

# fidh

International Federation for Human Rights

## FIDH POSITION PAPER NINTH SESSION OF THE ICC ASSEMBLY OF STATES PARTIES

New York, 6-10 December 2010

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security





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# Introduction

The Ninth Session of the Assembly of States Parties (“ASP” or “Assembly”) to the Statute of the International Criminal Court (“ICC” or “Court”) will be held in New York, from 6 to 10 December 2010.

Significant developments have taken place since the Eighth session of the Assembly held towards the end of 2009. Throughout 2010, the Court continued to operate in four situations, namely: Uganda, the Democratic Republic of Congo (“DRC”), the Central African Republic (“CAR”) and Darfur, Sudan. In March 2010, a fifth investigation was opened into the situation in Kenya. The Office of the Prosecutor has also continued to conduct preliminary analyses into various situations with a view to possibly opening further investigations. Situations under preliminary examination include: Afghanistan, Colombia, Côte d’Ivoire, Georgia, Guinea, Honduras, Nigeria and the Palestinian Territories.

The Court issued one arrest warrant for Callixte Mbarushimana for crimes committed in the Kivus, DRC and two summons to appear for Abdallah Banda Abaker Nourain (“Banda”) and Saleh Mohammed Jerbo Jamus (“Jerbo”), who are suspected of war crimes committed in Darfur. Callixte Mbarushimana was arrested in France on 11 October 2010 and is likely to be transferred to The Hague in the weeks following the Ninth session of the Assembly. Banda and Jerbo appeared voluntarily before the Court on 17 June 2010.

The first two ICC trials against Thomas Lubanga (first case) and Germain Katanga and Mathieu Ngudjolo (second case), which opened in 2009, have been ongoing. The third ICC trial, for the case against Jean-Pierre Bemba, opened 22 November 2010. Additionally, a confirmation of charges hearing for Banda and Jerbo is due to start on 8 December 2010. As a consequence, there is a prospect that the ICC will hold at least three trials in 2011.

Interesting developments have taken place in the field of victim participation. Victims have continued to participate in the two ongoing trials. Over 1000 victims could participate in the Bemba case.<sup>1</sup> Moreover, for the first time, victims participated in the proceedings in relation to the request for authorisation of the Pre-Trial Chamber to open an investigation, in accordance with Article 15 of the Statute (Kenya situation). Important measures have been taken by the Court to simplify the application process, facilitate legal representation of large numbers of victims and endeavour to make victim participation as meaningful as possible.

A landmark event of the past year was the Review Conference of the ICC Statute, which took place in Kampala, Uganda, from 31 May to 11 June 2010. The Review Conference made important decisions with respect to key amendments to the Rome Statute. Significantly, it also provided a space to “take stock” of achievements and shortcomings in the implementation of the Rome Statute system with respect to four relevant issues: the impact of the Rome Statute system on victims and affected communities, complementarity, cooperation, and peace and justice. Discussions in Kampala helped identify a number of significant positive developments, while also pointing to areas where further work needs to be done. In this regard, it is crucial that the Assembly and the Court ensure adequate follow-up of the findings made.

Throughout 2010, the Court has continued to face pressing challenges on the cooperation front. The African Union (“AU”) has once again disregarded the authority of the Court’s decisions. It has also refused to consider the opening of a Liaison Office at the AU. In addition, for the first time since the issuance of the arrest warrant against him, Omar Al-Bashir visited States Parties,

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1. At the time of writing, the ICC had ruled positively on 759 applications. Over 500 applications are still pending.

Chad and Kenya. Both countries have seriously failed to live up to their obligations by arresting and surrendering him to the Court.

Organisation of domestic proceedings for crimes under ICC jurisdiction, under the principle of complementarity, continues to be a challenge. FIDH has welcomed the OTP policy of positive complementarity. Our organisation endeavours to contribute to it through its various programmes. FIDH submits that further efforts must be deployed on this front to achieve prosecution of Rome Statute crimes at the domestic level.

This is the framework in which the Ninth session of the Assembly will take place. Issues before it include the follow-up of the Review Conference, the approval of the budget for 2011, as well as a range of issues related to the oversight role of the ASP.

This paper focuses on a limited number of areas, on which FIDH has particular expertise and would like to make recommendations upon.

FIDH has contributed actively to the papers developed by the Coalition for the ICC (CICC) Thematic Teams and subscribes to their content and recommendations. These papers are available at: <http://www.coalitionfortheicc.org/?mod=asp9>

FIDH is an umbrella organisation bringing together 164 human rights organisations from over 100 countries around the world. Its mandate is to contribute to the respect of all human rights, as defined in the Universal Declaration of Human Rights. FIDH aims at obtaining effective improvement in the protection of victims, the prevention of human rights violations, and holding perpetrators of serious violations to account. The fight against impunity for international crimes and the provision of assistance to victims of those crimes are among its main priorities. FIDH has been closely involved in following developments around the Rome Statute system. It has had a programme on international justice since the adoption of the Statute, and has a permanent delegation in The Hague since 2004. It is an active member of the CICC and member of its Steering Committee, as well as of the Victims' Rights Working Group (VRWG).



# I. Kampala Follow-Up

The Review Conference of the ICC Statute, held in May-June 2010, considered and adopted two key amendments to the Rome Statute: harmonisation of rules for international and non-international conflicts with respect to the use of certain weapons, and the definition of the crime of aggression, including conditions for the Court to exercise jurisdiction upon such crime. At the outcome of the Review Conference, FIDH expressed satisfaction about the agreement reached, while noting that the application of the provision on aggression as adopted has a potential to create double-standards and to undermine the independence of the Court. FIDH also regretted that States did not come to an agreement to delete the transitional provision in Article 124, which allows States adhering to the Rome Statute to opt-out of the Court's jurisdiction with respect to war crimes for a period of seven years.<sup>2</sup>

The Review Conference also devoted a segment to stocktaking on four topics which States Parties felt that there was a need to consider: the impact of the Rome Statute system on victims and affected communities, complementarity, cooperation, and peace and justice. Stocktaking discussions involved a number of activities and events bringing together States Parties, ICC officials, representatives of inter-governmental organisations, civil society and other experts. This exercise contributed to identifying both achievements and shortcomings. With respect to the latter, recommendations were made for further work to be accomplished on the relevant areas. FIDH believes that ensuring adequate follow-up of those discussions is crucial for the stocktaking exercise to bear fruits. The sub-sections below provide a brief assessment of key areas and make recommendations in that regard.

