

FIDH POSITION PAPER

Recommendations to the 12th Assembly of States Parties to the Statute of the International Criminal Court

The Hague, 20-28 November 2013

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 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,



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Introduction

Between the 20 and the 28 November 2013, States Parties to the Rome Statute of the International Criminal Court (ICC) will gather in The Hague during their 12th Assembly. They are approaching this meeting in the midst of serious threats to the core mandate of the ICC in light of political attacks led by the Kenyan government, in defence of two accused persons who were elected – after the Court confirmed the charges against them - as President and Deputy-President of the Country.¹ These attacks have gathered the support of some countries within the African Union.² In this environment, the commitment of States Parties to the fight against impunity for genocide, crimes against humanity and war crimes, at all levels, must prevail.

These discussions require to be approached by State delegations with a strong sense of commitment to the object and purpose of the Rome Statute. Delegations must bear in mind that the fight against impunity for the most heinous crimes “that shock the conscience of humanity”³ cannot be compromised by particular political interests of one or few States Parties. States should avoid short-term compromises to address these political interests that may translate in the long run, to affect the coherence and consistency between the legal texts, and the Court's ability to fulfil its mandate. They, at all moments, should avoid any double standards in guaranteeing justice for victims of atrocities.

At this Assembly, States Parties will also devote part of its plenary session to discuss Victims' Rights in the panel *Beyond Kampala: reaffirming the value of the victims' mandate of the Rome Statute System*. There will also be another plenary session on cooperation that will focus on witness protection. Both are essential elements for the investigative and judicial work of the Court, for ensuring its legitimacy, cooperation from local communities and to safeguard ICC investigations and proceedings.

1. Since Kenya did not set up the 'Special Tribunal' or addressed the alleged crimes of the post-election violence in any other way, the ICC Prosecutor filed an application before the Pre-Trial Chamber for authorization to open an investigation on 26 November 2009. This resulted in two cases before the ICC. The investigation on Kenya was opened on the 31st of March 2010 after the Pre-Trial Chamber II authorized the Prosecutor to open an investigation into the PEV. This investigation entailed the crimes against humanity committed between 1 June 2005 and 26 November 2009.

The Office of the Prosecutor brought charges against William Samoei Ruto, Joshua Arap Sang and Henry Kiprono Kosgey for crimes against humanity of murder, deportation or forcible transfer of population, and persecution. The Prosecution also presented charges for crimes against humanity of murder, deportation or forcible transfer of population, rape and other forms of sexual violence, other inhumane acts and persecution against Francis Kirim Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. The Pre-Trial Chamber did not confirm the charges against Henry Kiprono Kosgey and Mohammed Hussein Ali. On 11 of March 2013 the Prosecutor informed of the withdrawal of the charges against Muthaura.

2. For FIDH position on the AU position related to the ICC, see in particular *African Union : The PSC underlines the importance of international justice for peace and security in Africa available in:* <http://www.fidh.org/en/africa/african-union/Peace-and-Security-Council/African-Union-The-PSC-underlines-12619>, *AU Summit on the ICC - Protecting leaders in office to the detriment of victims and peace*, <http://www.fidh.org/en/africa/african-union/14154-au-summit-on-the-icc-protecting-leaders-in-office-to-the-detriment-of>, and *Side Event on the Fight against impunity for international crimes in Africa* <http://www.fidh.org/en/africa/african-union/African-Commission-on-Human-and-Peoples-Rights/14175-side-event-on-the-fight-against-impunity-of-international-crimes-in-africa>. See information available on the Special Summit on the ICC and Africa in: <http://summits.au.int/en/icc/events/africa's-relationship-international-criminal-court-discussed-extraordinary-summit-african>

3. Rome Statute, Preamble.

States Parties will also have to approve the Budget of the ICC for 2014. The Court has requested an increase of 10,95 million Euros to face the growing number of preliminary examinations, investigations and prosecutions; and in particular, the implementation of a new strategic policy of the Office of the Prosecutor (OTP) on investigations.⁴

4. OTP, *Strategic Plan 2012-2013*, 11 October 2013.

I. Defying Justice, Betraying Victims

The Kenyan Government has launched a political offensive to make sure that their sitting President, Uhuru Kenyatta, and Deputy President, William S. Ruto, both facing charges for crimes against humanity, do not stand trial before the ICC for their alleged responsibility in the commission of such crimes during the post-election violence in Kenya in 2007-2008. Among other strategies it includes:

