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Report

International Criminal Court Programme

ISRAEL
National Round table on the International Criminal Court : "Raising accountability of international criminals"

ABBREVIATIONS 4
FOREWORD 5
I - A BRIEF INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (ICC) 6
II - OPENING CEREMONY 10
III - SESSION 1: THE ICC IN THE INTERNATIONAL JUSTICE CONTEXT 12
IV - SESSION 2: THE LAW OF THE INTERNATIONAL CRIMINAL COURT 18
V - SESSION 3: ICC AND ISRAEL 34
VI - WORKING GROUP SESSION: ANALYSIS OF A CASE STUDY ON THE INTERNATIONAL CRIMINAL COURT 37
VII - FINAL PRESS RELEASE: MAIN RECOMMENDATIONS 41
APPENDICES 43

TABLE OF CONTENTS

ABBREVIATIONS 4

FOREWORD 5

I - A BRIEF INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (ICC) 6

II - OPENING CEREMONY 10

III - SESSION 1: THE ICC IN THE INTERNATIONAL JUSTICE CONTEXT 12

IV - SESSION 2: THE LAW OF THE INTERNATIONAL CRIMINAL COURT 18

V - SESSION 3: ICC AND ISRAEL 34

VI - WORKING GROUP SESSION: ANALYSIS OF A CASE STUDY ON THE INTERNATIONAL CRIMINAL COURT 37

VII - FINAL PRESS RELEASE: MAIN RECOMMENDATIONS 41

APPENDICES 43
- **AGENDA OF THE ROUND TABLE**
- **NON DEFINITE LIST OF PARTICIPANTS TO THE ROUND TABLE**

ABBREVIATIONS

ACRI: Association for Civil Rights in Israel
AI: Amnesty International
ASP: Assembly of States Parties
ASPA: American Service members' Protection Act
CICC: Coalition for the International criminal Court
EU: European Union
ICB: International Criminal Bar
ICC: International Criminal Court
ICTY: International Criminal Tribunal for the Former Yugoslavia
ICTR:International Criminal Tribunal for Rwanda
JCCD: Jurisdiction, Complementarity and Cooperation Division
NGOs: Non Governmental organizations
PCATI: Public Committee Against Torture in Israel
SOFAs: Status of Forces Agreements
TFV: Trust Fund for Victims
UK:United Kingdom
UN: United Nations
UNTAET: United Nations Transitional Administration in East Timor
US:United States
VPRS: Victims Participation and Reparation Section
VWU: Victims and Witnesses Unit

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FIDH would like to thank its affiliated organizations, the Public Committee Against Torture in Israel (PCATI), B'tselem, Adalah and the Association for Civil Rights in Israel (ACRI), for their invaluable help in organizing the round table and sharing their experience and expertise on this issue.

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FOREWORD

The FIDH and the International Criminal Court (ICC)

Since 1998, following negotiations in Rome on the Statute for the International Criminal Court, the International Federation for Human Rights (FIDH) has worked for the implementation of an independent and impartial ICC to protect the rights of victims. Throughout the process of implementation, FIDH has worked to defend these principles.

Today, FIDH focuses on transforming the ICC into an effective tool to be used in the struggle against impunity for crimes committed in violation of international law.

The FIDH ICC Programme

The FIDH programme devoted to the International Criminal Court – “ The struggle against impunity and the promotion of international justice”— has one primary global objective: to train and reinforce the capacity of national human rights NGOs to act in defense of human rights. The realization of this objective would permit these organizations to promote and *in fine* to utilize the mechanisms currently available in the struggle against impunity of those who commit the most serious crimes against human rights - one of the most important of such mechanisms being the ICC. This programme benefits from the support of the European Commission (European Initiative for Democracy and Human Rights).

FIDH, in the context of the campaign for universal ratification of the Statute of the ICC, has chosen to focus its action on countries in Asia, North Africa, and the Middle East, regions in which very few states have ratified the Statute. Thus, in close collaboration with NGOs in the concerned countries, FIDH organizes international missions and other activities in the field, including the organization of civil society round tables, in support of its objectives.

I - A BRIEF INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (ICC)

1. Historic overview

On 17 July 1998, 120 States overwhelmingly approved a Statute to establish a permanent and independent International Criminal Court (ICC). Four years later, on 11 April 2002, following the 60th ratification, the Rome Statute (RS) of the ICC entered into force. On 1 July 2002, the ICC became fully competent to try individuals for genocide, crimes against humanity and war crimes.

The "road to Rome" was a long and often contentious one. Efforts to create a global criminal court can be traced back to the early 19th century. The story began in 1872 with Gustav Moynier – one of the founders of the International Committee of the Red Cross – who proposed a permanent court in response to the crimes of the Franco-Prussian War.

Following World War II, the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals.

Because of the Cold war, 50 years passed before the world's leaders decided to put the ICC on their agenda again.

Nonetheless, efforts were made in the 90's to develop a system of international criminal justice with the establishment by the UN Security Council of the ad hoc tribunals, the International Criminal Tribunal for Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, and the creation of hybrid tribunals, like the Special Tribunal for Sierra Leone, the Khmer Rouge Tribunal in Cambodia and the Tribunal for East Timor, applying a combination of international and national law.

2. The ICC is permanent and complementary to national justice

Permanent jurisdiction
Unlike the ad hoc tribunals, which have jurisdiction over core crimes committed in Former Yugoslavia from 1991 to 1993 and in Rwanda in 1994, and the hybrid tribunals, the ICC has jurisdiction with respect to crimes committed after the entry into force of the Rome Statute, that is after 1st of July 2002. This means that the ICC cannot try individuals for crimes committed before this date and thus has a non-retroactive jurisdiction.

Complementary jurisdiction
The ICC is complementary to national criminal jurisdictions and does not replace national courts. The Court will only investigate and prosecute if a State is unwilling or unable to genuinely prosecute (i.e. where there are unjustified delays in proceedings, as well as proceedings which are intended merely to shield persons from criminal responsibility).

3. How to refer a situation to the ICC

There are three ways to refer a situation to the ICC Prosecutor:
→ **State Party** referral
→ United Nations **Security Council** referral under Chapter VII of the UN Charter
→ Any person can refer a situation to the **Prosecutor** who, pursuant to his ***propio motu*** prerogative, can decide to initiate an investigation, if he believes that there is "reasonable basis" to investigate. He must then seek the authorization of the Pre-Trial Chamber before proceeding with the investigation.

4. Jurisdiction of the ICC

The ICC has jurisdiction to prosecute **individuals** of crimes under the Rome Statute when:
→ crimes have been committed in the **territory** of a state which has ratified the Rome Statute;
→ crimes have been committed by a **citizen** of a state which has ratified the Rome Statute;
→ the Security Council refers a situation to the ICC. In such a case the Court's jurisdiction is truly universal, meaning that it is not necessary for the alleged perpetrator of the crime to be citizen of a State Party or for the crime to have been committed on the territory of a State Party.

Since **1 July 2002**, the Court has jurisdiction over the crime of genocide, crimes against humanity and war crimes. The Court will exercise jurisdiction over the crime of aggression only once the terms of its definition have been agreed upon.

If a State becomes a Party to the Rome Statute after July 2002, the Rome Statute will enter into force for this State **60 days** after the deposit of its instrument of ratification.

5. Core crimes defined in the Statute of the ICC

What crimes fall under the jurisdiction of the International Criminal Court?
The ICC has jurisdiction over the most serious violations of international human rights and humanitarian law: genocide, crimes against humanity, war crimes and the crime of aggression.

Genocide (Article 6 RS):
The definition of the crime of genocide has been taken from the 1948 Genocide Convention. Genocide is any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:
• Killing members of the group
• Causing serious bodily or mental harm to members of the group
• Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
• Imposing measures intended to prevent births within the group
• Forcibly transferring children of the group to another group.

Crimes Against Humanity (Article 7 RS):
The provisions of the Rome Statute are the first to codify crimes against humanity.
Crimes against humanity are defined as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
• Murder
• Extermination
• Enslavement
• Deportation or forcible transfer of population
• Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
• Torture
• Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
• Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law
• Enforced disappearance of persons
• The crime of apartheid
• Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. (...)

War Crimes (Article 8 RS):
Under the Rome Statute, war crimes are any of the following breeches of the Geneva Conventions of 12 August 1949, perpetrated against any persons or property:
• Willful killing
• Torture or inhuman treatment, including biological experiments
• Willfully causing great suffering, or serious injury to body or health
• Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
• Compelling a prisoner of war or other protected person to serve in the forces of a hostile power
• Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial
• Unlawful deportation or transfer or unlawful confinement
• Taking of hostages.
Under the definition of war crimes, the Court will also have jurisdiction over the most serious violations of the laws and customs applicable in international armed conflict within the established framework of international law. These violations are defined extensively in Article 8, subparagraph (b) of the Rome Statue In the case of armed conflict not of an international character, the Court’s jurisdiction will cover breeches of Article 3 common to the four Geneva Conventions of 12 August 1949.

Crime of Aggression:
The Court will have jurisdiction over the crime of aggression once a provision defining the crime has been adopted during the Review conference in 2009.

The **applicable law of the ICC** (the sources) is primarily the Rome Statute (RS), the Elements of Crimes and the Rules of Procedure and Evidence (RPE) (article 21).

6. General principles of criminal law

Individual criminal responsibility (Article 25 RS)
The ICC has jurisdiction over individuals and not legal entities, such as multinationals or corporations.

Minimum age for ICC jurisdiction (Article 26 RS)
The ICC only has jurisdiction over individuals of 18 years of age or older.

Non-retroactivity (Article 24 RS)
No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

Command responsibility (Article 28 RS)
Commanders, from the military as well as civilian superiors, can be tried where they knew or should have known that their subordinates were committing crimes within the jurisdiction of the ICC, when they failed to take necessary measures to prevent or repress their commission and, for civilian superiors, when the crimes concerned activities that were within their effective responsibility and control.

***Ne Bis In Idem* (Article 20 RS)**
No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

Irrelevance of official capacity (Article 27)
The Rome Statute applies equally to all persons without any distinction based on official capacity. Immunities that may apply under national or international law are not applicable before the ICC.

7. Sentences

The ICC does not recognise the death penalty and can impose a maximum penalty of 30 years of imprisonment or a term of life imprisonment when justified by the extreme gravity of the crime. In addition to imprisonment, the ICC can order a fine or a forfeiture of proceed, property and assets.

8. Organization of the Court

There are four organs within the ICC:
→ The **Presidency**, composed of the President, Mr. Philippe Kirsch (Canada), and two Vice-Presidents.
→ The **Chambers**, divided into Pre-Trial Chambers, Trial-Chambers and Appeals Chambers and composed of 18 judges, elected by the Assembly of State Parties.
→ The **Office of the Prosecutor**, composed of the Prosecutor, Mr. Luis Moreno Ocampo (Argentina), elected by the Assembly of State Parties, two Deputy Prosecutors, Mr. Serge Brammertz (Belgium) and Mrs. Fatou Bensouda (Gambia), also elected by the Assembly of States Parties.
→ The **Registry**, headed by the Registrar, Mr. Bruno Cathala (France), elected by the Assembly of State Parties.

9. Victims rights

Victims' access to international criminal justice is new. Indeed, for a long time, the interestsof victims were not considered in international law. In Nuremberg in 1945 as well as before the international criminal tribunals created in 1993 and 1994 (International Criminal Tribunal for Former Yugoslavia – ICTY – and International Criminal Tribunal for Rwanda – ICTR) the victim is only considered as a witness.

The Statute of the ICC consecrates the statute of the victim in international law. It includes innovating provisions enabling the protection, participation, legal representation and the reparation of victims.

Wide definition of "victim"
The Statute of the ICC includes in the definition of victims not only direct victims but also indirect victims. Moreover, psychological harm is recognized next to physical harm. Only natural persons are recognized as victims before the ICC.

Protection of victims and members of their family
Another progressive aspect of the ICC is the obligation of protection of victims-witnesses, during the investigation phase as well as during the proceedings. Victims and witnesses have the right to physical protection, but also to receive psychological assistance from all the organs of the Court.

Effective participation
Beyond the possibility of supplying information to investigations, victims can participate in the proceedings before the ICC, provided that they are effectively informed of their rights and are fairly represented. Having been informed of the consequences, modalities and limits of the participation to the proceedings before the ICC, victims are free to choose counsel of their choice. If there is a large number of victims, they will generally have to choose a common legal representative, for whose remuneration they can receive financial assistance from the ICC – within the limits defined by the Court.

Reparation
Unlike the ad hoc tribunals, the ICC establishes a real system of reparation for victims. The Court may determine the scope and extent of any damage to be repaired by the convicted person to the victims or their beneficiaries (restitution, compensation or rehabilitation), without the need for any specific request. If reparation cannot be paid directly by the convicted person, the Victims' Trust Fund, a subsidiary organ of the ICC, assists. The funds collected by the Trust Fund will come from forfeitures and fines ordered by the Court against convicted persons, as well as from voluntary contributions from States, individuals and organizations.

II - OPENING CEREMONY

1. H.E. Kurt HENGEL, Ambassador of Austria on behalf of the European Union (EU)

The Ambassador of Austria on behalf of the EU called back the Austrian position on the ICC, which is to support this international tribunal.

He insisted on the need for Israel to ratify the Rome Statute. This international instrument deals with fundamental principles of human rights and it is consequently very important that a state like Israel whose population has been the victim of the Holocaust, ratifies the Statute.

The Ambassador thus announced that the question of the ratification would be raised during the next meeting of the Association Council EU-Israel on 13 June 2006.

Moreover, all the EU embassies in Israel have been asked to provide information about what they have been doing on the protection of civilians. It is indeed very important that the European States set the example in the protection of human rights. It could allow to bring Israel to reconsider its stand on different human rights issues.

