



## **The International Criminal Court, 2002 - 2012**

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

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

The tenth anniversary celebration of the establishment of the ICC is taking place in a context of severe global financial crisis which is also affecting the Court. States Parties, in particular for the past two years, are refusing any increase of the Court's budget, particularly affecting its ability to carry out new investigations and prosecutions, and affecting the rules of due process (through the ongoing reform of legal aid granted to the accused and to the victims). Beyond this budget issue, which has a direct impact on the activities of the ICC, the central issue concerns the role and place that States intend to grant the ICC and, more broadly, the international criminal justice, in the peaceful settlement of conflicts and establishment of lasting peace, on an international scale.

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

#### **1. Increased universality of the scope of the Court**

Although the ICC Statute has been ratified by many States, efforts to reinforce its universality must be strengthened. Influential States such as the United States of America, Russia and China have not ratified the Statute of the Court; some regions, particularly the Middle East and Asia have not joined massively. This complicates, if not makes it impossible, for the Court to exercise its jurisdiction for crimes that fall under the Court's jurisdiction: Syria, Palestinian Territories, Sri Lanka, Russia (Chechnya). Further ratifications of the Statute are therefore needed to increase the scope of the Court's jurisdiction. This limitation of its jurisdiction contributes to the perception that the Court is not impartial, which is reinforced by the fact that all the ongoing investigations are conducted on the African continent, where serious crimes have indeed been committed.

The ICC Office of the Prosecutor should also conclude its preliminary analysis, still in progress, on other situations, not African, like Colombia, where an investigation is warranted and necessary.

## **2. Enhanced support of States**

States have an obligation to cooperate with the ICC that does not have its own police force. The Court suffers cruelly from the insufficient cooperation of the States which weakens its authority and efficiency. Thus, early 2012, only 5 out of 18 arrest warrants issued by the Court were executed. Other than a necessary judicial and technical cooperation, States Parties should further engage in a flawless political and diplomatic support. Individually, States should adopt public statements supporting the repressive but also preventive mandate of the ICC. They should also refrain from meeting any person for which an ICC arrest warrant has been issued. The adoption through a vote of a budget tailored to the needs as presented by the Court, against the principle of zero growth defended by States Parties, especially for the past two years, would also be an expression of practical support to the consolidation of the action of the ICC. Without interfering indirectly in the operations of the Court, States would preserve its independence, a guarantee of its effectiveness. States other than those on whose territory crimes were committed should also show increased and impartial support to the Court by referring situations of its jurisdiction, as provided in Article 14 of the Statute. This support must also be expressed through the priorities of intergovernmental organisations such as the European Union and the African Union. The latter (which a very large number of Member States have ratified the Statute) should also work towards compliance with the Court's decisions and the strengthening of complementarity in the prosecution for international crimes. The Security Council should continue to use, in an impartial manner, its power of referral to the ICC.

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

The new Prosecutor, Fatou Bensouda, should conduct a critical evaluation of the implementation and impact of policies and practices of the Office of the Prosecutor (OTP). The conduct of the OTP investigations has been questioned by the ICC Judges, in particular in the Lubanga, Mbarushimana and Mudacumura cases. Accordingly, the policy of limiting the size of the investigation teams should be revised to recruit professional investigators. The OTP should take into account the negative consequences of the sequential approach, which is to focus on a group (a party to a conflict), then reallocate limited resources to another party to the conflict. This approach perpetuates a perception of bias on behalf of the Court and leads to prosecutions that do not reflect the reality of the crimes committed, especially since in many cases, other groups are not prosecuted (Uganda, CAR, Cote d'Ivoire). The Office of the Prosecutor should review its focused prosecutorial strategy, in particular taking into account the representativeness of charges and their impact on affected communities. If the OTP must continue to focus on prosecuting those who bear the greatest responsibility, it should also go up the chain of command in situations currently before the Court.

## **4. Systematic prosecution of crimes of sexual violence**

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

Although we can note the efforts of the Office of the Prosecutor to systematize the presentation of charges of crimes of sexual violence, this remains unequal. Either they are not among the charges brought by the Prosecutor, because of insufficient investigation and evidence (*Prosecutor v. Thomas Lubanga*, *Prosecutor v. Bosco Ntaganda* (DRC) before an extension in 2012, *Prosecutor v. Ruto and others* (Kenya), *Prosecutor v. Saif El Islam*, *Prosecutor v. El Senussi* (Libya)), or they are not confirmed by the Pre-Trial Chamber because of the lack of connection with the accused (*Prosecutor v. Katanga and Ngudjolo* (DRC), *Prosecutor v. Muthaura and others* (Kenya)) or because of a restrictive interpretation of the definition of certain crimes, even sometimes not in compliance with international jurisprudence (*Prosecutor v. Bemba* (CAR), *Prosecutor v. Muthaura and others* (Kenya)). In all, one third of the charges for crimes of sexual violence have not been confirmed and therefore have not been able to reach the trial stage. Consequently, crimes of sexual violence should be given greater attention in all preliminary examinations and investigations of the OTP and the investigators should have special expertise. Charges reflecting the reality of the crimes of sexual violence should be presented whenever a sufficient basis exists and the interpretation of the qualification of crimes of sexual violence should comply with existing international jurisprudence.