- a) **Non-cooperation** with the investigations carried out by the Office of the Prosecutor, as it has been denounced by the OTP.
- b) **Use of political bodies** by asking for a deferral of their cases for 12 months by the United Nations Security Council (UNSC). An effort in which, despite its failure at the UNSC, they have enjoyed the support of the African Union.
- c) **Proposing reforms to the Rome Statute** to provide for immunities for sitting Heads of State, or making changes that would prevent the Court from exercising its jurisdiction over the two accused officials from Kenya.
- d) **Seeking a political agreement** to modify the rules of Procedure and Evidence of the ICC so the accused receive a special treatment in light of their official capacity and allowing them to be absent from most parts of the trial.

These strategies seek to diminish the legitimacy of ICC proceedings, their efficiency and efficacy and, most of all, block the efforts to fight impunity for crimes against humanity committed in Kenya through independent judicial proceedings. These actions are a betrayal to the Kenyan victims of the post-election violence as insisted by victims of the case *The Prosecutor v. Uhuru M. Kenyatta*, in a letter sent by their legal representative to the UN Security Council on 3 November 2013.⁵ These victims have a right to justice and have found none in Kenya. Many of these proposals contradict the purpose of the Statute, which is to make sure that genocide, crimes against humanity and war crimes do not go unpunished, no matter the current or past position of the alleged responsible. The ICC was created to prosecute the main perpetrators of international crimes, whose commission generally implies a government policy or its tolerance. The Rome Statute is clear: no immunities can be alleged before its jurisdiction.⁶

Moreover, States must take into account that the accused persons in the Kenyan cases were indicted by the ICC before being elected in such capacities. The accused knew that they were going to face trial after the charges were confirmed during their term at offices. It should be them, not the ICC and certainly not the victims, the ones bearing the political responsibility of their absence in Kenya to face justice in The Hague.

Non Cooperation and Pressure on Victims

According to the Prosecutor, the investigation in the Kenyan cases faced several challenges including “the disappointing fact that the Government of Kenya failed to provide my Office with important evidence, and failed to facilitate our access to critical witnesses who may have shed light

5. Letter expressing the opposition of the victims in the Kenyatta case at the International Criminal Court to any resolution by the Security Council to suspend the prosecution of that case, 3 November 2013.

6. Rome Statute, Article 27.

on the Muthaura case”.⁷ According to the Prosecutor, Fatou Bensouda, the investigation in Kenya faced enormous cooperation challenges. She expressed so at the beginning of the trial against William S. Ruto: “This trial is the culmination of a long and difficult investigation. It has been fraught with co- operation challenges and obstacles relating to the security of witnesses. Many victims and witnesses have been too scared to come forward, others have given statements, but subsequently sought to withdraw from the process, citing intimidation or fear of harm. Worrying evidence has also emerged of attempts to bribe witnesses to withdraw or recant their evidence. The fact that I stand before you at the opening of the trial today, your Honours, is something of an achievement in itself”.⁸

Deferral According to Article 16

The UN Security Council, on 15 November 2013, rejected the resolution on the deferral of the Kenyan cases. According to Article 16 of the Rome Statute, the Security Council can request the Court to stop the investigations or prosecutions for 12 months if there is a threat to peace and security according to the Charter of the United Nations. It should be made clear that no such threat exists in regard to the present Kenyan situation.

To the contrary, the absence of justice in the past was one of the main reason of the recurrence of international crimes committed on the occasion of electoral processes in the country. One could also remind that few years ago Sudan and the African Union were also opposed to ICC proceedings against President Al Bashir arguing that this would prevent peace negotiations regarding the situation in Darfur. Since then, Sudan refused any cooperation with the Court, mass crimes are still committed in that region and impunity prevails.

Proposals to Reform the Rome Statute

The Kenyan Government has proposed a reform to Article 27 of the Rome Statute to exempt incumbent Heads of State from prosecution during their term of office, at the ICC. While reforms to the Rome Statute cannot be discussed in the present Assembly of States Parties (ASP), as they have not been presented at least 90 days in advance, as required by the Rules of the Assembly, no State should support any measure to guarantee special immunities for sitting Heads of State. Such proposal contradicts international and regional law treaties, jurisprudence and practice that do not admit immunities for Heads of State at international criminal tribunals.⁹ In the fight against impunity for genocide, crimes against humanity and war crimes, States cannot justify double standards.

