



Review of the International Criminal Court

Views and Recommendations
from Civil Society

Executive Summary

November 2020

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Between June and October 2020, 90 CSO representatives (23 from sub-Saharan Africa; 27 from Asia-Pacific; 26 from Latin America and the Caribbean; 2 from Eastern Europe; and 12 from the Middle East and North Africa) participated in WFM/IGP's project to ensure civil society's input into the Review of the ICC.

77 CSO representatives completed a detailed questionnaire (see Annex 1) setting out their general perceptions of the ICC and views on the effectiveness of—and reforms required to strengthen—its preliminary examinations, investigations, cases, victim participation and reparations as well as the activities of the Trust Fund for Victims. Nearly all participants who completed the questionnaire were interviewed by WFM/IGP researchers to obtain further input on these issues.

Following the release of the final report of the Independent Expert Review of the ICC on 30 September 2020, 38 CSO representatives (7 from sub-Saharan Africa; 13 from Asia-Pacific; 13 from Latin America and the Caribbean; and 5 from the Middle East and North Africa), including 13 CSO representatives who had not completed the questionnaire, attended webinars organized by WFM/IGP seeking their initial reactions to some of the Experts' key findings and recommendations.

General Perceptions of the ICC

While a number of CSO representatives commented on the importance of the ICC, more than 50% of those who completed the questionnaire considered the ICC and the Rome Statute system's contribution to the fight against impunity to be less than effective.

Responses to follow-up questions show that while many CSOs are focused on the ICC's efforts to address impunity in their countries, most considered the extent and effectiveness of the Court's efforts globally in reaching their assessment. Some expressed concerns that the ICC is not doing enough to advance the fight against impunity and that it lacks a deep understanding of the causes of impunity in different countries and regions. One participant from Asia-Pacific stated:

Nowhere can we claim success. The culture of impunity is on the rise.

In reaching their assessment, they also considered a broad range of other factors relating to the outcomes of the Office of the Prosecutor's (OTP) investigations and cases and how the Court conducts its work, with particular emphasis on the Court's implementation of victims' rights. Some stressed that the work of the ICC is not sufficiently visible.

Other concerns were expressed about the lack of support and cooperation by States Parties.

Support for the ICC Review

While most CSO representatives support the ICC Review, some are concerned that there has not been more civil society engagement. 56 of the 77 CSOs that completed the

questionnaire were aware of the ICC Review, but only 25 had been consulted or had provided input to the process so far.

Many expressed distrust in the “State Party-driven process” and concern that political and financial considerations could lead to weakening the ICC. Some were unconvinced that States will support measures to improve the functioning of the ICC in important areas. One participant from Kenya said:

They might be unwilling to take on the proposals meant to improve the operations of the ICC and especially those related to the OTP, Victim and Witness Protection, and Victims Reparation.

Initial General Comments on the Independent Experts’ Report

CSO representatives who participated in the webinars to review the final report of the Independent Expert Review supported many of the Experts’ recommendations. Recommendations for the ICC to strengthen its relationship with civil society were particularly welcomed. One participant from Nicaragua stated in their questionnaire answers:

Only high-profile international organizations have direct access to the Court. The Court needs to engage with civil society in different countries and regions.

Webinar participants took particular note of the findings and recommendations of the Experts in relation to the internal functioning of the ICC, including distrust between its organs, strong perceptions of a lack of leadership and accountability, gender inequality, staff dissatisfaction and accounts of bullying and harassment. Many stressed serious concerns regarding the institutional situation’s impact on the effective operation and credibility of the Court.

Many were disappointed that, although the Experts had highlighted underfunding of the Court, they did not recommend that the ASP increase the resources available to the Court. Instead, the Experts proposed a number of measures to limit and delay investigations and reduce the scope of the ICC’s cases, which would curtail the Court’s efforts to address impunity, much to the dismay of many CSO representatives.

Preliminary Examinations

Many concerns were raised about the length of some preliminary examinations as well as the coherence, consistency and transparency of how some have been conducted. For example, one participant from Côte d’Ivoire said:

Preliminary examinations rarely lead to real investigations. They are lengthy and ineffective. There is not much transparency in the choice of countries and not much information on the process. [They have] no influence and/or impact on the reduction and cessation of crimes committed in the countries under review.

