



**fidh**

# Recommendations to the 14<sup>th</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court

The Hague, Netherlands, 18 – 26 November 2015

FIDH POSITION PAPER



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# I. Introduction

The 14<sup>th</sup> session of the Assembly of States Parties (ASP or Assembly) to the Statute of the International Criminal Court (ICC or Court) will take place 18 to 26 November 2015. During the session the Assembly will consider matters fundamental to the Court's functioning, including issues of cooperation, complementarity, and budget. A proposal of amendment to the Statute will be discussed aiming at deleting article 124 of the Rome Statute which allows states upon ratification of the Rome Statute to declare that they do not accept the jurisdiction of the ICC over war crimes committed by its nationals or on its territory for seven years after the Statute enters into force for that state.

As in 2013 and 2014, the Court is faced at this Assembly with proposals made by the government of Kenya, and in addition this year by the government of South Africa. They have requested that a agenda items be added to discuss matters that concern respectively the Court's handling on the Kenya cases as well as the Al- Bashir case. FIDH is deeply concerned at attempts to undermine the Court's independence and mandate.

FIDH has closely monitored the work of the ICC and its States Parties in 2015, and presents, in this position paper, our views on issues most relevant to FIDH's mandate.

During the course of the year, FIDH has also provided strategic comment to the Office of the Prosecutor (OTP), the Registry and the Trust Fund for Victims during their planning and reforms undertaken in the past year, including on progress made to the ReVision project and to the OTP's Draft Strategic Plan 2016-2018.<sup>1</sup>

## ***Activities of the Court***

Important judicial achievements were made at the ICC in 2015, marking a historical change towards a more global impact of the Court.

For the first time, on October 13, 2015, the Office of the Prosecutor requested to open an investigation outside the African continent. Pending approval by the Pre-Trial Chamber, investigations will begin in Georgia related to the crimes committed in the context of the armed conflict from July through October 2008.<sup>2</sup> This move, long-awaited by victims of the Georgian conflict, indicates that the Prosecutor is willing to expand the scope of her Office's reach, increasing the global impact of the ICC.<sup>3</sup>

In early 2015, pursuant to the ratification of the Rome Statute by Palestine<sup>4</sup> and its declaration authorising the ICC's jurisdiction from 13 June 2014 under Article 12(3)<sup>5</sup> the Prosecutor opened a new preliminary examination into crimes committed since 14 June 2014 in Gaza and the West Bank, including East Jerusalem. These measures present a new accountability avenue for the region, and represent a strong commitment by Palestine to fulfill its obligations to international

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1. Office of the Prosecutor Strategic Plan 2016 – 2018, (6 July 2015) ICC available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1129.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1129.aspx); The ReVision project was authorised by the ASP in 2013. See Resolution 1: [http://www.icc-cpi.int/en\\_menus/asp/resolutions/sessions/pages/2013%20-%2012th%20session.aspx](http://www.icc-cpi.int/en_menus/asp/resolutions/sessions/pages/2013%20-%2012th%20session.aspx); "FIDH Comments on the ICC Registrar's ReVision proposal in relation to victims" (18 November 2014) available at: [https://www.fidh.org/IMG/pdf/letter\\_registar\\_icc.pdf](https://www.fidh.org/IMG/pdf/letter_registar_icc.pdf); «Comments and Recommendations on the ICC Registrar's Proposed Victim Office» (3 April 2015) available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/comments-and-recommendations-on-the-icc-registrar-s-proposed-victims>; "Comments and Recommendations to the ICC Trust Fund for Victims regarding its reparation mandate" (16 July 2015) available at: [https://www.fidh.org/IMG/pdf/cicc\\_tfv\\_team\\_submission\\_to\\_the\\_tfv\\_board\\_july\\_2015.pdf](https://www.fidh.org/IMG/pdf/cicc_tfv_team_submission_to_the_tfv_board_july_2015.pdf)

