include lack of access to information or evidence (for example, in relation to Afghanistan), the need to wait for the outcome of ongoing complementarity-

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71. FIDH Press Release: Gobierno Colombiano consolida la impunidad de los crímenes de lesa humanidad y los crímenes de guerra cometidos en Colombia, 14 May 2008.

72. The Office has issued a number of declarations. It has also conducted four missions to the country. For information on the Office's activities concerning Guinea and to access the OTP declarations, see the OTP page on Guinea at: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Guinea/> (last visited: 11 October 2011). For information on the OTP's fourth mission to Guinea, see OTP Weekly Briefing, Issue #81, pp. 5-6.

73. For information on the 28 September 2009 events, see the FIDH page on Guinea: <http://www.fidh.org/-Guinee-Conakry-> (last visited: 11 October 2011) – in French.

74. FIDH is currently supporting victims of crimes committed in Guinea before domestic tribunals. Specifically, FIDH supports victims who have applied for and acquired civil party status in the proceedings, to which FIDH is itself a civil party.

75. See *i.a.*, OTP Weekly Briefing, Issue #81, pp. 5-6; OTP, Déclaration à la Presse Guinéenne, 24 May 2010: "Au cours de cette mission il nous êtes apparu des avancées significatives dans l'enquête et la poursuite des responsables des crimes odieux commis contre les victimes guinéennes des événements du 28 septembre."

related developments in the country concerned (for example, as regards Colombia), and lack of certainty in international law as to a matter before the OTP (for example, with respect to the admissibility of the declaration under Article 12.3 lodged by the Palestinian Authority).

Lack of access to information and evidence does not seem to be a reasonable explanation for a body whose primary function is to collect evidence and build cases. In addition, the information that needs to be gathered to make a decision to open an investigation does not need to reach a very high threshold.<sup>76</sup> As for the need to wait for local developments to unfold, it does not seem practical that the pace of ICC processes, in this case preliminary examinations, be determined by the pace of local developments. It must be recalled that justice delayed is justice denied. Reports on the extent to which the conditions under Article 53(1) are met would be welcomed, and could also help to maintain adequate pressure for domestic prosecutions. FIDH submits that such reports should be presented to the judges of the Pre-Trial Chamber.

The situation in Palestine is peculiar. Unlike factual developments which may, in certain circumstances, delay the OTP from making a decision, the question of the admissibility of the Palestinian Authority's declaration is strictly legal in character. The OTP received arguments from different actors throughout 2009 and 2010.<sup>77</sup> A year later, its decision on the admissibility of the declaration, which is a pre-condition to other phases of preliminary examination, has not been made, or at least has not been made public.<sup>78</sup>

FIDH believes that it could be beneficial for the OTP to involve the Pre-Trial Chamber in respect of certain key legal aspects of preliminary analysis. As indicated above, in practice, victims of situations where the OTP appears to have been inactive for years have nowhere to turn. In a court of law, it would be desirable for some debates to take place before a judge. Victims and NGOs who have sent repeated communications to the OTP on serious situations would welcome an independent bench of judges to make determinations on the conditions for opening investigations according to Article 53(1) as well as relevant matters such as the imperative of delivering justice within a reasonable time, in accordance with internationally recognised human rights law.<sup>79</sup> FIDH also respectfully invites judges, in particular the Pre-Trial Division, to proactively discharge their "checks-and-balances" responsibilities in respect of the OTP during the preliminary phase.

## **C. Investigative Capacity and Reliance on External Actors**

Pursuant to the policy of focused investigations, the Prosecutor decided at the outset that he would only need small investigation teams.<sup>80</sup> This would reduce the risks faced by staff in the field. The OTP has contended though that it establishes "joint teams", composed of members from different divisions which arguably increases the number of members in each team. Joint

76. According to Article 53 of the Rome Statute, the applicable threshold is "reasonable basis to proceed".

77. Summaries and the full text of the submissions are available on the ICC website at: <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/palestine/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20national%20authority%20meets> (last visited: 30 September 2011).

78. It is unclear why such a decision would be confidential, given the need for transparency in criminal proceedings in a court of law.