2. Representatives of ACRI, ADALAH, B'tselem, PCATI

Ms. Rachel Benziman, director of the Association for Civil Rights (ACRI) in Israel thanked FIDH for having initiated this round table on such a sensitive issue and pushed its member organizations in Israel to take part. She underlined that this event was even more important considering that Israeli NGOs had given up on this issue and that it was necessary to put international justice and the ICC on NGOs' agenda again.
She recalled that it would be very difficult to get the Israeli ratification of the ICC; but nevertheless the Israeli civil society should think about the issue again.

Lawyer Orna Kohn, representing the Legal Center for the Arab Minority Rights in Israel stressed on the reality in the Occupied Palestinian Territories where serious human rights violations occur every day. In this legal and political reality of very impartial protection it is of utmost importance that civil society organizations continue the monitoring of human rights violations.
Facing a culture of impunity and a lack of legal tools to bring justice, the life of human rights advocates was very hard.
Adalah hoped that the round table would help in setting up a strategy of campaign to bring Israel to ratify the ICC and would discuss practical steps to make sure that every possible tool to end impunity will be used by different organizations, with the help of international community as a whole.
Finally, it was mentioned that two days would not be enough but constituted nevertheless an important starting point.

Hannah Friedman, the director of the Public Committee Against Torture in Israel, welcomed the round table on the ICC and recalled that PCATI has long been involved in the support of the Court and joined the Coalition for the ICC;.

3. Ms. Stéphanie David, FIDH

This is the first activity that FIDH organised in Israel.

In the aftermath of the Second World War, FIDH was the first international human rights NGO to call for creation of a permanent international criminal court. In 1956, the International Board of FIDH passed a resolution urging States to adopt a mechanism that would be permanent and universal to fight against the impunity of alleged perpetrators of war crimes, crimes against humanity and genocide. Since 1997, FIDH has been involved in the negotiations of the Rome Statute and lobbying for a fair and independent ICC. Since then, FIDH has been actively promoting the universal acceptance of the ICC by organizing regional and national workshops throughout the world addressing national civil society about this new instrument that came into force on july 1, 2002.

The ICC is still far from being universal. While most countries of the latin American, African and European continents have ratified the Rome Statute bringing it to 100 State parties as of today, the Asian and middle east north African regions are still critically under represented.

For that reason, FIDH has decided three years ago, to focus its energy in raising civil society awareness on the ICC in

Asia, the Middle East and north Africa region. Indeed, only Jordan has ratified the Statute in this region. In that context, FIDH has organized national workshops in Yemen, Bahrain, Tunisia, Morocco, Lebanon, Jordan for Iraki lawyers, Turkey and Cambodia. Today's workshop is the last activity of this program.

FIDH acknowledges that bringing the issue of the ICC is Israel is not an easy endeavor. The position of the Israeli government is well known to all of you. The reasons behind Israel’s refusal of the jurisdiction of the Court are also of no secret to none of you.

On the web site of the Israeli Foreign ministry the following are Israel's primary issues of concern:

– The inclusion of settlement activity as a "war crime" is a cynical attempt to abuse the Court for political ends. The implication that the transfer of civilian population to occupied territories can be classified as a crime equal in gravity to attacks on civilian population centres or mass murder is preposterous and has no basis in international law.
– Many of the other 'crimes' included in the war crimes provision of the Statute represent a distortion of these crimes as they appear in the instruments of international law. (...)
– The jurisdiction given to the Court to try individuals even when their state of nationality is not party to the Statute disregards the fundamental principle that a treaty may only bind its own parties.

Despite those concerns, Israel decided to sign the Statute.
A few days after signing the Statute of the ICC, in a Press Briefing in Jerusalem on January 3, 2001 Israel Foreign Ministry Legal Advisor Alan Baker declared:
« I know that here in Israel we're living in a pressure cooker, where the political situation is at the head of everybody's agenda and it's something of immediate worry for all of us, but outside Israel this criminal court is the most serious development in international law, and we can't divorce ourselves from such a serious development, and therefore it's so important that we did sign this document. [...] It's the fitting result of half a century of work, of effort, and Israel had to be a part of this, and couldn't stay outside ».

We know that there is a lot of skepticism about the ICC from those, many of whom are in this room, who try to fight every day in the field with the victims against a situation of impunity which FIDH has never stopped to condemn.

We've been discussing for many years with Israeli human rights groups and prominent lawyers about the relevance of holding such a round table. The recent reaffirmation of our partners' interest convinced us to organize this event.

Working on the ICC in the Israeli context will be a tough and long process.

FIDH is not a blind supporter of the ICC; we believe that this instrument is one of the available mechanisms to fight against impunity when national courts are unable or unwilling to do so; today the ICC is a concrete mechanism where for the first time, victims can participate in an international criminal jurisdiction; FIDH is the first and so far the only organization to represent victims of DRC before the Court. On 17 January 2006, the ICC issued a historic decision where it allowed those victims to participate in the ongoing case; FIDH not only lobbies for the ratification but also uses whenever possible the concrete remedies for victims.

Israel is not a party to the ICC and therefore, we all know that there are very limited ways to help victims of the most heinous crimes using this very important instrument.

However, the UNSC Resolution of 2005 referring the Darfur situation to the ICC prosecutor has set a very important precedent. The challenges we are facing are immense but the US's decision not to veto the resolution has given hopes to all victims who, because of the refusal of their State to ratify the Rome Statute, were denied access to the Court.

In parallel to any lobby at the international level, FIDH experience shows that awareness campaign at the national level is fundamental; additionally, because of the complementarity nature of the ICC, such campaign can also be an incentive for national reform of the criminal legislation.

Therefore, we believe that a very strong support from the Israeli civil society hand in hand with international NGOs and committed States is crucial in order to launch a campaign in favor of a security council referral to the ICC, whilst at the same time and in parallel lobbying for the accession of Israel to the Rome Statute.

III - SESSION 1: THE ICC IN THE INTERNATIONAL JUSTICE CONTEXT

1) The legal and political obstacles for ratification of the ICC: worldwide efforts to establish the ICC: status of signatures/ratifications and the role of the CICC

Luisa Mascia, European coordinator of the CICC

The NGO Coalition for the ICC and the role of NGOs in the ICC process
The NGO Coalition for the ICC was created in 1995 by 7 NGOs. We are today more that 2000 including several participants of today's meeting. Founded in 1995 the CICC has been an integral part of efforts to establish the ICC. It played a major role in the rapid entry in force of the Treaty. Together, NGOs came up with one strong voice, the legitimate voice of civil society to demand international justice against the most hideous crimes.

Along the past nine years, the Coalition has been serving as the umbrella organisation for civil society NGOs. Today, the Coalition is a network comprising over two thousand NGOs and legal experts from all regions of the world, including legal, judicial, human rights, women's, children's, humanitarian, victims, religious, peace and many other sectors of NGOs, working for the establishment and fine functioning of the Court. A Steering Committee, (composed of International NGOs such as FIDH, Amnesty International (AI), Human Rights Watch (HRW), Parliamentarians for Global Action (PGA)) provides the political mandate to the Coalition while each member organisation maintains its independence.

A great part of the Coalition's work is dedicated to disseminating information and providing services as well as coordinating efforts with NGOs, governments, and International Organisations such as the United Nations, the African Union, and the European Union.

The Coalition's overarching objectives include promoting awareness of the ICC and Rome Statute; facilitating the effective participation of civil society in the sessions of the Assembly of States Parties and in this regard you would really encourage all the organisations interested in attending to contact us; promoting universal acceptance and ratification of accession to the Rome Statute and the full implementation of the treaty's obligations into national law; monitoring and supporting the full establishment the Court; promoting international support for the Court and strengthening the CICC national and regional networks. These goals are promoted, at the regional level, by the Coalitions' Regional offices in Africa, Asia, Europe, Latin America and in the Middle East.

Located in Brussels, Belgium, the CICC European Office implements the mandate of the Coalition in Europe and also in the Central Asian Region, where the Coalition would like to focus more of its efforts and strengthen collaboration with the governments and civil society. The European Office was the first to be decentralised, for one reason: to ensure the continuous support of the European Union and its Members to the ICC. The European Union has been fully committed to the success of the International Criminal Court. The principles of the Rome Statute of the International Criminal Court, as well as those governing its functioning, are fully in line with the principles and objectives of the Union, which shall contribute to the consolidation of the rule of law and respect for human rights, as well as the preservation of peace and the strengthening of international security.

Universality

We are approaching the historic benchmark of 100 ratifications of the Rome Statute. Recently, The Domican Republic ratified the Rome Statute so bringing the total number of ratifications of the Rome Statute to 99. The United Nations has expressed interest in holding a special ceremony for the symbolic 100th ratification. Despite on-going US attempts to undermine the ICC, these ratifications send a signal that there is a growing global consensus for international justice.

- While the vast majority of European and Central Asian countries are Parties to the Rome Statute, 39 to be exact, 14 have not yet joined the ICC.
- Turkey has not signed and has not acceded to the Rome Statute yet. Turkey together with Azerbaijan are the only two countries of the Council of Europe not to have signed the RS, and the only candidate country of the EU with the exception of the Czech Republic.
- 27 African States have joined the ICC; 21 are the States Parties from the Americas; there is only one State Party in the North Africa, Middle East Region, Jordan, and there are 12 States Parties in Asia/ Pacific.

The Implementation of the Rome Statute

It is another important objective of the CICC work. The ICC is complementary to the national criminal legislations, leaving for States Parties the primary responsibility to bring to justice those responsible for genocide, crimes against humanity and war crimes. Only if States are unable or unwilling, will the ICC act. States Parties are also obliged to cooperate fully with the Court, during the investigations, prosecution, the enforcement of sentences and in providing protection and reparations to the victims and their families. The ICC does not have a police force and thus must rely on the support from States. Therefore, States Parties must adopt adequate legislation to ensure the due fulfilment of such obligations with the Court.

Nonetheless, only a minor number of countries have adopted substantive criminal legislation or/ and procedural criminal legislation in full implementation of the Statute. What is also striking, is that some States have or are in the process of adopting flawed legislation. Indeed, a recent report of Amnesty International (AI) that analyses draft and enacted legislation points out common problems that might gravely weaken the Court's ability to fulfil its role in the fight for international justice and the promotion of long-standing customary and conventional international law." Amongst the problems identified by AI are the following:

- weak definitions of crimes;
- unsatisfactory principles of criminal responsibility and defences;
- failure to provide for universal jurisdiction to the full extent permitted by international law;
- political control over the initiation of prosecutions;
- failure to provide for the speediest and most efficient procedures for reparations to victims;
- inclusion of provisions that prevent or could potentially prevent cooperation with the Court;
- failure to provide for persons sentenced by the Court to serve sentences in national prisons; and
- failure to establish training programmes for national authorities on effective implementation of the Rome Statute

A strong participation of civil society in the implementation of the Rome Statute

Furthermore, the CICC seeks to promote and facilitate debates and technical assistance contributing to the development of adequate and effective implementing legislation. The CICC deems that any implementation process should be transparent and inclusive, involving consultation with civil society experts. Strong participation of national groups in the drafting or even in the discussions of the drafts can contribute to effective implementing legislation.

The Coalition believes that national civil society should be in the forefront of the ICC campaign, by urging the democratic institutions to ratify and implement the Rome Statute and by informing the general public on the existence and mechanisms of the ICC. National and international NGOs, academics, legal professions and the Media must take part in the world movement for international justice. We do hope that NGOs that are not yet member of the CICC will join us, by joining the worldwide movement for international justice you will not encounter any cost, we would just like to share information and support any local NGOs activity that might be in line with our objectives.

We also wish to promote as much as possible training for journalists, the judiciary and the public in general. And include ICC courses in Universalities curriculum and any other professional courses.

Another important objective: to monitor and preserve the integrity of the Rome Statute

Since the adoption of the Rome Statute in 1998, the Coalition and its members have committed to the preservation of this Treaty, in its letter and spirit. The Coalition is an international NGO and many of its members are American. It is important to state that the Coalition is not anti US but pro ICC.

Still, the United States continues to pressure countries all over the world to sign and ratify Bilateral Non Surrender Agreements, attempting to exempt US nationals and others from the ICC jurisdiction, while the CICC continues to call upon all States to resist to such pressure and recalls the primary legal obligations of States Parties to cooperate with the Court. Indeed, States that sign these agreements are in breach of their obligations under the Rome Statute, the Vienna Convention on the Law of Treaties and possibly their own extradition laws. Also the European Union has concluded that these agreements are inconsistent with the Rome Statute.

NGOs around the world have engaged in campaigns through advocacy and awareness denouncing the illegality of such agreements, namely with the national Governments, Parliaments, Civil Society and Media.

New Challenges for NGOs
While many important steps in the establishment of the ICC have been taken, an enormous amount of work still lies ahead. The next phase of the Court will see the development of rules and regulations with regard to legal aid, court management, the defense counsel, a detention unit, personnel, the Trust Fund for Victims, and an international bar association, among other issues.

In this new phase, where the Prosecutor is undertaking investigations in Uganda, in Democratic Republic of Congo and just recently with the announcement of the Prosecutor in Sudan, NGOs will have a fundamental and somehow ground-breaking role to play *vis à vis* the Court. In a recent publication, Human Rights Watch identified ways for NGOs to contribute to the prosecution of war criminals.

- First of all, NGOs can disseminate information about the Court and its mechanisms to the general public, victims and media.
- Secondly, NGOs can provide information to the Office of the Prosecutor about eventual crimes; and the capacity and state willingness to investigate, prosecute and try for the crimes in the RS. NGOs may also assist in launching proceedings before the Court. NGOs publish reports on human rights violations that may fall under the jurisdiction of the ICC and that can be sent to the Office of the Prosecutor.
- Third, NGOs are supporting victims and witnesses on the participation to the ICC proceedings, informing victims, etc. NGOs may also directly address the Court in order to represent victims. Moreover, NGOs can also apply to participate to the proceedings when they have suffered a crime themselves.