FIDH contributed greatly to the Review Conference through active involvement in preparations and through the participation of a large delegation, including member organisations from situation and preliminary analysis countries, in Kampala.<sup>3</sup> The organisation has already started working on follow-up and will continue to support this process.

## A. Victims and Affected Communities

FIDH pleaded for the inclusion of this matter among the stocktaking issues for debate in Kampala. The Rome Statute puts victims at the centre of international criminal justice, by acknowledging the suffering they have endured, by recognising their rights and giving them a substantial role in the Court's proceedings.

As an organisation oriented towards victims' rights, FIDH has worked extensively on the rights of victims of international crimes. It has monitored the ICC's implementation of those rights both by observing its judicial and institutional processes, and by supporting victims in countries where crimes within the jurisdiction of the Court have been committed.

FIDH has issued a number of publications assessing the implementation of victims' rights at the ICC.<sup>4</sup> The paragraphs below offer a brief assessment of developments in the field of victims

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2. FIDH Press Release, Conclusion of Landmark Review Conference: Difficult Compromise and Commitments to be Confirmed, 14 June 2010, <http://www.fidh.org/Conclusion-of-landmark-ICC-Review-Conference>

3. See also FIDH Report, ICC Review Conference: Renewing Commitment to Accountability, May 2010, <http://www.fidh.org/IMG/pdf/KampalaCPI543a-2.pdf>

4. See, e.g., 'Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs, April 2007, <http://www.fidh.org/Victims-Rights-Before-the-International-Criminal-Court>; The ICC First Years, December 2009, <http://www.fidh.org/IMG/pdf/NoteCPI516anglais2009.pdf>; Position Paper No. 14: Recommendations to the Eighth Session of the Assembly of States Parties to the Statute of the International Criminal Court, November 2009, <http://www.fidh.org/IMG/pdf/ASP532ang.pdf>; ICC Review Conference: Renewing Commitment to Accountability, May 2010, <http://www.fidh.org/IMG/pdf/KampalaCPI543a-2.pdf>

and affected communities, as well as an analysis of the findings made in Kampala. Finally, we look at the matter as presented before this session of the ASP and make recommendations. This analysis is based on FIDH's extensive expertise in monitoring the implementation of victims' rights at the ICC. For preparation of this analysis, we have considered the extensive number of documents prepared for and after Kampala, including documents prepared by the Focal Points and the Bureau.<sup>5</sup>

### *1. FIDH's Assessment of progress on implementation of victims' rights*

According to FIDH, the ICC has been making steady progress on the implementation of the rights of victims. Initial hurdles related to handling large numbers of applications seem to be in the process of being sorted out. A simpler and shorter form for participation has recently been approved. Also, through a recent decision, the Registry (Victims' Participation and Reparations Section – VPRS) has been instructed to accomplish a number of tasks to streamline the application process and facilitate decisions on acceptance or rejection of applications.<sup>6</sup> FIDH will monitor the impact of recent decisions in this regard.

Importantly, the Court has taken significant steps to group large number of victims under common legal representatives. It has also endeavoured to ensure that victims are significantly involved in participation so as to warrant that the process is meaningful to them. This has been done through the set-up of support structures in the field, as well as through modalities of participation which allow for the concrete involvement of victims in proceedings.<sup>7</sup>

Yet, key challenges lie ahead in the area of victims' participation. These include: further outreach to victims to inform them of their rights; acknowledging the role of and materialising support to intermediaries;<sup>8</sup> consulting victims and integrating their views when making decision clearly affecting their interests (including decisions by the Office of the Prosecutor on selection of situations and cases);<sup>9</sup> and adopting measures to implement the Statute's provisions on psycho-social assistance to victims.

### *2. FIDH's Assessment on outreach*

The Court has similarly made gradual progress in the conception and organisation of outreach activities. Outreach activities and outreach tools have increased and diversified. However, further field engagement is required. Some groups of the population and certain areas of the affected countries are not reached. It is also essential that outreach activities incorporate information on reparations and the role of the Trust Fund for Victims.

While a more efficient use of resources can be encouraged, a greater financial investment in outreach activities is required in order to adequately address some of these shortcomings.

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5. See inter alia RC/ST/V/1, Stocktaking of international criminal justice: Impact of the Rome Statute system on victims and affected communities - Draft informal summary by the focal points and ICC-ASP/9/25, Report of the Bureau on the Impact of the Rome Statute system on victims and affected communities

6. ICC-01/09-24, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2010; ICC-01/05-31, Decision on Victims' Participation in Proceedings Related to the Situation in the Central African Republic, 11 November 2010

7. See, e.g., Situation in the Republic of Kenya, Order to the Victim Participation and Reparations' Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, 10 December 2009, ICC-01/09-4, <http://www.icc-cpi.int/NR/exeres/3BA7A34D-63B7-48DD-A78E-3214F3F59F65.htm>; Prosecutor v. Jean-Pierre Bemba, Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, 9 November 2020, ICC-01/04-01/07-2517, <http://www.icc-cpi.int/NR/exeres/A522A2B0-E736-415C-BB66-CB77A82CC21C.htm>; Prosecutor v. Germain Katanga & Mathieu Ngudjolo, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005, <http://www.icc-cpi.int/NR/exeres/4397AEED-DAFB-4C76-A318-6F4E15A3F824.htm>

8. An intermediary is an individual or organization who facilitates contacts or provides a link between one of the Court's organs or Units, or Counsel on the one hand, and victims, witnesses or affected communities on the other.