79. Rome Statute, Article 21(3).

80. According to information collected by FIDH, the number of investigators per investigation team varies between 8 and 15. The OTP's proposed programme budget for 2012 requests 44 staff members for investigation teams at the professional level for seven investigations. An example of composition of team can be found in ¶145 of the requested proposed programme budget: the investigation team for Libya is composed of ten investigators and one assistant.

teams ensure that a multidisciplinary approach is taken to cases and investigations and that all OTP divisions work together with a joint strategy applicable throughout the lifespan of a case. However, this should not be an excuse to increasing the number of investigations. While joint teams may make significant contributions to strategy and analysis and ensure a multi-disciplinary approach, only investigators are entrusted with evidence-collection responsibilities.

FIDH has expressed reservations about this “small investigation team” policy on several occasions.<sup>81</sup> Another matter which has attracted criticism is the lack of sufficient professional investigators with a grounding in police services, forensic sciences, intelligence or criminology. While ensuring multidisciplinary expertise within teams is laudable, FIDH stresses that this must not be done at the expense of sufficient critical skills and experience in core investigative roles. Moreover, some of the problems arising in the first ICC case raise related concerns.

Two major concerns were raised by the Defence and the bench in the first ICC trial. In June 2008, the Trial Chamber stayed proceedings in the Lubanga case (then at a preparatory stage) because the OTP was not in a position to disclose documentation it had received to the Defence, pursuant to Article 54(3)(e) of the Rome Statute.<sup>82</sup> It was revealed that the OTP had obtained a very large number of documents through the United Nations (UN) but that the documents had been transmitted on condition of confidentiality. The UN eventually agreed to waive the confidentiality condition and the stay of the proceedings was lifted. However, this episode indicates that some inquiry work was facilitated by provision of information from other sources.<sup>83</sup>

Later, during the presentation of evidence in the same case, the Defence contested the OTP’s policy of resorting to intermediaries<sup>84</sup> to contact witnesses. Given the security conditions in the countries and regions where the OTP operates, as well as the need to breach the physical and cultural gap between ICC investigators and (potential) witnesses, the practice of resorting to intermediaries is understandable and justified.<sup>85</sup> A number of issues regarding potential witness coaching and the ethical standards of intermediaries have been raised and will hopefully be elucidated in the final Lubanga judgement. What is striking about this situation is the revelation that the OTP used intermediaries to contact half of the witnesses who ultimately testified in the Lubanga case.<sup>86</sup>

Both episodes raise questions about the investigative capacity of the OTP, and in particular its

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81. See *i.a.* FIDH Recommendations to the Assembly of States Parties to the Rome Statute, Position Paper No.13, November 2008, p. 8.

82. Article 54(3)(e) states: “The Prosecutor may...(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents”.

83. The OTP has changed its policy since then and only receives documents on condition of confidentiality under Article 54(3)(e) in exceptional circumstances.

84. There is no definition of “intermediaries” in the ICC legal texts. In this context, intermediaries are individuals - usually living and working in the communities where the OTP investigates - who facilitate contacts between the OTP and (potential) witnesses. The ICC has been criticised for its overreliance on intermediaries and for failing to offer adequate protection and remuneration. FIDH acknowledges that the OTP has, generally, adopted a position favouring the protection and recognition of the work of intermediaries.

85. As long as measures are in place to appropriately recognise their work, remunerate them and provide for their protection.

86. International Bar Association, The ICC’s Trials: An examination of key judicial developments at the International Criminal Court, May 2010, p. 28.

independence to conduct of investigations. FIDH believes that it would be highly desirable for the OTP to reinforce its investigation teams, including by recruiting more investigators.

## **D. Shifting Resources and the Sequential Approach**

It is acknowledged at the outset that the OTP must conduct its work with limited resources. Consequently, the Office has adopted a policy of shifting resources from one case to another in order to manage resource needs. A direct consequence of this methodology has been the so-called “sequential approach” to investigations, i.e. upon completion of field investigations for one group, the Office examines whether other groups warrant investigation. This allows the OTP to shift resources from one team to another.

FIDH has already commented on the detrimental effects of the sequential approach.<sup>87</sup> It firstly poses serious challenges to perceptions of impartiality, as the Office can be perceived as prioritising prosecutions against one group as it was the case in Ituri upon announcement of the first arrest warrant. Secondly, this approach presents serious risks in terms of preservation of evidence. As time passes, it is more difficult to find witnesses to events, and less likely that they will recall the details of their experiences. There is also more chance that documentary evidence is destroyed or disappears.

