



**Judicial Center of the French Association for the Promotion of Universal Jurisdiction
member of the International Coalition for the International Criminal Court**

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TO THE INTERNATIONAL CRIMINAL COURT**

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**Recommendations of the French Association for the Promotion of Universal Jurisdiction
(AFPCU)**

December 8, 2018

The French **Association for the Promotion of Universal Jurisdiction** (AFPCU) is an active member of the International Coalition for the International Criminal Court.

The AFPCU is the first French association to provide continuous information on trials applying the universal jurisdiction mechanism, ongoing trials before national courts of international character and the International Criminal Court (ICC).

At the national level, the AFPCU is actively mobilizing around a legislative improvement of French law to the Rome Statute creating the International Criminal Court.

It also devotes part of its activity to raising awareness, documenting, reporting on the prosecution of international crimes both before national and international jurisdictions.

In addition, it is mobilized on reflections, study groups, reports tending to a better consideration of the rights of the victims, the rights of the Defense, and compensation mechanisms before national and international jurisdictions concerning international crimes.

Essentially funded by its members and donations from individuals, the AFPCU is independent of any government, political trend, economic power and religious group.

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INTRODUCTION

The Assembly of States Parties of the International Criminal Court will hold its 17th session in The Hague from December 5 to 12, 2018 as the activities of the Court intensify, and it must undergo judicial criticisms concerning a number of malfunctions within the institution.

This document presents the three priority recommendations of the French Association for the Promotion of Universal Jurisdiction (AFPCU).

Before doing so, the AFPCU urges States Parties to affirm their support for the International Criminal Court, and to support the provision of additional resources to enable the Court to expand its work in 2018.

In addition, the AFPCU urges States Parties to the ICC to:

- Enhance their commitment to asset recovery and cooperation in financial investigations;
- Actively support the right of the victims to freely choose their lawyers and benefit from legal aid regardless of the mode of representation chosen;
- Pay attention to respect for the rights of the accused in the International Criminal Court cases;
- Strengthen measures ensuring States' cooperation with the International Criminal Court and reinforce the implementation of the principle of complementarity.

RECOMMENDATION N°1

Enhance commitment to asset recovery and cooperation in financial investigations

I – CONTEXT

Although the International Criminal Court (ICC) does not have jurisdiction over crimes of corruption or money laundering, the efforts of both the ICC and the States Parties in this regard are key in the fight against impunity for crimes covered by the Rome Statute.

Indeed, perpetrators of crimes under the Rome Statute are often themselves involved in financial crimes (source for them either of profit or funding) or maintain links with perpetrators of financial crimes. As a result, the location, freezing, seizure and recovery of assets stolen or linked either to the commission of international crimes or to persons accused of such crimes, are receiving increasing attention, not only by the ICC, but also from the entire international community.

The Court can thus benefit from significant synergies by joining efforts in financial investigations and asset tracing, including measures taken by the States at the national level, as well as international mechanisms and networks.

The reinforcement of financial investigations established itself exponentially since the the Lubanga case, where the Court provided for several compensation phases.

In this respect, the effectiveness of financial investigations is essential to:

- The implementation of the investigative role of the Office of the Prosecutor and the strategy adopted by the Office of the Prosecutor to diversify its sources of evidence;
- The identification of assets for the purpose of granting compensation to the victims;
- The prevention of diversion of legal aid, in particular by determining the indigence of suspects.

In addition, several ICC bodies are already conducting financial investigations within the mandate of the Rome Statute, taking into account the rights of the Defense, including the presumption of innocence and the right of third parties to good faith.

First, Article 54 of the Rome Statute allows the Office of the Prosecutor to conduct financial investigations:

- To identify financial flows that can provide evidence of crimes or links characterizing crimes, thus making it possible to determine criminal liability and rely less on witnesses, who require significant resources;
- To identify the assets that could form the basis of possible confiscation and reparation orders (Article 93 (1) (k) of the Rome Statute).