9. FIDH Comments on the ICC Office of the Prosecutor's Policy on Victim Participation, January 2010, [http://www.fidh.org/IMG/pdf/FIDH\\_comments\\_on\\_OTP\\_victims\\_policy.pdf](http://www.fidh.org/IMG/pdf/FIDH_comments_on_OTP_victims_policy.pdf)

The importance of outreach cannot be underestimated. Actual engagement of the affected communities is crucial to ensure the appropriation of the ICC system, deterrence in the commission of serious crimes and re-establishment of the rule of law.

### 3. Kampala findings

The analysis offered in this sub-section is based upon FIDH observation and comprehensive monitoring of preparations for the Review Conference, including information gathered through consultation of victims' groups,<sup>10</sup> as well as the various events which took place in Kampala, including but not limited to the official panel held on 2 June 2010.<sup>11</sup>

As a result of discussions around the stocktaking issue of the impact of the Statute on victims and affected communities, achievements made by the Court in this area were acknowledged. It was recognised that the Court had been chartering new waters in this field, as no other international criminal tribunal had included provisions on victim participation. It was also noted that the organs of the Court had endeavour to present and share a vision on victims' issues by putting together a victims' strategy. Last but not least, the reasons for victim's involvement in international justice were recalled: having been at the centre of the violations that made them suffer greatly, victims must also be at the heart of a system designed to address the crimes, hold those responsible accountable and ensure reparations for the harm they have suffered.

It is fair to recall that when looking at the "impact of the Rome Statute system" on this matter, discussions did not seek to focus exclusively on activities of the ICC, but also touched upon the role of States, both as supporters of the ICC and with respect to actions and proceedings within their jurisdictions.

The stocktaking segment on victims and affected communities also highlighted that there are a number of challenges that lie ahead, and that the Court and States Parties should address. These can be grouped under two categories: actions to be undertaken by States Parties and actions to be undertaken by the Court.

Actions to be undertaken by States Parties:

- Adopt domestic legislation providing for relevant involvement of and adequate assistance to victims at the national level.
- Create structures at the domestic level to address victims' needs (protection and support units, reparations structures, etc, as appropriate).
- Set-up of domestic reparations mechanisms for victims of international crimes committed on their respective territory.
- Enforce of arrest warrants in order for victims to be able to access a remedy.
- Increase cooperation agreements with the ICC providing for protection and support to victims.
- Implement of Court decision to trace, freeze and seize assets of the accused persons in a timely manner.
- Cooperate with the Court to enable the holding of trials and hearings *in situ*.

The list above shows that the issue of victims is cross-cutting and that it overlaps with complementarity and cooperation. For this reason, FIDH recommends that a victims' approach is adopted when ensuring follow-up on the other stocktaking issues, namely complementarity and cooperation.

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10. Victims Rights Working Group (VRWG), Impact of the ICC on the Rome Statute System on Victims and Affected Communities, March 2010, [http://www.vrwg.org/downloads/publications/05/VRWG%20Impact%20of%20ICC%20on%20victims%2021%20April%202010%20\\_2\\_.pdf](http://www.vrwg.org/downloads/publications/05/VRWG%20Impact%20of%20ICC%20on%20victims%2021%20April%202010%20_2_.pdf)  
11. RC/ST/W/1, Stocktaking of international criminal justice: Impact of the Rome Statute system on victims and affected communities - Draft informal summary by the focal point. See also: VRWG, Civil Society Takes Stock on the Impact of the Rome Statute System on Victims and Affected Communities, June 2010, <http://www.vrwg.org/downloads/publications/Victims%20Stocktaking%20Outcome%20Recommendations.pdf>



Actions to be undertaken by the Court:

- Develop a comprehensive policy on intermediaries.<sup>12</sup>
- Simplify the application process for victim participation.
- Increase outreach activities targeting victims for the purpose of informing them of their rights, including to address their concerns with respect to reparations.
- Increase the visibility of the Trust Fund for Victims.
- Develop specific policies to address the needs of children, women and minority groups at all levels.
- Develop protection measures adapted to the situation of victims.
- Give special consideration to the needs and views of victims of gender-based crimes, including through integration of their concerns in the prosecutorial policy.
- Adopt principles on reparations (article 75.1).

While these actions are to be taken by the ICC, the States Parties bear a responsibility to provide adequate support as necessary.

#### *4. The way forward*

The Review Conference provided a space for in-depth discussions on victim-related issues. Preparations for Kampala and discussions throughout the Conference have helped a number of actors gain further knowledge and exchange on current challenges. More importantly, preparations for Kampala and discussions throughout the Conference have helped identify actions and mechanisms to improve the impact of the Rome Statute system on victims and affected communities. As stated above, FIDH believes that it is crucial to ensure adequate follow-up.

At the Ninth session of the ASP, States will have before them a comprehensive Final Report on this stocktaking item, prepared by the Focal Points.<sup>13</sup> The Report identifies areas for follow-up, which are, to a great extent, along the lines of the recommendations made by FIDH in the subsection above. Further, the Report suggests a revision of the Strategy in Relation to Victims<sup>14</sup> to incorporate the findings and conclusions of the Review Conference. FIDH fully supports this recommendation, as the organisation had already recommended that the Victims' Strategy be reviewed in order to incorporate concrete plans and actions (as opposed to the description of current processes and activities contained in the current version of the Strategy). Such revision is key to have the Court appropriate itself of the Review Conference recommendations.

FIDH has taken note of a proposal made at The Hague Working Group that a cost-benefit study be prepared with respect to the recommendations made in Kampala. In this respect, FIDH would like to note, first of all, that financial implications should not be the primary determining factor to make a decision on implementation of the recommendations. It must also be noted that strategies to follow the recommendations may not necessarily have cost implications. FIDH acknowledges that such a study could be relevant to reinforce the need for potentially support the need for further investment in light of the benefits of an increased impact of the Rome Statute system on victims and affected communities. However, we submit that such an analysis would be premature because in order to identify concrete costs, plans and actions must first be identified and that can only be done after the Strategy in Relation to Victims will have been revised.

