



## OI Policy Compendium Note on the International Criminal Court

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

Oxfam International believes that establishing the International Criminal Court (ICC) was a critical step forward in seeking to hold individuals to account for their war crimes, and end the impunity that can fuel further conflict. Alongside others, Oxfam actively campaigned to establish the Court.

In future years, the ICC may investigate crimes committed in conflicts that have already been resolved. But for now, it is investigating crimes in current conflicts, with the inevitable potential for tensions between the actions most likely to provide immediate protection to civilians, a resolution to those conflicts, the prosecution of war criminals, and sustainable peace and development.

Where those dilemmas emerge, there is no single way to resolve them, or to decide the appropriate role for the ICC. The ICC Statute places the responsibility to suspend investigations, in extraordinary circumstances, not upon its Prosecutor, but on the UN Security Council.

Humanitarian agencies may face a second dilemma during ICC investigations, where co-operation with the Court might be *seen* to undermine their reputation as impartial humanitarian bodies.

Wherever ICC investigations or indictments may be forthcoming, Oxfam will judge its engagement with the Court, and issues around the Court, depending on the possible risk to:

- the immediate protection of civilians;
- ongoing or future prospects for peace;
- civilians' access to assistance (from humanitarian agencies and elsewhere);
- the perception of Oxfam's impartiality.

### 1. Background

The International Criminal Court (ICC) was established to help ensure that the gravest international crimes do not go unpunished. It is the world's first permanent, treaty-based, international criminal court. After several years of preparatory meetings, its Statute was adopted in Rome by 120 nations on 17 July 1998, and it was formally brought into existence in July 2002, when the treaty was ratified by the minimum 60 states required.

Accordingly, the ICC has jurisdiction only over crimes committed since July 2002. The Office of the Prosecutor (OTP) is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court; for examining them; and for conducting investigations and prosecutions before the Court.<sup>1</sup>

The ICC has jurisdiction over genocide, crimes against humanity, and war crimes. These include murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during a war; or persecutions on political, racial, or religious grounds as well as the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.<sup>2</sup>

<sup>1</sup> Article 42.1 of the Rome Statute.

<sup>2</sup> Definitions from 1949 Geneva Conventions, Nuremberg Rules, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Articles II and III of the 1948 Convention on the Prevention and Punishment of Genocide.

The ICC is based on the principle of 'complementarity' with other courts: that, in most cases, it will undertake investigations and prosecutions only when states are unable or unwilling to investigate or prosecute themselves. In any given case, there may be a number of ways, outside the ICC, in which individuals can be held to account for their war crimes: national courts, international tribunals, 'hybrid' tribunals with international and national participation, as well as inquiry and truth commissions.

The Court may undertake an investigation or prosecution only if the relevant crime takes place in a state that is a party to the Rome Statute (its principle of territoriality), or if the suspect is a national of a state that is a party to the Statute (the principle of nationality).

These preconditions are waived *only* when the United Nations Security Council refers a case to the ICC Prosecutor, in accordance with Article 13 of the Rome Statute, and when a state that is not a party to the Statute accepts jurisdiction of the Court by lodging a declaration to this effect.

Today, the ICC enjoys wide support, and 99 countries, 27 of them in Africa, have ratified the 1998 Rome Statute. The USA opposes the court and has cut military aid to dozens of ICC signatories, including South Africa, who refuse to enter into bilateral agreements with the US government. In this way American military personnel are shielded from prosecution. In 2002, President Bush signed into law the *American Service Members Protection Act*, intended to intimidate countries that ratify the ICC treaty. This US law authorises the use of military force to liberate any American or citizen of a US ally being held by the Court, which is located in The Hague. This provision, dubbed the 'Hague invasion clause', has caused a strong reaction from US allies around the world. The law also provides for the withdrawal of US military assistance from countries ratifying the ICC treaty, and restricts US participation in UN peacekeeping unless the USA obtains immunity from prosecution.

In the autumn of 2006, the Court issued arrest warrants in both northern Uganda and the Democratic Republic of Congo (DRC), and investigations in Darfur are expected soon to give way to another set of indictments. The investigations for all three cases took place in extremely challenging circumstances, with reports suggesting that there was very variable co-operation by the parties on the ground, and from the international community.

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

Oxfam International has long supported the establishment of an International Criminal Court. As a rights-based organisation, Oxfam believes that upholding all human rights – including the strict adherence, *de facto* and *de jure*, to international human rights law and international humanitarian law – is a prerequisite for creating sustainable peace and development. Holding war criminals to account can play a vital role in the effective protection of civilians, the consolidation of long-term peace, and the prevention of future atrocities and renewed conflict. The Court therefore has an enormous potential to reduce the violence against civilians around the world, including gender-based violence. (For this reason, it is important for the ICC to have a better balance of women and men among its staff.)