## **5. Providing support to complementarity efforts at national level**

The ICC has jurisdiction when national courts have neither the ability nor the will to genuinely investigate crimes within its jurisdiction and prosecute their perpetrators. Because the ICC prosecutes only those most responsible for crimes within its jurisdiction, the implementation of this principle and the initiation of effective prosecutions at the national level will effectively help to overcome the "impunity gap". States retain the primary responsibility for prosecuting the perpetrators of these crimes and can not discharge their obligations by referring situations to the ICC. On the contrary, States Parties to the Statute must adapt their domestic legislation so as to enable the investigation and prosecution of perpetrators of international crimes at the national level, including with extraterritorial and universal jurisdiction proceedings.

FIDH welcomes the efforts of the Office of the Prosecutor, which encourages the opening of investigations and initiation of effective and independent prosecutions at the national level, particularly in the framework of preliminary examinations and investigations before the ICC, and in application of the "positive complementarity" policy. These efforts, like many State and international programs, consist however mainly in technical assistance. But it is important that the political unwillingness also be addressed and considered in terms of additional mechanisms and bilateral and multilateral negotiations.

## **6. Transparency and impact of preliminary examinations**

The Office of the Prosecutor conducts preliminary examinations of the situations in Afghanistan, Colombia, Georgia, Guinea, Honduras, Republic of Korea, Mali, Nigeria, on the basis of which he will decide to open or not an investigation. Seized by the Palestinian Authority, the Prosecutor has recently decided not to pursue its preliminary examination of the situation in the Occupied Palestinian Territories, arguing he lacked jurisdiction to rule on the status of Palestine. In December 2011, he released a report on the activities conducted within this framework. If the opening of a preliminary analysis may have a deterrent effect, it must then be conducted so as to encourage complementarity efforts at the national level and

within a reasonable timeframe. It is therefore vital that the OTP communicate regularly on the status of these examinations, to strengthen their impact at a national level including their possible preventive effect. The OTP should address situations under preliminary analysis more consistently and rapidly, especially by submitting to the Judges of the Pre-Trial Chamber evaluation reports of the conditions for opening an investigation under Article 53(1), informing the Pre-Trial Chamber of any decision not to proceed and/or interrupt investigations, and publicly explain the reasons for these decisions. On this basis, the victims would have a legal ground to intervene and present their views.

## **7. Strengthening the impact of the ICC on affected communities**

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

It is therefore essential that the Court maintain and strengthen its outreach activities in the field. States should in this sense financially support relevant sections of the Registry. Upon opening of an investigation, the Registry needs to have access to the affected populations in order to give consistent information on the activities of the ICC and to strengthen their impact. These activities are often delayed by the cumbersome procedures for opening a field office. Alternatives should be found, such as renting temporary offices for outreach activities. Victims' access to proceedings would thus be facilitated. Various outreach activities could potentially better disseminate information on and clarify these very complex proceedings.

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

## **8. Support for the participation and effective representation of victims**

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

The system for participation must be improved, by allowing the Section for Victims' Participation and Reparations within the Registry to undertake activities in the field and inform victims of their rights to participate, as soon as an investigation is opened or a warrant of arrest or a summon to appear is issued. The States must allocate additional funds for the swift review of the requests for participation.

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

The victims do not participate directly in court proceedings, but through their legal representatives. It is of prime importance that the current reform of legal aid should not render victims' participation before the ICC meaningless, but should take into consideration the

specific nature of their legal representation. It is essential to guarantee that the representation be independent of the Court, by lawyers from the concerned situation country or who have special knowledge of it, and a permanent link with a team in the field.

## **9. Guaranteeing reparation and support for victims and affected communities**

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

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

The mandate of the Trust Fund for Victims is to implement the Court’s reparation orders, but also to carry out, on its own initiative, medical and psychological assistance programmes. FIDH encourages the Fund to continue to develop its support activities, which are complementary to the Court's reparation mandate. FIDH welcomes the efforts made towards greater transparency in the management of the Fund, and the fact that it will soon be able to receive contributions from private corporations and organisations, in addition to voluntary contributions from States. FIDH calls upon States to regularly make voluntary contributions to the Fund, and to present independent candidates with expert knowledge of such matters for the election of the next Board of Directors of the Fund, to be held during the eleventh session of the Assembly of the States Parties next November in The Hague.

## **10. Support the protection of witnesses, victims and intermediaries**

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

In order to contribute to the protection programme of the ICC, States must sign relocation agreements with the Court, which is often the only possible form of protection, considering the context of conflict of the situation countries. The need to maintain an effective and

independent system of protection must be at the heart of the upcoming discussions of the Court -as well as States Parties- in relation to the ICC completion strategy, for situations where investigations will be closed and cases concluded.

### **Useful links**

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

**["International Criminal Court Section"](#) of the FIDH website**