Second, Article 57 of the Rome Statute allows the Chambers - after the issuance of an arrest warrant or subpoena - as provisional measures for the purpose of confiscation, especially in the best interests of the Victims, to address requests for the "*identification, location, freezing or seizure of proceeds of crimes, property, assets and instruments related to crimes*"¹.

Third, Articles 75 and 93 of the Rome Statute allow the Registry to contact the Office of the Prosecutor to obtain relevant information available to it, in accordance with a memorandum of understanding internally concluded between the two organs. The Registry then liaises between the States concerned for the purposes of executing the applications and conducts financial investigations to rule on the indigence of a suspect who seeks legal aid at the expense of the Court².

However, in carrying out the above-mentioned activities, the ICC bodies encounter a series of difficulties, which have been highlighted during recent meetings on the subject and which focus on:

- The complexity of financial investigations (almost invariably international) compared to criminal investigations or other non-financial surveys. Indeed, in the context of financial investigations, and in particular investigations tending to prove the character or the illicit origin of certain assets, elements such as knowledge, intention or purpose must be deduced from factual objective circumstances.
- Difficulties in the cooperation of States Parties to the ICC in receiving and sharing information for the purposes of investigations. As the ICC does not have its own police force, it is almost entirely dependent on the cooperation of the States Parties, which must

¹ Articles 57-3-e and 93-1-k of the Rome Statute.

² Rule 21-5 of the Rules of Procedure and Evidence.

fully cooperate in accordance with Article 86 of the Rome Statute, in particular by making the necessary adjustments to their legal and institutional framework (Article 88 of the Rome Statute).

In light of the above, the AFPCU wishes to make proposals to improve cooperation in financial investigations between the ICC and States Parties in relation to 1) States Parties, 2) ICC, 3) States Parties and the Court jointly.

II – RECOMMENDATIONS FOR STATES PARTIES

- 1) Review and adjust national laws, procedures and policies on cooperation for financial investigations (Article 93 (1) K of the Rome Statute).
- 2) Publicize the different national channels to be addressed by identification and location requests, which do not require enforcement action and are more easily enforceable, as opposed to requests for freezing and seizure, which require larger legal ramifications such as a decision of a civil judge.
- 3) Continue to raise awareness among the relevant authorities and national officials of the Court's mandate in the area of financial investigations and asset recovery, as well as the role and responsibilities of the Court's organs in this area (prosecutor's office, rooms, transplant).
- 4) Open national investigations on the possible existence of financial crimes on the basis of information received in the context of requests for cooperation from the Court.
- 5) Reinforce, in the context of the Assembly of States Parties, the importance of cooperation in financial investigations and include in the agenda the issue of cooperation in financial investigations.

III – RECOMMENDATIONS FOR THE INTERNATIONAL CRIMINAL COURT

- 1) Raise awareness about the mandate of the Court and the obligations of States Parties. The recent elaboration of a manual describing the Court's mandate is therefore fully welcomed by the AFPCU³.
- 2) Enhance understanding and clarification of the applicable provisions of the Rome Statute, making publicly available the case law of the ICC and the Appeals Chamber regarding the extent of cooperation required.

³ ICC; Financial investigations and asset recovery, 1st Edition, November 1st, 2017.

- 3) Synthesize the rules in force in the different national systems to better understand the difficulties of implementation and better adapt the requests addressed by the Court to the States.
- 4) Develop coherent models of requests for assistance containing the necessary information to enable the authorities to answer them (e.g., legal basis, facts in question, information to identify the person concerned, possible link with the Requested State, concrete measures requested).
- 5) Establish or strengthen links with new international partners such as the Egmont Group, the CARIN network, UNODC, STAR, INTERPOL.

IV - RECOMMENDATIONS TO STATES PARTIES AND THE ICC

- 1) Collaborate, including through joint training, technical assistance and continued recruitment of qualified staff, building internal capacity to conduct complex international financial investigations and locate assets dispersed in several financial centers (sometimes extraterritorial or occult).
- 2) Use further sources of information, such as financial intelligence units and law enforcement networks (CARIN network).