The African Union and Kenya requested a special segment of the General Debate of the 12th ASP under the title: "*Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation*". While FIDH recognises the value of an open dialogue, these discussions should not overlook the 20th Century developments of International Law. It is a well established principle that, before an international criminal tribunal, the official capacity of the accused should be irrelevant in relation to investigations and prosecutions trying to establish the alleged responsibility for international crimes.

7. Statement by the ICC Prosecutor on the Notice to Withdraw the Charges Against Mr. Muthaura, 11 March 2013.

8. Opening Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, 10 September 2013.

9. Article 7 of the Charter of the International Military Tribunal (Nuremberg), Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, and Article 6 of The Statute of the International Criminal Tribunal for Rwanda. See in particular: International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, para. 61.

During this discussion, the voices of victims and relevant civil society actors (such as human rights NGOs) should be heard and taken into account, States must bear in mind that it is offensive and unacceptable to ask victims to renounce to their right to justice (a second time since no justice was rendered at the national level) in the name of an alleged reconciliation that seats on the objective to benefit those who face charges for international crimes before the ICC.

States Parties should evaluate the long-term consequences of many of these proposals. To recognise immunities for sitting Heads of State may become a temptation for undemocratic serving Heads of States, who may want to remain in power with the sole purpose of escaping justice.

Amendments to the Rules of Procedure and Evidence

Kenya has proposed an amendment seeking to allow an accused person from being absent in the courtroom. This has been followed by proposals from Botswana, Jordan and Liechtenstein in an effort to “deal with the current political crisis surrounding the ICC”. The United Kingdom has also presented proposals for amendments seeking to include the possibility for the accused to assist by *videolink* to the proceedings. At the time of writing, the New York Group on Amendments was working on a merged proposal.

States should not be tempted to change international norms as a rushed short-term solution to a specific political issue. The long-term consequences of such changes should be evaluated. Amendments to the legal texts should seek to improve ICC proceedings, the international system of justice and the international rule of law.

On the other hand, in light of the Appeals Chamber decision in the Ruto case on his request for excusal from continuous presence during the trial,¹⁰ the Rules of Procedure, as they are right now, allow them to evaluate, on a case by case basis and in exceptional circumstances, the need for an accused to be absent from the proceedings.

If a compromised solution is sought to address legitimate concerns of a State it should at all times backup judicial decisions on the matter and safeguard the integrity of the proceedings, including their legitimacy and credibility. Wide consultation for the adoption of these amendments is necessary. In this sense, discussions on amendments should carefully consider the evaluations to the proposals provided by the Working Group on Lessons Learnt of the ICC and the Vice-President of the Court, Judge Sanji Monageng.¹¹

The Court's contributions must be taken into account when evaluating the possible use of videolink. According to the Working Group on Lessons Learnt, participation through videolink may not amount to presence as required by the Rome Statute¹².

Finally, FIDH has received with alarm the news that an accused person, William S. Ruto, current Vice-President, might be leading the Kenyan delegation and, because of his seniority, could be the first to address the Assembly during the General Debate. While recognising the presumption of

10. ICC-01/09-01/11-1066, *The Prosecutor v. William S. Ruto and Joshua Arap Sang*, Appeals Chamber Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 25 November 2013.

11. Working Group on Lessons Learnt, *Comments on the Working Paper on Rules 134 bis to 134 quarter (11 November 2013) of the Rules of Procedure and Evidence*, 14 November 2013, and Letter from Judge Monageng to the Chair of the Study Group on Governance of 12 November 2013.

12. Working Group on Lessons Learnt, *Comments on the Working Paper on Rules 134 bis to 134 quarter (11 November 2013) of the Rules of Procedure and Evidence*, 14 November 2013, page 4.

innocence as a fundamental right, the presence of the accused person in the gathering of States that created the Court where his government has launched a strategy to tailor responses to his case and of his superior, is a clear act of defiance that may affect the legitimacy of the proceedings and the credibility of the Court among affected communities. Mr. Ruto, for respect to the Court, should refrain from taking the floor.

