

fidh

International Federation for Human Rights

# ICC THE INTERNATIONAL CRIMINAL COURT'S FIRST YEARS

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognizing that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures enhancing

must be ensured by taking at the national level and by international cooperation,





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# Introduction

Ten years after the adoption of the International Criminal Court's (ICC) Statute in Rome (Rome Statute), and six years after its entry into force (July 1, 2002) and the establishment of a new institution, there is now an "operational" permanent International Criminal Court. Although this young court has quickly taken on challenges and made great strides forward, it must still attain several goals and explore many avenues in order to truly put an end to impunity for the perpetrators of the most serious crimes, and thus ensure the prevention of new crimes<sup>1</sup>.

FIDH took an active role in the establishment of the ICC. It has worked towards the Statute's ratification and its implementation by the greatest number of States. It monitors the proceedings currently in front of the Court and actively contributes to the dialogue between civil society and the ICC.

1. Paragraphs 4 and 5 of the ICC Statute's preamble.

# I. A rapidly negotiated and implemented statute

At the conclusion of an international conference which took place in Rome in 1998, 120 States voted for the creation of a permanent international criminal court tasked with trying individuals responsible for the most serious crimes such as genocide, crimes against humanity and war crimes. States also decided to fight against impunity for these crimes within their jurisdictions and to guarantee reparations to victims.

## **The ICC's jurisdiction**

### **-Material jurisdiction**

The ICC has jurisdiction over four types of crimes, generally considered the “most serious crimes”: genocide, crimes against humanity, crimes of wars and – once a definition is adopted – the crime of aggression.

### **-Territorial and personal jurisdiction**

The ICC has jurisdiction over crimes

- committed by a national or on the territory of a State party to the Statute, or of a non-party State that has made an ad hoc declaration accepting the Court's jurisdiction.
- when it is the Security Council which refers a situation to the ICC, its jurisdiction is not limited to the national and territories of State Parties but will be determined by the terms of the referral

### **-Temporal jurisdiction**

The ICC has jurisdiction over crimes committed after 1 July 2002 (date of the entry into force of the Statute).

**Non-governmental organisations** (NGOs), including FIDH, joined together under the International Coalition for the ICC (CICC), actively followed the Statute's negotiations and participated in the establishment of the Court. They have led regional and national campaigns aimed at the ratification of the Statute and its implementation into domestic law. Thus, FIDH has, for example, directly participated in the creation of national and regional NGO coalitions (France, Morocco, the Gulf countries, Senegal, etc.). The ratification process is particularly complex: numerous constitutional reforms have been necessary to pave the way for adherence to an instrument which proposed, among other principles, the abrogation of the principle of immunity of State representatives for the most serious crimes, the subordination to a superior entity for crimes committed on sovereign States' territories and the non-applicability of the statute of limitation for crimes falling within the Court's jurisdiction.

The number of ratifications necessary for the entry into force of the Rome Statute, (60), was attained on April 11, 2002 and the ICC became a reality.

### **The United States' position**

This positive development, the rapid creation of the ICC, surprised the United States which – based on its dissatisfaction with certain aspects of the Statute and out of fear that its nationals would be brought before the Court – led an aggressive campaign against the ICC. The U.S. concluded bilateral “immunity” agreements to avoid any transfer of its nationals to the ICC. The U.S. threatened the other signatory States, mostly from the South, with the withdrawal of financial and military support to obtain the signature of these agreements. These initiatives were based on American legislation enacted to this purpose, the “American Service Members Protection Act” (ASPA; dubbed “The Hague Invasion Act”), which forbids any cooperation with the Court by the United States. Fortunately, many States decided to support the ICC and refused to succumb to this blackmail. This “anti-ICC” campaign ended a few years later for lack of effectiveness.

Moreover, the U.S. played a key role in the Security Council's referral to the ICC of the situation in Darfur, not only by not opposing its veto, but primarily by supporting this referral.

The election of Barack Obama and the Congress's new priorities herald a change in U.S. policy. On February 5, 2009, Barack Obama publicly endorsed the ICC and the possible issuance of an arrest warrant against the Sudanese president.

As of today, **108 States** have ratified the Statute and thus accepted to prosecute the crimes falling under the Court's jurisdiction and, by default, the jurisdiction of the Court over these crimes.

### **Ratification of the ICC Statute by region**

Americas and Caribbean: 24  
Western Europe and Central Asia: 40  
Africa: 30  
Asia and Pacific: 13  
North Africa and Middle East: 1

## **II. Establishment of the ICC and opening of the first investigations**

This court had to open its doors even prior to the work needed for its establishment being completed. The first years were mostly dedicated to the establishment of this new institution, particularly the creation of procedural rules, internal regulations, cooperation agreements, the definition of policies and strategies, the creation of procedures for on-site investigations, and the recruitment of personnel.

Unlike other international tribunals which have preceded it, the ICC's investigations are led in the context of **ongoing conflicts**. This creates huge challenges for the Court, linked to the cooperation of States – some of the representatives of which are allegedly responsible for the most serious crimes, the preservation of evidence, the safety and protection of witnesses and victims, as well as of those who facilitate the Court's actions locally ("intermediaries") and of the ICC's staff.

