

**fidh**

International Federation for Human Rights

# ICC REVIEW CONFERENCE: RENEWING COMMITMENT TO ACCOUNTABILITY

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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*“Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,[...] Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, Recalling that it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes,[.. ]Determined for these ends and for the sake of present and future generations, to establish a permanent International Criminal Court [...]”*

**Preamble, Rome Statute**

# Introduction

The Statute of the International Criminal Court (“ICC” or “Court”) was adopted in Rome, Italy, on 17 July 1998, and entered into force on 1 July 2002. The Court was created to “exercise [...] jurisdiction over persons for the most serious crimes of international concern”<sup>1</sup> and thus “put an end to impunity for the perpetrators of these crimes and [...] contribute to [their] prevention.”<sup>2</sup> The plight of victims of those crimes, which led to the creation of the Court, was acknowledged by the drafters of the Statute inasmuch as victims are at the centre of the system established by the Statute. The treaty recognises the rights of victims and puts in place mechanisms for them to exercise those rights fully.

According to Article 123, a Review Conference of the Statute was to be convened seven years after its entry into force. The first Review Conference of the Rome Statute will take place in Kampala, Uganda, from 31 May to 11 June 2010. The Conference will bring together representatives of 111 States Parties, observer States, inter-governmental organisations and hundreds of non-governmental organisations.

Almost eight years after the entry into force of its Statute, the ICC is a well-established and recognised institution, with five on-going investigations into atrocities committed in several countries. The Office of the Prosecutor is also monitoring other situations in five continents with a view to possibly opening further investigations. The Court has issued thirteen public arrest warrants, following which four persons have been arrested and surrendered to Court. The persons who are and have been sought include the President of Sudan and a former Vice-President of the Republic of Congo. This attests to the full implementation of the principle that there are no immunities for the most serious crimes.<sup>3</sup> The ICC is currently conducting its first two trials and will soon open a third one. It is implementing innovative provisions on victims’ rights, allowing for the participation of hundreds of victims in proceedings, and conducting assistance projects to attend to their physical, psychological and material needs.

It must be emphasised that the ICC is not but one piece of the “system” created by the Rome Statute. States are key stakeholders inasmuch as they retain primary responsibility to prosecute those responsible for crimes within the Court’s jurisdiction. Importantly, as creators of the system, they must fully support, assist and cooperate with the Court.

The holding of the first Review Conference of the Rome Statute is remarkably timely. While the Court has made significant achievements in the implementation of the Rome Statute, support by other actors has not always been forthcoming over the last few years. In particular, the fact that all ICC investigations are in Africa, coupled with the indictment of an African Head of Government, has moved a number of States to object to the Court’s operations.

In addition, as mentioned above, only four out of thirteen indicted personalities have been surrendered to the Court. Further cooperation with the Court is needed. In addition, States must reaffirm their commitment to fully implement the Rome Statute at the national level through the opening of investigations and prosecutions into the most serious crimes.

Furthermore, discussions in the Assembly of States Parties about a “zero-growth” policy in the set-up phase of the Court, and about differentiation between obligations and non-compulsory assistance to be lent by States Parties, show that support for an effective and robust international criminal court has been receding.

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1. Rome Statute, Article 1.  
2. Rome Statute, Preamble.  
3. Rome Statute, Article 27.

Against this background, the Review Conference offers an opportunity for States and other actors to renew the commitment made in Rome in favour of accountability for the most serious crimes. Although the Court has not yet completed a full cycle of proceedings, it is fair to evaluate performance of the system, including the role played by States Parties, over the first few years of implementation of the Rome Statute. This exercise should seek to acknowledge achievements made and to identify areas where further improvements can be made. These should lead States to make commitments so that those areas can be appropriately addressed.

For this reason, FIDH welcomed the inclusion of a “stocktaking” segment in the programme of the Review Conference.<sup>4</sup> In this paper, FIDH provides its own evaluation and makes recommendations on the four topics of the stocktaking exercise, namely: A) impact on victims and affected communities; B) complementarity; C) peace and justice; and D) cooperation.

FIDH will also be monitoring the adoption of the three proposals for amendments: A) the revision of Article 124; B) the inclusion of the use of certain weapons as war crimes in the context of an armed conflict not of an international character (“Belgian proposal”) and C) the definition of the crime of aggression.<sup>5</sup> This paper also offers an analysis and recommendations pertaining to these proposals.

The comments and evaluation provided in this paper are drawn from the experience of FIDH in the area of international justice since the 1990s. The organisation participated in the Preparatory Committee, the Rome Conference as well as the Preparatory Commission. Since the Statute’s entry into force, FIDH activities in this area have focused on, *inter alia*, monitoring of the Court’s operations, the sessions of the Assembly of States Parties (“Assembly”) and the impact of the work of the Court in various countries, including but not limited to countries under investigation. Significantly, this paper incorporates the views of FIDH’s member organisations which have deployed great efforts for the implementation of the Rome Statute in their respective countries.<sup>6</sup>

FIDH has been involved in preparations for the Review Conference since 2006. It has also monitored negotiations for a definition of the crime of aggression over the years. It contributed actively to discussions on the Review Conference prior to, during and after the eighth session of the Assembly. Notably, throughout 2010, it contributed to shaping the stocktaking discussions, either through input provided by the Coalition for the ICC (CICC) and the Victims’ Rights Working Group (VRWG), or by direct contacts with the focal points assigned to each stocktaking item. FIDH fully supports the papers produced by the CICC thematic teams during the preparation phase, as well as the VRWG Report “The Impact of the Rome Statute on Victims and Affected Communities.”<sup>7</sup>

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 at bringing perpetrators of serious violations to justice. The fight against impunity for serious violations of international crimes, and the provision of assistance to victims of those violations and crimes before judicial and quasi-judicial mechanisms are among its main priorities. FIDH has been closely involved in following developments in relation to 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.

4. ICC-ASP/8/Res.6, Resolution on the Review Conference, ¶15.

5. *Id.*, ¶15. See also annexes I, II and III.

6. For a complementary analysis of the Court’s actions over its first years, produced by FIDH, please see the FIDH paper, *The International Criminal Court’s First Years*, revised January 2010, <http://www.fidh.org/FIDH-paper-on-the-International-Criminal-Court-s>

7. Issued in April 2010, available at: <http://www.vrwg.org/Publications/05/Stocktakingreport2010.pdf>

# I. Stocktaking: Identifying Achievements and Shortcomings, and Looking Forward

During the stocktaking segment, States Parties will consider the functioning of the Rome Statute system since the adoption and entry into force of the treaty. This process naturally involves an analysis of the accomplishments and limitations of the ICC with a view to reaffirming the commitment of all actors concerned to further improve the functioning of the system. However, an essential part of the stocktaking exercise has to do with evaluating States' performance, both as regards support to ICC activities and proceedings, as well as to prosecution of Rome Statute crimes committed within their jurisdiction and encouragement for other States to prosecute such crimes committed on the respective territory or by their respective nationals.

As noted above, the Review Conference offers an excellent opportunity to renew States' commitment to fight impunity for the most serious crimes. For this reason, FIDH has fully supported the Assembly's initiative to encourage States Parties to make pledges, in order to make sure that the outcome of the Review Conference is as concrete as possible.<sup>8</sup> Pledges will also ensure that the stocktaking exercise is fully worthwhile since the assessment made will allow States to identify and make commitments for successful processes to be carried forward and for shortcomings to be addressed. FIDH has contributed to and fully supports the "CICC Checklist of Key Areas for Pledges at the Review Conference."<sup>9</sup> FIDH strongly encourages States Parties to make and announce further commitments to the full implementation of the Rome Statute after the Review Conference.

During the preparation of discussions on the stocktaking items, FIDH underlined that when looking at the impact of the Court, it is important to assess the effect of ICC action not only in situation countries, but also beyond, including countries under a preliminary analysis by the Office of the Prosecutor as well as other countries where serious crimes have been committed or could be committed.