It should be noticed that the NGO Coalition as a whole, and its secretariat, does not endorse or promote specific investigations or prosecutions or take a position on situations before the ICC. However, individual CICC members may endorse referrals, provide legal and other support on investigations, or develop partnerships with local and other organizations in the course of their efforts.

In 2003, during the Second session of the Assembly of States Parties to the ICC, States Parties approved a Resolution recognising the coordinating and facilitating role of the NGO Coalition for the International Criminal Court. The Assembly recognised and acknowledged the important contribution of all participating nongovernmental organizations, including the NGO Coalition for the ICC, to the establishment of the ICC throughout the meetings of the Preparatory Committee and of the ASP. States Parties also noted with appreciation the coordinating and facilitating role that the NGO Coalition for the International Criminal Court performs between the community of NGOs and the Assembly and between that community and the ICC, by (among others):

- encouraging and facilitating the participation of NGOs from all regions, particularly from developing countries;
- conveying the expertise of NGOs to Governments;
- and promoting worldwide awareness of and support for the Rome Statute of the ICC and the ICC. (The Resolution is available for distribution).

Conclusion

The Rome Statute has created the major International Justice mechanism of our time, a striking example of effective multilateralism in the history of international relations. This Court will not only contribute to the reparation and healing of victims and societies in the aftermath of gross violations of human rights and humanitarian law. It shall also contribute to the preservation of Peace and International Security, by deterring the commission of such hideous crimes.

2) The United States campaign against the ICC

Stéphanie David, FIDH Middle East North Africa Desk Director

It is spectacular that the ICC came into force on July 1, 2002 while in parallel the United States developed a very imaginative and dangerous opposition to the first permanent International Criminal Court. The US campaign against the ICC has been growing in intensity throughout the years since 1998. Today, the US opposition to the ICC has reached a level of hostility that one could say that the US is in war with the ICC.

What is at stake? The opposition of the US administration is based on their absolute refusal that a US citizens be one day investigated or prosecuted before an International criminal court. The US claim that politically motivated claims may put US citizens and in particular soldiers in a difficult position

Evolution

The United States were one of the 7 States to vote against the Rome Statute establishing the International Criminal Court on July 17, 1998 in Rome.

The US during the negotiations were in favour of an ICC under the authority and the control of the UN Security Council so as to keep effective control over the possible reach of the ICC jurisdiction. What has been adopted is far from the US ideal as the ICC can be triggered – as we will see later today – by either a state party, the security council or by the prosecutor itself. The role of the security council, in theory had been kept aside from preventing to limit the ICC jurisdictional reach. However and pursuant to a US proposal in Rome the US got the adoption of article 16 that gives the Security council the power to freeze an ICC investigation for one year. But for this to happen you would need to have a unanimity vote in favour of such a blockage in the ICC proceedings, which might be difficult to get with two permanent member of the security council being state parties that is France and the UK.

Since their clear opposition on the day of adoption of the Rome Statute, the United States has been seeking the means of guaranteeing that their nationals would never been prosecuted by the ICC.

When on 31 December 2000, when Clinton asked his Ambassador for war crimes, David Scheffer, to affix the signature of the United States to the ICC Statute, a glimmer of hope appeared. Very soon however, rumours were circulated to the effect that the Bush government intended to "un-sign" the Statute. Since March 2001, the seats of the American delegation to the ICC negotiations have remained despairingly empty.

To do so they built a complex legal machinery and started almost simultaneously to undertake actions at the domestic level, the international level and state bilateral level.

Level 1: At the domestic level : The Hague Invasion Act

The first legislation adopted by the US Congress in August 2002, is known as the "American Service members' Protection Act" (ASPA). The ASPA contains provisions restricting US cooperation with the ICC, making US support of peacekeeping missions contingent on achieving impunity for all US personnel; it also aims, amongst other things, at prohibiting all military assistance to States having ratified the Rome Statute creating the future permanent Court.

This domestic legislation was quickly nicknamed "Hague Invasion Act" as it allows the use of force to free a US citizen that would be imprisoned in The Hague by the ICC and it represents the public doctrine of the US on the ICC.
It recalls in its preamble that an international treaty cannot create obligations towards a non state party and that consequently the US refuse the jurisdiction of the Court over their nationals.

This legislation:

1. Prohibits all US cooperation with the ICC: in addition to the general prohibition on cooperation with the Court, this article prohibits extradition of a person from the United States to the Court; aid in the transfer of an American citizen or an alien permanent resident of the United States to the ICC; the use of any appropriated funds for the purpose of assisting the investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien by the Court; the conduct, in the United States, of any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.

2. Forbids all military assistance to most States having ratified the Rome Statute: the general principle laid down in this article states that, a year after entry into force of the Court, no American military assistance may be provided to a State Party to the ICC. However the law provides that some States may be exempted in accordance with American national interests. Thus, the non-assistance clause is not applicable to NATO member States, essential allies other than members of NATO (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, New Zealand) and Taiwan. Similarly, the President can revise the prohibition if the State in question has entered into an agreement with the United States, in accordance with Article 98 of the Statute, explicitly prohibiting the transfer of an American to the ICC.

3. Restrains the transfer of classified national security information to a country having ratified the ICC statute.

4. Restricts American participation in UN peacekeeping operations: the President is requested to use the American voice and vote in the Security Council to guarantee that all resolutions voted in the framework of chapters VI or VII of

the UN Charter, respectively authorizing the creation of peacekeeping or peace enforcement operations, permanently exempt members of the American armed forces from criminal prosecution by the ICC for actions undertaken in connection with the operation. The participation of American armed forces would only be accepted if the operation takes place on the territory of States not being parties to the Statute.

5. Would authorize the President to use "all means necessary and appropriate" for the release of any American citizen held by the ICC, whence the nickname, "Hague Invasion Act".

The law provides that 6 months after entry into force of the Court, the President should provide the Congress with a detailed report on each military alliance of which the United States is a member, specifying the extent to which the members of the American armed forces may, in the context of a military operation directed by that alliance, be placed under the operational control of foreign officers subject to the jurisdiction of the ICC as nationals of a State Party to the Court and evaluate the resulting risks for those forces.

The restrictions on the participation of American armed forces in peacekeeping operations and the prohibition on providing military assistance to countries having ratified the ICC may be suspended by the President for a one year period. In doing so, he would, nevertheless, have to guarantee that the ICC could not exercise jurisdiction over US nationals and that the latter could not be arrested, prosecuted or imprisoned.
The one year period may be renewed if, in a report to the Congress, the President demonstrates that the United States have entered into an agreement binding the ICC that prohibits it from exercising its jurisdiction over American nationals.

In December 2004, the Congress subsequently adopted the **Nevercutt Amendment** : this legislation is far more wide-reaching than ASPA and authorizes the loss of economic support funds to all countries, including many US allies, which have ratified the ICC treaty but have not signed a bilateral immunity agreement with the US; thus it poses the threat of broad cuts in foreign assistance, including unds for cooperation in international security and terrorism, economic and democratic development, human rights, and promoting peace processes.

Level 2 – At the State's bilateral level : the fallacious use of article 98 of the Rome Statute to enter into impunity non surrender agreements

Since the end of 2002, the United States has approached nearly all the countries of the world in its effort to enter into Bilateral Immunity Agreements, purportedly based on article 98 of the Rome Statute, excluding American citizens and military personnel from the jurisdiction of the ICC, in consideration of the possibility that they may be the target of politically motivated trials claimed by « hostile » countries.
These agreements prohibit to surrender to the ICC a broad scope of persons including current or former gouvernement officials, military personnel and US employees and nationals. These agreements, which in some cases are reciprocal, do not include the obligation for the US to subject those persons to investigation and/or prosecution.

Where foreign forces are present with the consent of the receiving state, Status of Forces Agreements (SOFAs) usually regulate their status: these agreements give the sending or the receiving state a primary right to exercise its jurisdiction over certain crimes. In other words, when a State party could have the obligation to surrender an American national to the ICC, the latter would be transferred, according to these agreements, to American jurisdictions. And article 98 was designed to prevent legal conflicts which might arise because of existing agreements or renewal of SOFAs. This article was not intended to allow agreements that would preclude the possibility of a trial by the ICC when the « sending state » did not exercise jurisdiction over its own nationals.

Article 98 of the statute governs conflicts of obligations with regard to the cooperation regime of the statute. Clashes may arise, for example, where a State party to the statute is bound by a request from the Court to arrest a person, but cannot comply with its obligation to cooperate without violating another obligation under international law, for example to respect the immunity of this person. Once it has been established that a norm exists under international law making it illegal for a State to comply with a request from the Court, then the court in general may not issue the request.
However, if a state waives its immunities, a request from the Court for cooperation would no longer imply that the requested state would be acting illegally to comply with the request.

Nevertheless, Article 98 of the Rome Statute does not prohibit the ICC from requiring the cooperation or the transfer in rare and limited circumstances.

To date, several versions of these agreements have been proposed: those that are reciprocal, providing that neither of the two parties to the accord would surrender the other's persons without first gaining consent from the other; those that are

non-reciprocal, providing only for the surrender to the ICC of US persons; and those that are intended for States that have neither signed nor ratified the Rome Statute, providing that bthose states not cooperate with efforts of third-party states to surrender US persons to the ICC.

8 countries from the North Africa and Middle East region would have entered into non surrender impunity agreements: Bahrain, Israel, Tunisia, Egypt, Jordan, Morocco, Tunisia and United Arab Emirates. Most of the time, these agreements are signed in secret.

Level 3 - At the international level : using the Security Council to shield Americans from the jurisdiction of the ICC

The United States continued to undermine the jurisdiction of the Court and to violate the integrity of the Statute in the context of international diplomacy.

Having failed in its attempt to negotiate an “acceptable ICC Statute in Rome and then during the following sessions of the Preparatory Commission for the ICC, the US decided to use the Security Council forum in order to ensure a political control over the jurisdiction of the Court. Despite the amazing mobilization of States, NGOs as well as the secretary general of the UN, Kofi Annan, Resolution 1422 was unanimously approved on July 1, 2002. That resolution grants immunity from the ICC to officials and personnels (current and former) of a contributing state not party to the Rome Statute over acts or omissions relating to a UN established or authorized operation. In other words, it was aiming at excluding from the jurisdiction of the ICC any national of a State non-party to the Rome Statute involved in UN peace-keeping operations and, foremost among them, American nationals.
The resolution was then renewed as Resolution 1487 in June 2003 for one year.
In May 2004, after the alledged acts of torture perpetrated in Abu Ghraib, the US tried to pass in force the renewal of that resolution within 48 hours. But this attitude was deemed unacceptable by most of the Member-States of the Security Council; therefore the United-States withdrew the resolution once they could not secure enough votes in the Security Council.

The International community has from now to make sure that any further resolution adopted by the SC will not contradict this positive evolution, as we can bet that the US will most of the time try to include a provision on immunity in resolutions creating or renewing peace-keeping operations.

In conclusion, the latest illustrative example of the American attitude towards the ICC is reflected by the case of Sudan, about the situation in Darfur: despite its opposition to the ICC, the US abstained rather than vetoed a UN security Council resolution referring the case of Darfur to the Court, last March.
Nevertheless, the US issued contradictory signals on whether it would support an ICC investigation: the acting US envoy to the UN said that US legislation prevented it from providing assistance and support to the ICC.
Should the US follow this line, there would be a possibility of the US becoming a haven for war crimes suspects wanted by the Court.

IV - SESSION 2: THE LAW OF THE INTERNATIONAL CRIMINAL COURT

1) Victims' Rights before the ICC

Jeanne Sulzer, lawyer, FIDH Coordination of the legal Action Group

Why is the icc unique with regards to victim’s rights ?

With the ICC, for the first time, victims are recognized as victims before an international criminal jurisdiction. It is important to recall that based on a common law approach, the two ad hoc tribunals for the former Yugoslavia and Rwanda did not acknowledge a participative role for victims but only as witnesses, whose testimonies are used by the prosecution to establish the responsibility of the convicted person. This lack of victim’s participation has lead, amongst other political considerations, to the current quasi-blockage of the ICTR as two of the main victim’s organizations have decided to boycott the Arusha Tribunal.

1. Historical perspective on victim's access to international criminal jurisdictions

1.1 The Nuremberg Tribunal

The Charter of the Nuremberg Tribunal did not contain a definition of victims. In fact, the use of witnesses before the Tribunal was limited. The “meticulous record keeping” of the Nazi regime meant the many elements of the charges could be proved by written evidence[1]. The prosecution team therefore decided, “to put on no witnesses [they] could possibly avoid”[2], and the prosecution was largely based on documentary evidence. By the time the trials began, the Allied Forces had access to German military archives as well as to national commissions reports which had heard about 55 000 witnesses[3].

1.2 The International Criminal Tribunals for the Former Yugoslavia and for Rwanda

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created by resolution of the United Nations Security Council in May 1993[4] in response to the serious violations of international humanitarian law committed during the conflict in the former Yugoslavia since 1991. Some 18 months later, in November 1994, the Security Council established the International Criminal Tribunal for Rwanda, following the deaths of approximately 800,000 Rwandan nationals during the genocide.

When the Tribunals were established, the rights of victims were to a large extent overlooked. The mandate of the Tribunals as defined in the Security Council resolutions was to ensure the suppression of those responsible for the atrocities. Only the preamble of the resolution establishing the ICTY contained a reference to victims, no reference is made in the body of the Statute.