RECOMMENDATION N°2

Actively support the right of the victims to freely choose their lawyers and benefit from the legal aid system and resources of the Trust Fund for victims

I - CONTEXT

The system of appointment of victims' legal adviser must be subject to special consideration and a sound policy in view of the specificity of the International Criminal Court, which is the first international criminal court to grant the victim a place as a participant in the proceedings and as a genuine civil party at the compensation stage.

Within the ICC, victims participate in proceedings through their legal representatives. This therefore implies that "[t]he quality of legal representation received by victims is essential to their meaningful and effective participation in ICC proceedings"⁴. Also, the legal aid policy must be able to devote a specific part to the system of representation of the victims in the same way as the representation of the accused which has made significant developments.

The organization of the legal representation of the victims is specified by Rule 90 of the Rules of Procedure and Evidence of the Court⁵. These provisions provide a legal basis for the evolution of the system of victim representation, a progressive interpretation of this rule allowing the free choice of legal representatives.

⁴ Report of the Panel of Independent Experts on Victims' Participation in the International Criminal Court, July 2013, para. 12

⁵ **Rule 90 Legal representatives of victims**

1. A victim shall be free to choose a legal representative.
2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.
3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.
4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.
5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.
6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1.

On the one hand, individuals wishing to participate in proceedings before the ICC as victims must remain free to appoint a legal representative of their choice, whether or not common to a group (or all) of victims. This principle is firmly recalled in rule 90 (1) of the Rules of Procedure and Evidence, which provides that "*victims are free to choose their legal representative*".

It is in this respect for the Registry and the Chambers, in their respective functions, to ensure that victims can as far as possible hold this right and enjoy the legal representation they wish. They must therefore be free to choose a specific Counsel, or, failing that, to be guaranteed that their preferences will be taken into account in the assignment of a Counsel. In addition to the right of the victims to choose their Counsel, the consideration of their opinion in the assignment of a Counsel is essential so that the victims can take full ownership of the procedure and the legitimacy of the Court be strengthened.

On the other hand, the potential - and unfortunately frequent - indigence of the victims should not be an obstacle to their right to freely choose their Counsel. Although Rule 90 (5) of the Rules of Procedure and Evidence provides that "*a victim or a group of victims who cannot afford to pay a common legal representative chosen by the Court [our emphasis] may benefit from the Registry assistance, including, where appropriate, financial assistance*", the victims exercising their right to choose their own Counsel should not be denied legal aid. As the Registry's proposal for a new Legal Aid Policy points out, even if the victims do not have a right to legal aid equal to that of the suspects and defendants, "*the experience of the proceedings before the Court shows that it must ensure that indigent victims can benefit from legal aid in order to effectively exercise the rights conferred on victims by the fundamental texts of the Court*".⁶

Thus, the AFPCU argues that in a generalized context of international criminal justice crisis, strengthening the legal representation of victims is one of the keys to restoring confidence in the ICC. The victim participation system should empower the victims in the judicial process.

In addition, in recent years, the States Parties have adopted a budgetary profitability approach that has proven harmful to victim representation in the International Criminal Court⁷. Although the internalization of the legal representation of the victims may have certain advantages, especially budgetary ones, the AFPCU considers that the primary consideration must be that of genuine and effective participation of the victims in Court proceedings, and that financial considerations should not take precedence over the right of the victims to choose their own Counsel guaranteed by the Rules of Procedure and Evidence of the Court. In addition, the legitimacy of the Court would suffer greatly from the discontent of participating victims who might feel excluded from the proceedings.

⁶ Proposal submitted by the Registrar of Amendment to the Legal Aid Policy of the International Criminal Court, submitted for consultation in September 2018, para. 14.

⁷ Human Right Watch, Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond, August 29, 2017.