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FIDH acknowledges the extensive work done by all focal points, who have held extensive discussions and consultations within the limited time allotted for preparations. It recognises in particular the efforts made to make the process as open, transparent and inclusive as possible. They have sought and carefully considered input provided by a number of actors, including non-governmental organisations.

## A. Impact of the Rome Statute on Victims and Affected Communities

The Rome Statute has introduced innovative provisions on the rights of victims. While these rights already existed under international law,<sup>10</sup> the ICC is the first international criminal

8. ICC-ASP/8/20, Official Records of the Eighth Session of the Assembly of States Parties, Add. 1, Appendix II, Explanatory Note on Pledges.

9. CICC Letter on Pledges to States, 22 April 2010, [http://www.coalitionfortheicc.org/documents/CICC\\_Letter\\_on\\_Pledges\\_to\\_States.pdf](http://www.coalitionfortheicc.org/documents/CICC_Letter_on_Pledges_to_States.pdf)

10. See, e.g., United Nations' Declaration of Basic Principle of Justice for Victims of Crimes and Abuse of Power, U.N. Doc. A/RES/40/34 (Nov. 29, 1985).

tribunal where victims can exercise those rights concretely. The Rome Statute recognises the following rights to victims: participation in proceedings,<sup>11</sup> legal representation,<sup>12</sup> protection and support,<sup>13</sup> and reparations.<sup>14</sup>

As a human rights organisation, with a particular mandate to assist victims of violations, FIDH has monitored the implementation of the Statute's innovative provisions on victims' rights and has made numerous recommendations for a fair and effective implementation of those provisions.<sup>15</sup>

Overall, FIDH has observed that implementation of provisions on victims' rights over the first few years of the Court's operations has not always been easy. The effective implementation of the rights of victims has required much creativity and the ability to learn lessons from some of the errors initially made. An assessment of the impact of the Rome Statute on victims must take into account that the Court has been charting new waters in this area.

FIDH has followed preparations for the stocktaking on this item<sup>16</sup> and has provided concrete input throughout the process. The organisation has also been involved in the process that led to the drafting of the report of the VRWG "The Impact of the Rome Statute System on Victims and Affected Communities" and fully supports the recommendations made therein.<sup>17</sup> It has also carefully considered the contribution to the stocktaking process prepared by the Court.<sup>18</sup>

The analysis provided in the sub-sections below seeks to contribute further to the stocktaking on the impact of victims and affected communities, by pointing out some of the most relevant conclusions which FIDH has come to as a result of its involvement in the area of victims' rights. First, the issue of outreach and sensitisation of affected communities will be addressed. Second, an assessment of the impact of the Rome Statute in empowering individuals and victims' communities will be made. Finally, the paper will look at the past, present and future implementation of two important rights: the right to participate in proceedings and the right to obtain reparations.

## **1. Outreach to Affected Communities**

Reaching out to the communities affected by the crimes is a core function of the Court. It serves the purpose of making the Court known, understood and reachable for the affected populations so that they can make use of it, and so that victims can exercise their rights to participation and reparations. Additionally, ensuring that the actions of the Court are well-known in the communities is crucial to maximise the ICC's deterrent effect. Finally, disseminating accurate information and clearing misconceptions about the Court can help protect those in the affected communities who cooperate with the ICC.

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11. Rome Statute, Article 68(3), 15(3).

12. Rome Statute, Articles 68(3) and 82(4); Rules of Procedure and Evidence, Rule 90(1).

13. Rome Statute, Articles 68, 43(6), 57(3)(c), 64(2), 64(6)(e) and 87(4).

14. Rome Statute, Article 75.

15. FIDH, Guide for Victims, their Legal Representatives and NGO on Victims' Rights before the International Criminal Court, April 2007, <http://www.fidh.org/Victims-Rights-Before-the-International-Criminal>

16. The Report of the Bureau on Stocktaking: The impact of the Rome Statute on Victims and Affected Communities (ICC-ASP/8/49), proposed the following substantive areas for discussion:

"a) Victims' experiences and expectations of obtaining justice, including those directly involved with the Court, those in situations but not cases under trial, situations under analysis and victims in unrelated situations;

b) Individual dignity, healing, rehabilitation, and empowerment;

c) Victims' exposure to and enhanced knowledge of their legal rights, of human rights and the rule of law in general; and

d) Especially in situation countries, national recognition of victims' rights to justice and reparation, particularly for specific groups of victims, e.g. women and children."

17. Issued in April 2010, available at: <http://www.vrwg.org/Publications/05/Stocktakingreport2010.pdf>, p. 37-39.

18. ICC, Turning the Lens: Victims and Affected Communities on the Court and the Rome Statute System, April 2010.

Outreach is a two-way dialogue with the affected communities. It plays an important role not only to ensure that expectations are tailored as much as possible to the outcome which can reasonably be expected from an ICC-process, but, most importantly, to ensure that the affected communities can “experience justice” despite the geographical and cultural distance between themselves and the Court.

FIDH is aware of the great expectations that victims and affected communities have put on the ICC. Such expectations arise, *inter alia*, from the frustration that such groups have as a result of their belonging to societies torn by conflict, their experiences of a dysfunctional national Judiciary and their situation within extremely politicised contexts.

Initially, the Court made only timid efforts to reach out to affected communities. However, some States and civil society referred to the experience of other tribunals, which revealed that increased outreach was essential for the success of the Court. Following those advocacy efforts, the States Parties decided to make a greater investment as of 2007. This development was key for the ICC to boost outreach activities. The breadth of activities and the diversity of tools used have increased considerably. So has the Court’s field presence. Among recent positive developments, FIDH welcomes the efforts made to start outreach before the opening of an investigation in Kenya. FIDH had been critical of the late start of outreach in situation countries and welcomes this positive development. The organisation hopes that earlier preparation will consistently apply to all future situations.

In the course of FIDH’S extensive work in situations under preliminary analysis by the Office of the Prosecutor, the organisation has noted big information gaps and many misconceptions among the affected population in those countries. For this reason, FIDH believes that it would be desirable that the ICC could conduct some information and outreach activities in situations under preliminary examination..

Overall, more resources are needed in the area of outreach. FIDH urges States to consider providing further resources to and continue to support this important function of the Court.

In addition, FIDH also recalls that States have a duty to disseminate information about the ICC. They also play an important role to facilitate outreach activities on their respective territories. In particular, *in situ* trials and hearings could have a very positive impact to bring the ICC closer to the affected communities. FIDH urges the relevant States to facilitate the holding of *in situ* hearings without delays. Finally, it is essential that States support an increased field presence of the Court, as such presence is crucial for the Court to be physically closer to and fully immersed in the affected communities.

## **2. Empowerment of Individual Victims and Victim Communities**

It is possible to affirm that sensitisation of victims and victims’ communities on the rights of victims as described in the Rome Statute and exercise of those rights, have contributed to an increased awareness by victims of their rights. Such awareness relates not only to their rights before the ICC, but also to their rights at the national level and the territorial State’s obligations vis-à-vis victims of serious crimes. This process has led to the empowerment of individual victims as well as victim communities.

For example, many victims in the Central African Republic have been able to speak out about sexual violence and, together, they played an essential role in raising awareness about crimes committed in 2002-2003 and advocated for the ICC to open an investigation. In Uganda, victims’ perspectives have been received and incorporated into the process of negotiations for a peace agreement. In Kenya, victims were key players in the ICC’s decision to open an investigation into the post-election violence.<sup>19</sup>

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19. ICC-01/09-17-Conf-Exp-Corr, Situation in Kenya, Public Redacted Version of Corrigendum to the Report on Victims’ Representations (29 March 2010).

Having said that, it must be noted that more efforts must be made by the Court to reach out to victim communities and sensitise them of their rights. Victims in remote areas remain unaware of the existence of the ICC and of their rights before the Court. Similarly, States must continue to ensure that victims' voices are heard in processes that affect them, including peace negotiations, accountability mechanisms and designing of reparations programmes.