The Rules of Procedure elaborated for the ICTY, and later for the ICTR[5], were based almost entirely on the common law model of criminal procedure. It was considered that, in view of the nature and scope of the crimes over which the ad hoc Tribunals possess jurisdiction, the participation of the victim could unduly delay the proceedings and undermine the rights of the accused.

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1 *The anatomy of the Nuremberg trials*, Telford Taylor, 1992, p. 57

2 *The anatomy of the Nuremberg trials*, Telford Taylor, 1992, p. 134

3 Wald, P. M. “Note from the Field – Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal”, *Yale Human Rights and Development Law Journal*, vol.5 (2002), pp. 217-239

4 Security Council Resolution 827, adopted 25 May 1993, creating the *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*

5 Security Council Resolution 955, adopted 8 November 1994 creating the *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994*

Victims are neither allowed to participate in proceedings, nor are they entitled to apply for reparations before the Tribunal. Under both statutes, the involvement of victims is limited to appearing as a witness for one of the parties to the proceedings. During the course of the trial, the victim can only be heard as a witness and therefore can only participate in the hearing at the request of one of the parties. Victims' interventions are therefore limited to responding to questions asked in examination and cross-examination. Victims are not entitled to legal representation when giving evidence. They have no right of access to the evidence presented during the trial and cannot demand to be kept informed of the progress of the proceedings, even where they are of personal concern to them.

Protection

Articles 20 (1) of the ICTY Statute and 19 (1) of the ICTR Statute provide that the Trial Chamber must ensure that the trial is “fair and expeditious” and is conducted “with full respect for the rights of the accused and due regard for the protection of victims and witnesses". The Rules of Procedure and Evidence of both tribunals provide for the creation of a Victims and Witnesses Assistance Unit within the Registry to support and protect victims and witnesses[6].
The Unit advises on measures necessary to guarantee the safety of witnesses and can initiate applications for protective measures[7]. It is to develop short and long term plans for protection of witnesses who have testified and who “fear a threat to their life, property or family”. The Unit provides support to victims and witnesses, in particular to victims of sexual violence, including physical and psychological rehabilitation, especially counseling. and assistance in ,for example, making travel and accommodation arrangements.

Articles 22 of the ICTY Statute and 21 of the ICTR Statute provide for the protection of witnesses and victims to be dealt with in the Rules of Procedure and Evidence, through measures which aim to protect the victim's identity, including the possibility holding closed hearings[8]. Protective measures can also include deleting the names and identifying information from the Tribunal’s public records, non-disclosure to the public of any records identifying the victim, giving of testimony through image or voice altering devices or closed-circuit television and using pseudonyms[9]. Rule 69 provides that “in exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk”. This is subject to the caveat that the identity of the victim or witness is disclosed within such time as “to allow adequate time for preparation of the Prosecution and the Defence”. Controversially, the ICTY has permitted anonymous witnesses, that is witnesses whose identities are not disclosed to the defence[10].

The Victims and Witnesses Section of the ICTY, in exceptional cases, has provided personal escorts to accompany witnesses from their homes to the Hague and back. It has established a witness relocation programme for cases where giving evidence endangers the safety of victims after the trial has concluded. However, the Section has had insufficient funding and is understaffed[11].

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[6] Rule 34
[7] Rule 34, Rule 69 and Rule 75
[8] Rule 79
[9] Rule 75
[10] See Chapter 4, Protection
[11] ***Wald, P. M., “Note from the Field, Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal”, Yale Human Rights and Development Law Journal, vol.5, 2002, pp. 217-239, p. 221***

The ICTR has been criticised for not fully implementing provisions on victims' protection. Victims have reported being threatened and harassed. Several potential witnesses were assassinated. Victims also reported that no measures had been taken after the proceedings, once they went back to Rwanda. As a result, two major victims' associations, Ibuka and Avega, decided to boycott the ICTR and called upon victims they supported to the same. At the same time, the Rwandese authorities, following a political disagreement with the ICTR, tightened regulations enabling victims and witnesses to leave the country in order to go and testify in Arusha. This caused several trials to be postponed because witnesses were not available.

Reparation

The provisions relating to reparations are inadequate[12]. The Security Council Resolutions establishing the Tribunals stated that they were created for the "sole purpose" of prosecuting those responsible for violations. The Resolution establishing the ICTR contains no reference at all to the reparation of victims. The Statute and the Rules of Procedure and Evidence of both Tribunals give little guidance on reparation.

The Tribunals can make orders for the restitution of property. Under articles 24 (3) of the Statute of the ICTY and 23 (3) of the Statute of the ICTR, the Court is authorized to make an order for the return of "any property and proceeds acquired by criminal conduct…to their rightful owners". This power may be exercised by the Trial Chamber, at the request of Prosecutor or on its own initiative, following a judgment of conviction containing a specific finding of 'unlawful taking of property'. The Chamber is required to hold a special hearing on the question of restitution[13].

There are no provisions concerning compensation, or reparations for physical or emotional injury. In order to obtain these forms of reparation, victims have to make claims before national courts. Rule 106 of both Tribunals provides that the Registrar "shall transmit to the relevant national authorities" the judgment finding the accused guilty of a crime that has caused injury to a victim. The victim will not have to prove the criminal responsibility of the defendant, or that the crime caused the victim's injury, before the national court, since the national court is bound by the judgment of the Tribunal: "the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury"[14].

However, this procedure for obtaining reparation poses numerous problems. The national justice systems in the former Yugoslavia and Rwanda, following years of conflict, were not in a position to effectively implement this procedure. In 2000, responding to proposals by the prosecutors, the judges of both tribunals submitted reports on the issue of victim compensation[15]. In respect of the current approach, the judges of the ICTY concluded that it appeared "unlikely to produce substantial results in the near future"[16].

1.3 Internationalised criminal courts

Internationalised criminal courts, also called hybrid or mixed tribunals, emerged at the end of the 1990s. They are sometimes referred to as the "third generation" of international criminal jurisdictions (the Nuremberg Tribunal being the first, the ad hoc Tribunals being the second). Examples of such bodies include the Special Court of Sierra Leone, the Extraordinary Chambers in Cambodia, the Special Panels for East Timor, the Special Chamber in Kosovo[17].

Like the ICTY and the ICTR, they are ad hoc institutions, created to address particular situations, for a limited amount of time. However, unlike those tribunals, internationalised criminal courts have both international and national components. They are composed of international and local staff, including judges, prosecutors and apply a combination of international and national law. They are located in the countries in which the crimes were committed.

12 See **Bassiouni, C.,** *Reconnaissance internationale des droits des victimes,* Terrorisme, victimes et responsabilité pénale internationale / SOS Attentats. Paris: Calmann-Levy, 2003, pp. 134-185, at p. 176

13 Rule 105 ICTY and ICTR

14 Rule 106 (C)

15 Letter from the Secretary-General addressed to the President of the Security Council (2 November 2000) UN Doc. S/2001/1063; Letter from the Secretary General addressed to the President of the Security Council (14 December 2000) UN Doc S/2000/1198

16 ICTY Judges' Report of 13 September 2000 on Victims Compensation and Participation

17 See generally, Romano, C. P. R., Nollkaemper, A., Kleffner, J. K., *Internationalized Criminal Courts : Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, (2004), LVIII, 491 p.

Special Court for Sierra Leone

The Special Court for Sierra Leone was established in 2002, by an agreement between the United Nations and the Government of Sierra Leone (the Special Court Agreement), to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and national law, committed in the territory of Sierra Leone since 30 November 1996. The Statute of the Court was annexed to the Special Court Agreement. The Rules of Procedure and Evidence were adapted from those of the ICTY and ICTR (http://www.sc-sl.org/).

The Special Court is independent from the national justice system. The Court contains national and international judges and applies a combination of national and international law. The seat of the Special Court is in the capital of Sierra Leone, Freetown.

As with ICTY and ICTR, victims do not have the right to participate in proceedings and there are no provisions enabling victims to seek reparations before the Special Court. Compensation can only be obtained through domestic courts and national legislation[18].

Article 16 (4) requires the Registrar to set up a Victims and Witnesses Unit to offer appropriate protection to victims and witnesses. The VWU, in consultation with the Office of the Prosecutor, is to provide, "protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses". Vulnerable witnesses are to be given assistance in testifying before the Court, and more general support. Rule 34 of the Rules of Procedure and Evidence provides that witnesses should receive "relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault, and crimes against children".

The Extraordinary Chambers of Cambodia

The Extraordinary Chambers are national courts, which will operate with international participation. They were established by domestic law, the Law on the Establishment of the Extraordinary Chambers 2001 as amended by the Law of 2004 (Extraordinary Chambers Law). International participation in the courts is organized by an agreement between the UN and the Cambodian government, which was finally concluded, following years of negotiation, in June 2003 (Extraordinary Chambers Agreement). The Extraordinary Chambers Agreement sets out the conditions for international participation in the Chambers. It was implemented into national law by amending the Law on the Establishment of the Extraordinary Chambers in 2004.

The Chambers were established to prosecute senior leaders of the Khmer Rouge and those who were most responsible for crimes committed under the regime in Democratic Kampuchea between 17 April 1975 and 6 January 1979. The Extraordinary Chambers Agreement came into force in April 2005, but the Chambers are yet to become operational[19].

Unlike the Special Court for Sierra Leone, the Extraordinary Chambers will form part of the national court structure. They are to operate under Cambodian rather than United Nations administration. They will however apply international and national substantive law and be staffed by both international and national judges and prosecutors. The official language of the Tribunals is Khmer.

Neither the Extraordinary Chambers Agreement, nor the Extraordinary Chambers Law expressly provide for the right of victims to participate, nor to receive reparation. Victims are generally referred to only as witnesses. The Rules of Procedure and Evidence for the Extraordinary Chambers are currently being negotiated and are likely to define the position of victims with greater clarity.

On the basis of the Extraordinary Chambers Law it may be considered that, in the absence of provisions dealing with the role of victims in the procedure, the general rule referring to national criminal procedure applies[20]. In the Cambodian criminal system, which is based on French law, victims can become parties to criminal proceedings as

[18] Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 105

[19] For general information and resources, see réseau internet pour le droit international at http://www.ridi.org/boyle/infoeecstruct.htm (English and French); www.justicepourlecambodge.com; *Victims' Rights Working Group Bulletin* No. 5 (2006); and Boyle, D., "The Rights of Victims, Participation, Representation, Protection, Reparation", Symposium on Khmer Rouge trials, *Journal of International Criminal Justice* (2006)

[20] Articles 20 and 23, see David Boyle, "A Possible Role for the Victims," Réseau Internet pour le Droit International. (1999), available at: http://www.ridi.org/boyle/victims.htm

parties civiles. This approach would also accord with Article 36 of the Extraordinary Chambers Law, which unusually grants victims the right to appeal decisions of the Trial Chamber.

Special Panels of East Timor (Timor Leste)

In 2000, soon after taking over the administration of East Timor, the United Nations Transitional Administration in East Timor (UNTAET) set up an internationalized tribunal, to try those responsible for crimes committed in East Timor before and after the referendum on independence in September 1999[21]. Ref site web special panels

The Special Panels are part of the District Court of Dili, forming part the national court structure. They have jurisdiction to try crimes under international law and certain provisions of national law.
The prosecution service is composed almost exclusively of international lawyers and the investigation unit is staffed entirely by international investigators. Each panel is composed of one national judge and two international judges.

The Statute and Rules of the Special Panels were heavily inspired by the Statute of the International Criminal Court. There are provisions concerning both the participation and protection of victims. The Transitional Rules of Criminal Procedure provide that measures must be taken to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, taking into account factors such as age, gender, health, and the nature of the crime[22]. In terms of participation, Victims are entitled to request the prosecutor to conduct specific investigations and to be heard in proceedings[23]. Victims can submit requests for a review of a decision of the prosecutor to dismiss a case[24].

With respect to reparation, a Trust Fund is to be established for the benefit of victims of crimes within the jurisdiction of the Panels and their families, funded by forfeiture collected from convicted persons[25], but this is yet to come into existence.

In practice, however, many of these measures are not adequately implemented. There are no protection or counselling programmes in place for victims or witnesses.

One of the major achievements of the Rome Statute was the recognition of an independent status for the victims of crimes under the jurisdiction of the Court which provides for the right of victims to be protected by the Court, to participate in the proceedings, to have legal representatives and to ask for reparation.

Thanks to the Rome Statute international justice is no longer about solely punishing criminals, but also about guaranteeing fundamental rights of victims.

2. Legal System Perspective: Common law and civil law approaches

The position of the victim in the criminal justice system varies significantly between states, and depends above all on whether states have adopted a common law or civil law approach.

In the common law system the victim's role is usually limited to that of witness. The active involvement of the victim is often considered to be in conflict with basic principles of criminal justice, and there has been significant resistance to according victims a more significant role. The main concerns voiced by those from common law backgrounds surrounding the issue of victim participation in criminal proceedings include that the addition of a third party would disrupt of the balance of the criminal process, which is traditionally a battle between prosecution and defence, and would considerably delay proceedings, with significant implications for the accused's right to a fair trial.

However, civil law systems generally allow victims an active and central role in criminal proceedings, permitting them to participate and claim reparation[26].

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[21] UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor (6 March 2000); and UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, (6 June 2000).

[22] UNTAET Regulation No. 20001/25, (14 September 2001), s. 36 (8)

[23] UNTAET Regulation No. 20001/25, (14 September 2001), s. 12

[24] UNTAET Regulation No. 20001/25, (14 September 2001), s. 25

[25] UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, (6 June 2000), s. 25

[26] For an in-depth study of the role of victims at the national level, in the member states of the Council of Europe, see Brienen, M.E.I. and E.H. Hoegen (2000) *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on te Position of the Victim in the Framework of Criminal Law and Procedure* 1178 pages, Dissertation, University of Tilburg. (dissertation advisor: professor Marc Groenhuijsen, Faculty of Law). Nijmegen, The Netherlands: Wolf Legal

2.1 Initiation of criminal proceedings

In the common law criminal system, it is considered that crimes are committed against the state and it is therefore the state that brings the prosecution. The role of victims is generally limited to providing information or evidence of the crime.