### **Trigger mechanisms**

For the Court to exercise jurisdiction, a situation must be referred to the ICC's Prosecutor:

- by a State party
- by the United Nations Security Council (within the framework of Chapter VII of the Charter)
- or if he decides upon his own initiative to open an investigation.

The Court is currently conducting 4 investigations; it has issued **13 arrest warrants** and **4 wanted individuals** have been transferred to the ICC's detention centre in The Hague.

In 2004, the Prosecutor opened an investigation into the situation in Northern **Uganda** (29 July 2004) and in the **Democratic Republic of Congo (DRC)** (on 23 June 2004, initially the investigation focused on the Ituri region and since November 2008 investigations are conducted in the Kivus), after both of these States themselves referred these situations.

Then, based on the International Commission of Inquiry's findings in relation to the **Darfur** region in Sudan, the United Nations Security Council referred the situation to the Court, considering that this conflict constituted a threat to international peace and security. This referral led to the opening of an investigation on 6 June 2005.

Finally, on 22 May 2007, the Prosecutor opened his fourth investigation in the **Central African Republic (CAR)**, over two years after the Central African State had referred it to the Court.

Contrary to what many thought at the conclusion of the Rome Statute negotiations, it has been States themselves who have solicited the ICC's intervention referring to it the investigation of crimes committed on their territories.

### **III. The ICC's Investigations**

Once a referral has taken place, the Prosecutor focuses particularly on the principle of complementarity and on whether the gravity of the crimes justifies the opening of an investigation.

#### **The Principle of Complementarity**

The ICC is complementary to national jurisdictions; it leads investigations and prosecutions only when the national authorities are unwilling or unable to do so.

-Criteria to determine unwillingness:

- a) A procedure undertaken or a decision made for the purpose of shielding the person concerned from criminal responsibility;
- b) Unjustified delay that is incompatible with the intent to bring the person concerned to justice;
- c) Proceedings not carried out independently or impartially, or in a manner which is inconsistent with the intent to bring the person concerned to justice.

-Criteria defining inability: total or substantial collapse or unavailability of the national judicial system of the State concerned rendering impossible the arrest of the accused, the gathering of evidence or otherwise affecting the conduct of proceedings.



## ► Uganda

The Prosecutor has decided to focus the investigation on the crimes committed in Northern Uganda in the framework of a 20-year-old conflict. Following a yearlong investigation, the Court issued five arrest warrants consisting of 33 charges of crimes against humanity and war crimes for Joseph Kony and four other commanders of the **Lord's Resistance Army (LRA)**, which has been fighting the Ugandan army in the north of the country. One of these individuals has since died<sup>2</sup>.

The appearance in public of the Prosecutor and the Ugandan President at the start of the investigation, the “low profile” strategy first adopted by the Prosecutor consisting of reducing all communication and public awareness campaigns regarding the purpose and the mandate of the ICC, have led to numerous accusations of partiality and to a lack of understanding of the purpose and mandate of the ICC. These factors have, for too long, been prejudicial to the ICC in Uganda.

The absence of arrest warrants against the Ugandan armed forces, the other party in the conflict, has led to criticisms of a possible lack of impartiality of the Prosecutor's Office. The Prosecutor has justified it by the purportedly lesser gravity of the crimes committed by the army.

Nonetheless, the arrest warrants have been key factors in the negotiation process aimed at ending a conflict that has been ongoing for more than 20 years: they have contributed to the LRA signing a cease-fire agreement, and negotiating the end of the conflict with the Ugandan government. Although, to this day, the arrest warrants have not been executed and no final peace agreement has been signed between the two sides, an intense debate on the peace and justice process has taken place in Uganda. The intensity of the crimes and battles has certainly diminished. A project to create a Special Division within the Ugandan High Court, which could try the crimes that fall under the ICC's jurisdiction, is now under study. Although FIDH considers that any effort for justice at the national level must take priority, it stresses that appropriate guarantees must be in place to ensure independence and impartiality and that the necessary human and material resources must be made available to achieve this purpose.

## ► DRC

The ICC Prosecutor opened his first investigation into serious crimes committed in the DRC by concentrating first of all on crimes committed in the Ituri district (in the Eastern province), where a civil war between militias and the Congolese army with neighbouring countries intervening, has raged since 1999.

Up to now, the investigations conducted in the DRC have led to the arrest of three militia leaders. An arrest warrant issued for a fourth individual has yet to be executed.

As a result, in March 2006, **Thomas Lubanga Dyilo**, president of the Union des Patriotes Congolais, was the first accused person to be arrested at the request of the ICC and transferred to the Court's seat in the Hague.

It was not until October 2007 and February 2008 that other militia leaders were also brought to justice:

2. The ICC has confirmed the death of one of them and is currently analysing data to determine whether two others have also been assassinated.

Germain Katanga of the *Force de Résistance Patriotique* in Ituri and Mathieu Ngudjolo of the *Front National Intégrationniste*. Both were transferred to the court.