Empowerment can lead to healing and to overcoming some of the negative effects caused by the commission of atrocities. In some cases, it can pave the way for the re-integration of victimised groups into the society. Acknowledgement and respect of the dignity and rights of victims are also pre-conditions for re-building societies in post-conflict situations.

Furthermore, the Rome Statute has also encouraged denunciation of gender-based violence, which has led to empowerment of women in countries like the Democratic Republic of Congo and the Central African Republic, but also in other regions of the world such as Latin America. However, further efforts need to be deployed by both the ICC and States Parties in this area. The ICC must make further efforts to reach out to victims of sexual violence. More States Parties must implement the Rome Statute provisions on gender crimes fully and they must carry out effective prosecutions for gender-based crimes.

### **3. Some lessons learned on victims' participation**

As recalled above, the ICC is the first international criminal tribunal where victims can participate actively in proceedings.<sup>20</sup> The recognition of these rights is undoubtedly one of the most significant achievements made by States at the Rome Conference.

#### *a. Application Process*

During the first years of the Court's operation, many of the ICC's efforts have focused on the phase of informing victims of their rights and processing applications for participation. The application process has proven to be particularly complex and long for victims. FIDH has recommended that the process be simplified, and that evidence requirements be adapted to the situation of victims in the countries where the Court is operating. While FIDH acknowledges the efforts made to revise the participation and reparation forms,<sup>21</sup> it argues that the Court must continue to improve the application process.

#### *b. Intermediaries*

The practice of applying to participate has also revealed that both victims and the Court have found it useful to act through "intermediaries". Given the physical and cultural distance between the affected communities and the Court, as well as the language differences and lack of proper understanding on the two sides, the need to use intermediaries became evident quite early on. Intermediaries are persons and organisations working in the affected communities, most of whom were already working in the communities before the Court's arrival in the relevant area. They help bridge the physical, cultural and linguistic gap between the Court and members of the community. Their belonging to the communities facilitates access to them by the Court.

Different organs and sections of the Court have worked through intermediaries; however, assistance and support to those intermediaries has generally lacked. The situation of intermediaries operating in the area of victim participation is particularly weak because they are relied upon greatly by the Court to carry out duties normally vested upon the Registry. The lack of financial support and protection has been raised repeatedly by the intermediaries themselves, as well as by international

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20. Rome Statute, Article 68(3).

21. In July 2009, FIDH participated in a consultation meeting on a new simplified version of the form. Although the new version has not yet been made public, FIDH understands that this new version is in the process of being approved.

non-governmental organisations, including FIDH.<sup>22</sup> The Court initiated a consultation process in late 2008 on the situation of intermediaries. A draft ICC policy on intermediaries is being considered at the time of writing.<sup>23</sup> FIDH recommends that this process be carried forward with a view to adopting a consistent policy with respect to intermediaries and to affording them the support and assistance that they need to carry out their duties.

Further, FIDH has repeatedly expressed concerns about the precarious situation of all intermediaries who are often human rights defenders. FIDH has sadly reported that human rights defenders cooperating with the Court or doing advocacy around the ICC have faced threats in countries such as the Democratic Republic of Congo,<sup>24</sup> the Central African Republic,<sup>25</sup> Sudan<sup>26</sup> and Colombia,<sup>27</sup> among others. FIDH urges all States to reinforce protection mechanisms vis-à-vis human rights defenders working in the area of justice and fight against impunity. It also calls upon the ICC to continue to consider the possibility of affording protection to intermediaries who became at risk on account of their interaction with the Court.

### *c. Legal Representation*

The practice of victim participation has also helped learn lessons in the area of legal representation. Experience has shown that in order for victim participation to be truly meaningful, it is imperative that there is fluid communication between victims and their legal representative or representatives. If victims are not able to be involved through information, instructions and dialogue with their lawyers, the concept of participation is devoid of all sense. For this reason, FIDH has strongly advocated for a legal aid system that takes into consideration this aspect and that allows for frequent communication and travel by legal representatives.<sup>28</sup> In the view of FIDH, representation by a lawyer from the same country as the victims very often facilitates communication with and involvement of victims.

### *d. Victims and Prosecutorial Strategy*

Transparency and consistency in the application of the Prosecutor's strategy can contribute greatly to improve the perceptions of the Court, to maximise its impact and to ensure that its actions will have a deterrent effect.

According to FIDH's assessment, victims have not always been satisfied with the Prosecutor's decisions, and have frequently complained about the lack of consistency and clarity in the choices operated. In general, they have found that the cases selected are too narrow, and that so are the charges brought for prosecution. Many have raised the fact that only one party to the conflict has been prosecuted in Uganda and in the Central African Republic. Some victims (for example in the DRC) have complained that the charges selected are not always reflective of the range of criminality registered in a certain region and during a specific time.<sup>29</sup>

22. See, e.g., VRWG, Comments on the Role and Relationship of 'Intermediaries' with the International Criminal Court, February 2009, <http://www.vrwg.org/Publications/05/VRWG%20intermediaries%206%20Feb%2009%20FNL.pdf>

23. FIDH received the document when this report was about to be finalised. Due to time constraints, it was not able to fully consider the draft policy so that an assessment could be provided in this paper.

24. See, e.g., Observatory for the Protection of Human Rights Defenders, Urgent Appeal COD 004 / 0510 / OBS 054, 5 May 2010, <http://www.fidh.org/Menaces-de-mort-a-l-encontre-de-MM-Andre-Kito-et>

25. See, e.g., Observatory for the Protection of Human Rights Defenders, Urgent Appeal CAF 002 / 0608 / OBS 106, 18 June 2008, <http://www.fidh.org/Menaces-a-l-encontre-de-M-Nganatouwa-Goungaye>

26. See, e.g., Observatory for the Protection of Human Rights Defenders, Urgent Appeal SDN 002 / 1108 / OBS 199, 25 November 2008, <http://www.fidh.org/Arbitrary-arrests-Release-Arbitrary-detention-SDN>

27. See, e.g., Observatory for the Protection of Human Rights Defenders, Press Release, Colombia: Vigilancia Constante del CCAJAR y Espionaje del mismo y de otros Defensores por parte del DAS, 9 July 2009, <http://www.fidh.org/COLOMBIA-Vigilancia-constante-del-CCAJAR-y>

28. Observations de la FIDH sur le projet d'ajustement du système d'aide judiciaire de la CPI, March 2007, <http://www.fidh.org/Observations-de-la-FIDH-sur-le-Projet-d>

29. Avocats Sans Frontières, Center for Justice and Reconciliation, Coalition nationale pour la Cour pénale internationale – RDC, Fédération internationale des ligues des droits de l'Homme, Human Rights Watch, International Center for Transitional Justice, Redress and Women's Initiative for Gender Justice, Joint letter to the Prosecutor of the International Criminal Court, 31 July 2006, <http://www.vrwg.org/Publications/02/>

The policy of “sequencing” has also been the object of frustration. In the beginning, the Office of the Prosecutor adopted a “sequenced” approach,<sup>30</sup> which meant that investigations teams were deployed to one investigation at the time in any given situation. As a consequence, arrest warrants for one party to the conflict were issued before investigations were at an advanced stage for the other party or parties. This brought about a perception of lack of impartiality in the communities. The latest prosecutorial strategy does not mention the sequenced approach,<sup>31</sup> which denotes an evolution in the strategical planning<sup>32</sup> based on the realisation that sequence can undermine the positive impact of arrests and prosecutions.

Furthermore, victims in countries where serious crimes have been committed but whose situation is under preliminary analysis by the Office of the Prosecutor, do not understand the reasons why no investigation has been opened in their countries.