In some states in which the common law applies it is possible for the victim to initiate a private prosecution. However, since the victim bears the costs of the investigation and potentially that of the prosecution if it fails, this option is rarely used.

Many civil law systems recognize the right of the victim to initiate criminal proceedings as a civil complainant ('constitution de partie civile'). Under some systems, victims can thereby oblige the authorities to investigate. In France, for example, if the court decides on the motion of the victim, as partie civile, that the case should be heard, the prosecutor is obliged to take over the prosecution. The cost of the prosecution and the proceedings is borne by the State.

2.2 Participation and reparation

Under the common law system, victims have no formal legal status. They are not considered as parties to proceedings, and generally participation is limited to the role of witness.

In some common law jurisdictions, limited opportunities for victims to make representation to the court have been introduced, for example, by asking victims to provide 'victim impact statements', containing details of the effects that the offence has had on the victim[27]. These statements are taken into account by the criminal judge at the sentencing stage.

Victims cannot generally obtain reparation through the criminal proceedings, although in some circumstances the victim may be entitled to an award of compensation from the criminal judge after the conviction of a defendant.

In order to obtain reparation the victim must generally institute entirely separate civil proceedings, involving exposure to liability for legal costs. This is particularly problematic in view of the fact that the convicted criminal often does not have the means to pay an order for damages awarded against him or her.

In contrast, civil law systems generally allow victims a much more significant role in proceedings. Victims are permitted to varying extents to become parties to the proceedings, and to claim reparation within the criminal trial. Victims generally have the right to request the authorities to perform certain investigative acts; inspect legal documents; question witnesses and experts, where relevant to the civil claim; and appeal decisions which affect the victim's civil interests.

In many civil law jurisdictions, including France, Germany and the Nordic jurisdictions, the victim, can choose to be legally represented. In some circumstances the legal representative can be paid for by the state, if the victim lacks the means to do so.

In several European states, including France[28], Belgium, Italy and Germany[29], victims and/ or their representatives are permitted to join criminal proceedings as a full party in the case (*partie civile*). In France, parties other than the victim, including non-governmental organizations, may also be permitted to join as parties civiles.

After being joined to the proceedings in France, the *partie civile* has the same right to be informed about the progress of the case as has the defendant, in addition to the right to be informed about the evidence gathered. Other rights include the right to address the court regarding the facts of the case and to make representations regarding the appropriate sentence.

A key aspect of the civil law system is that it enables victims to seek reparation within the criminal proceedings. This has the significant advantage of avoiding the cost and inconvenience of conducting separate trials. The claim is considered after the criminal charges have been proven. The victim does not have to prove guilt, only a link between the

Productions, available at http://www.victimology.nl/onlpub/Brienenhoegen/BH.html

27 For example, Ireland, Criminal Justice Act 1993, section 5

28 French Code of Criminal Procedure, articles 2-9

29 StPO, article 395

crime and the harm for which the victim seeks reparations.

The capacity for victims, and in some cases, NGOs, to directly invoke criminal and/or civil procedures has a direct impact on access to justice, particularly in cases based on the principle of universal jurisdiction (see below).

3. Before the ICC

3.1 Participation

Victims can trigger the Prosecutor

Victim’s participation is amplified by the historically unprecedented ability of victim’s groups and civil society actors to submit communications directly to the Office of the prosecutor for review.

→ Article 15 victims can send information to the Prosecutor

> *Article 15.1 - The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court*

→ Prosecutor can open an investigation on his own behalf

Unfortunately, this possibility has – as of today – never been used by the prosecutor. Out of more than 1000 communications received, 99 % come from NGOs/ Victims and other civil society sources using article 15, 3 by State party referrals and one by the Security Council. The three ongoing investigations are consequence of DRC, Ouganda State referral and R 1593 for Soudan.

Who may participate?

The mechanisms providing for victim’s participation are set in article 68(3) of the Statute and Rule 89 of the Rules of procedure and evidence.

→ Article 68.3 ICC « Victims whose personal interests are affected»

Article 68(3) of the Rome Statute states that “*where personal interests of victims are affected, the Court shall permit their views and concerns to be presented*”.

→ Rule 85 RPP Definition of « victims »

To be able to participate before the Court, victims will need to be recognized as such by the Court itself pursuant to a definition that can be found in the Rules of procedure and evidence (rule 85). It reads:

> *“Victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.*
> *Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science and charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”*

So victims are defined in a broad sense and include direct and indirect victims as well as physical and mental prejudice.

The application procedure

→ When does an application have to be made? (the causal link between the harm suffered by the victim and the crimes for which the accused is charged)? Before investigation is opened, before arrest warrant is delivered?

The Rome Statute and the Rules of Procedure and Evidence do not specify when applications must be made.
Some victims may apply early in the proceedings, at the investigation stage, for instance, or at a much later stage, after the charges have been confirmed or even when the Court notify victims of its decision to order reparation.
However, where applications are made very early, victims should be aware that they will not be examined before the Court decides whether it will prosecute.

→ In what form?

Rule 89(1) states that "victims shall make written application to the Registry". Applications are made through the filling in of a form returned to the Court.

Rule 89 Application for participation of victims in the proceedings

1 . In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

2 . The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

3 An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.

Official forms exist now from the Court VPRU

→ Role of NGOs / rule 89.3 RPP What is the procedure for applications made on behalf of the victims?
Ex of FIDH

The Court's decision to authorise participation

→ Organisation of the decision-making procedure of the Court

Rule 89(2) reads that " *The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim*."
Possibility to submit the case again.

→ How does the Court deal with large quantities of applications?

89 RPP: Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

Examples of Victim participation

A victim or his legal representative may
- submit observations to the Court where the admissibility of the case is challenged;
- provide observations where the Prosecutor decides not to investigate or prosecute following a State referral;
- provide observations when the Pre-Trial Chamber confirms the charges being brought against the accused
- participate in trial and question witnesses, the accused and experts.

Victims Participation and Reparation Unit
Participation of victims will be effective under two conditions: that they are well-informed of their right to participate, and that they are adequately represented. The Victims Participation and Reparation Section within the Registry, is in charge of designing and implementing public information and outreach campaigns to victims; processing applications for participation and reparation; and organizing legal representation for victims. This Section produced a standard form to make it easier for victims to file their petition and is drafting an informative booklet for victims.

3.2 Legal representation

In order to avoid overwhelming the International Criminal Court, the legal representation of victims is a key element of this regime.

Individual representation

→ The principle of the freedom of choice of a legal representative
Fundamental

→ What qualifications must a legal representative have ?
Rule 22 RPP

- → What is the procedure to appoint a legal representative?
- → The Court's assistance in choosing a legal representative: the Registrar's list of counsel

Common legal representation

- → What resort to common legal representation?
- → How are groups of victims constituted?
- → How are common legal representatives chosen?

Legal representation is strictly organized and where they are number of victims, they will have to choose a common legal representative, if necessary from a list presented by the Registry. That means that victims may or even can be forced to choice a common legal counsel to represent them before the Court.

It is necessary here to inform participants that an International Criminal Bar before the ICC has been recently created in order to organize the work of counsels before the Court. The ICB will include both defence lawyers and lawyers of the victims. Individual lawyers can register to the ICB.

The legal representative will have to receive all notification, to effectively represent the views of all interested victims in this process.

Victims who cannot afford legal representation

- → Legal assistance and support from the Victims Participation and Reparation Section (VPRS)
- → The issue of legal aid

As it is reasonable to think that victims will not have the resources to pay him, rule 90 provides for financial assistance. Indeed for this year, the budget might not ensure the effectiveness of victims rights, it might not be able to provide legal aid. Proceedings will only be successful if victims are provided quality legal representation. Victims are free to choose their legal representative. In cases where there are a large number of victims, the relevant Chamber may ask victims to choose a shared legal representative. The Registrar may provide a list of legal representatives and help the victims choose one with due respect to their interests. Victims may also receive financial assistance from the registry. The Chamber will decide on the modalities of such legal representation.

The Court set up the Public Counsel Office for Victims. It is filled with "in house lawyers" available at the earliest stage, mostly to assist the legal representatives, but also to represent victims on some specific issues.

4. Notification/ outreach

However, expectations are very high and many constraints exist. Few victims from Northern Uganda and Ituri know about the ICC and their right to participate. Few will have access to the standard form for participation if not distributed by NGOs. Few will be able to fill up such a form, as it is very technical and it only exists in French and English. Meetings between NGOs and the ICC are taking place on that specific issue at the Court. But the approach of the ICC seems to be dangerously unrealistic: if a collaboration has to be found, it is unreasonable to rely only on NGOs to have access to the victims, help them to understand the form, fill up the form and send it back to the Hague.

Statutory notification of specific categories of victims

- → The Pre-Trial Stage
- → The investigation is being considered
- → Official start of the investigation
- → The Trial Stage
- → Reparation proceedings

The organs in charge of notification

- → The Prosecutor and the Pre-Trial Chamber
- → The Registry

Means of notification and outreach

- → Mass media and other traditional means
- → Collaboration with national NGOs already working with victims
- → Influential community leaders
- → Other international organisations already working with victims
- → ICC field offices / Court officials travelling on the field

5. Reparation

The procedures for reparations are independent from participation procedure.

Forms of reparations
Forms of reparations : *restitution, compensation rehabilitation, satisfaction and guarantee of non repetition*

Implementation of reparation orders

- → States' assistance
- → The role of the Trust Fund

The ICC is the first international Court that recognizes the role of victims by enabling them and their families to apply for compensation. The reparations regime is independent from the victims' participation during the proceedings. A victim might apply for reparation, or the Court may decide on its own motion, without victims having participated in preliminary and/or in trial phases.

Article 75 of the Rome Statute and Rules 94-98 of the Rules of Procedure and Evidence enable victims to ask for reparation. Either upon request or on its own motion, the Court may determine the scope and extent of any damage, loss and injury to, or in respect of victims. The definition of reparation includes the right to live with family, reparation of goods, for legal and social and medical services, compensation for physical harm.

The regime for reparation before the ICC shall include: restitution, compensation rehabilitation, satisfaction and guarantee of non repetition

The Court may make an award for reparation directly against the convicted person on an individualized basis or when appropriate, on a collective basis. In most of the cases brought before the Court, collective reparation might be more adequate, as it will have a stronger impact on the injured community.

The Court may order that the award for reparations be made through the Trust Fund for Victims, in particular where the number of the victims and the scope of reparations make a collective award more appropriate. The Trust Fund operates in tandem with the Court's reparative function. It reinforces the restorative function of the Court. Article 79(1) of the Rome Statute has broadly characterised the purpose of the TFV as "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."

The Assembly of States Parties established a Trust Fund for Victims in September 2002. The Trust Fund is an independent organ which receives funds through fines, forfeitures, freezing of assets, awards of reparation ordered by the Court against a convicted persons, and through voluntary contributions. It implements the Court's reparation awards and its capacity to receive voluntary contributions will provide the Fund with the means to further assist victims in need. Its draft regulations still need to be approved at the next session of the Assembly of States Parties, and then it might be entirely operational.

6. Protection

Who can request protective measures pursuant to Rule 87?

- → Organs of the Court
- → Chambers ordering measures on their own motion
- → The Prosecutor
- → Victims, witnesses, the defence, and their legal representatives
- → The consultative role of the Victims and Witnesses Unit

What is the application procedure for protective measures ?

- → Prohibition of ex parte motions and requests

- → Serving of the request on other parties

Beneficiaries of protected measures ordered under Rule 87

- → Victims
- → Both prosecution and defence witnesses are protected
- → Those at risk on account of testimony

Types of measures that may be taken to protect victims and witnesses

- → Procedural measures ordered under Rule 87
- → Extra-procedural measures implemented by the VWU
- → Pre-Trial Stage : protection of potential witnesses interviewed during investigation
- → Trial Stage : security arrangements relating to victims’ stay in The Hague
- → Measures to be taken after the trial : victims’ safe return ; relocation

Assistance and support

- → The role of the Victims and Witnesses Unit in assisting and supporting victims
- → Special measures ordered by the Court to facilitate testimony

The Victims and Witnesses Unit, under the responsibility of the Registrar, is in charge of the protection and support for victims and witnesses. This Section advises all organs of the Court on protective measures, security measures, counseling, and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk of testimony given by such witnesses. This Section facilitates their participation in the proceedings in the Hague; it has also engaged in training for the other organs of the Court in issues of trauma, sexual violence, security and confidentiality; and that section is represented in the field offices of the ICC. As protection is confidential, it is difficult to know exactly what measures are taken in each case.

2) Main challenges before the ICC today: prosecution strategy and ongoing investigations

Jeanne Sulzer, lawyer, FIDH Coordination of the legal Action Group

Structure of the ICC

The structure of the Court is divided into 4 different divisions:

- Chambers
- Office of the Prosecutor (OTP)
- Registry
- The Presidency30

There are three types of *Chambers*: pre-trial chambers, trial chambers and the appeals chamber31. The pre-trial chamber is concerned with checks and balances over the acts of the Prosecutor. It has a central role in challenging the admissibility of a case and is a forum for victims' and their representatives; it acts as a counter-balance to the Prosecutor.

According to the Rules of the Court adopted by the judges, a pre-trial chamber is designated by the President, for every situation before the Court; hence it is a control organ where the decisions of the Prosecutor can be challenged.