The **sequence** of these proceedings, in line with the sequential approach followed by the Office of the Prosecutor in its investigations, has been a source of misapprehension particularly on the part of the public, which has viewed the Office as partial. The Office of the Prosecutor also follows a policy of «focused» investigations and prosecutions, that is, limited to those acts exemplifying the most serious crimes and main types of victimisation.

FIDH considers, however, that this method can lead to misconceptions. Concentrating solely on very specific and limited acts or perpetrators can give rise to the perception that other serious crimes are not being committed by other parties in the same conflict, or in other regions. This is all the more the case in this instance, as the charges that are brought are not always the same ones for the different militia groups and do not reflect in practice the overall reality of the most serious crimes committed during the ongoing conflict.

The court's credibility has thus been called into question as a result of limiting the charges against Thomas Lubanga to enlisting, conscripting and using child soldiers.

Yet UPC practices have been widely documented and many other crimes, such as murders, acts of torture and sexual crimes have been attributed to this group. The charges in this case do not reflect the scope of criminality.

The charges against **Germain Katanga** and **Mathieu Ngudjolo** are, on the contrary, broader. However, this case has also been the object of criticism. Whilst the case<sup>3</sup> involves only one attack on the village of Bogoro in February 2004, the Katanga and Ngudjolo militias are alleged to have committed other attacks, as recognised by the Prosecutor himself. The risk is that differences in the treatment of crimes committed amongst the different ethnic communities, historically opposed in these conflicts, could become a source of renewed tension and stigmatisation.

Lastly, the fourth arrest warrant issued in August 2006 but made public in April 2008 concerns **Bosco Ntaganda**, a former ally of Thomas Lubanga as Deputy Chief of Staff of the *Forces Patriotiques pour la Libération du Congo*. He is indicted on the same charges as Thomas Lubanga. Once again, the Office of the Prosecutor has been criticised for focusing on limited charges which poorly reflect the scope of the acts perpetrated by the militia in question. It should be recalled that, when the Prosecutor decided to suspend the investigation into other crimes committed by Thomas Lubanga (crimes other than those relating to child soldiers), he explained that his office was not willing to conduct supplementary investigations for the sole sake of upholding Thomas Lubanga's right to be tried within a reasonable delay. The same argument could not be applied to Bosco Ntaganda who, as of yet, has not been handed over to the court.

The Lubanga trial is the ICC's first trial. It was initially set to open on 23 June 2008 but had to be suspended on account of the United Nations not authorising the transmission to the defence of documents already in

3. The cases against Germain Katanga and Mathieu Ngudjolo were joined by decision ICC-01/04-01/07-257 of 10 March 2008.

possession by the Office of the Prosecutor (based on Article 57.3.e). These obstacles were overcome and the trial finally opened on 26 January 2009.

The difficulties stemming from the sequential approach, the disclosure of documents obtained from institutional sources such as the United Nations and their limits imposed by the latter on disclosure to the different parties involved in proceedings bring into question **the investigative capacity** of the Prosecutor's Office. The limiting of charges and the serious obstacles to proceedings underscore the pressing need for the Office to have considerably more investigators assigned to each situation. Currently this stands at about a dozen. Strengthening the Office in this way would enable evidence to be gathered in a more independent manner. It would also make it possible to carry out investigations on different cases simultaneously, thereby avoiding problems linked to the risk of losing evidence.

Finally, in November 2008, the Office of the Prosecutor announced the opening of a third investigation into crimes committed in the Kivus, also including sexual crimes.

### **13 arrest warrants issued by the ICC and 1 request for arrest warrant being processed**

#### ***Uganda :***

**5 arrest warrants issued** on 8 July 2005 for the commanders of the Lord's Resistance Army (LRA)

- Joseph Kony
- Vincent Otti
- Raska Lukwiya (deceased)
- Okot Odhiambo
- Dominic Ongwen

None of the above suspects has been handed over to the ICC.

#### ***DRC :***

**4 arrest warrants issued for:**

- Thomas Lubanga Dyilo, president of the *Union des Patriotes Congolais* (UPC) and commander-in-chief of the *Forces Patriotiques pour la Libération du Congo* (FPLC), 10 February 2006 (made public on 17 March 2006). Thomas Lubanga has been held at the ICC detention centre in the Hague since 17 March 2006.
- Germain Katanga, commander of the *Force de Résistance Patriotique en Ituri* (FRPI), 2 July 2007 (made public on 18 October 2007). Germain Katanga has been held at the ICC detention centre since 18 October 2007.
- Mathieu Ngudjolo Chui, former leader of the *Front des Nationalistes et Intégrationnistes* (FNI) and colonel in the DRC government's national army (FARDC), 6 July 2007 (made public on 7 February 2008). Mathieu Ngudjolo Chui has been in detention since 7 February 2008.
- Bosco Ntaganda, former Deputy Chief of Staff of the FPLC and currently alleged Chief of Staff of the *Congrès National pour la Défense du Peuple* (CNDP), an armed group active in North Kivu in DRC, 26 August 2006 (made public on 28 April 2008). He has not been arrested as of yet.