In addition, The Hague Working Group has identified as a priority area for follow-up the matter of reparations. Taking into account that the first reparations order are due to be issued in 2011-

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12. FIDH is aware that a process of internal and external consultations has been undertaken by the Court over the last two years.

13. ICC-ASP/9/25, Report of the Bureau on the Impact of the Rome Statute system on victims and affected communities

14. ICC-ASP/8/45, Report of the Court on the strategy in relation to victims

2012 and the need for the Court and other actors to be adequately prepared, prioritisation of this area seems relevant. States Parties could certainly benefit from an informative dialogue, in order to better understand the relevant processes within the Court, the measures for implementation of awards as well as the role of States Parties in this regard. FIDH believes that particular emphasis should be placed throughout this exercise on States Parties' fundamental obligation to trace, freeze and seize assets of the accused.

It is crucial to underscore that any follow-up mechanism must be respectful of the Court's independence and must not encroach on the judges' domain.

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**With regard to the follow-up on the Impact of the Rome Statute on Victims and Affected Communities, FIDH recommends that the ASP:**

- **Requests the Court to review the Strategy in Relation to Victims to incorporate the findings and recommendations from the Kampala Review Conference, and, once revised, to implement it without delay.**
- **Supports an informative dialogue on the issue of reparations, particularly focused on the role of States in that regard, including the freezing and seizure of assets of the accused.**
- **Ensures that follow-up mechanisms on the stocktaking item "The Impact of the Rome Statute System on Victims and Affected Communities" are respectful of the Court's independence and do not encroach on the judges' domain.**
- **Ensures that victims-related issues are appropriately streamlined through follow-up on other stocktaking items (cooperation, complementarity).**
- **Overviews implementation of the Strategy in Relation to Victims, as revised by the Court and supports such implementation including through further financial investment.**
- **Encourages States Parties to adopt national measures implementing recommendations from the Kampala Review Conference with regard to actions to be undertaken at the domestic level.**

## **B. Complementarity**

FIDH had also strongly encouraged States Parties to include the issue of complementarity in the Review Conference stocktaking segment. When creating the ICC, States agreed to retain primary responsibility for crimes within the Court's jurisdiction. With a focus on those most responsible for the most serious crimes, and given its limited resources and the vast number of potential perpetrators in the types of conflicts that the ICC is likely to focus upon, there is a great likelihood that the Court will only prosecute a very limited number of persons per situation. Addressing the complementarity gap is, therefore, crucial.

FIDH contributed to preparations in the lead-up to the Review Conference. Two main advocacy points were then put forward: 1) Taking stock necessarily implies a process whereby States would fairly assess their performance (both individually and collectively) in the prosecution of international crimes since the adoption of the Rome Statute; 2) Given that during the preparation phase, discussions focused heavily on incapacity, FIDH called upon States Parties to give equally appropriate consideration to the problem of unwillingness and identify ways to address it.

Discussions in Kampala contributed greatly to the advancement of the principle of complementarity. The role of States to investigate and prosecute Rome Statute crimes was strongly reaffirmed. It was also acknowledged that further measures needed to be taken at the domestic level in order to make complementarity a reality.

### *1. Addressing incapacity*

As expected, given the focus of the preparations, stocktaking exchanges in Kampala concentrated primarily on the need for further technical assistance to enhance the capacity of national jurisdiction to investigate and prosecute Rome Statute crimes, and the development cooperation and coordination initiatives in that regard. This is an important step and FIDH wholeheartedly supports efforts towards providing further assistance, including through ensuring that rule-of-law programmes take into consideration the dimension of prosecuting international crimes, and guaranteeing better coordination.

FIDH offers the following general observations with regard to technical assistance and cooperation programmes :

- It is important to note that there have been numerous cooperation and training programmes in the past. However, there seems to be a need to implement more practical programmes to address the beneficiaries' needs (for example, there have been a number of training programmes addressed to judicial operators which have focused on teaching international law provisions, while the beneficiaries needs are rather related to practical implementation of those provisions, witnesses protection demands, evidence handling, to name a few). FIDH recommends that future initiatives tailor projects to the relevant judiciary and other actors' demands.
- It goes without saying that incapacity to address international crimes is normally the result of a number of factors. This is why technical capacity initiatives must endeavour to address all the different fronts, including various structural problems within the relevant legal and judicial system, as well as the political structure. They must also support actors both within and outside the judicial system. In this regard, the role played by NGOs is noteworthy. For this reason, coordination among various donors contributing to actions within one country is crucial, as suggested extensively in Kampala.
- With regard to the work of NGOs, they can play an important role not only as advocates and trainers, but also by providing support to victims and victim groups in litigation. This is an aspect of NGO work which is less known. The experience of FIDH in this regard has proven that NGO supported-litigation to challenge the system within its legal and judicial boundaries can constitute an important means of leverage.
- Development cooperation in this area and capacity-building must necessarily take into consideration the needs of victims and witnesses. They must not only address the need for prosecution, but also parallel process, including witness protection, and most importantly, the necessary involvement of the victims of the crimes and reparations programmes to address the harm suffered.