In this context, support and understanding of victims' choices regarding their representatives at the Court can be avenues to improve the legitimacy and publicity of ICC decisions.

Finally, the AFPCU wishes to draw the attention of the ICC and the States Parties to the importance of the work of the Trust Fund for Victims. However, in its Report of the Committee on Budget and Finance on the work of its thirtieth session, the ICC noted that the Fund had underutilized the budget allocated to it, with an execution rate of around 78,4% percent in 2017, mainly due to the non-filling of approved positions.

The AFPCU argues that this sub-allocation is doubly harmful. On the one hand, because it directly affects the activities of the Fund and the compensation of the victims. On the other hand, the lack of recruitment on certain positions whose mission is to raise funds, penalizes the activities of the Fund again. Indeed, the recruitment of qualified personnel would make it possible to find solutions to the problems of private fundraising encountered by the Court, and thus to reap the 40 million euros needed by the Fund Secretariat to finance its victim assistance and reparation programs over the next few years.

In response to these observations, the AFPCU wishes to make proposals on the free choice of lawyers, the conditions for the award of legal aid system, as well as on the shortcomings of the Trust Fund for Victims, to (1) States Parties, (2) the ICC, (3) States Parties and the Court jointly.

II - RECOMMENDATIONS TO STATES-PARTIES

The AFPCU recommends the States Parties to ensure with the Registry that the right of the victims to choose their Counsel is fully guaranteed by the new Legal Aid Policy and that legal aid is adequately funded by the budget of the Court for the coming year. The AFPCU also recommends that the States Parties ensure that their contributions to the Court's budget are made without delay.

III - RECOMMENDATIONS TO THE INTERNATIONAL CRIMINAL COURT

Regarding the legal representation of the victims before the ICC, the AFPCU recalls that the Clerk, having accepted the appointment of an external counsel in his draft revision,⁸ the judges should therefore allow its effective application. In addition, the AFPCU supports the use of a progressive approach of rule 90 to victim representation.

⁸ International Criminal Court, "Comprehensive Report on the Reorganization of the Registry of the International Criminal Court", August 2016.

Therefore, the AFPCU recommends that the Practical Guide for Chambers' Procedures be amended to describe the steps that the Chamber and the Registry will take in accordance with Rule 90, including the criteria to be used by a Chamber to determine whether it is necessary to move from the free choice of the Counsel by the victims under rule 90 (1) to the choice by the victims of a common legal representative under Rule 90 (2) and, ultimately, to the appointment by the Chamber of the said common legal representative under Rule 90 (3).

Finally, the AFPCU reaffirms its commitment to an extensive application of the Legal Aid Policy, benefiting all indigent victims, without prejudice to their right to appoint a Counsel of their choice. In this regard, the AFPCU calls on the Registry to review the Legal Aid Policy and invites it to clearly indicate the possibility for the victims having chosen their legal representative (whether common or not) to benefit from legal aid as long as they fulfill the conditions of indigence.

It is therefore incumbent upon the Registrar, in particular when revising the Legal Aid Policy, to ensure that all indigent victims can benefit from legal aid, without prejudice to their right to choose their own lawyer.

III - RECOMMENDATIONS TO STATES-PARTIES AND THE ICC

- *Regarding the legal representation and the legal aid system*

With regard to the representation of the victims, the AFPCU recommends that State Parties and the ICC combine their efforts to ensure that the victims have the freedom to choose their legal Counsel and that they receive financial assistance regardless of their chosen mode of representation.

- *Regarding the under-allocation of the resources of the Trust Fund of victims*

With respect to the Trust Fund of victims, the AFPCU encourages the ICC and the States-Parties to address this issue of the under-allocation of the resources of the Trust Fund of Victims. For the ICC, it will be a question of monitoring the execution of the budget of the Fund and helping to address the difficulties encountered. For States Parties, it will be necessary to encourage their nationals to apply for unfilled positions. Indeed, if the Fund faces an increased workload, it must be able to use all the means available to it in the most efficient possible manner.