Because of the politicised environment victims live in, some of the Prosecutor’s decisions are perceived to be politically-motivated. Sadly, judicial avenues for victims to express concerns about certain elements of the prosecutorial strategy have been limited, despite the existence mechanisms for victims’ participation.<sup>33</sup> FIDH hopes that, with the evolution of the ICC practice, the use of those mechanisms will be interpreted in accordance with the spirit of the Statute, so that this problem can be addressed.

#### *e. Court’s Strategy on Victims*

Another area which FIDH has highlighted in previous reports is the manner in which the Court perceives victims. For example, the Court’s Strategy in relation to victims<sup>34</sup> presents a view of how the Court manages victims but fails to acknowledge what victims bring to the ICC and how they can positively contribute to judicial and institutional processes. Nor does the document put in place strategies to improve the manner in which the Court considers victims’ input when devising policies. For this reason, FIDH has recommended that the Strategy in relation to victims be kept under review and that matters such as the one highlighted in this paragraph be incorporated in a revised version of the document.<sup>35</sup>

## **4. Reparations and Assistance**

### *a. The ICC’s implementation of the right to reparations and the work of the Trust Fund for Victims*

The ICC has not yet completed full cycle of proceedings. Therefore, no reparations proceedings have been initiated and no reparations award has yet been made. As a consequence, no assessment on the matter can be made at this stage. However, FIDH takes this opportunity to encourage judges to develop principles on reparations<sup>36</sup> in accordance with the definition and types of reparations recognised in international law.

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DRC%20joint%20letter%20english%201-8-2006.pdf. See also ICC-01/04-01/06-1891, The Prosecutor v. Thomas Lubanga Dyilo, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court (22 May 2009)

30. See ICC Office of the Prosecutor, Report on the Prosecutorial Strategy, September 2006, [http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf), p. 5

31. See Prosecutorial Strategy 2009-2012, February 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>

32. This evolution is yet to become visible in the practice of the Office.

33. FIDH Comments on the Office of the Prosecutor’s Policy Paper on Victims’ Participation under Article 68.3 of the ICC Statute, 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)

34. ICC-ASP/8/45

35. See, e.g., Position Paper No. 14 – Recommendations to the Eighth Session of the Assembly of States Parties to the Rome Statute – The Hague, 18-26 November 2009, <http://www.fidh.org/IMG/pdf/ASP532ang.pdf>, p. 6-7.

36. Rome Statute, Article 75(1).

Similarly, a comprehensive assessment of the performance of the Trust Fund for Victims would be difficult at this stage, since the Fund has only been operational for three years and it has not yet implemented any reparations award. However, a number of observations can be made in relation to the implementation of Regulation 50 of the Trust Fund Regulations<sup>37</sup> authorising the Fund to provide for physical, psychological and material assistance. The Fund has implemented 31 assistance projects in Uganda and in the Democratic Republic of Congo, and will soon be launching projects in the Central African Republic.<sup>38</sup> FIDH welcomed the States Parties' decision to allow the Fund to provide assistance prior to a conviction, as such a possibility recognises that victims have imperative needs as a result of the crimes they have suffered. It also reaffirms the principle that a person is a victim "regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted [...]"<sup>39</sup>

FIDH acknowledges the intrinsic difficulties of Trust Fund's work: providing assistance to and implementing reparations among groups whose needs are considerable; and doing so in the context of the tensions inherent to conflict and post-conflict situations. FIDH has made recommendations to the Trust Fund in other reports.<sup>40</sup> In particular, FIDH members have expressed concerns about the lack of information on the Trust Fund and its activities among potential beneficiaries. For this reason, FIDH welcomes the Trust Fund's recent announcement that it will be conducting outreach in affected communities together with the relevant sections of the Registry. FIDH reiterates that it considers beneficiaries themselves should be aware that the assistance received comes from the Trust Fund and the ICC, so that it can be understood that such assistance is part and parcel of the justice process initiated by the ICC.

In addition, FIDH welcomes the assessment project conducted by the Trust Fund Secretariat on the impact of its assistance activities, which is to be presented at the Review Conference. FIDH looks forward to considering this study.

Furthermore, FIDH recalls that the Trust Fund needs many more resources, and reiterates its call to States to make regular donations to the Fund.

Finally, FIDH would like to comment on the suggestion which has been made for the Trust Fund to assume an advisory function vis-à-vis governments establishing reparations programmes.<sup>41</sup> Firstly, it is relevant to recall the importance of the Trust Fund's work directly with the affected communities, and direct access by the communities to the Fund, normally through associations and structures already existing in the field<sup>42</sup> and which could be reinforced by the Trust Fund's actions. Additionally, in FIDH's views, the proposed advisory function would fall outside the mandate of the Trust Fund. Moreover, vesting such function on the Trust Fund could affect its independence and the perception of impartiality, especially in cases where the government concerned has been involved in the commission of atrocities.

### *b. Victims' Rights at the National Level*

Under human rights treaties, States are under the obligation to ensure the access of victims of serious crimes to remedy and reparations. An analysis of the extent to which States have

37. Adopted by Resolution ICC-ASP/4/Res.3.

38. ICC-ASP/8/18, Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2008 to 30 June 2009.

39. United Nations' Declaration of Basic Principle of Justice for Victims of Crimes and Abuse of Power, U.N. Doc. A/RES/40/34 (Nov. 29, 1985). See also: United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

40. See, e.g., Position Paper No. 14 – Recommendations to the Eighth Session of the Assembly of States Parties to the Rome Statute, The Hague – 18-26 November 2009, <http://www.fidh.org/IMG/pdf/ASP532ang.pdf>, p. 12-13; Position Paper No. 13 – Recommendations to the Seventh Session of the Assembly of States Parties to the Rome Statute, The Hague, 14-22 November 2008, [http://www.fidh.org/IMG/pdf/FIDHPositionPaperASP7\\_Nov2008.pdf](http://www.fidh.org/IMG/pdf/FIDHPositionPaperASP7_Nov2008.pdf), p. 11-13.

41. ICC/8/49, Report of the Bureau on stocktaking: The impact of the Rome Statute system on victims and affected communities, ¶138.

42. Note that according to Rule 98 of the Rules of Procedure and Evidence, "the Court may order that an award for reparations be made through the Trust Fund through an intergovernmental, international or national organisation approved by the Trust Fund."

discharged their obligation to grant access to justice will be made in the section devoted to complementarity in this paper.<sup>43</sup>

This sub-heading seeks to focus, in particular, on the matter of access to reparations. According to the *United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* ("UN Basic Principles on Reparations"), "the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to [...] provide effective remedies to victims, including reparation [...]"

By adopting the Rome Statute, States reaffirmed the idea that doing justice for serious crimes involves not only prosecution of those responsible but also making reparations to the victims. The nature and extent of the crimes prosecuted at the ICC is such that the damage caused, and consequently, the needs for reparations are huge. The territorial State must complement ICC reparations by ensuring availability of national reparations mechanisms. It must be recalled that it is imperative that victims are adequately consulted in the process of designing programmes programmes. FIDH notes that the majority of States whose citizens have been victims of crimes under the Court's jurisdiction have overwhelmingly failed to provide reparations. FIDH urges States to adopt the necessary measures to ensure that victims of international crimes have access to different types of reparations as described in the UN Basic Principles on Reparations.