Overall, FIDH agrees that there is certainly much to be done in the area of technical cooperation to enhance States' capacity to try those responsible for international crimes. Follow-up of the Kampala discussions seems essential in this regard.<sup>15</sup> In addition, the stocktaking made it clear that the issue of complementarity bear links with the matter of cooperation (especially with reference to technical assistance), as well as with victims and affected communities (victims' access to a domestic remedy was also recalled in Kampala).<sup>16</sup>

### *2. Addressing unwillingness*

FIDH regretted that the problem of lack of political will to investigate and prosecute Rome Statute crimes has been given little consideration in preparations for Kampala, during the Review Conference and in the initial follow-up undertaken since June. FIDH has observed that problems of incapacity and unwillingness are invariably linked. Although provision of technical assistance for prosecution of serious crimes could by itself boost political will to

15. Resolution RC/Res.1, Complementarity, §8

16. ICC-ASP/9/26, Report of the Bureau on Complementarity, § 6

hold those responsible to account, other actions are very often needed. It must be noted that the goals set by donors could be frustrated should the matter of unwillingness not be adequately addressed either through the relevant initiative or through other programmes or actions.

Since little efforts have been devoted to this matter, FIDH hereby offers some ideas on ways in which unwillingness could be addressed:

- States Parties should regularly raise the need for domestic investigations and prosecutions with the State(s) concerned, including through their diplomatic representatives in the relevant country.
- Technical assistance projects could make delivery of assistance dependant upon achievement of concrete results in terms of actual investigations and prosecutions.
- Cooperation agreements (with respect to rule-of-law/ICC programmes or other matters) between States Parties or intergovernmental organisations States Parties belong to, on the one hand and the State(s), on the other hand, should include clauses threatening withdrawal of cooperation should objectives set with regard to domestic prosecutions not be met.
- States Parties' cooperation programmes could support studies undertaken by external actors on the reasons for lack of domestic prosecutions in a given country.
- States Parties' cooperation programmes could support advocacy by third parties (including civil society) in this regard.

FIDH calls upon States Parties to integrate the unwillingness dimension in the follow-up of the issue of complementarity. The organisation recommends that this aspect be specifically addressed in the report to be prepared by the ASP Secretariat to the tenth session of the Assembly.<sup>17</sup>

### *3. Role of the Court and the ASP Secretariat*

As it has been repeatedly recalled in the context of the stocktaking on complementarity, clearly the Court is not a development agencies. However, it has been recognised that it can play a useful role. The Office of the Prosecutor, through its positive complementarity policy, has aimed to contribute to domestic prosecutions, including through initiatives seeking to enhance political will to address atrocities (e.g. statements, threat of ICC intervention, dialogue with local authorities).

FIDH welcomes the mandate given by the Review Conference to the Secretariat of the Assembly to “facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organisations and civil society, aimed at strengthening domestic jurisdictions”<sup>18</sup> as a means of concretely following up on this stocktaking issue. FIDH calls upon all relevant actors, including the Assembly and the ICC organs, to adequately support this function.

FIDH regrets, however, that the Review Conference decided to establish this function “within existing resources” as this could entail diverting resources from the Court’s core mandate to another extremely important though accessory function. FIDH submits that the ASP could decide to allocate further funds in the future should that prove necessary.

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**With regard to the follow-up on complementarity, FIDH recommends that the ASP:**

- **Requests the Bureau to continue the dialogue with the Court and other stakeholders on the issue of complementarity with a view to further implement the Review Conference Resolution on complementarity.**
- **Requests the Bureau, the Court and the ASP Secretariat to report on the implementation of the resolution at the Tenth session of the Assembly.**

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17. ICC-ASP/9/26, Report of the Bureau on Complementarity, Annex

18. Resolution RC/Res.1, Complementarity, § 8

- **Decides that further follow-up needs to be undertaken on the matter of addressing unwillingness, and requests the ASP Secretariat to specifically include this item in its report to the tenth session of the Assembly.**
- **States that it could decide in the future to allocate further funds to the coordinating function within the Court.**

## C. Cooperation

Cooperation is an obligation that States Parties assumed when they ratified the Rome Statute. Cooperation measures include the execution of arrest warrants, as well as other actions including facilitating access by the Office of the Prosecutor to their territory and official records for the purposes of investigations; protection of victims and witnesses; identification, tracing and freezing or seizure assets of the accused, among others. Importantly, cooperation also encompasses political and diplomatic support to the Court in all relevant bilateral contacts and multilateral forums. Cooperation of international and regional organisations is equally crucial.

FIDH fully supports the paper prepared by the CICC Cooperation Team. The paragraphs below summarise the key points introduced in the CICC paper and provide additional observations from FIDH.

First of all, FIDH has noted that there seems to be a gap between rhetoric and reality in terms of cooperation. For example, while acknowledging that cooperation could be enhanced, the Report of the Bureau on Cooperation makes an overall positive assessment of States' cooperation with the Court.<sup>19</sup> This assessment contrasts with a number of actions and events over the past year that denote a will to disregard Court's decisions and not to cooperate with the ICC, including in the implementation of arrest warrants. Key examples of such actions and events are:

- The African Union renewed decision in July 2010 calling on its members not to cooperate with the ICC.<sup>20</sup>
- The non-implementation of the arrest warrant by Chad and Kenya at the time of the presence of President Omar Al-Bashir on their territories, in July and August 2010.
- Key Security Council meetings on Sudan and outcome documents issued in 2010, where no mention of the ICC and the need for accountability for the crimes was made.<sup>21</sup>

Although, as suggested in a recent report,<sup>22</sup> some of these actions should not be overstated, it is fair to note that they have sent a signal of disregard for the Court's decisions.

It is also a fact that only five out of thirteen public arrest warrants have been executed.