This has been somewhat acknowledged by the OTP: while in 2006, the Office explicitly referred to the sequential approach as being part of its strategy,<sup>88</sup> this was not contemplated in the 2009 prosecutorial strategy. The Office also seemed to understand the adverse effect that sequential investigations could have in the situation in Kenya and decided to conduct investigations in two cases in parallel so that summonses to appear for members of two opposing parties could be announced simultaneously.

Nevertheless, the policy of shifting resources and sequencing investigations continues to apply in practice. As far as investigations in the Kivus are concerned, although the OTP announced that it was looking into crimes committed by all groups involved,<sup>89</sup> only one person has been indicted to date.<sup>90</sup> In addition, with reference to the situation in Libya, the Prosecutor indicated during a press conference that the Office would not focus on crimes allegedly committed by rebels until after investigations against Gaddafi and his inner circle had been completed.<sup>91</sup>

As a consequence of the policy of shifting resources, investigations in Uganda and CAR have been discontinued.<sup>92</sup> This is concerning since the Prosecutor had indicated that his office was considering investigating the UPDF for crimes in Uganda, and persons other than Bemba

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87. See e.g. FIDH Statement on the Prosecutorial Strategy of the Office of the Prosecutor of the International Criminal Court, The Hague, 26 September 2006, p.4; FIDH, Comments on the Office of the Prosecutor’s draft policy paper “Criteria for selection of situations and cases”, January 2007, p.3.

88. OTP, Report on the activities performed during the first three years (June 2003-June 2006), September 2006, p.8.

89. OTP Press Release, ICC Prosecutor recalls ICC has jurisdiction over crimes against civilian population in the Kivus, 4 November 2008. See also Statement of Mrs. Fatou Bensouda, Deputy Prosecutor of the International Criminal Court ICC Sixth Diplomatic Briefing, Brussels, 26 May 2009, p. 2.

90. Callixte Mbarushimana, alleged Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda* (FDLR), was arrested on 11 October 2010 following the issuance of an arrest warrant by the ICC on 28 September 2010. Mbarushimana was transferred to the ICC on 25 January 2011. A confirmation of charges hearing was held from 16 to 21 September 2011.

91. Prosecutor’s Press Conference on the issuance of arrest warrants in Libya, 28 June 2011.

92. It is unclear whether these teams have been formally dissolved; judging from the resources moved to other situations and cases, it does not seem that there are currently active investigations on-going in relation to Uganda and CAR.

for crimes committed in CAR. No official decisions not to prosecute have been formally notified at this stage, though in practice it seems that the possibility has been discarded. It is concerning that the OTP has not made such decisions public nor informed the Pre-Trial Division accordingly, as per its obligations under Article 53 of the Rome Statute.

## **E. Independence and Autonomy: Relationships with Other Organs and Internal Administration**

Through the monitoring conducted by FIDH, we have observed that the OTP has applied a strict interpretation of its independence under Article 42(1) of the Rome Statute, whereas some States Parties were pushing for more control over its internal administration.<sup>93</sup> This has given way to certain internal disputes, in particular in its relations with other organs. It has further led to the Office's reluctance to submit itself to oversight mechanisms in the same manner as other organs of the Court. The illustrations below are the results of this strict interpretation.

FIDH has observed some lack of coordination between the communications department of the OTP and the Court's communications section<sup>94</sup> situated within the Registry. It is understandable that the OTP, as one of the parties to proceedings, needs to pass messages that are OTP-specific and different from those communicated by the Court as a whole. However, FIDH has noted a general lack of coordination between the two departments, leading at times to duplication of efforts. For example, the OTP and the ICC have different weekly publications, press releases and sometimes press conferences, between which there appears to be no coordination. As a result of the Office's initiative to communicate and liaise with the media independently, the OTP has become the primary face of the Court in the media. This can tarnish the Court with a perception of partiality, as one of the parties to proceedings rather than the Court (judiciary) itself take prominence of place in media interactions.

In addition, the OTP has taken a very firm position regarding the Operational Mandate and Procedural Manual of the Internal Oversight Mechanism (IOM), whereas some States Parties wanted to develop such a mechanism.<sup>95</sup> The Prosecutor has argued that given the independent status of the Office, OTP staff cannot be subject to inquiries by the IOM in the same manner as other ICC staff. This position has led the OTP to make proposals to limit the investigative powers of the IOM over OTP staff.<sup>96</sup> While FIDH acknowledges that it is necessary to strike a balance between independent oversight and undue interference, this balance still needs to be defined.