2. Corrected Version of "Request for authorisation of an investigation pursuant to article 15", 13 October 2015, ICC-01/15-4, available at: <http://www.icc-cpi.int/iccdocs/doc/doc2090710.pdf>

3. FIDH, HRIDC, "After a long wait by victims, International Criminal Court may investigate crimes in Georgia" (14 October 2015), available at <https://www.fidh.org/en/issues/international-justice/after-a-long-wait-by-victims-international-criminal-court-may>

4. Depositary notification of Accession to the Rome Statute by the State of Palestine, 06 January 2015, available at: <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>

5. Declaration lodged by Palestine pursuant to article 12(3) of the Rome Statute, 1 January 2015. available at: [http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine\\_A\\_12-3.pdf](http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf)

law.<sup>6</sup> FIDH and its member organisations in Palestine submitted to the OTP its fact finding report on the evidence consistent with the commission of crimes under ICC jurisdiction by the Israeli military during Operation Protective Edge.<sup>7</sup> FIDH also welcomed the landmark decision of the ICC judges requesting the Prosecutor to reconsider opening an investigation into Israel's 2010 attack on a humanitarian aid flotilla bound for Gaza.<sup>8</sup> In this framework, FIDH, along with the State of Palestine, Al Haq and the Open Society Justice Initiative, will be sponsoring a side event on "Palestine and the ICC: Accountability Opportunities and Obligations" on 20 November.

Additionally, following Ukraine's extended Article 12(3) declaration in September 2015, the Prosecutor has also extended the preliminary examination in Ukraine to cover the conflict in the territory from February 2014 to present. FIDH submitted two communications to the OTP and conducted several advocacy missions with national authorities, as well as strategy meetings on documentation of crimes and legal representation of victims for NGOs and lawyers.<sup>9</sup>

These developments mark a willingness for the OTP to expand its international reach, which may provide the added benefit of helping the ICC to overcome criticisms that it focuses solely on Africa. However, FIDH and its two member organisations in Honduras, COFADEH and CIPRODEH, also deeply regretted the OTP's decision to close the preliminary examination in Honduras, arguing that grave human rights violations committed after the military coup in 2009 do not constitute crimes within its jurisdiction. We believed that the necessary elements could have been established by the OTP during the investigation stage, and called for the crimes to be investigated even without the ICC.<sup>10</sup>

In 2015, two new suspects were also surrendered to the ICC. Dominic Ongwen, the long-sought commander of Joseph Kony's Lord's Resistance Army in Uganda was transferred to the ICC in January 2015, and faces expanded charges that include numerous counts of war crimes and crimes against humanity, including a substantial number of sexual and gender-based crimes.<sup>11</sup> Ahmad al-Faqi al-Madi wanted for the destruction of religious and historical sites in Timbuktu, Mali, was transferred to the ICC from Niger in September 2014. This is the first case from the situation in Mali, where an investigation was opened on 16 January 2013. FIDH urges the OTP to expand the list of charges against him to include allegations of devastating counts of torture, sexual slavery, forced marriage, rape and other crimes, for which he faces complaints before national courts in Mali.<sup>12</sup>

Additionally, two new trials began at the Court in 2015. The trial of Bosco Ntaganda from the Democratic Republic of Congo began in September 2015. Ntaganda's case is unique in that the accused held a senior position in a rebel armed group when the alleged crimes were committed, and later received the official rank of senior military official within the DRC armed forces. It is also the first of the DRC cases in which the ICC's Pre-Trial Chamber has confirmed all charges of sexual and gender-based crimes sought by the Prosecutor, including, historically, of sexual violence committed against child soldiers within his own ranks.<sup>13</sup>

6. FIDH, Al-Haq, Al-Mezan and PCHR, "The ICC opens a preliminary examination into the situation in Palestine" (16 January 2015) available at <https://www.fidh.org/en/region/north-africa-middle-east/israel-palestine/the-icc-opens-a-preliminary-examination-into-the-situation-in#nb2-1>