## **CAR :**

**1 arrest warrant for** Jean-Pierre Bemba, President et Commander-in-Chief of the *Mouvement de Libération du Congo* (MLC) and former Vice-President of the Democratic Republic of Congo, 23 May 2008 (made public on 24 May 2008), amended and re-issued on 10 June 2008.

He has been held at the ICC detention centre in the Hague since 3 July 2008.

## **Darfur**

### **3 arrest warrants issued for:**

- Ahmed Muhammad Harun («Ahmad Harun»), former Minister of State for the Interior of the Government of Sudan and currently Minister of State for Humanitarian Affairs, on 27 April 2007 (made public on 1 May 2007)

- Ali Muhammad Ali Abd-Al-Rahman («Ali Kushayb»), leader of a Janjaweed militia, on 27 April 2007 (made public on 1 May 2007)

- Omar Hassan Al Bashir, sitting Sudanese President, for crimes against humanity and war crimes, made public on 4 March 2009, after the Prosecutor's request for an arrest warrant against him on 14 July 2008.

All three are at large.

### **1 arrest warrant requested by the Prosecutor:**

The Prosecutor requested on 20 November 2008 that an arrest warrant be issued for the rebels accused of being responsible for the attack on units of the African Union peacekeeping mission at Haskanita in September 2007. The judges have yet to decide on this case.

## **► Darfur**

As explained above, the Darfur case was referred to the ICC by the United Nations Security Council on the basis of Article 13 of the ICC Statute and Chapter VII of the United Nations Charter dealing with threats to international peace and security.

Sudan's refusal to cooperate has made this a particularly difficult case. Investigations have had to be conducted mainly from the outside.

This investigation has, however, made it possible to reveal that «the whole state apparatus» has been involved in the crimes committed in the western region of Sudan and that the Sudanese government recruited the Janjaweed militia in order to attack, destroy and displace the civilian population from Darfur.

The first arrest warrants were issued on 27 April 2007 for Ahmad Harun, former Minister of State for the Interior and currently Minister of State for Humanitarian Affairs, and for Ali Kushayb, Janjaweed militia leader. Not only has Sudan not arrested these men but it has also protected them. Mr. Harun was promoted to co-preside a committee investigating human rights violations in Sudan as well as to sit on a committee overseeing the deployment of the joint United Nations and African Union mission in Darfur (UNAMID). Mr. Kushayb, under detention in Sudan at the time the arrest warrant was issued, was released by a Sudanese court for «lack of evidence». He now enjoys complete freedom.

On 14 July 2008, the ICC Prosecutor requested that an arrest warrant be issued for the Sudanese President, Omar Al-Bashir. This is the first time that the ICC Prosecutor has accused a sitting head of state and qualified the conflict in Darfur as «genocide». He accuses Al-Bashir of masterminding a plan to destroy certain ethnic groups in the region. On 4 March 2009, Pre-Trial Chamber I made public its decision on this request to issue a warrant of arrest for Omar Al-Bashir for crimes against humanity and war crimes.

The Sudanese government categorically denies the accusations and questions the the ICC's jurisdiction. This is why the Darfur situation poses serious challenges to the international community and in particular to State Parties, who are called upon to lend their support and cooperate with the court. This cooperation implies not only executing the arrest warrants should the indicted individuals be travelling outside Sudan but also providing political and diplomatic support to the ICC within the framework of bilateral relations with Sudan and in multilateral forums.

The undeniable fact is that this support is sometimes still too timid or lacking. It was not until 16 June 2008 that the Security Council echoed the Prosecutor's concerns and recalled Sudan's obligation to cooperate with the Court. Above all, in support of Sudan's request, the Arab League and the African Union have asked the Security Council to suspend prosecutions on the basis of **Article 16** in the Rome Statute. Some Security Council Member States, such as France, even expressed for a while a favourable stance towards such a suspension on condition that Sudan change its policy. According to FIDH, that change has not come about.

Fortunately, until now, these kinds of political manoeuvres to suspend ICC activities have not succeeded. The FIDH considers that resorting to Article 16 to suspend investigations and action against Al-Bashir would be totally unfounded and inappropriate. Such a suspension would constitute the biggest setback ever in the recent history of international criminal law, which aims precisely to bring to justice those most responsible for the most serious crimes. Invoking Article 16 would also damage the vital principle of the independent of justice. Quite on the contrary, the role of the community of States is to take all the measures possible to put an end to the serious crimes being committed in Darfur and, in the pursuit of a lasting peace, to back the work of the ICC Prosecutor in effectively establishing and punishing the individual responsibility of those perpetrating crimes of genocide, crimes against humanity and war crimes in Darfur.

## ► CAR

The fourth investigation, which opened on 22 May 2007, concerns the situation in the CAR. For the moment it focuses on the crimes committed during the 2002-3 conflict (on the occasion of the coup d'État that brought to power General Bozizé), though the Office of the Prosecutor continues to analyse the situation which has unfolded in the northern part of the country in subsequent years, particularly from 2005 onwards.

As of 2003, FIDH submitted reports every year following its missions in CAR. Those reports provided information on crimes within the ICC jurisdiction as well as on the lack of capacity and unwillingness on the part of the CAR courts to prosecute the said crimes.

