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The evolving role of NGOs in international criminal justice

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"Do the NGOs 'watch' internationalized criminal jurisdictions?"

Gilbert Bitti[1]

I will present six points:

1) Do we need civil society to watch public power and, if so, why do we need that?
2) The system of accountability at the ICC
3) What *can* NGOs do in such a system?
4) Do the NGOs really "watch"?
5) What *should* NGOs do?
6) What could be the role of NGOs in respect of proceedings before the Court?

1) Do we need civil society to watch public power and, if so, why?

NGOs are not elected for the purpose of watching public power and they choose to give themselves such a mandate.

By doing that, they expose what public power, and, more precisely, what States and the organizations of States are doing.

This public exposure is necessary because the public opinion has little knowledge of what States do in the international arena and what the international organizations they have set up do and how they function.

Such public exposure is also extremely useful to remind international organizations of what their mandate actually is[2].

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[2] For example, the ICC mandate is to put an end to impunity for crimes within its jurisdiction.

There is also what could be called a "democratic deficit" in the making and functioning of those international organizations.

First, in the making of those institutions: national parliaments do not exercise detailed control over their government's power in their respective countries when the constitutive instruments of those institutions are negotiated. Very often, discussions around such constitutive instruments are considered to be secret within the government and discussions are held in closed sessions.

Second, there is a democratic deficit in the functioning of those institutions: the lack of transparency may quite often be considered a serious problem. In addition, the functioning of those institutions is marked by a lack of democracy as the decision-making is most often in the hands of powerful States.

2) The system of accountability at the ICC

As far as the ICC is concerned, we can see a double system of accountability before States Parties, direct and indirect.

Judges and Prosecutors (the Prosecutor and the Deputy Prosecutors) are directly accountable to the States Parties. In accordance with article 46 of the ICC Statute, the Assembly of States Parties may remove them from office if they have committed serious misconduct or a serious breach of their duties, or if they are unable to exercise their functions.

Prosecutors, and especially the Prosecutor, have little protection in this regard. Indeed, contrary to the Judges where you need first a two-thirds majority of the other Judges and then a two-thirds majority of the States Parties for a removal from office, the Prosecutor may be directly removed by a an absolute majority of the States Parties. It is interesting to note that States have given the power to one person, the Prosecutor, to choose situations and cases for investigation and prosecution before the ICC, albeit with an internal review mechanism by the Pre-Trial Chamber, and it is the person with such powers who has the strictest system of accountability before the States Parties and the more limited protection against political action by them.

The ICC is also indirectly accountable to the States Parties through the approval of the budget by the Assembly of States Parties in accordance with article 112 of the ICC Statute.

This does not mean that the ICC is not independent from the States Parties although the need to get cooperation from States is a way for them to exercise strong control over the Court.

The ICC certainly has independence through the power given to it by article 15 of the ICC Statute, whereby it can start an investigation without being seized by a State Party or

the UN Security Council. This power, given to the Prosecutor, is subjected to strong internal control by Pre-Trial Chambers in accordance with the criteria set out in article 53 of the ICC Statute. It is interesting to note that the ICC Prosecutor did not use such a power for the moment. He may be forced to do so by the Pre-Trial Chamber acting on its own motion in accordance with article 53, paragraph 3 b) of the ICC Statute, or by victims acting in accordance with article 68, paragraph 3. Such a system of checks and balance is crucial to ensure the legitimacy of ICC investigations and prosecutions.

3) What *can* NGOs do in this respect?

The problem here is where to go when the system of accountability functions through States Parties.

Indeed, NGOs can not push the States Parties to put pressure on the ICC as this would contradict their line of action for the last ten years which is to preserve ICC independence from pressure from States.

So they are limited to putting public pressure on the Office of the Prosecutor of the ICC, as putting pressure on Judges would seem to be more difficult, taking into consideration their independence and necessary impartiality.

We will see later that there is also a "judicial" way for NGOs to put pressure on the Office of the Prosecutor, by using Rule 103 of the ICC Rules of Procedure and Evidence concerning "amicus curiae and other forms of submission".

4) Do the NGOs really "watch" the ICC?

There are several, serious problems for the NGOs – at least until today – to genuinely "watch" the ICC and be able to criticize, if need be, the functioning of this institution:

a) The ICC is largely a creation of the NGOs and it is always difficult to criticize one's creation.

b) The NGOs have fought a lot for the creation of the ICC which they still see as a fragile child which they have to protect: is that true? Would it not be better to address directly the shortcomings of the institution in order to ensure from the beginning its credibility?

c) One may wonder about the image NGOs have of the ICC Prosecutor and more generally of the prosecutors of internationalized criminal jurisdictions: indeed, whereas national prosecutors are seen very often with suspicion by NGOs because they may not respect basic human rights of defendants, international prosecutors seem to largely be perceived by NGOs as the champions of human rights. Indeed, when they are investigating mass-killings in war, they are in fact protecting the

right to life, as the crimes described in the statutes of the internationalized criminal tribunals and courts are simply the other face of the basic human rights protected by international human rights treaties. In this respect, it is interesting to note that States, during the negotiations of the ICC Statute in Rome, did not have such a naive belief. The power given to the Pre-Trial Chambers to review *ex officio* the decisions of the Prosecutor not to investigate or prosecute and to order the Prosecutor to do so when he declines for reasons of "interests of justice" was justified by numerous States explaining that the Prosecutor would be too dependent on powerful States and that those States would be in a position to force the Prosecutor to decline investigating or prosecuting due to "interests of justice" – whereas less powerful States would not be in the same position. Thus, for many States the check and balance established over the Prosecutor by the intervention of the Pre-Trial Chambers was meant to ensure equality of States before the ICC.

d) The NGOs want to maintain good relations with the ICC and especially with the Office of Prosecutor in order to maintain also their access to the information which the Office of Prosecutor could provide to them. This may also give NGOs an "illusion of power" as they think they can influence the Office of the Prosecutor by maintaining good relations. This is why some NGOs may be tempted to oppose, or at least not to support, a broad access to the Court given to victims as they think they may loose their power of influence.

5) What *should* NGOs do?

The problem for the NGOs until now seems to be finding a proper balance between the protection that they think the ICC deserves as a "young child" and the need to denounce the shortcomings of the system. This is why the first public letter of NGOs criticizing actions by the ICC Office of the Prosecutor only came out at the end of July 2006.

6) The role of NGOs in the judicial process

NGOs could have at least two different roles in judicial proceedings before the ICC:

a) They could assist victims in making applications to the Court to participate in the proceedings. Indeed, in accordance with Rule 89(3) of the ICC Rules of Procedure and Evidence, an NGO may present an application to participate in the proceedings with the consent of that victim. The *Fédération Internationale des Droits de l'Homme* (FIDH) was the first NGO to file applications for victims to participate in proceedings.[3]

[3] See Decision on the applications for participation in the proceedings of VPRS 1 to 6, 17 January 2006, Pre-Trial Chamber I.

b) In accordance with Rule 103, NGOs may at any stage of the proceedings and on any issue, request leave to present in writing or orally any observation to a Chamber of the Court. This could be very useful to bring more information to the Pre-Trial Chamber in order for that Chamber to exercise full control over the Prosecutor's decisions not to investigate or not to prosecute. This possibility has barely been used by the NGOs: only one request has been presented to date.[4] One may wonder if this is eventually driven by the NGOs' desire to maintain good relations with the Office of the Prosecutor for the reasons described above.

[4] Request submitted by the Women's Initiatives for Gender Justice on 7 September 2006 for leave to participate as amicus curiae in the article 61 confirmation proceedings.