Furthermore, the OTP's interpretation of its independence has led it to prevent other organs from conducting missions to the field at a time which would be inconvenient for the OTP. For example, in June 2011, the OTP stated in a filing concerning the situation in Côte d'Ivoire: "[I]t should be avoided that the Registry establish a presence on the territory of Côte d'Ivoire to collect Rule 50(3) representations or establish direct contacts with victims and/or intermediaries."

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93. "The Office of the Prosecutor shall act independently as a separate organ of the Court."

94. Public Information and Documentation Section.

95. The IOM was created in accordance with Article 112(4) of the Rome Statute.

96. Address by Mr. Luis Moreno-Ocampo, ICC Prosecutor, to the Ninth Session of the Assembly of States Parties, The Hague, 6 December 2010, pp.8-9.

# IV. Final Remarks

## **A. Acknowledging the Difficulties: Importance of Support and Cooperation**

FIDH acknowledges that the ICC as a whole, and the OTP in particular, operate in extremely politicised situations and polarised societies.

FIDH would also like to point out that the ICC and the OTP cannot operate without the cooperation and support of external actors, in particular States Parties and non-States Parties. Cooperation and support are key not only to the implementation of arrest warrants, but also to facilitate the Office's investigations and allow for execution of other Court decisions, including the tracing and freezing of assets.

In this regard, FIDH has observed that the OTP has undertaken efforts to call for further cooperation and to denounce instances of non cooperation, including in relation to the non-execution of arrest warrants. For example, the OTP did not hesitate to inform the Security Council and the ICC Pre-Trial Chamber of the lack of execution of arrest warrants regarding the situation in Darfur.<sup>97</sup>

The OTP has also raised the matter of cooperation repeatedly in its statements<sup>98</sup> and participated in relevant meetings with the aim of galvanizing support for the execution of arrest warrants.<sup>99</sup>

FIDH recommends that the next ICC Prosecutor adopts a vigorous position on the matter of cooperation and continues to recall States obligations to support and cooperate with the Court, as well as undertaking all possible steps to galvanise efforts to execute arrest warrants, in cooperation with other organs of the Court.

## **B. Maximising Impact: Positive Complementarity and Deterrence**

The Prosecutor has placed particular emphasis on encouraging domestic investigations and prosecutions. The OTP has coined the term “positive complementarity” to describe the policy of actively encouraging investigations and prosecutions by national tribunals of crimes potentially falling under ICC jurisdiction.<sup>100</sup>

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97. See *e.g.*, Seventh Report of the Prosecutor of the ICC to the UN Security Council pursuant to UNSCR 1593 (2005), 5 June 2008; *Prosecutor v Al Bashir*, Prosecution notification of possible travel in the case of the Prosecutor v Omar Al Bashir, pursuant to Article 97 of the Rome Statute, 10 January 2011, ICC-02/05-01/09-125.

98. See *i.a.*, Address by Mr. Luis Moreno-Ocampo, ICC Prosecutor, to the Ninth Session of the Assembly of States Parties, The Hague, 6 December 2010, pp.5-6; Address by Mr. Luis Moreno-Ocampo, ICC Prosecutor, to the Eighth Session of the Assembly of States Parties, The Hague, 18 November 2009, pp.5-7; Address by Luis Moreno Ocampo, ICC Prosecutor, at the International Conference “Building a Future of Peace and Justice”, Nuremberg, 24-25 June 2007, p. 4.

99. Details of activities undertaken by the OTP to galvanise support can be found in the relevant section of the OTP's Weekly Briefings, available at: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Weekly+Briefings/> (last visited: 10 October 2011).

100. “The positive approach to complementarity means that the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance,” OTP, Prosecutorial Strategy 2009-2012, February 2010, ¶17.