**FIDH recommends that States Parties:**

- **Recall and reaffirm the centrality of the rights of victims in the Rome system.**
- **Reaffirm the importance of the Rome Statute to victims and affected communities in its determination to put an end to impunity for the perpetrators of the most serious crimes of international concern, thus contributing to their prevention.**
- **Recognise that victims' right to equal and effective access to justice, protection and support; adequate and prompt reparation for the harm suffered; and access to relevant information concerning the violations and redress mechanisms are essential components of justice.**
- **Reiterate their commitment and make concrete pledges to fully implement the right of victims to remedy, reparations and protection at the international and national levels.**
- **Provide political and financial for the full implementation of these rights by the ICC.**
- **Recall the importance of communication about the Court's activities and policies, including the prosecutorial strategy, in affected communities so as to ensure a greater impact of the Court's activities and an increasing deterrent effect.**
- **Reaffirm the importance for victims to access the Court through information and outreach activities, so as to become involved in the justice process, and to facilitate participation in proceedings.**
- **Deploy further resources in the area of outreach to allow the Court to continue to increase and diversify its outreach activities.**
- **Fully support the holding of *in situ* hearings as well as an increased field presence of the Court.**
- **Encourage the Court to continue to implement the strategy in relation to victims and to revise it regularly in order to improve it further, as well as to continue to adapt it to the situation of victims of crimes within the jurisdiction of the Court.**
- **Reinforce protection measures vis-à-vis human rights defenders promoting, doing advocacy around or collaborating with the ICC.**
- **Continue to provide financial support to the implementation of victims'**

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43. See Section B below.

rights, in particular to a legal aid scheme for victims which allows appropriate communication between victims and their lawyers.

- **Make regular contributions to the Trust Fund for Victims.**
- **Reaffirm the importance of the work of the Trust Fund with local associations and non-governmental organisations to facilitate direct access to the Fund by the communities.**
- **Ensure follow-up of the recommendations to be made by States Parties at the Review Conference.**
- **Ensure that all recommendations and any follow-up mechanism established do not encroach upon the judicial domain.**

For further recommendations, see: VRWG, *The Impact of the Rome Statute System on Victims and Affected Communities*, available at: <http://www.vrwg.org/Publications/05/Stocktakingreport2010.pdf>, p. 37-39

## B. Complementarity

Complementarity is an admissibility criterion under the Rome Statute's rules. The principle was agreed to by States during negotiations of the ICC Statute in order to ensure that the Court would only step in when the State or States concerned were not investigating and prosecuting crimes under ICC jurisdiction. States thus retained primary responsibility for investigation and prosecution of serious international crimes. The Rome Statute also introduced two important qualifiers to measure whether relevant State has conducted or is conducting *genuine* investigations and prosecutions. As a result, the ICC should only intervene when the relevant State or States are *unable* or *unwilling* to carry out investigations and prosecutions. Further, the ICC will only investigate a few people, notably those bearing the greatest responsibility for the crimes. National prosecutions are crucial to bridge the impunity gap, so that those not prosecuted by the ICC will be brought to justice before national tribunals.

Over the first few years of implementation of the Rome Statute, it has been demonstrated that the principle of complementarity can act as a significant incentive for States to carry out investigations and prosecutions, if they want to avoid action by the ICC with respect to crimes within their jurisdiction.

**The stocktaking exercise offers an excellent opportunity for States Parties to assess individually and collectively their performance in prosecuting Rome Statute crimes at the national level. It is also an opportunity for States to make concrete pledges for further developments on this front.**

FIDH has made its own assessment and its conclusion is not particularly positive, both as regards prosecution of crimes in non-situation countries, as well as in situation countries for crimes other than those being prosecuted at the ICC. FIDH has taken note of a few initiatives, notably in Colombia and Uganda. Nevertheless, it questions the extent to which it can categorically be affirmed that these initiatives reach the standards set in the Rome Statute, i.e. that these States are genuinely able and willing to conduct investigations and prosecutions into international crimes.

In Colombia, the existence of the ICC has fostered the set-up of a structure to prosecute members of the paramilitary structures who have committed crimes against humanity. However, the ineffectiveness of the Justice and Peace Law; the extradition and consequent exclusion from the process of the top paramilitary commanders; the overwhelmingly low number of investigations for serious crimes among politicians having ties with the paramilitary structures; as well as the limitations observed in the trial of top members of the army for crimes against humanity and war crimes, attest to a lack of genuine willingness to conduct national proceedings against those

most responsible for the crimes.<sup>44</sup> In the view of FIDH, this situation grants intervention by the ICC. In addition, threats to members of the Supreme Court and other judicial operators,<sup>45</sup> as well as harassment of human rights defenders denouncing violations and combating impunity,<sup>46</sup> add to doubts about the genuine nature of the process.

In Uganda, the set-up of a Special Division within the High Court is a welcomed initiative. However, FIDH notes that the establishment of such a structure is not enough. The Special Division must become operational, and it must be enabled to try all parties responsible for serious crimes as opposed to solely members of the Lord's Resistance Army. It must also be recalled that the Rome system does not allow for amnesties for serious crimes.<sup>47</sup>

FIDH also regrets that little efforts have been done to try perpetrators not targeted by ICC Prosecutions in the Democratic Republic of Congo. The lack of implementing legislation constitutes an important obstacle. FIDH and its member organisations in the Democratic Republic of Congo call for adoption of such legislation without delay. Furthermore, although the adoption of the law on sexual violence in 2006 was an important achievement, FIDH and its member organisations note with regret the low implementation rate of the said law, and urge judicial operators to ensure its effective application. Given the massive criminality registered in the Democratic Republic of Congo and the capacity and independence constraints faced by the Congolese Judiciary, FIDH and its member organisations in the Democratic Republic of Congo call for the establishment of special chambers of a hybrid (national-international) nature to address those crimes.

In Kenya, efforts to set a Special Tribunal to enquire into the 2007-2008 post-election violence have failed. No progress has been registered in other States Parties, including the Central African Republic, Afghanistan, Georgia and Guinea. FIDH recalls that it is imperative that States Parties adopt effective and comprehensive legislation implementing the Rome Statute, so as to carry out national proceedings.

FIDH is similarly concerned by the lack of investigations and prosecutions into international crimes committed in Sudan, Côte d'Ivoire, and the Occupied Palestinian Territories, among others. The same should apply to other situations, such as Burma and Iran. FIDH notes that further efforts are needed by States Parties to call upon other States to conduct genuine investigations and prosecutions into allegations of war crimes and crimes against humanity, or, in the alternative, to set up or resort to other accountability mechanisms. With respect to violations in the Occupied Palestinian Territories and Israel, FIDH calls for an effective follow-up of the report of the international commission of inquiry headed by Richard Goldstone. As regards allegations of serious crimes committed in Burma, FIDH reiterates its call for the set up of a United Nations commission of inquiry.<sup>48</sup>

FIDH regretfully notes that, since the adoption of the Rome Statute, there have been a number of initiatives by States to withdraw themselves from the responsibility of holding those responsible for international crimes accountable.

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44. FIDH Report, *La desmovilización paramilitar: En los caminos de la Corte Penal Internacional*, October 2007, <http://www.fidh.org/Paramilitary-Demobilization-in-Colombia-On-the>. See also: FIDH Press Release, *Gobierno Colombiano consolida la impunidad de los crímenes de lesa humanidad y crímenes de guerra cometidos en Colombia*, 14 May 2008, <http://www.fidh.org/Gobierno-colombiano-consolida-la-impunidad-de-los>

45. See, e.g., FIDH Press Release, *Colombia: Se reiteran amenazas contra magistrados de la Corte Suprema de Justicia, urge incrementar su protección y la de sus familias*, 21 August 2009, <http://www.fidh.org/Colombia-Se-reiteran-amenazas-contra-magistrados>

46. See, e.g., Observatory for the Protection of Human Rights Defenders, *Carta abierta a las autoridades: Existencia de un plan de espionaje del DAS afectando a varios defensores de derechos humanos*, 4 May 2009, <http://www.fidh.org/El-Observatorio-Carta-abierta-a-las-autoridades>

47. See Section C below, on Peace and Justice.

48. FIDH-ALTSEAN-BLC Report, *International crimes committed in Burma: the urgent need for a Commission of Inquiry*, August 2009, <http://www.fidh.org/IMG/pdf/bu08.pdf>

An example of such tendency was the Bilateral Immunity Agreements campaign initiated by the United States,<sup>49</sup> which ended up being unsuccessful thanks to the strong support to the principles of the Rome Statute expressed by the European Union and many other countries.