Most of the discussions around the Kenya cases, and the support from some members of the African Union, arise from the perception that the ICC only targets Africa. These arguments tend to overlook the importance of ensuring the right to justice of African victims. Nevertheless, it is true that victims from other regions in the world seek justice too. In this sense, universality of the ratification of the Rome Statute is essential.

Recommendations

1. All the discussions, including proposals to discuss amendments to the ICC legal framework should respect the integrity and the object and purpose of the Rome Statute.

- **States must make unequivocal their commitment to the principles of the Rome Statute and to the fight against impunity for genocide, crimes against humanity and war crimes.**
- **Discussions on proceedings against sitting Heads of State must bear in mind and safeguard the developments of international law and the provisions of the Rome Statute, which do not recognise immunities for international crimes.**
- **States must firmly reject any amendment to modify the Rules of Procedure of Evidence that may affect the credibility and legitimacy of proceedings as well as the capacity of the Court to fully fulfil its mandate.**

2. No amendment should be adopted without a proper consultation process and should avoid a tailored response to address the concerns of accused persons before the ICC.

- **In light of the politically charged environment, States Parties should not rush to adopt any amendment to any legal text during this ASP. States must refrain to adopt any rushed proposal to solve a specific political problem raised by an accused before the Court. The coherence of the Rome Statute must be protected and any amendment should seek to improve, not diminish, the legal texts and the proceedings at the ICC.**
- **Any proposed amendment to the Rules of Procedure and Evidence should seek the views from the Court and other stakeholders, including victims' representatives and civil society. A consultation process as well as any possible solution should seek to address a legitimate concern and not to provide a tailored response to one or more accused persons.**
- **Victims' views and interests to seek justice must prevail in these debates as well as in any compromised solution. Their right to justice and to find redress is a price too high to make them pay as result of political agreements.**

II. Ensuring Redress for Victims

FIDH has participated in the drafting of the submission of the Victims Rights Working Group (VRWG) to the 12th Assembly and as an active member of the Group, supports all its recommendations.¹³

In addition, FIDH wishes to acknowledge the importance of the debate on victims and affected communities that will take place during the General Debate in accordance with Assembly of States Parties Resolution ICC-ASP/11/Res.8, were it “[decided] to include a specific item on victims and affected communities on the agenda of its twelfth session”.

FIDH calls States Parties to accept the invitation of the co-facilitators of the Working Group on Victims and Affected communities and Reparations, and take the opportunity to “reaffirm the commitment to the Court’s mandate towards victims”,¹⁴ and to commit themselves to specific measures “to realize the full reparative potential of the Rome Statute System”.¹⁵ The General Debate at the ASP Plenary is an ideal moment for States Parties and the Court to recognise the benefits that victims’ participation in the proceedings bring for victims themselves, but more important for the legitimacy of the Court, the fulfilment of the object and purpose of the Rome Statute and its centrality to international justice as a whole. Victims' participation shortens the gap between the courtrooms and the affected communities. What happens in The Hague should not remain only in The Hague.

During the year, the Hague Working Group has engaged in enriching discussions on specific issues such as participation, reparations and intermediaries. One of the most tense discussions was the proposal to adopt a sole collective approach to victims participation as a possible solution to on going challenges faced by the judicial system. Some States have taken the view that this approach would make the system more efficient and less costly. There is not substantial evidence to support this affirmation, however, instead there is increasing evidence of the confusion that such approaches create in the field among victims groups and the need to make sure that, before implementing them, a wide consultation with victims, their representatives and local civil society are conducted.

FIDH¹⁶ has insisted that, while in principle not opposed to collective approaches, it takes the position that the legal texts recognise an individual right to participate. Therefore, any “collective” approach would certainly require a consultation with victims, and to allow them to express their views as to whether they want to exercise their rights collectively. In all discussions and decisions on their participation -and other victims' rights enshrined in the Statute- victims should be recognised as right holders and treated as such by the different organs of the Court, the Trust Fund for Victims and the Assembly of States Parties. Respect to victims as right holders should mean that all the necessary arrangements are made to ensure their consultation.