RECOMMENDATION N°3

Pay attention to the respect for the rights of the accused in International Criminal Courts cases

I – CONTEXT

The universalist anchoring of the respect for the rights of the Defence demonstrates the importance of the effective and non-theoretical implementation of these rights, which is fundamental to the smooth running of the proceedings and trials.

If the place of the victims in the various proceedings brought before the Court must be central, this cannot be to the detriment to the rights of the accused. To this end, intransigence must be the keyword in the conduct of any proceeding and trial.

The scale of the prosecuted crimes, the gravity of the allegations and the heavy incurred sentences call for extra caution regarding the respect of the rights of the accused.

While contemporary justice tends to a quantitative approach of the cases with a strong focus on the results, it must be affirmed that an acquittal, although it may be painful for the victims, may be the sign of the well-being of international justice. Far from being a statement of failure, it is rather a demonstration of the exemplarity and integrity of the Court and its proceedings.

The budget allocated to the Defence is one of AFPCU first preoccupation, the AFPCU being concerned about the reduction of the remunerations of the Defence teams, while it shall be kept in mind that the valorization of the work of these teams and the resources allocated to them are elements guaranteeing the observance of high standards of the international justice system for the conduct of exemplar investigations and trials.

The guaranty of a fair trial, provided for by article 67 of the Rome Statute, must also remain one of the main concerns for the ICC. The practical effectiveness of the principle of equality of arms faces many obstacles, particularly concerning the institutional status of the Defence Office attached to the Registry, and the lack of available resources for the Defence. These elements contribute to an imbalance between the parties and prevent the Defence from questioning every element of the prosecution case in order to see through their defence strategy.

Both these human and financial resources remain today incommensurate with those of the Prosecutor Office. While article 67.1 of the Statute requires “*the full equality*” of the accused in front of the prosecution when it comes to the enjoyment of his rights, the investigation resources available for the Defence Office remain significantly smaller than those of the Prosecutor Office.

The Defence Office does not benefit from contact networks as extensive as those of the Prosecutor Office, which usually benefits from an *ad hoc* office in the countries where it conducts investigations, as well as a department responsible for the cooperation with the States, which allows regular contacts with various national authorities. The Prosecutor Office also has a larger staff, including investigators, experts and interpreters, which are valuable functions for the management of international criminal cases.

Similarly, the AFPCU is concerned about the possible breaches which can be made to the **protection of the presumption of innocence**, which is a cardinal point for impartial and effective justice.

The question of the consideration given to the presumption of innocence arose as early as in 2012 with the Ngudjolo Chui case, for which the judgment of acquittal rendered by the ICC Trial Chamber II emphasized that “*stating that an accused is not guilty does not necessarily mean that the Chamber establishes his innocence*”⁹. A judgment of acquittal, when total, must be unconditional and must not question the innocence of the acquitted individual.

This question arose again in 2017 in the Gbagbo case, during which several criticisms were made concerning the ICC Trial Chamber decision to dismiss an application for conditional release from the Defence of Laurent Gbagbo “*in the interests of justice*”, because the Defence had made a technical error in its request¹⁰.

The presumption of innocence of the accused and the obligation to construe the law in compliance with human rights must guarantee the right of the accused to have their applications for conditional release judged fairly.

⁹ « Une telle décision démontre simplement que les preuves présentées au soutien de la culpabilité ne lui ont pas permis, au vu du standard de preuve, de se forger une conviction « au-delà de tout doute raisonnable. », CPI, communiqué de presse, 18 décembre 2012, disponible en ligne [<https://www.icc-cpi.int/Pages/item.aspx?name=pr865&ln=fr>].

[free translation]: “*Such a decision simply shows that the evidences brought to support the guilt accusation did not allow it, considering the standard of proof, to be convinced “beyond any reasonable doubt”*”.

¹⁰ The Defence had written a request for conditional release without taking into account the modifications recently made to the cited articles.