However, FIDH has also observed other unfortunate initiatives, such as the introduction of restrictive conditions on the application of the principle of universal jurisdiction in a number of countries, including Belgium and Spain, mainly due to external pressure exerted by other States. A similar restrictive tendency has been registered in the French bill on implementation of the Rome Statute.<sup>50</sup> It must be recalled that the inclusion of universal jurisdiction mechanisms under their legislation is an obligation for States, emanating from their commitment to retain primary responsibility for the most serious crimes,<sup>51</sup> international conventions,<sup>52</sup> as well as customary international law. When it comes to the actual implementation of the universal jurisdiction principle, FIDH notes that Senegal seems to be dragging its feet with respect to the trial of Hissène Habré.

This situation underscores the fact that most problems related to the exercise of the principle of complementarity lie overwhelmingly on the area of unwillingness, rather than inability.

While acknowledging that investigations and prosecutions are the ICC's primary and main activity, FIDH has welcomed the ICC Prosecutor's initiatives on *positive complementarity*, i.e. a proactive policy of cooperation aimed at promoting national proceedings.<sup>53</sup> FIDH has equally welcomed the Prosecutor's more public and transparent approach on situations at a preliminary examination phase, as a measure to promote national prosecutions. Plans directed at building capacity, such as the Law Enforcement Network, are very positive. FIDH also recalls the importance of the Office of the Prosecutor's permanent presence in the meetings of European Network of Contact Points in Respect of Persons Responsible for Genocide, Crimes Against Humanity and War Crimes. However, FIDH would like to emphasise the importance of initiatives seeking to foster willingness.<sup>54</sup>

In this sense, FIDH appreciates the work carried out by the focal points on the stocktaking item "complementarity" and applauds the proposals made to ensure that technical assistance can be made available to States under the obligation to conduct investigations and prosecutions for serious crimes. While the provision of technical assistance could by itself be a mechanism to encourage willingness to conduct such proceedings, FIDH considers that it must be supplemented by other efforts directed at overcoming obstacles related to unwillingness. This is an area where certainly further discussions by States Parties on their role and the role of the Court are needed. For this reason, FIDH fully supports the proposal to ensure the set-up of appropriate follow-up mechanisms on the issue of complementarity within the Assembly of States Parties.

#### **FIDH's programmes on complementarity**

FIDH trains and contributes to capacity-building of local civil society organisations in international justice mechanisms. FIDH's international justice programme has a particular focus on the ICC and complementarity. Through this programme, FIDH seeks to reinforce the capacity of local human rights organisations for them to be in a position to advocate for reforms

49. See FIDH Report, International Criminal Court - No To American Exceptionalism, December 2002, <http://www.fidh.org/IMG/pdf/cpi345n8a.pdf>

50. See, e.g., FIDH Press Release, La France entend-elle s'affranchir des poursuites sur son territoire des responsables des crimes contre l'humanité, génocide et crimes de guerre ?, 19 May 2010, <http://www.fidh.org/La-France-entend-elle-s-affranchir-des-poursuites>

51. Rome Statute, Article 1

52. Such as the Convention against Torture.

53. See Prosecutorial Strategy 2009-2010, February 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>

54. Examples include letters sent to the Colombian government requesting information on on-going national proceedings; public statements announcing that Georgia, Kenya, Guinea and Palestine are under preliminary analysis; missions of the Office of the Prosecutor to Colombia, Georgia, Russia and Guinea, and meeting with members of the government and the Judiciary.

at the national level (including through litigation) in order to contribute to improving the capacity and willingness of the State or States concerned to undertake national investigations and prosecutions. The programme includes, *inter alia*, trainings at the seat of the ICC; missions to relevant countries; fact-finding reports on crimes as well as on measures undertaken by the Judiciary to investigate those crimes. The results of the findings are regularly communicated to national authorities, and form the basis of communications under Article 15 of the Statute to the ICC Office of the Prosecutor.

**FIDH recommends that States Parties:**

- **Reaffirm that States bear the primary responsibility to prosecute those responsible for the most serious crimes of international concern.**
- **Underscore that the ICC is a court of last resort to fight impunity for the most serious crimes.**
- **Reiterate their commitment and make concrete pledges to fill the impunity gap, with respect to crimes committed on their territory and elsewhere.**
- **Assess their performance in the area of complementarity since the adoption of the Rome Statute, and do so in a critical manner.**
- **Adopt effective and comprehensive legislation implementing the Rome Statute and call on other States to do so.**
- **Call upon all States Parties to deploy further efforts to carry out national investigations and prosecutions for crimes within ICC jurisdiction.**
- **Continue to promote the provision of technical assistance to other States who may need to enhance their national capacity to prosecute international crimes.**
- **Urge all States Parties to conduct diplomatic and other actions necessary vis-à-vis States facing obstacles related to unwillingness.**
- **Support the Office of the Prosecutor's policy on positive complementarity by joining efforts towards the same objective.**
- **Agree on a follow-up mechanism within the Assembly of States Parties to pursue discussions on complementarity after the Review Conference.**

**Recommendation to the Government of Uganda:**

- **Take all steps necessary to operationalise the Special Division of the High Court without delay.**

## **C. Peace and Justice**

According to the Template on Peace and Justice, a number of background papers were to be produced by 30 April 2010.<sup>55</sup> These papers as well as other potential contributions have not been made public at the time of preparing this paper. Nor is it clear whether they will be made public before the Review Conference. Therefore, the comments made in this section will not make specific reference to the said documents. The ideas summarised hereunder reflect general elements of the FIDH's position on the matter of peace and justice.

### **1. The Role of Justice in Achieving Peace**

First of all, it is fair to acknowledge that victims and affected populations have an inherent right to peace as well as to justice. Much has been said about the perceived opposition between the two concepts. However, it is widely acknowledged that peace and justice are not opposite but rather complementary goals.<sup>56</sup>

FIDH firmly believes that justice is an indispensable element of any solution to peace.

<sup>55</sup>. ICC-ASP/8/Res.9, Resolution on the Review Conference, Annex.II, ¶15.

<sup>56</sup>. ICC-ASP/8/52, Report of the Bureau on Stocktaking: Peace and Justice, ¶¶3-4.

Accountability for the most serious crimes is a condition for stability and development. Holding perpetrators accountable is also crucial in order to ensure deterrence of future crimes and, therefore, lasting peace. Impunity for those crimes is often seen by the affected communities as an obstacle to move on and turn the page. Mechanisms designed to grant impunity, such as amnesty, pardon and others, are often either evidence of complicity between the government and the beneficiaries of the said mechanism, or the result of bargaining with the alleged perpetrators. It is fair to notice that victims are rarely consulted in processes resulting in a waiver from prosecution.

The drafters of the Rome Statute recognised that the commission of the most serious crimes threatens peace, security and the well-being of the world,<sup>57</sup> thus acknowledging that prosecution of those crimes is an essential element to achieve peace. The idea of amnesties for those most responsible for the most serious crimes, has been increasingly rejected under international law.<sup>58</sup> Under the Rome Statute, a State who grants amnesties can be considered unwilling to carry out proceedings. This complementary nature is not only recognised by the Statute, but it has also been upheld by the United Nations Secretary General<sup>59</sup> and the Security Council (for example, when it established the International Criminal Tribunals for the former Yugoslavia and Rwanda under its Chapter VII powers; or more recently, when it referred the situation in Darfur to the ICC).

It is fair to acknowledge that the issue of how best to achieve peace is likely to be a matter of concern in practically every situation where the ICC investigates. Given its mandate, the ICC has intervened and is likely to intervene in conflict and post-conflict situations (although not exclusively). However, suspending investigations and prosecutions “in the name of peace” would make the ICC hostage of alleged perpetrators; it would also displace the debate and, most importantly, it would clearly betray past experiences. Indeed, it must be recalled that prosecution of personalities such as Slobodan Milosevic and Charles Taylor was not an obstacle but rather a contributing factor to peace in the former Yugoslavia and Liberia.