13. Recommendations to the 12th Session of the Assembly of States Parties 20-28 November 2013, The Hague in: http://www.vrwg.org/VRWG_DOC/2013_July_VRWG_HWG_ParticipationFINALrevised.pdf

14. ASP, Concept note by the co-facilitators for victims and reparations issues on the Plenary Session on Victims and Affected Communities, 13 November 2013.

15. Idem.

16. FIDH, Contribution on the occasion of the expert meeting on victims participation, 22 to 26 April 2013, organized by Redress and Amnesty International and FIDH Presentation to the Board Meeting of the Trust Fund for Victims, 20 March 2013.

FIDH welcomes the fact that in the draft Resolution on Victims for the 12th ASP, States have refrained from calling for amendments to the legal framework of the Court and, instead, mentioned them only as a possible consequence of the ongoing review processes. Changes to the legal framework of the Court in relation to the participation of victims are premature. As stated above, any proposal to that effect must be preceded by a Court-led *comprehensive evaluation* of how the system has worked to date. FIDH urges States Parties to offer only general directions regarding any revision to the victims' participation scheme, requesting expert advice, and delegating implementation to the Court's organs and recommend the Court to continue its review processes by ensuring consultations with relevant stakeholders, including victims themselves, NGOs, victims legal representatives and states.

Any future discussions on the implementation of victims' rights in The Working Group must seek to render the participation of victims before the ICC reparative, meaningful, efficient and effective for all and refrain from adopting a purely financial approach.

FIDH in its recent report *Enhancing Victims' Rights at the ICC*, gathered the views and concerns of experts, advocates and practitioners working directly with victims in situation countries. It is clear that, while victims' strongly support the mandate of the Court, there are challenges faced by the work of the institution that lead to disappointment among affected communities. The sources of this disappointment may go from the absence of outreach before the opening of an investigation, the length of the proceedings, some difficult interactions with the staff of the Court and a sense that the Court and the States Parties do not always listen to their views and concerns. As one of the participants said: "the Court takes a lot of time talking about the suspects and very little time on victims".

Among States, there is still confusion as to the role of victims in international criminal proceedings, and particularly from the point of view from common law countries, where victims have a very limited role in criminal proceedings. The inclusion of victims' participation in international criminal proceedings, particularly at the ICC should not be treated as the export of an element of civil law traditions to international criminal proceedings but an evolution of their standing under international law, in particular, international human rights law. The rights to justice, truth and reparations of victims are well established in international law. The answer of many of the debates over the foundation and extent of the rights recognised to victims in the Rome Statute may be better addressed from a complementarity approach between international criminal law¹⁷ and international human rights law¹⁸, and the growing recognition of the individual "as *titulaire* of rights and bearer of duties which emanate directly from International Law"¹⁹.

Intermediaries

This year, States were presented by the Court with Draft Guidelines on Intermediaries. In many cases, these intermediaries are essential to ensure the interactions between affected communities, victims and the Court. FIDH calls States Parties to welcome these guidelines.

17. UN Declaration on victims of crimes, EU resolution on victims rights.

18. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ECOSOC Resolution 2005/30, 25 July 2005 (<http://www.un.org/en/ecosoc/docs/2005/resolution%202005-30.pdf>), Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005:

http://ap.ohchr.org/documents/dpage_e.aspx?m=138), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985 (<http://www.un.org/en/ecosoc/docs/2005/resolution%202005-30.pdf>).

19. Cançado Trindade, Antônio Augusto, *The Access of Individuals to International Justice*, Oxford University Press, 2011, page 203.

Legal Aid

The Hague Working Group on Legal Aid²⁰ has suggested the Court to continue with the present system of remuneration of legal aid, which was adopted after a much criticized reform implemented in 2012 that sought to find savings, after strong pressure from States Parties to find “efficiencies” in the funding for legal aid, labelled then as a “cost driver”.

The Court has presented several documents to report on the implementation of reforms adopted in 2012²¹. Whilst FIDH acknowledges the elaboration of these reports by the Registry, the information presented is insufficient to evaluate comprehensively the functioning of the new system and whether the changes implemented in 2012 have affected the quality of representation for the accused and victims. Those reports seek to show the savings achieved, but a more comprehensive approach in the reporting may be useful.²²

The Hague Working Group has recommended the Court to prepare a “reassessment” of the legal aid system, “within 120 days following the completion of the first full judicial cycles”. FIDH is concerned that, under such a tight time frame, proper consultation with victims’ representatives, civil society and other stakeholders will not be possible. Moreover, an assessment should include a qualitative approach which in some cases must prevail over a mainly financial one.