On 22 December 2004, the CAR government referred the situation to the ICC. On 11 April 2006, the

Cour de Cassation upheld the ruling of the Bangui Court of Appeal from 16 December 2004, which had determined that only the ICC could prosecute serious crimes committed in the CAR since 1 July 2002.

Despite these convergent decisions, the analysis phase lasted over four years, which raised many criticisms and questions from FIDH and its member organisations, especially relating to the risk of losing evidence and the preventive impact that the Court could have had on the deteriorating situation in the north of the country as of 2005. It was in that sense then that, on 30 November 2006, following a complaint filed by the CAR government, ICC Pre-Trial Chamber III requested that the ICC Prosecutor provide a status update on the progress of his analysis.

«This is the first time the Prosecutor is opening an investigation in which allegations of sexual crimes far outnumber alleged killings.» Statement by Luis Moreno Ocampo on 22 May 2007.

The investigation is particularly focused on the prosecution of sexual crimes, characterising the 2002-3 conflict, committed widely and indiscriminately - in public - against women, men, and children. The perpetration of these widespread crimes and their impunity has increased the trivialisation of rape, the worsening of the AIDS pandemic and the stigmatisation of victims in the CAR.

Just one year after the investigation was opened, the Court issued its first arrest warrant for **Jean-Pierre Bemba**, former Vice-President and sitting Senator from the DRC. He is accused of crimes committed in the CAR by his militia, known as «Banyamulenges» which was sent to the CAR in support of former President Patassé, to counter the attempted coup d'État of General Bozizé. With the arrest of Jean-Pierre Bemba, a major political figure in the region has been brought before the ICC for the very first time. Arrested on 24 May 2008 in Belgium, he was transferred to the ICC's detention unit in The Hague on 3 July 2008.

FIDH and its member organisations continue to draw the attention of the Office of the Prosecutor to the serious and delicate situation in northern CAR and to the fact that other participants in the 2002-3 conflict should also be prosecuted for the international crimes they have committed.



## IV. The ICC: A Court for Africa?

The ICC is currently investigating four situations in Africa.

Following the request that an arrest warrant be issued for the Sudanese President, this exclusive intervention on the African continent was widely criticised by observers and Heads of State in the region.<sup>4</sup>

However, the argument that the ICC is «singling out Africa»<sup>5</sup>, «against the poorest southern States», and therefore biased, does not stand up to an objective examination of the matter.

First, it is important to note that African States now make up almost one-third of the States having become party to the Statute, thus recognising and accepting the ICC's jurisdiction on their territory or against their nationals (Senegal was the first State to ratify the ICC Statute).

Secondly, it was because they had ratified the ICC Statute and thus accepted its jurisdiction, that three of the four States with a case before the Court, have themselves referred the situation to the ICC. They have themselves requested that the Prosecutor investigate the crimes committed on their territory, thereby acknowledging their lack of capacity to investigate and prosecute these crimes.

With respect to the situation in Darfur, the intervention by the Security Council was justified by the very serious situation in the Sudanese region since 2003, with more than two million displaced persons and hundreds of thousands of victims of international crimes, all of which threatened peace and security in the region.

Finally, the gravity of crimes is a determining factor in the opening of investigations by the ICC. Many international reports confirm that some of the most serious crimes were committed in a systematic manner in all four countries.

The Office of the Prosecutor has already previously stated: “The situations selected contributed to a problematic perception as to the existence of an intentional geographically-based prosecution strategy. The Office understands this concern, but regional balance is not a criterion for situation selection under the Statute.”<sup>6</sup>

If some Heads of State and representatives of regional organisations have attacked the Court because it might focus solely on Africa, it is worth noting that the victims in the cases handled thus far are praising the action of the Court, which they consider the only possible and useful remedy.

4. Sudan lobbies against Bashir case, <http://news.bbc.co.uk/1/hi/world/africa/7630071.stm>, <http://sudantribune.com/spip.php?article28660>

5. African Officials Troubled by Timing of Genocide Arrest for Sudan's President, <http://www.voanews.com/english/archive/2008-09/2008-09-30-voa45.cfm?CFID=116848925&CFTOKEN=70568425&jsessionid=0030cbcd79aad455628345e1614234120a75>

6. Office of the Prosecutor, Report on the activities performed during the first three years (June 2003-June 2006), p.7.

At the same time, FIDH continues to insist that the ICC Prosecutor use its power to open investigations of his own initiative, as it has the right to do under Article 15 of the Statute. Although such proceeding could prove to be more difficult, insofar as the Prosecutor may not receive the necessary cooperation of the States concerned, they could also help establish his independence.

The Office of the Prosecutor also assesses the situation of countries on other continents.

## **V. Situations «under preliminary analysis»**

Along with its current investigations, the Office of the Prosecutor is monitoring other situations, which could lead to future formal investigations. In the beginning, information on situations that were under “preliminary analysis” (the phase prior to opening an investigation) was kept confidential. In its regular dialogue with the Office of the Prosecutor, FIDH repeatedly stressed the importance of making this information public in order to «maximise the impact” of the Court’s actions and, in this sense, to increase its deterrent effect. Since 2007, the Office has progressively changed its policy in this direction, and now publicly acknowledges that it is analysing situations in **Afghanistan, Colombia, Georgia, Ivory Coast and Kenya**.