Non-cooperation and inadequate cooperation with the Court has clearly a negative effect on the Court's capacity to carry out its mandate. Furthermore, lack of cooperation creates additional costs for the Court and States Parties.<sup>23</sup>

FIDH has welcomed the facilitation on cooperation to assist the Court and States in reaching the best possible level of cooperation. However, FIDH submits that a number of measures could be taken to reinforce the dialogue between the Court and States on this crucial issue. In this regard, FIDH proposes:

- The ASP should create an **inter-sessional cooperation body** to support the work

19. ICC-ASP/9/24, Report of the Bureau on Cooperation

20. Assembly of the African Union, "Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec. 270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)," Assembly/AU/Dec.296 (XV), Kampala, 27 July 2010

21. See e.g. Statement by the President of the Security Council, S/PRST/2010/24, 16 November 2010

22. Human Rights Watch Memorandum for the Ninth Session of the International Criminal Court Assembly of States Parties, p. 32-34

23. ICC-ASP/9/10, Proposed Programme Budget for 2011 of the International Criminal Court, §38



of the facilitator on cooperation. Indeed, a more robust support to cooperation will largely benefit the Court. This inter-sessional mechanism could support the Court in obtaining positive responses to its cooperation requests, through findings, experience sharing, and diplomatic action, among other measures. The body could be composed of 5-10 States Parties representatives, thus constituting a more flexible structure than the Working Groups of the Bureau. This would be helpful to conduct contacts with a number of actors, including Court officials.

- The ASP should address the matter of non-cooperation with a view to put in place a **system to deal systematically with Court findings of non-cooperation**.<sup>24</sup> In 2010, the ICC has issued a number of decisions on non-cooperation for the first time since the Court started its operations. In May 2010, the Court informed the United Nations Security Council of its finding of non-cooperation in the Darfur situation with respect to the case against Ahmad Harund and Ali Kushayb, in order for it to take action. In August 2010, the Court notified the Assembly and the Security Council of the visit President Omar Al-Bashir to Chad and Kenya, in order for them to take all measures they may deem appropriate. The Court also requested observations from the Republic of Kenya on a possible visit by Al-Bashir in October 2010. FIDH welcomes the reaction of the ASP President upon reception of the Court's notification, in particular the letter addressed to the Kenyan government enquiring on the reasons why Kenya had not executed the arrest warrant. FIDH submits, however, that the Assembly needs to be prepared to process and act upon such notifications from the Court, in a consistent and systematic manner.
- With respect to the establishment of a liaison office at the African Union, FIDH submits that falling short of the set-up of such an office pending approval by the AU, the Assembly should provide full support, including financial, for the Court to engage further in Addis Ababa to promote and explain the role of the Court and dispel any misapprehension or misunderstanding. In addition, States Parties (in Africa and elsewhere) should themselves promote understanding of, the mandate and operations of the Court. These actions would be in line with the Resolution of the Review Conference on cooperation, which acknowledged that enhancing public information about the Court could help increase the level of cooperation.<sup>25</sup>

Additionally, FIDH would like to draw the attention of States Parties to an area of cooperation which has received little attention over the past years, but which whose importance will increase in years to come as the Court approaches the end of the first trial and, therefore, the first reparations proceedings. During the Review Conference, issues relevant to reparations were discussed also in the stocktaking on victims and affected communities.<sup>26</sup> States were urged to take measures allowing the freezing and seizure of the assets of perpetrators.<sup>27</sup> FIDH recommends that the facilitation on cooperation pays particular attention to this matter throughout 2011 and reports on this item to the Assembly at its Tenth session.

**With regard to the follow-up on cooperation, FIDH recommends that the ASP:**

- **Establishes and inter-sessional body to support the facilitation on cooperation, in order to provide strengthened support to the Court and to States Parties in meeting their cooperation obligations.**
- **Discusses the matter of non-cooperation with a view to put in place a system to deal systematically with Court findings of non-cooperation.**
- **Provides full support, including financial, to the Court for it to engage further in**

24. ICC-ASP/9/24, Report of the Bureau on Cooperation, §19

25. Declaration RC/Decl.2, §11. See also: ASP/9/24, Report of the Bureau on Cooperation, §18

26. ICC-ASP/9/24, Report of the Bureau on Cooperation, §11

27. RC/ST/V/1, Stocktaking of international criminal justice: Impact of the Rome Statute system on victims and affected communities - Draft informal summary by the focal point, §33

**Addis Ababa to promote and explain the role of the Court, pending a decision to set up a liaison office at the African Union.**

- **Encourages States Parties to continue to promote understanding of, the mandate and operations of the Court to enhance awareness about the ICC.**
- **Requests the Bureau to place particular emphasis on the issue of identification, tracing, freezing and seizure of assets throughout the facilitation on cooperation in 2011, in view of the imminent start of reparations proceedings, and requests that the Bureau reports on this matter to the Tenth session of the Assembly.**

# II. Oversight and Other Key ASP Functions

## A. The Court's Budget and the Role of the ASP

### *1. Observations about the 2010 Budget Proposal*

For 2011, the Court has presented a budget request of 107 million euros. This includes a minimal increase, which is justified *inter alia* by the need to go from consecutive to parallel trials, and the opening of a new investigation in Kenya. As far as parallel trials are concerned, holding simultaneous trials seems a very reasonable measure to ensure a more efficient use of the Court's resources overall.

With regard to the opening of a new investigation in Kenya, it should be noted that most of the costs related to this new situation have been absorbed by the Court. While FIDH welcomes measures to enhance efficient use of resources, the organisation is concerned about some redeployment exercises. FIDH has noted in particular that investigators in the CAR Investigation Team have been redeployed to the Kenya and DRC3 Teams.<sup>28</sup> This measure raises serious concerns since only one person (Jean-Pierre Bemba) has been indicted for crimes committed in CAR. This is problematic, firstly, because according to the Court's documents, Bemba allegedly committed crimes jointly with Ange-Félix Patassé. No arrest warrant for Patassé has been sought. Secondly, the other party to the conflict, the troops led by François Bozizé, who also allegedly committed serious crimes with the Court jurisdiction, has not been investigated either. Thirdly, this creates a striking disparity with the number of arrest warrants sought and issued in other situations before the Court.<sup>29</sup> This raises a perception of lack of impartiality, which contributes to damage the image of the Court among victims and others.