FIDH notes that the system to assist victims has mirrored that of the defence and fails to address the specific needs of victims in ensuring meaningful representation. Almost a decade since the establishment of the system the discussions and the experience reveal that there is a need to tailor the legal aid system to the victims’ needs. FIDH welcomes that the draft paragraphs presented by the Bureau considers that any reassessment should evaluate the ability of counsels to consult with victims. Consultation with victims is an essential part of the work of legal representatives.

While the Registry recognises the particular needs of victims for the purposes of legal aid²³ such recognition needs to be reflected in the main principles that guide the policies and standards of the ICC legal aid system. FIDH submits that there is a need to look into international standards to gather some principles usually linked to legal aid. Meaningful participation, accessibility, effectiveness, sustainability, credibility, counsel's independence and safety as well as quality representation should guide the Registry's policies on legal aid for victims and the defendant. Some of these principles are contained all along the Registry’s documents, in particular the single policy document, but they need to be specified and clearly established as guiding principles of the system, and be developed into indicators of its performance.

Legal aid has been recognised, by the United Nations, as an essential guarantee for defendants and victims to exercise their rights under international law.²⁴ FIDH invites States Parties to consider the *Draft United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* in building their positions on the matter, support a meaningful consultation process in the reassessment mandated to Registrar and promote the tailoring of a victims' oriented scheme on legal aid.

20. ASP, Report of the Bureau on Legal Aid, 15 October 2013, ICC-ASP/12/29

21. ASP, Registry's single policy document on the Court's legal aid system, CBF/20/5, 5 march 2013; ASP, Report of the Registry on the Comprehensive Review of the Legal Aid System of the Court, CBF/20/22, 2 April 2013, ASP, Registry’s first quarterly report on monitoring and assessing the implementation performance of legal aid, CBF/20/2, 27 February 2013; Registry’s second quarterly report on monitoring and assessing the implementation performance of legal aid, ICC-ASP/12/50, 22 October 2013.

22. FIDH, Comments to Registry’s Single Policy and Comprehensive Review Papers on Legal Aid, May 2013.

23. ASP, Registry's single policy document on the Court's legal aid system, CBF/20/5, 5 march 2013, para. 52.

24. Draft United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, V.11-85805 (E) para 13.

Recommendations:

- **The ASP must recognise the benefits that victims' participation in the proceedings bring for victims themselves and for their communities, for the legitimacy and mandate of the Court and for international justice as a whole.**
- **In the adoption of any language, States must respect the sphere of judicial independence in the decisions on victims' participation. The determination of the extent of the exercise of rights in the courtroom is for the judges to decide.**
- **States must not rush into easy solutions regarding legal aid system and participations approaches and ensure that a comprehensive evaluation of the present system and wide consultations with different stakeholders take place bearing in mind that the first full trial cycles are yet to be completed.**
- **Discussions must continue to engage in constructive discussions with the Court, international and local civil society organisations, experts and legal representatives of victims on how to improve the current system for victims' participation in order to render their participation before the Court reparative, meaningful, efficient and effective for all.**
- **States must provide general directions regarding any revision to the victim participation regime, requesting expert advice and delegating its implementation to the Court.**
- **States must give due consideration to the challenges associated with collective applications and participation processes and recommend that the Court examine the concept thoroughly, engaging in the process with all stakeholders and avoiding a perspective that is only budgetary.**
- **In the discussions on legal aid, States must bear in mind the specific requirements of representing victims. States must recognise that the present system of legal aid needs to be tailored to the victims' needs.**
- **States must welcome the *Draft Guidelines Intermediaries*.**

III. Guaranteeing the Efficiency and Capacity of the Court

Budget for 2014

During past years, the Court has been affected by a zero nominal growth approach encouraged by States. FIDH has constantly expressed its concern that this approach was limiting the capacity of the ICC to fulfil its mandate adequately, and at the same time, called the Court to request the funds it really needed to respond to the needs identified in practice.