FIDH monitors developments around situations under analysis, and has also sent numerous communications to the ICC Prosecutor of the ICC bringing to light the commission of crimes within the jurisdiction of the Court (communications under Article 15 of the Statute).

### **FIDH and the analysis of the situation in Colombia**

Since 2005, FIDH and its member organisations have regularly transmitted information on crimes committed in Colombia, particularly by the paramilitaries despite the demobilisation process. FIDH has also submitted reports on crimes committed by other participants in the conflict. FIDH also monitors the implementation of the Justice and Peace Act, to determine whether Colombia is willing and able of to investigating and prosecuting the most senior individuals responsible for the most serious crimes committed on its territory, in particular those committed by the paramilitary units, which have historically benefited from impunity and protection from the State apparatus. This information is regularly sent to the Office of the Prosecutor.



## VI. Major challenges for the ICC

The International Criminal Court must tackle a significant number of challenges to solidify its position and become truly operational and universal.

### ► Intervening in conflict situations and peace processes

The intervention of the ICC in conflict situations poses eminent challenges and obstacles to its operations, particularly related to: security, including that of personnel from the ICC and its intermediaries; the difficulty of access to victims, witnesses or to the places where crimes were committed; the risk of losing evidence due to the passage of time; and, poor infrastructure at the national level to support the ICC.

Some cases, the relationship between rendering justice for international mass crimes and finding peace in these situations is early put into question; that is, finding the balance between the interests of peace and justice.

The Office of the Prosecutor has recently and publicly announced that the concept of the “interest of justice” that may be invoked in order not to investigate or prosecute did not include the “general concerns of international peace and security”, under its independent judicial mandate.<sup>7</sup> It went on to warn against any “political compromise” of the “legality and accountability” of the Court.<sup>8</sup>

FIDH has recalled the importance for the Prosecutor to reaffirm its independence, and to take into account the primary objective of the Court, which is the fight against impunity and the absolute respect for the rights of victims.<sup>9</sup>

Moreover, as demonstrated by the political offensive of Sudan, and some States and regional organisations (such as the African Union and the League of Arab States) following the request for an arrest warrant against the Sudanese President, arguments putting peace at the top of the list may be in bad faith, since such a process does not exist in fact.<sup>10</sup>

7. See the Policy Paper of the Office of the Prosecutor of the ICC of September 2007 on the Interests of Justice, <http://www2.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf>

8. See the Address of the Prosecutor of the ICC to the Nuremberg Conference, June 24-25, 2007 [http://www2.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO\\_nuremberg\\_20070625\\_English.pdf](http://www2.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf)

9. See IFHR comments of September 2006 on the policy paper of the Office of the Prosecutor of the ICC on the Interests of Justice of November 2005, <http://www.fidh.org/spip.php?article3987>

10. See the report published 2 December 2008: “Rhetoric versus Reality in Darfur - Continuing Abuses Despite Government Charm Offensive”, <http://www.fidh.org/spip.php?article6073>

## ► Rendering victims' rights effective

The Rome Statute recognises, for the first time under international criminal law, the rights of victims before an international criminal tribunal, including the right to participate in court proceedings, to be represented by a lawyer, to benefit from protection and to obtain reparations for damages suffered.

Not only does FIDH closely monitor institutional developments at the ICC, thereby helping to define and implement its policies and strategies, it also provides assistance to the victims of crimes falling under the jurisdiction of the court, through its Legal Action Group (LAG). FIDH was the first organisation to submit applications, on behalf of the victims from the DRC, to participate in proceedings before the Court.

The right to participate in the Court's proceedings is one of the key issues argued in front of the judges. Despite repeated challenges by the Prosecutor and the Defence to the right of victims to participate both at the situation and case stages, the following rights, among others, have been recognised:

- The right to access certain elements of the Prosecutor's files;
- The right to produce evidence and to present conclusions on the admissibility or relevance of the evidence presented by the parties;
- The right to protection, from the moment the application to participate in proceedings is received by the court;
- The right to legal representation even before their application to participate is accepted.

A judgement on the participation of victims at the situation stage was handed down by the Appeals Chamber on 19 December 2008.

The status of victims before the ICC, and their right to participate in its proceedings, recognises, as acknowledged by the judges, the principle according to which the interest of victims in legal proceedings goes beyond the awarding of reparations. This interest also includes the right to justice, that is, that the perpetrators of the crimes of which they were the victims should be tried and, if applicable, convicted, as well as the right to truth regarding the facts and the circumstances in which the atrocities they experienced were perpetrated.

However, dogged by a lack of resources, a poor understanding of the challenges involved and an absence of creativity on the ICC's part, there is still a long way to go before victims are able to fully exercise their rights.

Firstly, the Court should provide victims with more information about their rights and explain what participating in its proceedings means and involves, in order to exercise their rights and meet their legitimate expectations.