FIDH is equally concerned about the proposed decrease of outreach efforts and field presence in Uganda, for the benefit of outreach and field presence in Kenya. FIDH agrees that outreach in Kenya is very much needed and that the Court's presence in Kenya will enable to conduct outreach in a more regular and systematic manner. The Court made important efforts to reach out to the affected communities around the opening of the investigation. However, the number of activities went down after the investigation was opened. With the issuance of arrest warrants approaching,<sup>30</sup> renewed outreach efforts are crucial. However, FIDH is concerned that field presence in Kenya would be improved at the detriment of field presence in Uganda.<sup>31</sup>

The lack of arrests in Uganda should not be a reason to decrease outreach. Affected communities' questions and concerns do not disappear in the absence of trial. Quite the contrary, information needs remain. It is also essential to maintain engagement with the population and prepare it for when trials will happen, once the accused have been arrested and surrendered.

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28. ICC-ASP/9/10, Proposed Programme Budget for 2011 of the International Criminal Court, §172

29. Five arrest warrants have been issued in the situation in Uganda; further five with respect to the situation in the DRC; three arrest warrants and three summons to appear have been issued for crimes committed in Darfur. A request for arrest warrants for four to six individuals is expected with respect to the situation Kenya.

30. Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Kenya, 21 September 2010, <http://www.icc-cpi.int/NR/rdonlyres/3B2D9447-5BC0-44F7-8816-EBB0BA4C52C7/282485/StatetmentonKenyaENG.pdf>

31. ICC-ASP/9/10, Proposed Programme Budget for 2011 of the International Criminal Court, §207

## 2. Cuts beyond the CBF recommendations

Over the last few years, States Parties have put pressure on the Court to present a so-called “zero-nominal-growth budget”. While FIDH agrees that it is desirable that the Court adopts measures to increase the efficient use of resources allocated to it, the organisation has noted that putting a cap to the Court’s budget could seriously undermine the ICC. The Court is a young institution still growing in terms of activities for the purpose of achieving its mandate (arrested persons must be tried within a reasonable delay, new investigations must be opened should the relevant conditions be met, etc).

The Committee of Budget and Finance (“Committee” or “CBF”) has recommended cross-cutting cuts with respect to extra General Temporary Assistance (GTA) contracts and travel funds. It has also advised to reduce from six to four the number of months during which the Court will be able to hold parallel trials. The Court appears ready to absorb these cuts.

Some states have reportedly proposed that further cuts to the budget be introduced. FIDH considers that this is simply unacceptable, especially because such cuts would be arbitrary and would not take into consideration the Court’s needs.<sup>32</sup>

## 3. The role of the CBF beyond financial and budgetary matters

FIDH has noted that, over the years, the CBF has stretched its authority to make recommendations on policy matters, thus going beyond the financial and budgetary nature of its mandate. FIDH has raised concerns about this way of proceeding, firstly, because the Committee is composed of financial experts whom, in most cases, lack special expertise on judicial matters. Secondly, the Committee’s consideration of such aspects raises questions as to the limits and the nature of the Committee’s mandate. Finally, the Assembly has regularly adopted or sought to adopt the CBF recommendations “as a package”, thus refusing to fully exercise its mandate and oversight function.

For example, in its report of its fifteenth session, the CBF made observations on reparations proceedings and Chambers’ decisions.<sup>33</sup> In the past, the Committee also made reference to the financial implication of judicial decisions and suggested that core elements of the judicial proceedings could be “cost-drivers”.<sup>34</sup> In this regard, FIDH would like to recall that judicial independence must be upheld and that interpretation of the Rome Statute lies solely with the judges, according to basic legal principles.

\* \* \*

**With respect to the Court’s budget and the role of the ASP, FIDH recommends:**

- **That States Parties put questions to the Court as to how it will absorb new costs, and what the implications will be *inter alia* for the investigation in the Central African Republic and outreach in Uganda.**
- **That the Assembly does not implement cuts beyond the CBF recommendations.**
- **The ASP clarifies the role of the CBF and decides that its recommendations should not go beyond financial and budgetary matters, and that judicial independence must imperatively be respected.**

32. A similar situation arose during the Seventh Session of the Assembly, when assessments were set below the approved budget. States Parties agreed at the time that that measure was due to exceptional circumstances, and stressed that it should not set a precedent. See Resolution ICC-ASP/7/Res. 4

33. ICC-ASP/9/15, Report of the work of the Committee of Budget and Finance on the work of its fifteenth session, §67-68. See also §66

34. ICC-ASP/7/15, Report on the work of the Committee of Budget and Finance on the work of its eleventh session §129

## B. Independent Oversight Mechanism

Throughout 2010, FIDH has followed developments on the establishment of an independent oversight mechanism (“IOM”), in accordance with Article 112(4) of the Statute, including the operationalisation of the the IOM investigative function through the adoption of the IOM Operational Mandate. FIDH has also been made aware of the concerns expressed by the Office of the Prosecutor’s with regard to the draft Operational Mandate prepared by the Temporary Head of the IOM and adopted by the Bureau.

FIDH has observed that the debate raises two fundamental concerns: 1) How to strike the right balance between independent oversight and the need to preserve confidential and sensitive information, and most importantly how to prevent inappropriate interference with the Court’s activities, including ICC investigations; 2) How to prevent and eventually deal with politicised, frivolous, knowingly false or wilfully reckless reports, as well as complaints falling manifestly outside the IOM’s mandate.