This year the Court has requested an increase in its budget for 2014 of 10,95 million Euro for a total of 126.07 million Euro that is 9,5% increase of the approved budget of 2013. This increase reflects the growing workload of the Court. More situations and cases obviously demand an increase in the prosecutorial and judicial activities, with the corresponding support needs.²⁵

The OTP also has announced the adoption of a new strategic policy, seeking to improve the quality of its investigations, and meet the expectations of the judges for the Office to have trial ready investigations earlier.²⁶ Indeed, the Office has requested 35,74 million Euro, for an increase of 26,5 % in relation to its budget of 2013. It is worrying, however, that while recognising the increasing demand for OTP investigations and prosecutions, the Office has decided to “decrease temporarily the number of active investigations from 7 to 5. This should allow the Office to absorb the increase of resources and offers as a benefit to the States Parties a phasing in of the extra cost”.²⁷

This year, the Court, as a whole, has supported the demands of the OTP, with the Registrar even recognising that the Registry would have to accept some sacrifices to allow the OTP resources to grow. FIDH commends this view of “one Court”. It also expects the same commitment of all organs in the future, for demands of increase of resources that may benefit other activities of the Court, in particular, those that may benefit victims.

Many States Parties have recognised the need to provide the OTP with more resources. FIDH welcomes this openness. While the Committee on Budget and Finance (CBF) has recommended States to approve only half of the additional positions requested by the Office,²⁸ States must take careful consideration to the impact of any cuts on the funds requested by the Court.

All the posts to be created with the increase of resources are GTA (General Temporal Assistance) and not permanent posts. This is due to a freeze on the creation of permanent posts imposed by States on the Court. It is necessary, for the Court to build its permanent capacity that States lift the freeze on the creation of permanent posts.

Strategic Planning

Strategic plans are seen nowadays as essential for building confidence in judicial institutions and strengthen their capacity. FIDH sees it as a positive exercise for the whole Court and each of its

25. ASP, Proposed Programme Budget for 2014 of the International Criminal Court, 29 July 2013, ICC-ASP/12/10, para. 3

26. OTP, *Strategic Plan 2012-2013*, 11 October 2013, page 6.

27. OTP, *Strategic Plan 2012-2013*, 11 October 2013, para 100.

28. ASP, Report of the Committee on Budget and Finance on the work of its twenty-first session, 4 November 2013, ICC-ASP/12/15, para 73.

organs that may contribute to the accountability and transparency of the institution, and thus helping to avoid undue interference in its work. All around the world, more and more judiciaries are publishing their own strategic plans. States Parties may play an essential role in bringing the expertise of their judiciaries and contribute in strengthening the capacity of the Court and its organs in building its strategic plans.

The strategic planning of a judicial institution has to contribute in strengthening its independence. It should be the Court, and each of its organs, the ones establishing the priorities, evaluating the necessary activities, and identifying the indicators to measure its performance. States Parties may have a role in overseeing the implementation of the plan, as an accountability exercise, but not in approving the Court's priorities or activities. In other words, the strategic planning is a great opportunity for positive engagement with the Court and its organs, but States should refrain from any micromanagement that may endanger the independence of the institution.

The Court and States have considered further integration between strategic planning and the budgeting process. FIDH believes that this may give some predictability to the budget in an institution working with unpredictable circumstances. At the same time, the budget should not be used as a tool to influence the strategic planning.

All processes to build a strategic plan are an opportunity for reflection on how everyday work contributes in fulfilling the mission of an institution, in the case of the ICC, how every organ, division, service, unit or section helps in fulfilling the object and purpose of the Rome Statute. It is an opportunity for long term thinking about the work, challenges and opportunities of Rome Statute system, including States and how they contribute with the ICC.

The Rome Statute should be the starting point in building the priorities of the strategic plan. In other words, ensuring the deterrent effect of the investigations and proceedings is essential. The ultimate goal of the Statute -as of any legal text- is that its recipients (the international community and affected communities in particular) internalise a rejection to the use of violence that amounts to international crimes. How to achieve this should be one of the key elements of the strategic planning, and for this, victims' participation and outreach are essential, as well as more meaningful presence of the different organs of the Court in the field, from preliminary analysis to the implementation of reparations.