FIDH has welcomed this policy and, more generally, all efforts made by the Office to “maximise” the impact of investigations and trials. In our comments to the 2006-2009 Prosecutorial Strategy, we noted that the Office’s actions had still further potential to impact on situations under preliminary analysis and situations under investigation; we called upon the OTP to adopt a more proactive approach.<sup>101</sup> FIDH has noted with satisfaction that the Office’s Prosecutorial Strategy for 2009-2012 incorporates the idea of maximising the impact of the Office’s activities as a core principle.<sup>102</sup>

The Office’s focus on positive complementarity has attracted attention from other actors, including from States Parties who discussed this matter extensively in preparations for and during the ICC Review Conference.<sup>103</sup> In addition, States have pursued discussions on this matter through the Assembly of States Parties’ Working Group in The Hague.<sup>104</sup> Other actors, including the European Union<sup>105</sup> and NGOs,<sup>106</sup> have also produced resources and undertaken initiatives which aim to contribute to encouraging national investigations and prosecutions.

FIDH has also welcomed steps taken by the Office with a view to increasing the ICC’s deterrent potential.<sup>107</sup> For example, the OTP has made declarations on a number of situations, including in the Kivus,<sup>108</sup> Guinea,<sup>109</sup> and Côte d’Ivoire<sup>110</sup> amongst others, with a view to deterring the further commission of crimes. It also acted swiftly on the situation in Libya, with a view to preventing the further commission of crimes.<sup>111</sup>

The extent to which the Office, and the ICC as a whole, have contributed to deterrence in countries where the ICC has operated, as well as other countries around the world, is difficult to determine. For example, it is accepted that the level of conflict in northern Uganda has considerably decreased; however, this seems to be a consequence of the LRA’s moving to other countries, rather than a direct impact of the Court’s involvement in Uganda. The arrest warrants for Joseph Kony and other LRA commanders could have contributed to the LRA moving away, but it has not stopped the militia from committing crimes as it continues to

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101. FIDH, Statement on the Prosecutorial Strategy of the Office of the Prosecutor of the International Criminal Court, The Hague, 26 September 2006, pp. 2-3.

102. OTP, Prosecutorial Strategy 2009-2012, February 2010, ¶4.

103. Complementarity was one of the issues included in the stocktaking segment during the Review Conference held in Kampala in May-June 2010.

104. In relation to discussions on complementarity at the Assembly of States Parties, FIDH has expressed regret that exchanges of view have overly focused on the relation between complementarity, development and rule of law programmes, to the detriment of a fair assessment of States’ performances on complementarity and considerations of unwillingness. See: FIDH Position Paper, ICC Review Conference: Renewing commitment to Accountability, May 2010, pp. 15-18; FIDH Position Paper, Ninth Session of the ICC Assembly of States Parties, December 2010, pp. 10-13.

105. The European Union is working towards establishing a toolkit on complementarity. See Council of the European Union, Action Plan to Follow-up on the Decision on the International Criminal Court, 12080/11, Brussels, 12 July 2011, ¶ E.2.d.

106. See *i.a.* Open Society Justice Initiative, Putting Complementarity into Practice: Domestic Justice for International Crimes in the Democratic Republic of Congo, Uganda, and Kenya, January 2011; International Center for Transitional Justice, Meeting Summary of the Retreat on “Complementarity after Kampala: The Way Forward”, 19 November 2010.

107. OTP, Prosecutorial Strategy 2009-2012, February 2010, ¶ 23; see also, Statement to the Press by Ms Fatou Bensouda, Deputy Prosecutor, Conakry, 10 November 2010: “My second reason relates to the preventive mandate of the ICC Prosecutor. The Prosecutor’s mandate is to ensure that those who perpetrate the most serious crimes are prosecuted. His mandate is also to prevent further crimes from being committed.”

108. OTP Press Release, ICC Prosecutor recalls ICC has jurisdiction over crimes against civilian population in the Kivus, 4 November 2008.

109. See OTP statements on the situation in Guinea, available at: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Guinea/> (last visited: 11 October 2011).

110. Statement by the Deputy Prosecutor of the ICC on the situation in Côte d’Ivoire, 2 December 2010.

111. The investigation was opened only 5 days after the Office received a referral from the Security Council, and a request for arrest warrants was presented within 2 months.

attack civilians in DRC, CAR and South Sudan. As for the situation in DRC, it is generally accepted that crime rates in Ituri have gone down. This could partially be because militia leaders have been removed from the territory and sent to The Hague. However, the situation in the neighbouring Kivus region has been dramatic over the last few years, with the widespread commission of crimes, including sexual violence. In the circumstances, it is difficult to categorically affirm that the ICC has had a deterrent impact to date.