The Court is composed of 18 *judges* elected by the Assembly of States Parties (ASP)32. Every State Party can nominate a candidate for judge33. Election of judges is based on geographic distribution and gender criteria34. A President of the court has been elected namely the Canadian national Philippe Kirsch.

The *Office of the Prosecutor* is basically divided into four main organs:

- ***The immediate Office of the Prosecutor: elected unanimously by the Assembly of States Parties, occupied by the Argentinean Luis Moreno Ocampo.***
- ***The Division of Investigation headed by the Deputy Prosecutor elected by the ASP***
- ***The Division for Prosecution headed by the Deputy Prosecutor elected by the ASP.***
- ***The Jurisdiction, Complementarity and Cooperation Division.***

The fourth division - the Jurisdiction, Complementarity and Cooperation Division (JCCD) - is an invention of the Prosecutor himself. It is more or less of legal and political nature and is concerned with analyzing applicability of the complementarity principle i.e. whether there are mechanism for implementation of ICC jurisdiction on the national level, it undertakes primary analysis of cases coming to the Court.

The *Registry* has non-judicial functions; it has a division for victims and witnesses primarily concerned with their protection, a division for victims' participation and a defense section, as well as a public council for defense and a public council for victims, in addition to a Registrar and a secretariat35.

The budget of the ICC in 2005 was € 68 million; the budget requested for 2006 is 22% higher due to the three investigations in Uganda, the Democratic Republic of Congo (DRC) and Darfur. In comparison, the budget granted to the International Tribunal for the former Yugoslavia was in the recent years around € 120 million.

Staff of the ICC is composed of 661 persons, and until now the Court has had only four field offices. Funding comes from States Parties according to the same macro-criteria used in the United Nations.

Policy of the Prosecutor

The Prosecutor has decided to establish 6 phases in analysis of any given case:

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[30] Article 34 of the Statute provides for the Presidency to be constituted within the Court.
[31] Article 39(2)(b) of the Statute
[32] Article 36(1) of the Statute. The number of judges may be increased by the two-thirds majority of the ASP on the Presidency's request (Article 36(2) of the Statute).
[33] Article 36(4) of the Statute.
[34] Article 36(8)(a)(ii)-(iii) of the Statute, Article 36(8)(a)(i) also provides for the representation of principle legal systems of the world.
[35] Article 43 of the Statute.

- **Phase 1**: starts right after reception of a communication. *A priori* there is jurisdiction of the Court, at least 7 situations are being currently analyzed.
- **Phase 2**: decision to open an investigation, as is the case in the DRC, in Uganda regarding the Lord's Resistance Army since July 2002, and in Darfur.
- **Phase 3**: pre-trial phase before delivery of arrest warrants, this is the situation now for the DRC.
- **Phase 4**: trial phase, no hearings are to take place before 2006.
- **Phase 5**: appeal.
- **Phase 6**: implementation of Court rulings.

There are 3 ways to trigger the Court:

- **Referral from a State Party** to the ICC; these are 99 States. Any State Party can refer a situation to the Prosecutor, not only on its own territory but also on the territory of any other State Party.

- **Referral from the Security Council**, acting under Chapter VII of the UN Charter.

- **Simply sending information to the Prosecutor**; lawyers, individuals and NGOs can send information to the Prosecutor asking to open an investigation into a particular situation. Actually, the Prosecutor can open an investigation on his own behalf.

For a crime to fall under jurisdiction of the ICC it must be committed on the territory of a State Party or by a national of a State Party36.

Only in the case of a Security Council referral can this condition of nationality and territoriality be overrun37.

In all cases, the Prosecutor can just decide on his own behalf if there is reasonable basis to proceed with an investigation.

He has to notify the decision to open an investigation to all States Parties and all States having jurisdiction traditionally over the alleged crimes as stated in article 18(1): *"When a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation pursuant to articles 13(c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, may limit the scope of the information provided to States*."

Therefore, when the Prosecutor decided to open an investigation into the situation in Darfur, he must have notified the Sudanese Government. Notification is actually the first 'complementarity test', since the State can ask for a halt of the investigation and initiate its own prosecution procedure thus exercising complementarity38. As such and according to the Statute, only in the case of unwillingness from the side of the State concerned does the case go back to the Court39.

In all cases, the Prosecutor must evaluate material submitted to him and decide whether to proceed with the prosecution. Around 1100 communications have been sent to the Office of the Prosecutor:
- Three State Parties so far have made referrals for crimes committed on their territories since 1 July 2002, date of the entry into force of the Rome Statute. These are: **Uganda** in December 2003 for crimes committed in Northern Uganda; **the Democratic Republic of Congo** (DRC) in April 2004, and **the Central African Republic** in December 2004.
- One non state party has used the ad hoc jurisdiction of the ICC : ivory coast
- On the 31 March 2005 the Security Council referred the situation in **Darfur** - Sudan to the ICC with abstention of the US.
- The rest of the information he received came from other sources, including NGOs or victims.

Based on information collected, the Prosecutor opened three investigations: the first in DRC on 23 June 2004 (which focuses on Ituri, Eastern Congo), the second in Northern Uganda, opened on 29 July 2004, and the third on 6 June 2005

[36] Article 12(2) of the Statute.
[37] *Ibidem*.
[38] Article 18(2) of the Statute.
[39] Article 18(3) of the Statute.

in the situation in Darfur, Sudan.

Mr. Ocampo has, as of today; privileged situations referred to him by States Parties rather than used his *proprio motu* power to act on his own initiative.

On one hand, a State Party referral might guarantee better cooperation from the State as the ICC largely relies on States' cooperation to fulfill its mandate. On the other hand this approach could hold the risk of political instrumentalities of the ICC. The Prosecutor does not have to investigate them all but he has to consider the cases. 99% of referrals came from civil society organizations and individuals. When the different delegations met in Rome they were thinking that one State would refer the situation of another State and not the case of crimes committed on its own territory.

The FIDH has used the mechanism of article 15 to send communications to the Court on the alleged commission of crimes falling within the jurisdiction of the ICC in the following situations:

9. Democratic Republic of Congo
10. Central African Republic
11. Ivory Coast
12. Colombia

In contradiction by contrast with the Nuremberg Tribunals the ICC is a court that investigates at the same time that crimes are being committed, therefore issues of protection of victims and witnesses have great significance and have been addressed by the Statute.

Challenges facing the Court

Article 53 describes three criteria for the decision to open an investigation:

- The information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- The case is or would be admissible under article 17;
- Taking into account the gravity of the crime and interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice[40].

The first and the third criteria are evidently very subjective since the Prosecutor can decide not to open an investigation if there is no 'reasonable basis' or if an investigation does not serve the interest of 'justice'.

Another difficulty is the *limited jurisdiction of the Court*; since the Court's budget is quite small it cannot deal with all alleged perpetrators in any given situation. The Prosecutor stated clearly that only those who bear the highest responsibility are to stand before the Court. This creates an 'impunity gap' since all individuals who fall below the uppermost level of responsibility are thus to be left for national jurisdiction. This criminal policy decision has direct consequences on the implementation of the complementarity principle with national courts; recall that the ICC is complementary to national courts contrary to the former ad hoc tribunals established by UN Security Council Resolutions.

A number of factors actually contribute to the ICC *impunity gap*:
If crimes within the jurisdiction of the ICC are committed in a country, the ICC pursuant to the Rome Statute will only look at the “most serious crimes”.
Within those “most serious crimes”, the ICC will only target the leaders that have the highest responsibility in the commission of the said crimes.
Therefore, whether or not the State concerned will decide to exercise its complementarity with the ICC, there will still be, in any case, a large responsibility in the fight against impunity which will rest on the State's national tribunals' capacity and on the State's willingness policy to open investigations.

For the FIDH, it is absolutely essential that the Prosecutor makes clear policy statements when deciding to take a case. In the interest of victims, the ICC should be clear from the beginning that it has limited resources and therefore a limited reach of whom it can indict.

Knowing that, one even more challenging issue is how the ICC will interpret the *complementarity principle*. One should remember that according to article 17 of the Rome Statute, the ICC has jurisdiction only if the State is unwilling or unable to prosecute.

40 See FIDH position paper on the issue of “interest of justice” on the FIDH website www.fidh.org

Article 17 of the Rome Statute

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State, which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a)The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner, which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

In the draft policy paper the inability criterion is considered as an objective criterion and on the contrary the unwillingness criteria is said to be subjective.

The main issue is how will the Court- the judges, be able to independently assess and analyze the notion of interest of justice and the national judicial system of a State. Clearly, the principle of complementarity has not been created to protect national sovereignty. Therefore, there should be a set of clear guidelines and a checklist to provide an objective determination on how the State is conducting investigation and prosecution at the national level.

Here national civil society, human rights NGOs in particular have an important role to play. Building upon their experiences in drafting shadow reports national NGOs are often in a better place to monitor the judicial system of their country.

ICC – Deterrent mechanism

Furthermore, the ICC should acknowledge its role as a deterrent mechanism to avoid the commission of future crimes. Prevention cannot and should not be opposed to the fight against impunity. The Office of the Prosecutor necessarily needs to implement its own set of preventive policy guidelines. Prevention and Justice are two landmark pillars that need to be addressed in the interest of victims and peace.

While the ICC is in a position to act in response to State’s failure to fight against impunity, its deterrent and preventive powers should not be underestimated. In that regard also, the FIDH believes that the ICC can be complementary to States. The complementarity principle should be understood to encompass the exercise by the ICC of any action that would aim at preventing future violations, in particular when States are incapable or unwilling to do so.

One example: in October 2002, with the ICC already an existing entity having jurisdiction over nationals of States Parties or crimes committed on the territory of States parties since 1 July 2002, the Central African Republic faced a violent “coup d’Etat” which resulted in the alleged commission of war crimes. The FIDH urgently decided to send an international fact finding mission, which concluded that there was sufficient evidence of summary executions and rapes on minor girls. With its affiliated organization in the Central African Republic, the FIDH decided to use the newly

created ICC as a mean to deter the commission of future crimes.

The impact of the FIDH public notice that information was sent to the relevant instances of the ICC has been, from our view, important. Today, it is impossible to assess the real contribution of the ICC, as a sword of Damocles, in the then on-going conflict in the Central African Republic. However, it is, in the same manner impossible to imagine what would have the status of the conflict today should no emergency button had been used.

The simple message I am trying to convey is that the ICC should be able to reach out and voice concerns at a much larger scale and thus maybe prevent future grave human rights violations.

Measuring the preventive impact of the Office of the Prosecutor can only be a post facto assessment, yet it is in the vital interest of the ICC to try, whenever possible, to use this tool and hopefully prevent other crimes against humanity and genocide from happening.

The independent status of the Prosecutor enables him to be above *realpolitik* considerations that govern the Community of States. It is absolutely crucial that his voice be heard without consideration of color, nationality, religion or state’s interests. If this is true for an effective ICC prosecution strategy, it is equally true for an effective ICC preventive strategy.

V - SESSION 3: ICC AND ISRAEL

1) The Israeli historical background *vis à vis* the ICC

Stéphanie David, FIDH

1.1 Constrained signature of the ICC Statute:

The State of Israel signed the Rome Statute on 31 December 2000, racing against the deadline, like Iran and the United States. Israel's Ambassador Yehuda Lancry signed a few hours after the United States did. He said Israeli lawyers had « in mind and in heart the memories of the Holocaust, of the Shoah, the greatest and the most heinous crime against mankind ».

The last minute decision to sign came after the government had originally rejected the accord on the grounds that, according to Israeli experts, it included a clause that appeared to be directed clearly against Israel. The clause, which involved settlements in the Occupied Territories, was said by the Israeli experts to be « politically motivated ».
As a matter of fact, Israel's main concern about the ICC was that the settlement of Israeli citizens in the Palestinian Occupied Territories could be considered a war crime, according to the provisions contained in the Rome Statute. According to the Israeli Government, the inclusion of settlement activity as a « war crime » had no basis in international law.

In this respect, Judge Eli Nathan, Head of the delegation of Israel at the UN diplomatic conference of Plenipotentiaries on the Establishment of the ICC in July 1998 stated that « Article 1 of the Statute clearly refers to the most serious crimes of concern to the international community as a whole; the preamble talks of « unimaginable atrocities » and of « grave crimes which deeply shock the conscience of the whole international community ». We therefore fail to comprehend why it has been considered necessary to insert into the list of the most heinous and grievous war crimes the action of transferring population into occupied territory, as it appears in article 8, paragraph 2 (b)...Without entering here into the question of the substantive status of any particular alleged violation of the 4th Geneva Convention , which clearly Israel does not accept, can it really be held that such an action as that listed in Article 8 above really ranks among the most heinous and serious war crimes, especially as compared to the other, genuinely heinous ones listed in Article 8? Or is it not clear that this has been inserted as a means of utilizing and abusing the statute of the ICC and the ICC itself as one more political tool in the Middle East conflict? »

The inclusion of this article 8 paragraph 2, was largely resolved through the negotiations on the elements of crimes at the UN preparatory committee.
If Israel ratified the statute, the ongoing settlement policy in the OPT would lead to serious consequences for it.
Israel's settlement policy is only one breach of international law that is likely to lead Israel to be anxious about being brought before the ICC. Israel is concerned that cases, inevitably brought against it, will lead to investigations into Israeli's affairs and actions. Such investigations would allow for the possibility that the truth on what has been happening to the Palestinians may surface in such an international forum.

Israel had also expressed concerns over several issues including a State's right to withhold from the Court information or documents that could prejudice its national security interests, as well as the principle of equitable geographical representation in selecting the judges of the court which would probably give little hope for the election of any Israeli candidate.