In general, accused individuals must be guaranteed **the right to be tried in a reasonable time**, without undue delay, as provided for in article 67.1.c of the Rome Statute, particularly when the accused individuals are in custody.¹¹

Therefore, all proceedings, measures and protocols must concur to the respect of the right to be tried in a reasonable time, including the human and financial resources allocated to the Court.

AFPCU is concerned about possible violations of the right to be tried in a reasonable time considering the time taken to investigate and hear the cases brought before the Court. A particular attention must be paid to this question in the event that the length of the proceedings and the pre-trial custody may be proven inadequate with the sentence incurred or imposed, thus causing a certain prejudice to the person being prosecuted.

As such, if the article 60.4 of the Rome Statute provides that “*The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.*”, it remains difficult in practice to protect the accused individuals from prolonged pre-trial custody because of the delay caused by the Prosecution, notably, in the event of a **late communication of the charges**.

Thus, in the Lubanga case, the judges of the Trial Chamber I tried to terminate the unjustifiably prolonged detention, following the conditional suspension of the proceedings for lack of communication of the exhibits by the Prosecutor. This decision, however, was overturned by the Appeal Chamber which judged that [free translation – our emphasis] “*if a Chamber orders a conditional suspension of the proceedings, the unconditional release of the accused is not the "inevitable consequence, nor the" only appropriate option*”.¹²

The impossibility for the Prosecutor to gather the evidence and to allow the accused to know them in a reasonable time should necessarily have for unavoidable consequence the release of the accused.

Finally, the fundamental principle of **the right to a public trial**, enshrined in article 67.1 of the Rome Statute, constitutes an essential guaranty for the rights of the accused.¹³

¹¹ The AFPCU underlines that the respect of the right to be tried in a reasonable time must not be implemented to the detriment of the right of the accused to have enough time and all necessary means to prepare his/her defence.

¹² *In French*: CPI, Chambre d’appel, Le Procureur c. Thomas Lubanga Dyilo, arrêt, ICC-01/04-01/06OA12, 21 octobre 2008, p. 3-27.

¹³ Beyond the recognition of this right among the rights of the accused, articles 64.7, 74, 76, 83 remind that this essential guaranty is applicable to every phase of the proceedings, from trial hearings to the sentencing and the appeal.

Article 68 of the Rome Statute provides for the confidential classification of documents, identity of the witnesses and writings, but it must not be prejudicial or contrary to the rights of the Defence and the requirements of a fair trial. Although the right to a public trial is not absolute, some exceptions being provided for, the latter must be sporadic and used only when revealed strictly necessary.

The AFPCU is concerned about the routine and unjustified use of practices that infringe this right and reminds that *in camera* hearings as well as the confidential classification of documents, identity of witnesses and writings, are an exceptional regime which should only be resorted to in the event of an objective, serious and established risk.

In addition, if necessary and motivated, the AFPCU recommends a greater recourse to avoidance and correction measures, those shall be favored to limit the prejudicial effect on the right of the accused.¹⁴

II – RECOMMENDATIONS TO THE INTERNATIONAL CRIMINAL COURT

- 1) Attached to the guaranty of a fair trial for every prosecuted individual and to the principle of equality of arms, the AFPCU recommends ensuring the institutional role of the Defence Office by recognizing its organic independence. The AFPCU also exhorts to provide Defence with sufficient technical, material, human and financial resources to enable any prosecuted individual to enjoy “*full equality*” with the Prosecution, in accordance with article 67.1 of the Rome Statute.
- 2) Worried by the attacks to the presumption of innocence found in judged or pending cases before the ICC, the AFPCU recommends that the prosecuted and individuals in custody be guaranteed the right to have their application for conditional release examined. The AFPCU also insists on the unavoidable nature of the full and unconditional recognition of innocence of an individual in the event of a judgment of total acquittal.
- 3) Concerned about the respect of the right of prosecuted persons to be informed of the charges against them in a reasonable time and to be judged without undue delay, the AFPCU recommends that sufficient human and financial resources be allocated to ensure the quick trial of prosecuted individuals, but also that any excessive delay in the prosecution's communication of the charges shall result in the release of the individuals in custody.