It is possible that the Court's first judgments, the arrest of high-profile figures including Heads of State, and increased outreach and communication efforts will contribute to further deterrence in the future. As the Court enters its next phase, the next ICC Prosecutor's term will present considerable challenges in this regard.

### **C. Election of a New Prosecutor**

In electing ICC officials, States must strive to select those with the highest and most suitable qualifications for the position. In past ICC elections, including judicial elections, practices such as vote trading have been observed.<sup>112</sup>

For the election of the second ICC Prosecutor, the Assembly of States Parties has put a new and innovative mechanism in place. The Assembly has set up a search committee with a mandate to facilitate the nomination and election, by consensus, of the next Prosecutor.<sup>113</sup> The Search Committee has been enabled to receive informal expressions of interest from individuals, States, regional and international organizations, civil society members, professional associations and other sources. The Committee has also been able to interview candidates and conduct research into their profiles. The Search Committee has produced a shortlist of candidates, which it has submitted for consideration to the Assembly. The candidates who have been shortlisted are: Fatou Bensouda (Gambia), Andrew Cayley (United Kingdom), Mohamed Chande Othman (Tanzania) and Robert Petit (Canada).<sup>114</sup> On the 1 December 2011, the President of the Assembly of States Parties to the ICC Statute announced that Mrs. Fatou Bensouda, current ICC Deputy Prosecutor, was nominated as consensus candidate for the consideration of the Assembly of States Parties, that will elect the next ICC Prosecutor on 12 December 2011 at its tenth session.<sup>115</sup>

The Search Committee's proceedings, including nominations and expressions of interest, have been confidential for the most part. While the need not to disclose some information is understood, there remains some concern about lack of sufficient transparency in the work of the Committee. FIDH emphasises that what is relevant is that this process is aimed at facilitating the election of the most qualified candidate.<sup>116</sup> The tenth session of the Assembly provides an opportunity for States to evaluate the work and proceedings of the Search Committee, and

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112. Kofi Anan, No Politicking for ICC Prosecutor, Global Memo, 18 October 2011.

113. ICC Press Release, Search Committee for the position of ICC Prosecutor takes up work, 8 February 2011.

114. ASP, Report of the Search Committee for the Position of Prosecutor, October 2011.

115. For information on the selection process, including next steps, see CICC, Questions and Answers on the ICC Prosecutions Elections, 15 September 2011. See also the ICC press statement regarding Fatou Bensouda's nomination, "Consensus candidate for next ICC Prosecutor", 1 December 2011.

116. For recommendations on qualifications to be met by the next ICC Prosecutor, see FIDH, International Crisis Group, Human Rights Watch, Institute for Security Studies, International Center for Transitional Justice and Open Society Justice Initiative, Joint Letter to Members of the Search Committee, 16 March 2011.

to identify ways of improving and reinforcing the work of similar structures in supporting election processes. In this regard, FIDH recommends that States consider setting up similar intermediary structures to facilitate future elections, including judicial elections, with a view to ensuring that such elections are fair, transparent and merit-based.<sup>117</sup>

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117. CICC Press Release, ICC Nominations and Elections Must be Fair, Transparent and Merit-based, New York/The Hague, 28 July 2011.

# Conclusion

As the first ICC Prosecutor, Luis Moreno-Ocampo has accomplished an impressive task in under 9 years: he has built an office and established policies and manuals for the investigation of the most serious crimes of international concern. He has faced severe criticism over lack of sufficient public communication about the work of the Office during its first years, and consequent misunderstandings and missed opportunities to maximise the impact of the ICC's work in countries concerned. The Office's most recent public communication about the work of the OTP, including on situations under preliminary analysis; its "positive complementarity" policy and its emphasis on crime deterrence are welcomed. FIDH considers that the OTP can play a significant role in encouraging prosecutions at the domestic level and enhance the rule of law in the countries concerned. The Office of the Prosecutor has also made significant progress in interpreting the "interest of justice" provision and overcoming the "justice v. peace dilemma", by asserting the ICC's mandate to achieve peace through justice. FIDH also welcomes the Prosecutor's efforts to galvanise support for cooperation and execution of arrest warrants.