1.2 Obstacles to the enforcement of the ICC's jurisdiction:

A reciprocal bilateral agreement (so-called article 98 impunity agreement) was signed by between Israel and the US on August 4, 2002, when none of the two countries are State parties to the ICC. Foreign minister Shimon Peres and Under-secretary of State John Bolton signed the agreement.
Such a reciprocal agreement provides that neither of the two parties to the accord would surrender the other's persons to the ICC without first gaining consent from the other; therefore, this shields US and Israeli citizens from prosecutions by the ICC.

Right after the signing of this bilateral agreement, Israel submitted formal renunciation of its signature of the Rome Statute on August 28, 2002. Alan Baker, director of the Israeli Foreign Ministry's legal department stated that as long as the Middle east crisis was raging, Israel could not sign the Statute of the ICC. the most important reason for this

decision being the possible political bias of the court. The Israeli Embassy in Washington then added « almost everybody is a soldier in Israel; someone can complain against a soldier and say they perpetrated a crime ».

Furthermore, some internal legal steps have been initiated in Israel as a law proposal was introduced on 28 October 2002 at the Knesset by MK Zeev Boim under the title « Law proposal to prohibit any help to the ICC ».
This proposed bill provided that anyone who would give help to the ICC in a passive or an active way, anyone who would send personal data about an Israeli citizen or an Israeli resident to the ICC might be punished up to 10 years in prison.
« Information would mean written papers, photos, any official document and « help » would mean collecting, keeping, preparing or sending information, holding investigations and writing down their results.

The law provides more details by adding that help or information given by official authorities would not be punishable whereas an association (cooperative or NGO) providing the same could be ended by a judicial decision on the request of the Attorney general. This last provision of the law proposal is of particular concern to us because should it be one day passed and enforced,, Human rights NGOs that are working in Israel and in the OPT would be directly targeted and challenged for most of the work carried out by such organizations would automatically be made unlawful and the information provided by them would be construed as unlawful under the pretext that the result of such work might get to the ICC and be used by the Court as further evidence.

A representative of Israel Ministry of Foreign Affairs attended the 3rd Assembly of States parties at the Hague and mentioned that Israel still has concerns with the Rome Statute and will observe development of the ICC before taking any steps.

2) Building on the Darfur precedent: the Security Council and the ICC

Jeanne Sulzer, lawyer, FIDH Coordination of the Legal Action group

Summary of events prior to the referral

Sudan signed the Rome Statute on 8 September 2000 but did not ratify it.

However, the Court is competent to consider situations that occurred on the territory of a State, which is not a Party to the Statute provided that the case is referred to the Court by the UN Security Council acting under Chapter VII[41] of the Charter of the United Nations.

In response to the events in the Darfur region of Sudan, the UN Secretary General in September 2004 appointed an International Commission of Inquiry presided over by Prof. Antonio Cassese.

The Commission's Report, published on 25 January 2005 (Doc. S/2005/60), recommended, *inter alia*, that the situation in the region of Darfur be referred to the Court on the grounds that there were substantial evidence to believe that crimes against humanity and war crimes had been committed since 2003.

Furthermore it was considered that the Sudanese judiciary was unwilling to prosecute the alleged perpetrators.[42]

The Security Council's referral

In March 2005, Nigeria, acting on behalf of member states of the African Union and in its capacity as the president of the AU, proposed the creation of “*The African Panel for Criminal Justice and Reconciliation*” to prosecute “the alleged violations of human rights and war crimes in Darfur”. This proposal, though supported by the Government of Sudan, was rejected together with several other proposals, including that of the USA to extend the mandate of the International Criminal Tribunal for Rwanda to consider the crimes in Darfur.

- On 31 March 2005, the Security Council adopted Resolution 1593 (2005) and for the first time in its history referred a case, that of the Darfur region, to the Court (China, the USA, Algeria and Brazil abstained from voting). The Security Council, having taken note of the Cassese Commission's Report, *inter alia*, decided that Sudan and all other

41 Chapter VII: “Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”
42 See Report of the International Commission of Inquiry on Darfur to the United Nations Security Council’, Section 572 and 608.

parties to conflict in Darfur should fully cooperate with the Court and the Prosecutor; invited the Court and the AU to discuss practical agreements that would facilitate the work of the Prosecutor and the Court, including the possibilities of conducting proceedings in the region.

However, US opposition to the Court can be read between the lines of the Resolution:

- the Resolution refers to bilateral immunity agreements (“agreement referred to in Article 98(2) of the Rome Statute”), concluded by the US with several third parties;
- the Security Council decided that “*nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State*”;
- the Resolution recognized that “*none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily*”.

Opening of the investigation

The Prosecutor of the Court, Mr. L. Moreno Ocampo, received the case-file of the Cassese Commission consisting of more than 5000 documents, including a sealed envelope with 51 names of persons whose criminal responsibility may be engaged. On 6 June 2005 the Prosecutor concluded that the requirements of the Statute for initiating an investigation[43] had been fulfilled. The Office of the Prosecutor noted that the investigation would focus “on the individuals who bear the greatest criminal responsibility for crimes committed in Darfur”[44]. He also announced that he will not be bound by the 51 names of persons contained in the sealed envelope that had been passed to him.
→ *as regards admissibility of the case:* the Office has studied Sudanese institutions, laws and procedures, sought information on any national proceedings that may have been undertaken in relation to crimes in Darfur, and also analyzed the multiple *ad hoc* mechanisms that were created by the Sudanese authorities in 2004 in the context of the conflict in Darfur, including the Committees against Rape, the Special Courts and the Specialized Courts that replaced them, the National Commission of Inquiry and other *ad hoc* judicial committees and non judicial mechanisms; following this analysis, the Prosecutor is determined that there are cases that would be admissible in relation to the Darfur situation; this decision does not represent a determination on the Sudanese legal system as such, but is essentially a result of the absence of criminal proceedings related to the cases on which he will focus;

→ *as regards the interests of justice:* the Prosecutor examined the relevant issues, including traditional mechanisms for justice and reconciliation, and decided to pursue the investigation.

According to the Rules of the Court, once a situation is referred to the Prosecutor, he must inform the Presidency of the Court, which assigns the case to a Pre-Trial Chamber. In the present case, the Prosecutor's letter is dated 4 April 2005, and the Pre-Trial Chamber I, to which the case was assigned, was constituted on 21 April 2005.

[43] Article 53 of the Statute.
[44] The Prosecutor of the ICC opens investigation in Darfur, Press-release of 6 June 2005, Doc. OTP/LSU/066-05, http://www.icc-cpi.int/press/pressreleases/107.html.

VI – WORKING GROUP SESSION: ANALYSIS OF A CASE STUDY ON THE INTERNATIONAL CRIMINAL COURT

The participants in the round table worked half a day on a case study to use efficiently the International Criminal Court, based on the situation in Israel. They were provided with the relevant texts and legal instruments before being split in two groups working on a specific position. The two groups then got together and shared their conclusions and recommendations.

Text of the case study

On 12 April 2004 at 6.30 pm a suicide bomber blew himself in a shopping center in downtown Tel Aviv.

This bombing caused a large number of casualties amongst the civilian population. The police said that 9 people died and 32 were wounded.

The bombing was claimed by the Islamic Jihad on 14 April 2006.

On 16 April 2006, the Israel army launched a retaliation military operation in Gaza city targeting alleged perpetrators of the Tel Aviv bombing. A missile launched by an F16 killed 15 people, amongst which many children, in a residential area. The operation was conducted by Israeli soldiers, some of whom had a double nationality (Canadian, French in particular).

In a letter to the Security council denouncing the April 16, 2006 the Permanent Observer of Palestine to the United Nations addressed to the Secretary-General and the President of the Security Council denounces :

> "*The continuation of aggression committed by the Israeli occupying forces against the Palestinian people should be vigorously condemned by the international community […] "This letter is in follow-up to our previous 241 letters to you regarding the ongoing crisis in the Occupied Palestinian Territory, including East Jerusalem, since 28 September 2000. These letters, dated from 29 September 2000 (*A/55/432-S/2000/921*) to 15 May 2006 (*A/ES-10/331-S/2006/297*), constitute a basic record of the crimes committed by Israel, the occupying Power, against the Palestinian people since September 2000. For all of these war crimes, State terrorism and systematic human rights violations committed against the Palestinian people, Israel, the occupying Power, must be held accountable and the perpetrators must be brought to justice.*"

Since 2000, Israeli and Palestinian human rights NGOs regularly report and denounce the retaliation policy by the Israeli army resulting in the killing of civilian population and demolition of houses.

The International Community including the European Parliament, the Council of Europe and the United Nation's Secretary General Kofi Annan issued strong statements condemning the disproportionate military response of the Israeli forces and the collective punishment of the Palestinian civilian population (closures, electricity and water cut off and house demolitions)

Some key European states also condemned the Israeli policy in particular Italy, Spain, France, UK and Belgium.

Within the civil society most international human rights and humanitarian NGOS including Amnesty International, Human Rights Watch, Doctors Without Borders, Doctors of the World, FIDH issued press releases and sent international fact finding mission to collect evidence.

Other responses came from the British academic world that launch a boycott campaign against Israeli universities that would not denounce the occupation.

In response to this international reaction, the Israeli authorities claim that such an operation was legitimate for security purposes.

A few days later, on May 20 2006, a terrorist attack has been perpetrated against the citizens of Israel. Over the weekend, the Hizbollah fired eight Katyusha rockets deep into northern Israel from Lebanese territory, wounding an Israeli soldier and resulting in an extensive exchange of fire along the Lebanese border. In a letter to the Security council Israel hold "*not only the Government of Lebanon fully responsible for all terrorist activity emanating from within its territory but also hold responsible the Governments of Iran and Syria for harbouring, financing, nurturing*

and supporting Hizbollah and other terrorist organizations".

Others Facts

13. Israel does not recognize the ICC
14. Israel has signed a reciprocal bilateral agreement with the United States
15. One of the Israeli chief of staff flies to the United States when he hears that some prominent lawyers are looking at bringing a case against the alleged perpetrators of the Gaza operation.
16. A few months later some Palestinian victims decide to seek political refugee status in Spain.

GROUP I

Ressource persons, *Michael Sfard, lawyer (TBC), Orna Kohn, Adalah, Jeanne Sulzer, FIDH*

You have been contacted by the Israeli Ministry of Defence to conduct an analysis on the relevance of the International criminal court in this context. The State of Israel believes that there could be jurisdiction of the ICC over the crimes committed in Tel Aviv.

However, if such was the case, the state representative told you that accepting the jurisdiction of the ICC should not violate in any case the right of Israel to protect its citizens in particular when military necessity prevails.

The DOD also enquires whether the ICC would be relevant to protect Israeli citizen from possible deterioration of the situation in the region in particular possible "terrorist activity" from Lebanon, Iran and Syria.

Analysis is required :

- On the issue of ICC jurisdiction
- On the issue of ICC admissibility

Could you assess whether:

- there would be reasonable basis to open an investigation
- this would pass the complementarity test and
- the interest of justice wouldn't prevail over such an investigation by the ICC.

The DOD requires an analysis of Palestinian national justice with regards to article 17 criteria of ability and willingness.

This would also require analysis on national relevant legislation with regards to the ICC Rome Statute.

GROUP II

Ressource persons, *Avner Pinshuk, lawyer, Aeyal gross, law professor, Stéphanie David, FIDH*

Several Palestinian families of people that have been killed in the operation in Gaza come to your office to know what are the available remedies to seek justice.

Can they send information to the ICC prosecutor, can the Security council be of any help ?

Analysis is required:

- On the issue of ICC jurisdiction.
- On the issue of ICC admissibility

Could you assess whether:

- there would be reasonable basis to open an investigation
- this would pass the complementarity test and
- the interest of justice wouldn't prevail over such an investigation by the ICC.

You need to do an analysis of Israeli national justice with regards to article 17 criteria of ability and willingness.

This would also require analysis on national relevant legislation.

***

Article 12 Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 17 Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 53 Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) The case is or would be admissible under article 17; and
(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

The Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

VII – FINAL PRESS RELEASE : MAIN RECOMMENDATIONS

Fédération internationale des ligues des droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO, DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

International Federation for Human Rights

Federación Internacional de los Derechos Humanos

الفدرالية الدولية لحقوق الانسان

Prominent Israeli human rights organizations met last week to discuss the International Criminal Court

Paris, Jerusalem, June 12, 2006– During two days, representatives of Israeli based human rights organizations met in Tel Aviv in the context of a national roundtable organized by the International federation for Human rights (FIDH) in collaboration with the Coalition for the International Criminal Court (CICC).

Lawyers and representatives of ADALAH, Association for Civil Rights in Israel (ACRI) Public Committee against Torture in Israel (PCATI) … discussed the importance of the ICC to fight against impunity of alleged perpetrators of war crimes, crimes against humanity and genocide. Experts addressed the conference on the jurisdiction and the functioning of the ICC, with a focus on the historic rights of victims to participate in the proceedings and in the reparation process. Information was given on the status of ratification of the Rome Statute establishing the ICC and on the efforts that still need to be made by under represented regions of the world in particular Asia and the Middle East / North Africa region in order for the ICC to be truly universal. During the second day, participants focused on international justice mechanisms in general and the ICC in particular in the Israeli context.

Representative of Israeli and international human rights NGOs analyzed the official Israeli position vis-a-vis the ICC and noted that

- Israel had voted against the Statute on July 17, 1998 - joining six other states including the United States.
- After signing the statute on 31 December 2000 with an interpretative declaration on a controversial definition of the war crime of "transfer of population …..", the Government of Israel send a communication to the UN Secretary-General on 28 August 2002:
  ".....in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [...] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.[45]"

45 http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp#N3

Participants denounced the signature between Shimon Perez and John Bolton on 4th of august 2002 of a reciprocal bilateral immunity agreement forbidding the surrender of American or Israeli nationals to the International Criminal Court.

