



## OI Policy Compendium Note on the International Criminal Court

### Overview: Oxfam International's position on the International Criminal Court

Oxfam International has long supported the establishment of the International Criminal Court (ICC). Sustainable peace and development – and the immediate protection of civilians – are impossible without upholding international human rights and humanitarian law. Holding perpetrators of the gravest crimes to account is one way to reduce future atrocities. The ICC is one vital way to do this.

#### Humanitarian agencies – supportive but independent

Oxfam does *not*, however, cooperate with the ICC's specific investigations or prosecutions, pass information to the ICC Prosecutor's Office, or comment on any specific investigations or prosecutions. Such cooperation could compromise Oxfam's ability to provide life-saving humanitarian assistance wherever it is needed. In today's current conflicts, it poses too great a risk.

It is entirely appropriate that NGOs with different mandates, whether based in countries affected or international NGOs, may decide to cooperate with ICC investigations. The diversity of civil society is strength, not a weakness.

#### The ICC – fulfilling its potential

Every government that has not ratified the Rome Statute should do so. Without universal jurisdiction, it will always be difficult to realise the ICC's potential to help reduce the gravest crimes in the world.

The ICC itself and the governments that support it must find an effective way to pursue justice without the danger of risking other vital objectives, including the resolution of conflicts, sustainable peace and development, and immediate assistance and protection. There is no single solution applicable to every case, but the ICC and governments should consider how ICC proceedings might make the situation better or worse for civilians in both the short- and long-term – and listen to the communities who have suffered most from the crimes committed. In each different case, they are the best judges of which means of justice to pursue.

## 1 Background

The International Criminal Court was created to help ensure that the gravest crimes in international law are punished. Its Statute was adopted by 120 countries in Rome in 1998, and the Court was formally established in July 2002, when the Statute was ratified by the 60 states required. Since then, 50 more countries have ratified the Rome Statute.

The ICC has jurisdiction over the core international crimes – of genocide, crimes against humanity, and war crimes – committed since 1 July 2002.<sup>i</sup> Almost all its investigations<sup>ii</sup> currently

<sup>i</sup> These crimes include murder, extermination, enslavement, deportation, other inhumane acts committed against civilians; persecutions on political, racial, or religious grounds; the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group; and aggression. The Statute of the ICC sets out in detail the crimes over which it has jurisdiction.

<sup>ii</sup> Except Kenya.

focus on armed conflicts, but the ICC's jurisdiction covers crimes against humanity and genocide committed in other situations as well.

The Court's jurisdiction is limited, however. Most importantly, it was set up to *complement* other courts, not to supersede them. Its trials can only take place when national authorities are unable or unwilling to prosecute. It can only investigate or prosecute crimes committed in a state that is party to its Rome Statute – or if the suspect is a national of a state party. These conditions can be waived when another state accepts jurisdiction of the Court over a particular case, or when the UN Security Council refers a case to the ICC Prosecutor.

Since its inception, the Court has faced widely varying levels of cooperation from governments around the world. Many have failed to cooperate with its investigations to the extent that it has sought. In some cases, this has been a calculated attempt to shield war criminals from justice. But those governments have been able to manipulate a wider international concern about some of the ICC's investigations: on the potential impact of the investigations on peace deals, on their limited success to date, and on their focus on some parts of the world and not on others.

At the time of writing, four investigations are ongoing: in northern Uganda, Democratic Republic of Congo (DRC), Darfur in Sudan, and Central African Republic (CAR). Their current status is:

- **Northern Uganda:** The ICC has issued five arrest warrants, including for the leader of the Lord's Resistance Army, Joseph Kony. Four suspects are considered by the ICC to be still at large (although one is generally presumed by Ugandans to be dead); and the death of the fifth suspect has been confirmed.
- **DRC:** Three out of four suspects indicted have been arrested and are held in custody in The Hague. The first trial, that of Thomas Lubanga, has begun.
- **CAR:** Jean-Pierre Bemba Gombo, the only person accused, was arrested in Belgium in 2008 and is in custody awaiting trial in The Hague.
- **Darfur, Sudan:** The ICC issued arrest warrants for four suspects, including President Al Bashir in March 2009. One suspect appeared voluntarily before the ICC in May 2009, and proceedings in his case continue.