¹⁴ Reference is made to good practice recommendations from the Trial Chamber II, such as the obligation to justify the extraordinary measures, the re-classification of the hearings and documents as soon as possible, the establishment of a list of confidential elements, the implementation of a codified system to publicly deal with confidential questions, *in French*: CPI, Chambre de première instance II, Le Procureur c. G. Katanga et M. Ngudjolo, *Décision orale*, Transcrit, ICC-01/04-01/07-T-189-FRA, September, 20 2010, p. 7-12.

- 4) Committed to the right to a public trial enshrined in article 67.1 of the Rome Statute, the AFPCU recommends that derogations to this right be only implemented when they appear to be strictly necessary – in the case of objective, serious and established risk. The AFPCU also recommends that it shall be effectively guaranteed that the confidential classification of documents, identity of the witnesses and writings, would not be prejudicial to or in contradiction with the rights of the Defence and the rule of a fair trial. Last, the AFPCU recommends a greater use of avoidance and correction measures as recommended by the Trial Chamber II.

III – RECOMMENDATIONS TO THE STATES PARTIES AND THE ICC

- 1) In connection with the recommendation to the Court regarding the necessity to provide the Defence with the technical, material and financial resources in order to guaranty a full equality of the arms with the Prosecution, the AFPCU recommends that the Court increases the amount of legal aid allocated to the Defence to come closer to the allowances allocated by other international criminal jurisdictions¹⁵.
- 2) The AFPCU is also concerned about the decrease in the remuneration of the Defence teams and recommends considering the variation of the financial resources allocated to the Defence budget depending on the complexity of the cases and providing for a specific budget line for the conduct of investigation and the transportation in situations countries.
- 3) Concerning the use of the Contingency Fund, the AFPCU notes that the definition of “*unforeseen event*” used in the resolution of September 10, 2004 is imprecise¹⁶. The definition makes it possible to use the funds in a systematic rather than punctual way. In this context, the AFPCU recommends that the Court clarify and narrow the definition of “*unforeseen event*” as referred to in the aforementioned resolution in order for the funds to be used wisely and allocated fairly between the various parties. At the same time, the AFPCU recommends that the Court adjust its budget to reflect its real needs. Such an adjustment shall result in an exceptional use of the Contingency Fund.

¹⁵ *In French*: Richard I. Rogers, Rapport Evaluation du système d'aide judiciaire de la CPI, Global Diligence, 5 janvier 2017.

¹⁶ICC, Resolution ICC-ASP/3/Res.4, Programme budget for 2005, Contingency Fund, Working Capital Fund for 2005, scale of the assessments for the apportionment of expenses of the International Criminal Court and financing of appropriation for the year 2005, September 10, 2004.

RECOMMENDATION N°4

Strengthen measures ensuring States' cooperation with the International Criminal Court and reinforce the implementation of the principle of complementarity

1. Cooperation

Full cooperation between States Parties and the International Criminal Court (ICC) is essential to ensure access to justice for the victims of international crimes and to combat the impunity of their perpetrators. Such cooperation can be achieved through various actions, mainly: surrenders of accused to the Court, exclusion of personal and diplomatic immunities, and investigations and actions on the field.

In this context, the AFPCU joins President Silvia Fernández de Gurmendi in reminding the States of the need to implement the Court's arrest warrants in all the concerned regions. Such cooperation, provided in particular by Article 89 of the Rome Statute, makes it possible to guarantee or facilitate the work of the Court, which does not have sufficient field intervention capacity. In this framework, States play a vital role in the proper functioning of international justice.