The concerns outlined above call for the incorporation of adequate safeguards. This can be done through provisions in the IOM Procedural Manual, which is to be drafted in 2011 and presented to the Assembly at its Tenth session.<sup>35</sup> According to FIDH, safeguards should be included, in particular, in the following areas listed:

- Definition of misconduct and serious misconduct. While the Operation Mandate refers to the definition of misconduct (unsatisfactory conduct) contained in the ICC Staff Rules, it is unclear whether that definition is the one to be used as a basis for the operation of the IOM. In addition, it must be observed that neither the Staff Rules nor any other ICC legal text defines “serious misconduct”. Definition of these terms by the ASP is essential as they are the basis of the IOM’s investigative mandate. Non-definition would increase the chances of stretching the IOM’s mandate beyond its purposes. In this regard, we note that while some safeguards have been incorporated in the Operation Mandate, further precision is needed.<sup>36</sup>
- Who can make a complaint and under which conditions.
- Politicised, frivolous, knowingly false or wilfully reckless reports, as well as complaints falling manifestly outside the IOM’s mandate to be received by the IOM: how to prevent such reports/complaints; how to assert the *prima facie* true character of the complaint; how to handle politicised, frivolous, knowledge false or wilfully reckless complaints and avoid that they pose a threat or that they harm the Court’s activities in any way.
- Advisability of notifying and/or involving the heads of the relevant organs in certain cases and under certain conditions. According to the draft Operational Mandate, the IOM may decide to notify heads of organs.<sup>37</sup> The Procedural Manual could elaborate on the cases and situations where such notification and/or the involvement of heads of organs in any appropriate form would be advisable.
- Respect of due process rights of the person(s) investigated.

The Operational Mandate, as currently drafted, lacks precision on a number of issues, which the Procedural Manual is likely to clarify. Given the seriousness of the concerns described before, FIDH recommends that the adoption of the Operational Mandate be delayed until the Procedural Manual has been drafted, and those concerns have been adequately addressed

35. ICC-ASP/9/31, Report of the Bureau on the Independent Oversight Mechanism, §74

36. See e.g. ICC-ASP/9/31, Draft Operational Mandate of the Independent Oversight Mechanism in Report of the Bureau on the Independent Oversight Mechanism (Appendix), §5 “The independent oversight mechanism will not investigate contractual disputes or human resource management issues, including work performance, conditions of employment or personnel-related grievances.”

37. ICC-ASP/9/31, Draft Operational Mandate of the Independent Oversight Mechanism in Report of the Bureau on the Independent Oversight Mechanism (Appendix), §17



through appropriate safeguards. Alternatively, the Assembly could adopt the Operational Mandate provisionally to allow the process of drafting the Procedural Manual to go forward, but should reconsider the Operational Mandate for final adoption at its Eleventh session jointly with Procedural Manual.

**In respect of the Independent Oversight Mechanism, FIDH recommends that the ASP:**

- **Delays adoption of the Operational Mandate until the Procedural Manual has been drafted, or alternatively, adopts the Operational Mandate provisionally to allow for the drafting of the Procedural Manual but reconsider the former at the Tenth session of the Assembly in light of the latter’s provisions.**
- **Directs the IOM Temporary Head to take into consideration the risks underlined above and include adequate safeguards in the Procedural Manual to avoid inappropriate intrusion or unjustified interference with ICC investigations or judicial activities, and to prevent and deal with politicised, frivolous, knowingly false or wilfully reckless reports as well as complaints falling manifestly outside the IOM’s mandate.**

## C. Governance of the Rome Statute System

FIDH has followed developments over the last year with respect to the usefulness of enhancing dialogue between the ASP and Court officials on the “efficiency and effectiveness of the Court” in the framework of governance of the Rome Statute system.<sup>38</sup> FIDH welcomes measures to support the role of the Assembly to provide management oversight to the Court’s organs, in accordance with Article 112(b) of the Statute.

FIDH has followed discussions within The Hague Working Group on the possibility of establishing a mechanism to enhance the efficiency and effectiveness of the Court. Such mechanism would seek to conduct structured dialogue between Member States and Court officials with a view to strengthen the institutional framework of the Rome Statute. The issues to be dealt with would include, but would not be limited to, matters pertaining to the strengthening of the institutional framework both within the Court and between the Court and the ASP, as well as other relevant questions related to the (daily) operations of the Court, including the provisions of the Rules of Procedure and Evidence related to trial procedures.

Our organisation has a number of concerns with regard to this proposal. The origin of this process seems to be the Japanese proposal for stocktaking at the Review Conference, which was rejected as a stocktaking item, but which the ASP suggested could take the shape of a dialogue within the Bureau’s working groups. The nature of that proposal, together with the increasing pressure from States Parties to limit the Court’s resources and introduce further cuts,<sup>39</sup> makes us fear that this mechanism could be a tool to introduce unjustified cuts. We are also concerned about the vagueness of the mandate as proposed in the relevant draft resolution. “Efficiency and effectiveness” are not only vague but also subjective concepts. Furthermore, a mandate to look into the Court’s day-to-day operations is problematic. Altogether, this raises concerns about the referred mechanism encroaching on judicial independence and interfering with Court’s policies. Finally, with regard to improvements to the Rules of Procedure and Evidence, it must be noted that the ICC judges have indicated that it would be preferable to wait until the Court has gone through a full cycle of proceedings, before proceeding to reforms of its main legal texts.

In addition, FIDH has noted that the proposed mechanism would look at the institutional framework *both within the Court and between the Court and the ASP*, but would not consider

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38. ICC-ASP/8/15 Report of the Committee of Budget and Finance on the work of its thirteenth session, § 26; ICC-ASP/9/CBE.1/12 Report of the Court on measures to increase clarity on the responsibilities of the different organs.

39. See section II.B above “The Court’s Budget and the Role of the ASP”

the functioning of the ASP itself. This is disappointing, considering the urgent need for the Assembly to further strengthen its mechanisms to deal with very relevant issues such as cooperation of States Parties with the Court, enhancing complementarity, and improving nominations and elections. With regard to the latter question, FIDH recalls that vote trading (as opposed to elections based on candidates' qualifications) has been a usual practice of the ASP.

**In respect of the dialogue on efficiency and effectiveness, FIDH recommends that the ASP:**

- **Rejects the establishment of such a structure at this point in time.**
- **Continues to examine the best possible ways to provide management oversight to the Presidency, the Prosecutor and the Registry, in ways that are respectful of judicial independence and the Court's autonomy.**
- **Considers including strengthening of the ASP institutional framework in any future mechanism of this sort.**





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of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest,

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