In March 2010, the ICC's judges authorised formal investigations into the violence that followed Kenya's elections in December 2007.<sup>1</sup> The Office of the Prosecutor has also reported other situations under analysis, including Afghanistan, Chad, Georgia,<sup>2</sup> the occupied Palestinian Territories,<sup>3</sup> and Colombia (where the Court's jurisdiction covers war crimes committed from November 2009, after a moratorium on its jurisdiction over these crimes expired). But so far, no crimes outside Africa have been prosecuted, and in September 2009 Judge Richard Goldstone challenged Western governments (rather than the ICC itself) to demonstrate their commitment to 'the *equal* application of international justice'<sup>4</sup> when he presented the report of the UN Fact-Finding Mission on the Gaza Conflict. The Goldstone Report proposed that the UN Security Council should refer the situation in Gaza to the ICC if Israel and the relevant Gaza authorities did not show sufficient progress in investigating alleged war crimes within six months.<sup>5</sup>

## 2 Oxfam International's position on the International Criminal Court

**Oxfam International has long supported the establishment of the ICC. Sustainable peace and development, and the immediate protection of civilians, are impossible without upholding human rights – including the strict adherence, *de facto* and *de jure*, to international human rights and humanitarian law.**

Holding perpetrators of the gravest crimes to account can play one important role in preventing future atrocities, protecting civilians, and consolidating long-term peace. The ICC is one vital way to do this.

### **The ICC and other means of justice**

Whether the intervention of the ICC is the best way in any given case will depend on the circumstances, and the efficacy, of the other potential forms of justice available. National courts, international tribunals, hybrid tribunals (involving both national and international jurists), as well as truth and justice commissions and traditional community mechanisms, are all potential means. No one approach is appropriate in every case. Sometimes, several mechanisms will have to work together. In some cases, the ICC's investigations may encourage national authorities to pursue more effective action than they otherwise would have done. In each case, **it is vital to listen to the communities who have suffered most from the crimes committed, and to understand which mechanism *they* consider the most appropriate.**

### **Peace versus justice?**

The ICC has a significant potential to help reduce the crimes it has jurisdiction over. But in its early years, its investigations have provoked a heated debate about how – and when – to prosecute suspects, without potentially undermining other vital objectives. In almost all crises, Oxfam has found that affected communities want those responsible for crimes to be held to account (in some way); but they also demand the immediate protection of civilians, the provision of life-saving aid, and a sustainable resolution of the conflict, so that they can at last build peace and development. And the affected communities are often acutely aware that the practical actions to pursue all those aims must be integrated, balanced, or sometimes sequenced with great care.

The challenge to do so is an example of the wider discussion on how to resolve conflicts and at the same time uphold human rights, using different strategies that support rather than undermine each other. It is a discussion in which humanitarian, human rights, and conflict-resolution agencies are all seeking to find practical solutions. As one human rights study concluded, 'approaches that impose human rights standards on principle, or jettison them for short-term negotiating purposes, are both unlikely to produce lasting solutions'.<sup>6</sup>

### **No single solution**

Where the ICC faces such dilemmas, there is no single answer or appropriate role for the Court. The resolution of past conflicts – from South Africa to Sierra Leone, Mozambique to Liberia – suggests that no simple model can be applied universally. In each crisis, there will be genuine choices to be made on whether the ICC is the best mechanism to pursue justice – without undermining prospects for the immediate protection of civilians or for sustainable peace – and, if it is, what approach the ICC should take.

In some cases, the timing of peace negotiations and ICC investigations may need to be carefully sequenced, and tensions may still remain. But in others, the very prospect of ICC investigations may help drive warring parties to negotiate peace, or persuade governments to take effective action through national courts. Where an ineffective ‘peace process’ is bringing real peace no closer, there is no excuse for delaying bringing war criminals to justice. But in other cases, pragmatic solutions may have to be sought – at all times within the parameters of international human rights and humanitarian law. International human rights law, for example, prohibits blanket amnesties for war crimes, but it permits amnesties for minor crimes and for belonging to or fighting with insurgent forces, or related offences such as carrying arms.

These all pose extraordinarily difficult choices for the ICC’s Office of the Prosecutor, and, in some circumstances, the UN Security Council. The ICC Statute places the responsibility to suspend investigations for one year, in extraordinary circumstances, not on the Prosecutor, but on the UN Security Council. The Council may decide whether or not to accept alternative mechanisms that hold suspects to account – and has the power to restart ICC prosecutions if peace negotiations fail.

In future, of course, it is hoped that ICC convictions will provide a potent deterrent to individuals who might commit further atrocities – and that this will apply at every level from the most senior to junior perpetrators.

### **Humanitarian agencies – supportive but independent**

Humanitarian agencies, particularly those like Oxfam grounded in a rights-based tradition, strongly believe that civilians must be protected from war crimes, crimes against humanity, and genocide, and that ending impunity for those crimes is a vital part of doing that. Upholding international humanitarian law is one of our strongest ideals, and we consistently call on *all* warring parties, in *all* armed conflicts, to do so.

The primary work of humanitarian agencies, however, is not to end impunity – but to provide life-saving assistance and protection to people in need. The consequence of that, as the ICRC has written, is ‘that humanitarian organisations, that is, organisations that endeavour to relieve the suffering of individuals, being guided solely by their needs, without discrimination of any kind, do not work for international criminal tribunals, even if they share the same ideals.’<sup>7</sup> Oxfam International shares that conviction.