Solutions will need to be tailored to every given context. However, FIDH submits that the following actions should invariably contribute to achieve peace in any situation:

- Ensure that the most responsible for the most serious crimes never go unpunished.
- Investigation and prosecution must apply to all parties to the conflict under equal conditions, provided the necessary requirements (gravity of the crimes, evidence, etc) are met.
- Consultation of victims both with respect to prosecutorial choices, but also in any peace negotiating process.
- Avoid that accountability become the bargaining chip in peace negotiations.
- Any transitional process must involve truly transitional measures, including elimination of the structural and policy deficiencies which led to the commission of crimes; cessation of all violations of human rights; and reparation to victims.

## **2. Peace & Justice in Situations Currently under Investigation**

When it comes to countries under ICC investigation, reference to a perceived tension between peace and justice has been made with respect to every single situation or potential situation. This has mostly been the object of discussion with respect to the situations in Uganda and Darfur. Back in Rome, FIDH opposed to the adoption of Article 16 of the Statute (which authorises the United Nations Security Council, acting under Chapter VII of the United Nations Charter, to

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57. Rome Statute, Preamble.

58. ICC-ASP/8/52, Report of the Bureau on Stocktaking: Peace and Justice, ¶4.

59. See, e.g., Statement of the United Nations' Secretary-General at ceremony for the sixtieth anniversary of the Geneva Conventions, New York, 26 September 2009, <http://www.un.org/News/Press/docs/2009/sgsm12494.doc.htm>

defer investigations and prosecutions for a period of 12 months). FIDH has advocated actively against the use of Article 16 in situations like Uganda and Sudan, and has particularly warned against abuse or misuse of this provision.<sup>60</sup>

In Uganda, it is generally acknowledged that the ICC arrest warrants were a determining factor to bring the Lord's Resistance Army to the negotiating table. The fact that the final peace agreement has not been signed has to be interpreted in light of the context. The Lord's Resistance Army had not accepted previous peace agreements. Further, it has been reported that the Joseph Kony used the time of the negotiations to re-organise and re-arm.<sup>61</sup>

As a result of the ICC process, the population of Northern Uganda enjoys relative peace. However, as long as the arrest warrants are not executed, it is uncertain whether peace will be lasting. Unfortunately, the Lord's Resistance Army has since conducted numerous attacks in neighbouring countries. These problems could be solved if the arrest warrants were executed.

In Sudan, accepting the Sudanese government's claims that the ICC posed a threat to peace would only have implied becoming accomplice of the government's actions. When the Government of Sudan expelled humanitarian organisations and closed down national human rights organisations following the issuance of an ICC arrest warrant for President Omar Al-Bashir, thus obstructing delivery of assistance to the affected populations, FIDH highlighted that those decisions were made by the government, not the ICC. Given the Sudanese government's bad faith with respect to any accountability mechanism and genuine peace negotiation in relation to Darfur, it can be easily concluded that there has never been a real will to achieve peace. Therefore, any argument that it is the ICC that poses a threat to peace in the region must inevitably be rejected. A High-Level Panel was established by the African Union in 2009, to enquire into ways to attain peace, justice and reconciliation in Darfur. The panel, headed by former president Mbeki, concluded that prosecutions are an essential part of the solution.

Finally, the issue of peace and justice has also come up in the Democratic Republic of Congo with reference to the arrest warrant for Bosco Ntaganda. We have seen time and again that the issue of "peace vs. justice" has been used as an excuse. In the case at hand, the Democratic Republic of Congo refuses to surrender a member of its army. It can be noted that no similar argument was made when it came to surrendering members of militia not linked to the Congolese national army.

**FIDH recommends that States Parties:**

- **Reaffirm that peace and justice are complementary objectives.**
- **Acknowledge that the ICC does not per se constitute a threat to peace.**
- **Affirm that accountability for the perpetrators of the most serious crimes must be an essential element of any negotiated solution to put an end to conflict.**

## **D. Cooperation**

As recalled above, the Rome Statute did not only create a Court but a whole system where the action, assistance and support by other actors are essential for the system as a whole to succeed. Importantly, as creators of the system, States accepted that their cooperation was vital for the Court to operate, and committed themselves to lend the necessary assistance and support. Cooperation by other actors, including intergovernmental organisations, is similarly crucial. FIDH has welcomed the efforts made to address the matter of cooperation at the Assembly of

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60. See, e.g., FIDH Press Releases, Ongoing Crimes and Impunity Endanger Peace Not Justice, 3 December 2008, <http://www.fidh.org/Ongoing-crimes-and-impunity-endanger-peace-not>; FIDH and FHRI urge the Security Council to respect the independence of the International Criminal Court and protect the integrity of the Rome Statute, 11 April 2008, <http://www.fidh.org/FIDH-and-FHRI-urge-the-Security-Council-to>

61. See, e.g., Fourteen Diplomatic Briefing of the International Criminal Court, Compilation of Statements, The Hague, 8 October 2008, <http://www.icc-cpi.int/NR/rdonlyres/90ED4A0B-029E-49BA-8AA2-9DA59BE3EB09/279061/CCDB14STENGFRA1.pdf>, p. 6.

States Parties since 2006. It has acknowledged the breath and usefulness of the various reports adopted in this framework, including the Reports of the Bureau on Cooperation of 2007<sup>62</sup> and 2009,<sup>63</sup> as well as the Report of the Court on international cooperation and assistance.<sup>64</sup> FIDH sees the Review Conference as part of this process initiated at the Assembly which aims at a concerted action of all actors to galvanise support for and reinforce assistance to the Court. FIDH hopes that the work done over the years will enable States to carry discussions forward at the Review Conference.

As shown by the Bureau's Report on Cooperation of 2007, the areas where cooperation with the Court are needed are numerous and vast. FIDH recalls the need for States to adopt effective implementing legislation, the Agreement on Privileges and Immunities of the Court, as well as to sign further bi-lateral agreements (including agreements on relocation of victims and witnesses, and enforcement of sentences). It is also imperative that the African Union concludes the relationship agreement which has been negotiating with the Court for several years, notably in view of the opening of a liaison office in Addis Ababa.

This section offers comments on specific areas of cooperation which FIDH has been monitoring rather closely, and which it would like to bring to the attention of States for the purpose of the stocktaking exercise.

FIDH regrets the turn the debate on cooperation has taken since last year, leading to a distinction between mandatory and non-mandatory forms of assistance. This is reflected in the background paper on cooperation prepared by the focal points: "The Rome Statute obliges States Parties to cooperate with the Court in a number of ways, whilst other forms of cooperation are non mandatory."<sup>65</sup> With this debate, States seem to be seeking to limit the extent of the obligations they assumed when they ratified the Rome Statute.

FIDH places particular emphasis on "the need to ensure broad understanding and support for the work of the Court through sustained diplomatic action."<sup>66</sup> States must consistently raise necessary cooperation with the Court in their bi-lateral relations with relevant actors. They must also ensure that intergovernmental organisations they are party to, fully support the Court's action. In this regard, FIDH has found the position of the African Union since the issuance of an arrest warrant against President Al-Bashir fully inappropriate, given that thirty members of the African Union are parties to the Rome Statute.

In addition, FIDH considers that it is unacceptable that many States do not have adequate national mechanisms to implement comply with ICC requests for assistance. It also deplores that a considerable number of requests are not met with a response.<sup>67</sup> FIDH similarly regrets the low level of responses to the questionnaire<sup>68</sup> issued by the Secretariat of the Assembly of States Parties.<sup>69</sup>

Furthermore, there are two important areas which, in the view of FIDH, need to be addressed immediately to guarantee effective access to justice by victims of crimes within ICC jurisdiction.

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62. ICC-ASP/6/21

63. ICC-ASP/8/44

64. *Id.*, Annex I. The up-dated Court report on cooperation had not been made available at the time of writing.