CSO representatives participating in the webinars overwhelmingly supported the Experts’ recommendations that: transparent criteria should be adopted for opening preliminary

examinations; strategy plans, including timelines and benchmarks, should be established for each preliminary examination; and outreach should start at the opening of a preliminary examination.

However, many were concerned that the Experts' recommendation for the OTP to consider a higher threshold of gravity in determining whether to open an investigation could establish an opaque standard that may be applied inconsistently to different situations, despite the fact that all Rome Statute crimes are among the most serious of crimes of concern to the international community. One CSO representative from Singapore remarked:

Nuancing of gravity against a backdrop of atrocity crimes is very hard to delineate.

Investigations

83% of all questionnaire participants stated that strengthening investigations should be a high priority, with some expressing concern about the promptness, thoroughness and effectiveness of OTP's investigations and inadequate outreach. The majority of CSO representatives thought that investigations are not adequately resourced, and that States do not provide the Court with effective cooperation. One participant from Afghanistan stated:

I believe that [the] ICC/OTP investigates cases differently and ... they do not receive enough support from the State Parties if the crimes involve countries, such as [the] USA and Israel or members of NATO countries.

Webinar participants overwhelmingly supported the Experts' recommendations that the OTP should prepare a policy on investigations and strategies for specific situations. The vast majority also supported recommendations to strengthen the OTP's field presence, including by increasing the number of country experts and recruiting local investigative staff.

However, most CSO representatives opposed or expressed caution regarding the Experts' recommendation that challenging situations should be hibernated (temporarily suspended) if sufficient resources are not available to conduct serious investigations. One participant from Asia-Pacific commented:

This approach would give extra leverage to States to put more obstacles in the way of the ICC and justice.

Referring to Experts' indication that the lack of State cooperation may be a factor considered by the OTP in deciding whether to hibernate a situation, a participant focused on Burma/Myanmar questioned whether this approach would be consistent with the purpose of the Rome Statute, stating:

In most cases we need an investigation because the state has refused cooperation.

Another participant from Malaysia asked:

Isn't it the responsibility of the ASP to provide resources if the ICC decides to proceed with an investigation?

Cases

Although most CSO representatives agreed with the OTP's policies in relation to case selection and charging, many thought that the policies have not been implemented consistently. One participant from the Democratic Republic of Congo stated:

In the majority of cases, [the] OTP has focused on the cases of those opposed to the government (armed groups, opposition political actors). As a result, this policy, which is not in line with the spirit of the Rome Statute, has left several key perpetrators of crimes unpunished.

Most were less than confident that States would arrest and surrender suspects to the ICC or that the ASP would ensure that States cooperate.

Most participating CSO representatives perceived ICC trials to be fair and to respect the rights of the accused. However, some expressed concern about the implementation of victims' rights during cases. A number of CSO representatives considered that the ICC's trials are not expeditious.

While many CSOs agreed with the Experts that the quality and quantity of evidence should be the OTP's main concern in case selection and charging, some stressed that this approach should not result in the ICC further scaling back on its efforts to prosecute crimes, including sexual and gender-based violence, that are often challenging to investigate.

Representatives cautioned that the Experts' recommendation to limit the scope of cases (temporally, geographically and with regard to modes of liability) is not consistent with the OTP's policy to bring charges that, as much as possible, reflect the true extent of criminality that occurred in a given situation—a policy that the vast majority of CSO representatives who completed the questionnaire expressed strong support for.

Outreach

Most CSO representatives who completed the questionnaire considered that outreach is insufficient at all stages of the ICC process and called for this to be addressed as a priority, including through the provision of additional resources by the ASP to support the Court's efforts. One participant focused on the Darfur situation stated:

In terms of outreach to victims and the affected communities, in our case it wasn't the ICC's initiative, it's us who have worked very hard to establish [a] relationship with the Court.