A need for an organized campaign to urge the state of Israel to accede to the ICC was discussed and further meetings will be organized in the near future for that purpose.

APPENDICES

AGENDA OF THE ROUND TABLE

in collaboration with

NATIONAL ROUND TABLE
ON THE INTERNATIONAL CRIMINAL COURT :
“RAISING ACCOUNTABILITY OF INTERNATIONAL CRIMINALS”

4/5 June 2006

Prima Astor Hotel, 105 Hayarkon street (Tel Aviv, Israel)

Sunday June 4th, ***2006***
THE LAW OF THE INTERNATIONAL CRIMINAL COURT

9.00 - arrival of the participants / distribution of the agenda and kit of documentation

9.30 – 10.30: Opening Statements
- H.E Kurt HENGEL, Ambassador of Austria on behalf of the European Union
- Representatives of ACRI / ADALAH / B’tselem / PCATI
- FIDH

10.30– 12.30 / SESSION 1 - The ICC in the international justice context
Chair : Rachel BENZIMAN, Director of ACRI

- The legal and political obstacles for ratification of the ICC
  (Worlwide efforts to establish the ICC: status of signatures/ ratifications and the role of the International Coalition for the ICC (CICC))
  Luisa Mascia, *European coordinator of the Coalition for the ICC*

Coffee break

- The United States campaign against the ICC
  Stéphanie David*, FIDH Director, Middle East North Africa Desk*

Question and answers

12.30 – 14.00 : Lunch

14.00 – 17.00 : SESSION 2- The law of the International Criminal Court
Chair : Tamar PELLEG, lawyer

- A general introduction to the ICC (45')
  (definition of crimes, jurisdiction of the ICC, complementarity principle, trigger mechanisms)
  Hala Khoury-Bisharat*, Adalah , lecturer in international criminal law*

- Victims' Rights before the ICC
  Jeanne Sulzer*, Lawyer, FIDH Coordination of the Legal Action Group*

Coffee break

- Main challenges before the ICC today : Prosecution strategy and ongoing investigations
  Jeanne Sulzer*, Lawyer, FIDH Coordination of the Legal Action Group*

Questions and answers

Monday June 5th, *2006* **THE INTERNATIONAL CRIMINAL COURT IN THE ISRAELI CONTEXT**

9.00 – 10.30 WORKSHOPS : ANALYSIS OF CASE STUDIES

9.00 – 9.15 : introduction of the case studies
9.15 – 10.30 : workshops

Workshop 1 Ressource persons : Michael SFARD, lawyer (TBC) , Orna KOHN / ADALAH , Jeanne Sulzer /FIDH

Workshop 2 Ressource persons : Avner PINSHUK / lawyer, Aeyal GROSS / law professor, Stéphanie David / FIDH

10.30 – 11.00 - Feedback from workshop sessions

Coffee break

11.15 – 13.00 SESSION 3 – ICC AND ISRAEL (PART I)
Chair :

- The Israeli historical background vis à vis the ICC
  Stéphanie David, FIDH

- National Legislation and the ICC
  Netta Amar, lawyer

13.00- 14.30: Lunch

14.30 – 16.45 <u>SESSION 3 – ICC AND ISRAEL (PART II)</u>
Chair :

- Using national courts in the fight against impunity

Dan Yakir, Lawyer, ACRI

- Building on the Darfour precedent : the security council and the ICC

Jeanne SULZER, Lawyer, FIDH Coordination of the Legal Action Group

Questions and answers

PANEL : DISCUSSION ON STRATEGIC OPTIONS
(Setting the momentum for a national ICC Israeli Coalition, strategies for bringing a case to the ICC etc.)
Chair : Luisa Mascia, European coordinator of the CICC

- Representative ADALAH
- Representative B'TSELEM
- Representative ACRI
- Representative PCATI

16.45 – 17.00 Coffee break

<u>17.00- 18.00: Conclusions (adoption of recommendations ?)</u>

- discussion on draft recommendations

With the financial support of the European Commission

Non definite list of participants to the round table on the ICC organized in Israel

	Name	*Organisation/ Title*
1	**Attorney Yakir**	ACRI
2	**Rachel Benziman**	ACRI
3		B'Tselem
4		B'Tselem
5	**Executive Director, Hannah Friedman**	PCATI
6	**Attorney Eliahu Abram, PCATI's Legal Director**	PCATI
7	**Orna Kohn**	Adalah
8	**Hala Khoury**	Adalah
9	**Lea Tsemel**	Lawyer
10	**Tamar Pelleg**	Lawyer
11	**Avigdor Feldmann**	Lawyer
12	**Michael Sfard**	Lawyer
13	**Avner Pinchuk**	Lawyer
14	**Gaby Lasky**	Lawyer
15	**Netta Amar**	Lawyer
16	**Allegra Pacheco**	OCHA
17	**Dalia Kerstein**	Director of Ha'Moked
18	**Aeyal Gross**	Professor of law, expert in international criminal law
19	**Orna Ben Naftal**	Professor of law, expert on international criminal law, consultant for the UN
20	**Yuval Shany**	Director of Minerva Center for Human Rights, Tel Aviv University; expert on international courts and tribunals
21	**Irit Kohn**	IDF lawyer
22	**Anne Messagee**	
23	**Luisa Mascia**	CICC
24	**Karine Mc Allister**	BADIL
25	**Jeanne Sulzer**	FIDH
26	**Stephanie David**	FIDH
27	**Ramiro Cibrian-Uzal, Head of Delegation Ambra Longatti and Matthias Peitz, Political attachés**	Délégation of the European Commission in Israel
28	**Kurt Hengl, ambassador**	Ambassade d'Autriche en Israel au nom de la Présidence de l'UE
29	**ICRC delegation**	ICRC/ cf Soizic
30	**Gilles Pécassou, 1er Secrétaire (section politique).**	French Embassy in TLV
31	**Adv. Alber Nahas**	Mossawa

FIDH represents 141 Human Rights organisations

141 organisations

Albania-Albanian Human Rights Group
Algeria-Ligue algérienne de défense des droits de l'Homme
Algeria-Ligue algérienne des droits de l'Homme
Argentina-Centro de Estudios Legales y Sociales
Argentina-Comite de Accion Juridica
Argentina-Liga Argentina por los Derechos del Hombre
Austria-Österreichische Liga für Menschenrechte
Azerbaijan-Human Rights Center of Azerbaijan
Bahrain-Bahrain Human Rights Society
Bangladesh-Odhikar
Belarus-Human Rights Center Viasna
Belgium-Liga Voor Menschenrechten
Belgium-Ligue des droits de l'Homme
Benin-Ligue pour la défense des droits de l'Homme au Bénin
Bhutan-People's Forum for Human Rights in Bhutan (Nepal)
Bolivia-Asamblea Permanente de los Derechos Humanos de Bolivia
Brazil-Centro de Justica Global
Brazil-Movimento Nacional de Direitos Humanos
Burkina Faso-Mouvement burkinabé des droits de l'Homme & des peuples
Burundi-Ligue burundaise des droits de l'Homme
Cambodia-Cambodian Human Rights and Development Association
Cambodia-Ligue cambodgienne de défense des droits de l'Homme
Cameroon-Maison des droits de l'Homme
Cameroon-Ligue camerounaise des droits de l'Homme (France)
Canada-Ligue des droits et des libertés du Québec
Central African Republic-Ligue centrafricaine des droits de l'Homme
Chad-Association tchadienne pour la promotion et la défense des droits de l'Homme
Chad-Ligue tchadienne des droits de l'Homme
Chile-Corporación de Promoción y Defensa de los Derechos del Pueblo
China-Human Rights in China (USA, HK)
Colombia-Comite Permanente por la Defensa de los Derechos Humanos
Colombia-Corporación Colectivo de Abogados Jose Alvear Restrepo
Colombia-Instituto Latinoamericano de Servicios Legales Alternativos
Congo Brazzaville-Observatoire congolais des droits de l'Homme
Croatia-Civic Committee for Human Rights
Czech Republic-Human Rights League
Cuba-Comisión Cubana de Derechos Humanos y Reconciliación National
Democratic Republic of Congo-Ligue des Électeurs
Democratic Republic of Congo-Association africaine des droits de l'Homme
Democratic Republic of Congo-Groupe Lotus
Djibouti-Ligue djiboutienne des droits humains
Ecuador-Centro de Derechos Economicos y Sociales
Ecuador-Comisión Ecumenica de Derechos Humanos
Ecuador-Fundación Regional de Asesoria en Derechos Humanos
Egypt-Egyptian Organization for Human Rights
Egypt-Human Rights Association for the Assistance of Prisoners
El Salvador-Comisión de Derechos Humanos de El Salvador
Ethiopia-Ethiopan Human Rights Council
European Union-FIDH AE
Finland-Finnish League for Human Rights
France-Ligue des droits de l'Homme et du citoyen
French Polynesia-Ligue polynésienne des droits humains
Georgia-Human Rights Information and Documentation Center
Germany-Internationale Liga für Menschenrechte
Greece-Ligue hellénique des droits de l'Homme
Guatemala-Centro Para la Accion Legal en Derechos Humanos
Guatemala-Comisión de Derechos Humanos de Guatemala
Guinea-Organisation guinéenne pour la défense des droits de l'Homme
Guinea Bissau-Liga Guineense dos Direitos do Homen
Iran-Centre des défenseurs des droits de l'Homme en Iran
Iran (France)-Ligue de défense des droits de l'Homme en Iran
Iraq-Iraqi Network for Human Rights Culture and Development (United Kingdom)
Ireland-Irish Council for Civil Liberties
Israel-Adalah
Israel-Association for Civil Rights in Israel
Israel-B'tselem
Israel-Public Committee Against Torture in Israel
Italy-Liga Italiana Dei Diritti Dell'uomo
Italy-Unione Forense Per la Tutela Dei Diritti Dell'uomo
Ivory Coast-Ligue ivoirienne des droits de l'Homme
Ivory Coast-Mouvement ivoirien des droits de l'Homme
Jordan-Amman Center for Human Rights Studies
Jordanie-Jordan Society for Human Rights
Kenya-Kenya Human Rights Commission
Kosovo-Conseil pour la défense des droits de l'Homme et des libertés
Kyrgyzstan-Kyrgyz Committee for Human Rights
Laos-Mouvement lao pour les droits de l'Homme (France)
Latvia-Latvian Human Rights Committee
Lebanon-Association libanaise des droits de l'Homme
Lebanon-Foundation for Human and Humanitarian Rights in Lebanon
Lebanon-Palestinian Human Rights Organization
Liberia-Liberia Watch for Human Rights
Libya-Libyan League for Human Rights (Switzerland)
Lithuania-Lithuanian Human Rights Association
Malaysia-Suaram
Mali-Association malienne des droits de l'Homme
Malta-Malta Association of Human Rights
Mauritania-Association mauritanienne des droits de l'Homme
Mexico-Liga Mexicana por la Defensa de los Derechos Humanos
Mexico-Comisión Mexicana de Defensa y Promoción de los Derechos Humanos
Moldova-League for the Defence of Human Rights
Morocco-Association marocaine des droits humains
Morocco-Organisation marocaine des droits humains
Mozambique-Liga Mocanbicana Dos Direitos Humanos
Netherlands-Liga Voor de Rechten Van de Mens
New Caledonia-Ligue des droits de l'Homme de Nouvelle-Calédonie
Nicaragua-Centro Nicaraguense de Derechos Humanos
Niger-Association nigérienne pour la défense des droits de l'Homme
Nigeria-Civil Liberties Organisation
Northern Ireland-Committee On The Administration of Justice
Pakistan-Human Rights Commission of Pakistan
Palestine-Al Haq
Palestine-Palestinian Centre for Human Rights
Panama-Centro de Capacitación Social
Peru-Asociación Pro Derechos Humanos
Peru-Centro de Asesoria Laboral
Philippines-Philippine Alliance of Human Rights Advocates
Portugal-Civitas
Romania-Ligue pour la défense des droits de l'Homme
Russia-Citizen's Watch
Russia-Moscow Research Center for Human Rights
Rwanda-Association pour la défense des droits des personnes et libertés publiques
Rwanda-Collectif des ligues pour la défense des droits de l'Homme au Rwanda
Rwanda-Ligue rwandaise pour la promotion et la défense des droits de l'Homme
Scotland-Scottish Human Rights Centre
Senegal-Organisation nationale des droits de l'Homme
Senegal-Rencontre africaine pour la défense des droits de l'Homme
Serbia-Center for Peace and Democracy Development
South Africa-Human Rights Committee of South Africa
Spain-Asociación Pro Derechos Humanos
Spain-Federación de Asociaciones de Defensa y Promoción de los Derechos Humanos
Sudan-Sudan Organisation Against Torture (United Kingdom)
Sudan-Sudan Human Rights Organization (United Kingdom)
Switzerland-Ligue suisse des droits de l'Homme
Syria-Comité pour la défense des droits de l'Homme en Syrie
Tanzania-The Legal & Human Rights Centre
Thailand-Union for Civil Liberty
Togo-Ligue togolaise des droits de l'Homme
Tunisia-Conseil national pour les libertés en Tunisie
Tunisia-Ligue tunisienne des droits de l'Homme
Turkey-Human Rights Foundation of Turkey
Turkey-Insan Haklari Dernegi / Ankara
Turkey-Insan Haklari Dernegi / Diyarbakir
Uganda-Foundation for Human Rights Initiative
United Kingdom-Liberty
United States-Center for Constitutional Rights
Uzbekistan-Legal Aid Society
Vietnam-Comité Vietnam pour la défense des droits de l'Homme (France)
Yemen-Human Rights Information and Training Center
Yemen-Sisters' Arabic Forum for Human Rights
Zimbabwe-Zimbabwe Human Rights Association Zimrights

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