It is also essential that States that have only signed the Rome Statute ratify it as soon as possible to ensure the jurisdiction of the Court and thus allow universal justice. In pursuit of this same objective, we recommend that States that have neither signed nor ratified the Rome Statute accept the jurisdiction of the Court.

We deeply regret Burundi's decision to withdraw from the Rome Statute. We welcome, however, withdrawal revocations from South Africa and The Gambia and look forward to full future cooperation.

Finally, cooperation between States Parties and the ICC must continue and strengthen in the field of financial investigations (identification, location, freezing and seizure of assets). Completed, these investigations will allow the recovery of assets that guarantee the financial compensation of victims. The exchange of financial information and the strengthening of investigative capacities at the national level are among the tools for this cooperation.

2. Complementarity

In order to enable the ICC to exercise its mandate in accordance with the principle of complementarity, which governs the admissibility of cases before the Court on the basis of the criteria of willingness and capacity of the States competent to investigate or prosecute, the States must take measures to enable national investigations and prosecutions to be carried out in accordance with the right to a fair trial.

In France, two cases relating to crimes committed in Rwanda in 1994 were the subject of investigations and prosecutions under the universal jurisdiction provided for by the law of August 9, 2010 on genocide and crimes against humanity. Although in this situation both cases could not be dealt with by the ICC because of its lack of temporal jurisdiction, the holding of these trials allows certain observations as to respect for the right to a fair trial.

First, the success of these procedures must be noted. Whether at trial in 2015 and appeal in 2016 for Pascal Simbikangwa (6 weeks), or the trial of Octavien Ngenzi and Tito Barahira in 2016 (8 weeks), the ability of justice to handle these cumbersome procedures, requiring significant judicial efforts, was undeniable. In fact, the following must be underlined: the material adjustments related to the state of health of two accused; the holding of preparatory meetings with the legal services and lawyers; the proper presence of escorts / squadrons of *gendarmérie* during hearings; the recruitment of a specialized assistant for sitting judges by the Paris Court of Appeal; the exceptional efforts made by the transplant services in Paris and Bobigny; the recruitment of an additional assessor; the preparation of forecast audience schedules; and the organization of the coming of the witnesses.

In addition, the following issues relating to the respect for the rights of the defense and the principle of equality of arms must be raised. As regards the exercise of the profession of lawyer during these proceedings, the determination and the amount of the legal aid granted was made under the existing legislative texts, without taking into account the costs generated by the extraordinary character of such a trial.

Moreover, in the Simbikangwa case, the defense lawyers asked that the Assize Court be transported to Rwanda to "*see the places and soak up the sensitivity of the country*". This request was refused, in particular because "*the Code of Criminal Procedure did not allow it*". The lack of competence of the French institutions in the countries of the places of commission of the crimes and the lack of technical means must here be highlighted as a real obstacle to the ability to adjudicate cases concerning facts which took place in countries of different culture. This obstacle can hardly be offset by the contradictory debate of the documents filed by the parties, including during the hearings.

Regarding the conditions of detention and trial of the accused, two points can be raised. On the one hand, the hearings were particularly long, and this had consequences for the accused, with, for example, very late returns to the cells. On the other hand, the possibility and the confidentiality of the access to the file by the accused was problematic as they could only have access to the file one hour per week in a room made available for this purpose and not in their cell. This point was raised in the Simbikangwa case because the conditions of consultation of the file were very restrictive, namely 25 procedural volumes supposed to be consulted in a small room for example. In the Ngenzi-Barahira case, this was raised by one of the defense lawyers during the investigation and therefore caused fewer problems during the hearings.

During these trials, motions and incidents of nullity of the proceedings were filed, but without success, mainly because of the lack of competence of the authorities in these areas. In the absence of appropriate legislation and because of a limited jurisdictional response, the hypothesis of a pool of specialized lawyers is not recommended. If the involvement of the Bar in the training of these lawyers is desirable, the specialization of lawyers is not. Also, French bar associations cannot make financial compensation for the expenses incurred by lawyers.