Strategic plans have a public vocation to further understanding of an institution. As a result, the importance of different stakeholders should be recognised. Transparency and accountability require the consideration of the wider public -including taxpayers-, civil society and journalists as relevant stakeholders, who, even if not involved directly in the decision making process, should be recognised an important role as independent observers.

All strategic plans and decisions of the ICC, including the budgetary process, should be as transparent as possible, in line with international standards of transparency of administrative information of judicial institutions, with due respect to the rights of individuals, the confidentiality requirements of the Rome Statute and decisions of the Chambers. Transparency of administrative information of the ICC -including budget information- should be governed by the principle of publicity as the norm. Exceptions to the principle -including at the CBF level- should be properly justified in line with international requirements.

Recommendations

- **States should provide the Court the resources it needs and consider the impact of any reduction on the proposed budget in the capacity of the ICC, and its organs, to fulfil its mandate.**
- **States should lift the freeze on permanent posts, so as to allow the Court to increase its permanent institutional capacity.**
- **Strategic planning discussions must respect the independence of the Court to establish its own objectives and provide for internal indicators and refrain from using Strategic planning as a door to micromanage strategic decisions of the Court.**
- **Transparency is essential to ensure the legitimacy and efficiency of the Court and the ASP. Publicity of administrative information of the ICC and the ASP -including the CBF- should be the norm and not the exception.**

IV. Cooperation

Cooperation from States Parties is essential for the work of the Court. Under Part 9 of the Rome Statute, States have an obligation to cooperate with the Court in particular in relation to an arrest or surrender. Currently 12 individuals subject to ICC arrest warrants remain at large. The lack of arrests is an obvious barrier to the fulfilment of the mandate of the Court and a factor that may diminish the Court's legitimacy and credibility.

FIDH welcomes the recognition from the Hague Working Group of Cooperation that arrests require not only statements, but mainly clear and active steps towards their achievement²⁹. States must continue their discussions towards the establishment of an effective mechanism for implementing arrests.

However, when States cannot execute an arrest, they must limit any "contact" with those subject to an arrest warrant. FIDH supports the Coalition for the International Criminal Court (CICC) Team recommendations on this issue, asking States, the Assembly and Regional Organisations to adopt policies proscribing *non-essential contacts* with such persons, and at the same time, joins the Coalition in asking the States to work further on the language of the resolution, which at the time of writing fails to set a clear policy. If adopting a better and clearer language is not possible for this Assembly, the discussion should thus continue next year.

FIDH shares the Coalition's worries about the bracketed language of the draft resolution on Agreements on Privileges and Immunities (APIC) with the Court. FIDH invites States Parties to delete this language and retain the agreed language of previous years and for those States that have not done so yet, approve this instrument.

This year, the Assembly will conduct a plenary on cooperation to address, specifically, witness protection. This is a key element for international justice, and States must take the opportunity to commit themselves to specific measures on this regard. Of particular relevance is the adoption of voluntary agreements of witness protection and relocation. All States Parties should evaluate the possibility to conclude these agreements with the relevant organs of the ICC.

All States Parties have an obligation to cooperate with the Court, not only those where the ICC is presently conducting investigations and prosecutions. FIDH invites all regions of the world to actively engage with the Court to implement framework agreements on cooperation.

Regional and other international organisations may play an essential role in facilitating the adoption and implementation of such agreements. FIDH welcomes the high level representation of the *Organisation Internationale de la Francophonie*, whose President, Abdou Diouf, will be addressing the Assembly. FIDH also highlights the participation of the Organization of American States (OAS) in this year's Assembly and the will it has expressed to positively engage in the discussions on cooperation between its Member States and the Court's officials.

29. ASP, Report of the Court on cooperation, ICC-ASP/12/35, 9 October 2013, para. 16.

Recommendations

- **States Parties must take the opportunity of the plenary on cooperation to commit themselves to specific and concrete steps for enhance the protection of witnesses and towards the execution of arrest warrants.**
- **The Assembly must work towards a more clear language on non-essential contacts.**
- **The bracketed language in the paragraph on APIC in the draft resolution on cooperation must be deleted.**

Establishing the facts

investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

Supporting civil society

training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level

Mobilising the international community

permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

Informing and reporting

mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.

FIDH
represents 178
human rights organisations
on 5 continents

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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, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 178 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

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Find information concerning FIDH's 178 member organisations on www.fidh.org