The vast majority of webinar participants supported the Experts' recommendation that an outreach plan should be developed for each ICC situation. However, many opposed the Experts' recommendation that, if additional resources are not provided to the ICC to conduct outreach, CSOs could conduct outreach for the Court. Some explained that while the ICC and CSOs may collaborate in relation to outreach, CSOs cannot speak on behalf of the Court and they also lack resources. One participant from Asia-Pacific stated:

It is outraging to suggest that the ICC should use the very limited resources of civil society groups. The burden is on the ASP to give the ICC resources to function effectively.

Victim Participation

CSO representatives who completed the questionnaire expressed mixed views regarding the effectiveness of the ICC's victim participation system. While many expressed confidence in the system, others were concerned about the ability of victims, especially marginalized victims, to access the process. Some commented that the requirements of applications and timelines were onerous and inconsistent. One participant focused on a situation under investigation stated:

The limited time period given to [the Victims Participation and Reparations Section of the Registry] and the victims for filling and submitting the application forms [undermines] victims' effective participation.

CSO representatives also questioned the effectiveness of the ICC systems in place to protect victims who want to participate. One participant focused on Venezuela emphasized:

Many victims are afraid to participate. The system needs to take into account the risks to victims and provide appropriate protection mechanisms.

Although a significant majority of webinar participants supported the Experts' recommendation for the ICC to conduct what appears to be an internal review of victim participation, some thought that the Experts should have gone further, especially in light of the long-standing nature of some of the concerns that the ICC has yet to address. One participant from Asia-Pacific stated:

[The Experts] have put a lot of trust in the ICC to take appropriate steps [even though] these issues have existed for a long time. [It is a] missed opportunity to leave this to the ICC without providing detailed recommendations based on their findings.

Reparations

Only a small number of CSO representatives who completed the questionnaire said they had been following the ICC's reparations proceedings, which have been completed in four cases so far. Some concerns were raised about the length and clarity of the proceedings in some cases. One participant focused on the Democratic Republic of Congo stated in relation to reparations in the *Lubanga* case:

[The ICC should expedite reparations because] the [situation for] victims who participated in the proceedings more than 8 years ago ... is getting worse and they are tired of waiting.

During the webinars, CSO representatives expressed overwhelming support for the Experts' recommendations that the Court further develop consistent and coherent principles relating

to reparations as well as standardized, streamlined and consistent procedures and best practices applicable in the reparations phase of proceedings.

Many supported the Experts' recommendation that reparations proceedings should commence pending the outcome of an appeal against conviction, subject to effective outreach being conducted to manage victims' expectations. However, the fact that more CSO representatives did not support the recommendation indicates that some may be concerned about starting the process before a final conviction, since a conviction overturned on appeal would result in the termination of the reparations proceedings and disappointment of victims.

Trust Fund for Victims

All CSO representatives who completed the section of the questionnaire about the Trust Fund agreed that it is a vital part of the Rome Statute system. However, some expressed concerns and uncertainty about the coherence, consistency, timeliness and accessibility of its activities.

Some highlighted the need to increase the funds and capacity of the Trust Fund. The vast majority of CSO representatives participating in the webinars supported the Experts' recommendation that the Trust Fund develop a fundraising strategy.

However, many were opposed or expressed caution regarding the Experts' recommendation that the Trust Fund's functions be restricted to fundraising, administering the funds and releasing the funds as ordered by the Court. Although some recognized that this would allow the Trust Fund to focus on fundraising, concern was raised as to whether its other functions would be performed effectively if they were reassigned to the Registry, especially without a significant increase in the resources of the Registry's Victims Participation and Reparations Section.

WFM/IGP's Recommendations

The ICC and States Parties should:

- Fully consider the views and detailed recommendations of civil society set out in this report and other submissions by CSOs, including their feedback on the Independent Experts' recommendations, in determining which reforms to take forward and how to implement them;
- Consult broadly with civil society, especially CSOs that are working against impunity in Africa, Asia-Pacific, Eastern Europe, Latin America and the Caribbean, and the Middle East and North Africa, throughout the process to obtain their further input in operationalizing reforms; and
- Keep civil society fully informed of progress with implementation efforts and the impacts of reforms.