In its early years at least, however, the ICC faces a genuine challenge to contribute to these enormous goals, without contradicting other vital initiatives that may be taken in different conflicts to end violence and consolidate peace. One day, the ICC may investigate crimes committed in conflicts that have already been resolved. But now, and for the foreseeable future, it is investigating crimes in current conflicts, with the inevitable potential for tensions between the actions most likely to provide immediate protection to civilians, a resolution to the conflict, the prosecution of war criminals, and sustainable peace and development.

This dilemma is perhaps the most prominent example of the wider discussion on how to resolve conflicts and uphold human rights, with 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 research study concluded in 2006, 'approaches that impose human rights standards on principle, *or* jettison them for short-term negotiating purposes, are *both* unlikely to produce lasting solutions' (italics added).<sup>3</sup>

<sup>3</sup> International Council on Human Rights Policy (2006) *Negotiating Justice? Human Rights and Peace Agreements*, Geneva: ICHRP, Summary p. 6.

Where the ICC faces such dilemmas, there is no single way to resolve them, or to decide the appropriate role for the Court. There are genuine choices to be made in each crisis on whether the ICC is the best tool to pursue justice, without undermining prospects for the immediate protection of civilians, or sustainable peace – and, if so, how the ICC should do that. In some cases, the timing of peace negotiations and ICC investigations may need to be carefully sequenced. In others, tensions may still remain. But in others, the ICC investigations themselves may be an effective pressure to drive warring parties to negotiate peace, rather than entrench themselves in further violence. In future, it is hoped that ICC convictions will provide a potent deterrent to individuals who might commit further atrocities.

Each crisis *is* different. The resolution of past conflicts – from South Africa to Sierra Leone, Mozambique to Liberia – does *not* point to one model to uphold justice and find peace. International human-rights law prohibits blanket amnesties for war crimes, but allows some others.<sup>4</sup> In each current crisis, the choice on whether (and how) to use the ICC must be made objectively, based on the evidence of the particular conflict, with some form of amnesty as a last resort.

These are choices that go beyond the remit of the ICC Prosecutor. Similarly, the ICC Statute places the responsibility to suspend investigations, in extraordinary circumstances, not on the Prosecutor, but on the UN Security Council. Upon it lies the awesome responsibility to decide if the more certain prospect of an immediate end to a conflict outweighs the important but less certain prospect – through an ICC investigation – of deterring future war crimes, and reducing future conflict. Under Article 16 of the ICC Statute, the Council may accept alternative accountability mechanisms that may be less rigorous than the ICC, but nevertheless hold war criminals to account in some way. Perhaps more importantly in such circumstances, the Security Council may also order the renewal of ICC prosecutions if peace negotiations fail.

For humanitarian agencies, the question of contact with the ICC is also complex. Humanitarian agencies' primary purpose is to provide life-saving services to people in need. But, if those populations are subject to violent attacks, there may also be a vital need to bring the attackers to justice, to help prevent further violence from them and others.

But the right course of action for a humanitarian agency in each crisis may still not be straightforward. It will have other questions to consider beyond the dilemma above.

### 3. Recommendations

There is no single way to answer either of the dilemmas that ICC investigations in current conflicts, or during fragile peace processes, may face:

- I. Whether there is any tension between, on the one hand, ICC investigations and, on the other, the prospects for the immediate protection of civilians, and sustainable peace and development
- II. Whether there is any tension for humanitarian agencies between contact with the ICC, and their ability to maintain safe and effective access to all those in need of assistance.

Nevertheless, there are a number of criteria to consider when facing these dilemmas in each situation. Some of them could include:

#### For all actors

- **Civilian protection:** Will ICC proceedings actually make the situation on the ground better or worse for civilians, in both the short term and long term? Will they help deter future war crimes, in the current crisis and beyond?
- **Prospects for peace:** In specific circumstances this above criterion requires 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 solidified; or a peace process in the early stages of development. In those different circumstances, will ICC proceedings affect or hinder the

---

<sup>4</sup> *Ibid.* p. 7.

development of a broader justice and reconciliation process that can be the foundation for sustainable peace and development?

For humanitarian agencies

- **Humanitarian access:** Will ICC proceedings lead to reduced or increased violence? If violence increases, will this jeopardise humanitarian operations and relief organisations' ability to access their beneficiary populations?
- **Perceptions of impartiality:** For operational organisations with access to victims on the ground and therefore as potential witnesses or recipients of information about violations, great care must be taken to properly balance and manage risk to avoid perceptions of non-neutrality that might hinder an agency's ability to operate safely.