The Court should then take it as axiomatic that the crimes falling under its jurisdiction necessarily involve a large number of victims, and therefore potentially a large number of participants in its proceedings. **The existence of a large number of participants should not be a “problem” but the starting point in defining its strategies.** Involving a large number of participants would also boost its credibility. The participation of victims being a collective act in practice, the Court must put in place new procedures to process applications, in order to facilitate their consideration and, as a consequence, victim participation.

Lastly, the court should set up systems, and in particular IT systems, that would enable a larger volume of applications to be processed.

The complexity of the proceedings, in a language that most victims do not speak, implies that victim participation is only possible through effective legal representation. The Court must therefore set up a legal aid system adapted to the particular situation of victims.

The Trust Fund for Victims and their families, instituted by the Rome Statute, is independent from the court. Its dual mandate, the awarding of reparations and provision of assistance to victims, is performed during the situations and cases before the ICC. The Fund must therefore: i) execute the Court’s decisions ordering reparations and ii) determine the most appropriate means of using voluntary contributions in order to provide assistance to victims of crimes under the Court’s jurisdiction and member of their families. Operational since 2007, the Trust Fund has initiated certain projects in the DRC and Uganda.

## **Trust Fund for Victims**

The Fund is administered by a Board of Directors. Its members include:

Minister Simone Veil, Chair (France)

His Eminence Archbishop Desmond Tutu (South Africa)

Mr. Tadeusz Mazowiecki (Poland)

Mr. Arthur N. R. Robinson (Trinity and Tobago)

Mr. Bulгаа Altangerel (Mongolia)

Funds received: approximatively €3,100,000

Activities supported by the Fund:

Funds are allocated to projects according to the following criteria:

- The project should directly address the harm (physical, psychological, economic and social) caused by the conflict and target the most vulnerable and marginalised survivors.
- The selection of project beneficiaries and its implementation must not result in discrimination based on social status.
- Reparation activities should preferably target groups, based on similar requests and personal situations.
- The project must avoid duplication with other interested institutions and promote complementary approaches.
- Victims and survivors should be active participate actively in the implementation of the project.
- The project includes an outreach component to ensure that it is understood by beneficiaries and their communities.
- The project is designed to be sustainable, beyond the time-span of the funding by the Trust Fund for victims.
- The project managers must be able to show that the intended target group benefits from the project and that the resources allocated are used efficiently and effectively.

(source: [www.icc-cpi.int](http://www.icc-cpi.int))

Projects: 34 projects in Uganda and the DRC were approved in 2008

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## ► Reaching out to communities affected by crimes within the ICC's jurisdiction

To ensure that the ICC activities and proceedings have a real impact, especially given that the Court is based in The Hague, the communities concerned by the Court's investigations must be aware of them and understand them.

Outreach activities (aimed at establishing a dialogue between the communities concerned and ICC representatives) as well as public information activities (targeting the media) are therefore vital.

However, during its early years, the ICC, ignoring the experiences of other international courts, did not find it useful or necessary to set up a solid outreach policy. Poor information, leading to misinformation and mistrust, undermined the credibility and effectiveness of the Court and raised major challenges for the ICC.

Thanks to the insistence of NGOs, the States party to the ICC Statute responded to this challenge by allocating more resources and, as of 2007, the ICC put in place a new outreach strategy (including a wide range of activities and information tools, greater transparency, etc.)

As a result, the quality and quantity of activities have increased significantly. However, the Court's limited resources and poor representation on the ground, coupled with the time necessary to organise its initial activities after the opening of an investigation (a single media event has been organised since the opening of the investigation into the situation in the CAR in May 2007, despite the arrest of Jean-Pierre Bemba in May 2008) suggest that there is a major need to intensify these efforts.

## ► Obtaining States' and international organisations' cooperation

The cooperation of States and international organisations represents a major challenge for the Court. The Court has no independent police force. It depends, therefore, on the willingness of States Parties to cooperate with it.

The implementation of the Court's decisions, including primarily the execution of arrest warrants, requires a high level of support and cooperation on the part of States. Cooperation as set out in the ICC Statute includes not only the arrest and transfer of suspects, but also support in terms of access to information, the gathering of evidence, witness protection, the freezing and seizing of assets, the execution of sentences, and others activities. It is therefore necessary for individual States to incorporate the Statute into national law. This is an area in which, unfortunately, much work is still needed. In addition to this support for its legal activities, the ICC also needs political support in the framework of bilateral relations between States as well as within international and regional organisations, and the signing of cooperation agreements, which are then effectively implemented.

## ► Ensuring ratification by a larger number of States

Promoting the ratification of the ICC Statute is vital to ensuring that the Court becomes truly universal. The Court would expand its field of influence and be capable of investigating international crimes, and prosecuting perpetrators, in a larger number of States.

In addition, after ratifying the ICC Statute, States must include their obligations in their domestic legislation. This incorporation of the ICC Statute into national law reinforces the world system for prosecution of the most serious crimes.

In fact, adapting national laws to the ICC Statute enables States to reform criminal and criminal proceedings law, allowing them to prosecute crimes falling under the jurisdiction of the ICC themselves, and to strengthen the rule of law, peace and security in the world over the long term. It also improves the effectiveness of the Court, since such legislation should also enable the State to cooperate with the ICC in fields such as evidence gathering and the transfer of suspects.