While considerable progress has been made, a number of concerns remain. These include:

- the implementation of the policy of focused investigations and prosecutions in a way that reflects the most serious crimes and types of victimisation, and is fully respectful of the rights of victims;
- overcoming the sequential approach;
- investigating all parties to the conflict and going up the chain of command in all situations to ensure that the Office is perceived as impartial;
- reinforcing the Office's independent investigative capacity;
- supporting meaningful victim participation;
- strengthening public communication, including on selection of cases and investigations, with a view in particular to enhancing deterrence;
- and ensuring that victims from situations under preliminary examination can access justice within a reasonable time.

The new ICC Prosecutor is thus left with a well-established Office, set policies and procedures. S/he will nevertheless face a number of challenges from day one. S/he will have to review the Office's policies as applied over the last nine years, assess both the positive and negative aspects of their impact and make decisions on how to proceed. The new ICC Prosecutor will need to make decisions on how to optimise the work of the Office in the context of financial constraints, while maintaining and improving the OTP's performance on different fronts, from investigations to prosecutions and preliminary examinations; from cooperation to communication. Lastly, s/he will need to improve coordination efforts with other organs and mechanisms within the ICC, and maintain a high level of engagement and cooperation with other actors within the Rome Statute system.

The new Prosecutor will need the full cooperation and support of States. FIDH expects States Parties to focus more on making positive contributions to enhancing the ICC's efficacy through, *inter alia*, cooperating in all stages of proceedings as required by the ICC; they should focus less on limiting the Court's scope for action through budgetary constraints and internal management control. This is the only way to eliminate suspicions that States' primary concerns are to control the Court, rather than support it.

# Recommendations to the Next ICC Prosecutor

Based on the analysis presented in this report, FIDH makes the following recommendations to the next ICC Prosecutor:

## **Structure of the Office of the Prosecutor**

- Consider appointing a Deputy Prosecutor for Investigations, as well as a Deputy Prosecutor for Prosecutions.
- Take measures to reinforce the Office's investigative capacity and to ensure fulfilment of the OTP's mandate to actively target those most responsible for the gravest crimes, irrespective of station.
- Improve relations with other organs, including in coordinated public communication efforts, the ICC's presence in the field, and the development of an oversight mechanism capable of respecting the OTP's independence.

## **Policies and Practices**

- Reconsider the policy of focused investigations and prosecutions, in particular as regards its implementation in relation to the representativeness of charges and its impact on affected communities.
- Continue to focus on prosecuting those most responsible, and consider going up the chain of command in situations currently before the Court.
- Continue to emphasise that justice is necessary to attain peace, and act upon this premise when conducting investigations and prosecutions in conflict and post-conflict situations.
- Reconsider the Office's policy of maintaining small investigation teams, and recruit more investigators.
- Consider the adverse impact of the sequential approach and shifting resources upon ICC investigations as well as the impact of the OTP's decisions among affected communities, and find creative solutions for optimal use of resources which do not denigrate the perception of the Office's impartiality.
- Further the OTP's policy on positive complementarity, while asserting the Office's independence.
- Take every possible opportunity to contribute to crime deterrence.

## **Communications and Interests of Victims**

- Consider the impact and importance of public communications by the OTP on maximising the impact of the Office's activities, including in relation to the Office's selection of cases for investigation and prosecution.
- Consider the establishment of a clear victims' policy that would promote victim participation, genuinely take into account the interests of victims in making decisions

that affect them, and make all possible effort to ensure that victims can exercise their rights to participation and reparations in a meaningful manner.

- Reinforce the OTP's impartiality by conducting simultaneous investigations into crimes committed by all parties to the conflict in any given situation, including forces of or close to governments.

#### **Selection of Situations and Cases**

- Handle situations under preliminary analysis in a more consistent and swift manner, including by submitting to the Pre-Trial Division reports on the Office's assessment on the conditions to open an investigation under Article 53(1).
- Inform the Pre-Trial Division of decisions not to proceed with prosecutions and/or when investigations are in practice discontinued, and publicly explain the reasons for such decisions.

#### **Cooperation**

- Adopt a vigorous stance on the matter of cooperation, recall States obligations to support and cooperate with the Court, and take all possible steps to galvanise efforts to execute warrants of arrest, in cooperation with other organs of the Court.

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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, 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,

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