Since the ICC was first established, it has become clear that cooperation between humanitarian agencies and the ICC on specific investigations may undermine agencies’ ability to carry out their primary purpose. Such cooperation could be misinterpreted – we stress *mis*interpreted – and jeopardise humanitarian agencies’ reputation for independence and impartiality. (The Government of Sudan expelled Oxfam GB and eleven other international humanitarian agencies in March 2009, although Oxfam has made no comment and had no cooperation with the ICC on any of its Sudan investigations).

**That is why Oxfam does not cooperate with the ICC on any specific investigation or prosecution.**

Oxfam will continue to engage with the ICC in The Hague, and with others, in the vital debate on how to pursue justice without compromising the need for humanitarian assistance, immediate protection, and lasting peace. But Oxfam will *not*:

- Pass information on any specific investigation or prosecution to any part of the ICC, including the Office of the Prosecutor. Oxfam staff in affected countries have no contact with the ICC at all;
- Cooperate with any specific investigation or prosecution, or with the Office of the Prosecutor, in any other way;
- Comment on any specific ICC investigation or prosecution; or
- Seek or accept funds from the ICC Trust Fund.

Oxfam will continue to do all that it can, in its programming in affected countries and in its campaigning, to improve civilians' safety, prevent war crimes, crimes against humanity and genocide, and help those countries build lasting peace and development. *Without referring to any specific case*, Oxfam may speak publicly about which states are party to the Rome Statute – including when they first ratify it – and which crimes are covered, in the hope that this will help deter future crimes. We will listen to the communities affected by atrocities, to help assess when that would be useful without creating unacceptable risks to their safety or to Oxfam's life-saving activities.

Oxfam has decided not to cooperate with the ICC on any specific case, in order to maintain its ability to provide life-saving assistance to people affected by conflicts and disasters wherever they need it. Such cooperation would pose too great a risk. Oxfam continually assesses and reassesses a wide range of risks to its programmes. Whether or not the risks associated with the ICC change in the future remains to be seen. The ICC is still less than ten years old. **Oxfam will continue to review these risks, and its consequent decisions, as the relationship between the ICC, governments, and others evolves over the years.**

Other NGOs with different mandates, whether based in the countries affected or international NGOs, may decide to pass information to the ICC or to support its specific investigations in different ways. That is entirely appropriate. The diversity of civil society is a strength, not a weakness.

### 3 Recommendations

Two things are vital for the ICC to carry out its role:

1. **Every government that has not signed and ratified the Rome Statute should do so now.** Without universal jurisdiction, the ICC will always find it difficult to realise its potential to help reduce the gravest crimes in the world.
2. **The ICC itself, and the governments that already support it, must find an effective way to pursue justice without the danger of risking other vital objectives.**

There is no single solution applicable to every conflict or fragile peace, but the ICC, UN Security Council, and governments should consider clear criteria when facing these dilemmas, including:

**Civilian protection:**

- Will ICC proceedings make the situation on the ground better or worse for civilians, in both the short-term and the long-term?
- Will ICC proceedings help deter future crimes, in the current crisis and beyond?

**Prospects for peace:**

- In specific circumstances, the prospects for peace require consideration of what could be gained (or lost) by ICC proceedings if there is: a live, ongoing peace process; a peace process that has already been established; or a peace process in the early stages of development.
- In those different circumstances, will ICC proceedings affect or hinder the development of a broader justice and reconciliation process that can be the foundation for sustainable peace and development?

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<sup>1</sup> BBC (2010) 'ICC to investigate Kenya violence', 31 March 2010: <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/8597211.stm>

<sup>2</sup> International Criminal Court (2008) 'ICC Prosecutor confirms situation in Georgia under analysis', press release, 20 August 2008: [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/icc%20prosecutor%20confirms%20situation%20in%20georgia%20under%20analysis?lan=en-GB](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/icc%20prosecutor%20confirms%20situation%20in%20georgia%20under%20analysis?lan=en-GB)

<sup>3</sup> Richard Goldstone (2009), 'Justice in Gaza', *New York Times*, 17 September 2009: <http://www.nytimes.com/2009/09/17/opinion/17goldstone.html>.

<sup>4</sup> *Ibid.*

<sup>5</sup> UN Fact-Finding Mission on the Gaza Conflict, 15 September 2009:

<http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>.

<sup>6</sup> International Council on Human Rights Policy (2006) 'Negotiating Justice? Human Rights and Peace Agreements', Geneva: ICHRP, Summary, p. 6.

<sup>7</sup> ICRC (2006) 'Humanitarian organisations and international criminal tribunals, or trying to square the circle', *International Review of the Red Cross*, Volume 88, Number 861, March 2006, p. 182.