A number of challenges must be met in order to involve a larger number of States in the process, in particular in regions where the fewest States have ratified the statute (Asia and the Middle East).

Firstly, these States must be made aware of and understand the ICC Statute and the Court's activities. Secondly, domestic legal issues need to be resolved, such as the absence of immunities according to the Statute, the non-applicability of the statute of limitations and applicable penalties. Lastly, it is vital to promote and generate the political will necessary to make reluctant States become parties to the Statute.

## VII. Selection of FIDH reports on the ICC

- CAR: “Déjà-vu: d(é)s accords pour la paix au détriment des victimes”, December 2008
- Sudan/Darfur: “Rhetoric versus Reality in Darfur - Continuing Abuses Despite Government Charm Offensive”, December 2008 (joint report)
- ASP: Recommendations to the seventh session of the Assembly of States Parties to the Statute of the International Criminal Court, November 2008
- Sudan Darfur: “The International Criminal Court and Darfur : Questions and Answers”, July 2008
- CAR: «FIDH and the situation in the Central African Republic before the ICC: the case of Jean-Pierre Bemba Gombo», July 2008
- DRC, «Sexual Crimes in DRC: Breaking the cycle of impunity », May 2008
- Uganda: «FIDH and FHRI urge the Security Council to respect the independence of the International Criminal Court and protect the integrity of the Rome Statute», April 2008
- Colombia: “Paramilitary Demobilisation in Colombia: On the road to the International Criminal Court”, October 2007
- Chad Sudan: “ We want security, we want justice”, October 2007
- Victims’ Rights before the International Criminal Court, A Guide for Victims, their legal representatives and NGOs, April 2007

These publications and others are available on the FIDH website: [www.fidh.org](http://www.fidh.org)

# FIDH represents 155 human rights organisations on 5 continents

keep your eyes open

## Establishing the facts

### investigative and trial observation missions

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

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

## Supporting civil society

### training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level.

## Mobilising the international community

### permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

## Informing and reporting

### mobilising public opinion

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

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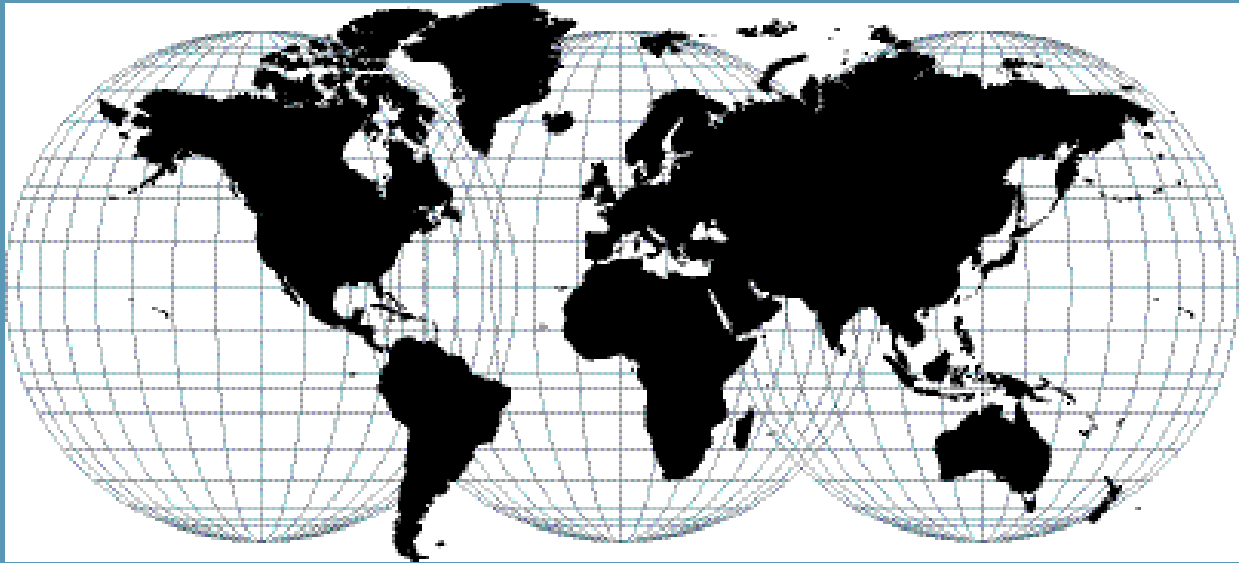
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# FIDH represents 155 human rights organisations on 5 continents



Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute

to the prevention of such crimes, (...) Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court (...) with jurisdiction over the most serious crimes of concern to the international community as a whole, Emphasizing that the International Criminal Court (...) shall be complementary to national jurisdictions, Resolved to lasting respect for and the of international justice,

## About FIDH

- FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.
- A broad mandate  
FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.
- An universal movement  
FIDH was established in 1922, and today unites 155 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.
- An independent organisation  
Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

*Find information concerning FIDH 155 member organisations on [www.fidh.org](http://www.fidh.org)*