65. ICC-ASP/8/50, Report of the Bureau on stocktaking: Cooperation, ¶8

66. *Id.*, ¶17

67. "[T]he analysis of responses to cooperation requests has indicated two general trends which states may consider addressing. First, a considerable number of requests of the Registry to States are not met with a response. In limited circumstances, the Registry's notification of cooperation requests has even been rejected. Second, a number of States have indicated a lack of available procedures under national law to provide the requested cooperation. Pursuant to Article 88 of the Rome Statute, there is an obligation to ensure such procedures are available." *Id.*, ¶8

68. Questionnaire on the measures undertaken in respect of implementing legislation of the Rome Statute of the International Criminal Court (note verbale ICC-ASP/8/S/PA/19)

69. ICC-ASP/8/50, Report of the Bureau on stocktaking: Cooperation, ¶7

As indicated in the report prepared by the VRWG, the non-execution of arrest warrants is a source of frustration for many victims.<sup>70</sup> In practice, the non-execution of the warrants brings proceedings at the ICC to a halt, thus denying victims the right to access to justice. It is imperative that further efforts be deployed for the persons still at large to be arrested and surrender. Such efforts must be undertaken by both territorial States and other States, who can contribute to execution through joint operations and diplomatic action. Serious consideration must be given to the guidelines put forward by the Office of the Prosecutor.<sup>71</sup>

Moreover, in order to ensure that victims' right to reparations will not be frustrated, States must ensure that they can comply with all Court's requests to trace, seize and freeze assets. The implementation rate reported by the Court in 2009 is largely unsatisfactory.<sup>72</sup>

**FIDH recommends that States Parties:**

- **Reaffirm their commitment to fully support the combat against impunity for the most serious crimes.**
- **Reiterate their obligation to cooperate fully with the ICC and make concrete pledges to support and assist the Court, including through adoption of national legislation, the Agreement of Privileges and Immunities of the Court, and agreements for relocation of victims and witnesses or enforcement of sentences, but also through unconditional political and diplomatic support.**
- **Call on all States Parties to ensure that their national legislation allows for full cooperation with the ICC, including in the area of tracking, freezing and seizing assets.**
- **Urge all States Parties to consider adopting the Agreement of Privileges and Immunities of the Court, and agreements for relocation of victims and witnesses or enforcement of sentences.**
- **Assess their cooperation with the Court to-date, taking into account, *inter alia*, the reports of the Court on cooperation, and do so in a critical manner.**
- **Identify processes both at the national level and within the Assembly of States Parties to further strengthen cooperation with the Court.**
- **Recall that all States Parties must provide unrestrictive diplomatic and political support to the Court's action, including by upholding cooperation with the Court in their bilateral meetings with other actors and within intergovernmental organisations they are parties to.**
- **Reiterate the need to execute the arrest warrants for those persons still at large without any further delay.**
- **Ensure that after the Review Conference there will be a follow-up of the discussions on cooperation within the Assembly of States Parties.**

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70. VRWG, The Impact of the Rome Statute System on Victims and Affected Communities, <http://www.vrwg.org/Publications/05/Stocktakingreport2010.pdf>, section 2.2

71. "Eliminate non-essential contacts with individuals subject to an arrest warrant issued by the Court; When contacts are necessary, attempt first to interact with individuals not subject to an arrest warrant by the Court; In bilateral and multilateral meetings, proactively express their support to the enforcement of the Court's decisions, request cooperation with the Court, and demand that crimes, if ongoing, cease immediately; Contribute to the marginalization of fugitives and take steps to prevent the diversion of aid/funds meant for humanitarian purposes or peace talks to the benefit of persons subject to an arrest warrant issued by the Court; and Make collaborative efforts to plan and execute arrests of individuals subject to an arrest warrant issued by the Court, including by providing operational or financial support to countries willing to conduct such operations but lacking the capacity to do so," Report of the Court on international cooperation and assistance, ICC-ASP/8/44, Annex I, ¶174.

72. *Id.*, ¶157.

# II. Proposals for Amendments

FIDH has favoured a restrictive approach to amendments at the first Review Conference of the Rome Statute, given the need to preserve the integrity of the States and the fact that the Court has not yet tested all of its provisions by going through a whole cycle of proceedings. FIDH has welcomed the fact that this was also the spirit of States Parties.

## A. Article 124

Article 124 of the Rome Statute states “a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article *shall be reviewed at the Review Conference* convened in accordance with article 123, paragraph 1” (emphasis added).

The inclusion of this article in the Statute was the result of a compromise necessary for the adoption of the Statute. The drafters agreed, however, that this would be a *temporary provision* and mandated the Review Conference to be held seven years after the entry into force of the Statute to review it. It must be recalled that only two States (France and Colombia) made use of this provision. Furthermore, France withdrew the declaration before the expiration of the seven-year-period, and the declaration made by Colombia has expired.

Article 124 has not proven to be a determining factor in encouraging ratifications. It also amounts to a reservation otherwise prohibited by the Statute.<sup>73</sup> Its retention after seven years would run contrary to the spirit of the Rome Statute, whose aim is to fight against impunity for the most serious crimes, including war crimes.

### **FIDH recommends that States Parties:**

- **Delete Article 124 from the Rome Statute.**

## B. The “Belgian proposal”

The proposal put forward by Belgium involves expanding the use of certain weapons as war crimes in the context of an armed conflict not of an international character.

If this amendment is adopted, the following sub-paragraphs will be added to Article 8.2.e):  
“xiii) Employing poison or poisoned weapons;  
xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;  
xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.”

FIDH notes that the use of these weapons is already criminalised in the Rome Statute in the

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73. Rome Statute, Article 120.

context of armed conflict of an international character (Article 8.3.b) xvii), xviii) and xix)). The use of these weapons is prohibited under customary international humanitarian law. Further, there is no reason why victims of non-international conflicts should be afforded a lower level of protection than victims of international armed conflicts.

**FIDH recommends that States Parties:**

- **Adopt the amendment proposed to Article 8 in order to harmonise the rules applicable to international and non international armed conflicts.**

### **C. Crime of aggression**

FIDH has followed the negotiations on the definition of the crime of aggression, and has taken particular interest on the conditions for the Court to exercise jurisdiction. As stated in several reports,<sup>74</sup> FIDH opposes any alternative which would compromise the independence of the Court or undermine the integrity of the Rome Statute. For this reason, FIDH has taken a position against Security Council involvement in triggering the Court's jurisdiction for the crime of aggression. FIDH also opposes the view that prior determination on the existence of an act of aggression by the Security Council would be necessary for the Court to exercise jurisdiction over the crime. Retaining such an option would imply disregarding the judicial nature of the ICC and would seriously affect its independence.

For the similar reasons, FIDH objects to the involvement of other external bodies such as the United Nations General Assembly or the International Court of Justice.

Full respect for the integrity of the Statute must also be ensured when seeking a solution to proposals for conditions of acceptance by the aggressor State or the victim State. FIDH argues that the ICC should be in a position to exercise jurisdiction over the crime of aggression under the same conditions as it does on other crimes, i.e. when the crime is committed on the territory or by a national of a States Party, and that no additional condition should be imposed.

**FIDH recommends that States Parties:**

- **Negotiate the provisions related to the crime of aggression in a way so as to find a solution with respect to the conditions to exercise jurisdiction which is fully respectful of the independence of the Court and the integrity of the Rome Statute.**

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74. FIDH Position Paper No. 13, Recommendations to the seventh session of the Assembly of States Parties to the Rome Statute, The Hague – 14-22 November 2008, [http://www.fidh.org/IMG/pdf/FIDHPositionPaperASP7\\_Nov2008.pdf](http://www.fidh.org/IMG/pdf/FIDHPositionPaperASP7_Nov2008.pdf), p. 19; FIDH Position Paper No. 12, Recommendations to the sixth session of the Assembly of States Parties to the Rome Statute, 30 November-14 December, <http://www.fidh.org/IMG/pdf/ICCpospaper12eng-novembre2007.pdf>, p. 15-16.





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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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