7. FIDH, "Palestine : New report documents international crimes committed during Operation Protective Edge" (27 March 2015) available at <https://www.fidh.org/en/region/north-africa-middle-east/israel-palestine/palestine-new-report-documents-international-crimes-committed-during>

8. FIDH, "ICC to reconsider investigating Israel's 2010 attack on humanitarian aid flotilla", (22 July 2015) available at: <https://www.fidh.org/en/region/north-africa-middle-east/israel-palestine/icc-to-reconsider-investigating-israel-s-2010-attack-on-humanitarian> and "Q&A on ICC's preliminary examination of Israel's 2010 attack on humanitarian aid flotilla" available at <https://www.fidh.org/en/region/north-africa-middle-east/israel-palestine/questions-answers-on-icc-s-preliminary-examination-of-israel-s-2010>

9. See in particular <https://www.fidh.org/en/region/europe-central-asia/ukraine/>

10. FIDH, COFADEH, CIPRODEH, "Honduras: Crimes committed following the 2009 military coup must be investigated even without ICC" (29 October 2015) available at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/honduras-crimes-committed-following-the-2009-military-coup-must-be>

11. Dominic Ongwen transferred to The Hague, ICC Press Release, 20 January 2015, available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1084.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1084.aspx)

12. FIDH, "The hearing of Abou Tourab before the ICC is a victory, but charges must be expanded" (30 September 2015), available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/mali-the-hearing-of-abou-tourab-before-the-icc-is-a-victory-but>

13. FIDH, "Congolese rebel leader, Bosco Ntaganda, to be tried for war crimes and crimes against humanity" (28 August 2015) available at: <https://www.fidh.org/en/region/Africa/democratic-republic-of-congo/drc-congolese-rebel-leader-bosco-ntaganda-to-be-tried-for-war-crimes>; FIDH, "Bosco Ntaganda and the International Criminal Court: Questions and Answers" (28 August 2015) available at: <https://www.fidh.org/en/region/Africa/democratic-republic-of-congo/bosco-ntaganda-and-the-international-criminal-court-questions-and>

The second trial against Jean-Pierre Bemba Gombo, alongside four others, for violations to the administration of justice also began in September 2015. The trial focuses on violations to Article 70 of the Rome Statute involving Bemba and colleagues, accused of serious witness tampering, include corruptly influencing witnesses by giving them money and instructions to provide false testimony, presenting false evidence and giving false testimony in the courtroom. Arrest warrants were also issued for two Kenyan nationals, on allegations of corruptly influencing at least six Prosecution witnesses.<sup>14</sup> The Office of the Prosecutor has further indicated such practices occur in other cases, including in the DRC.<sup>15</sup> It has become clear that witness tampering is a rampant practice in cases before the ICC, and one that threatens the fundamental principles of the Court.

As multiple trials are carried out simultaneously across different chambers of the Court, and the ICC moves its headquarters to its new Permanent Premises, an increase in resources will inevitably also be necessary for the Registry and Chambers to successfully perform their duties while respecting the rights of victims and the accused. FIDH welcomes this increased activity, as it indicates the Court is running closer to its capacity, and edging closer to fulfilling its mandate.

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14. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation, 10 September 2015, available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-10-09-2015-2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-10-09-2015-2.aspx)

15. Bemba case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo, 24 November 2013, available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr962.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr962.aspx)

## II. Ongoing Political Threats to the ICC

Newly-elected ASP President Sidiki Kaba, Justice Minister of Senegal, has taken actions this year to engage with representatives of African States Parties as well as the African Union, making clear his commitment to develop a new relationship between Africa and the Court.<sup>16</sup>

Striking political challenges from the region still face the ICC moving forward, however. Non-cooperation will be discussed in detail in this Position Paper in Section IV below.

### 1) Kenyan Proposed Agenda Items

In a *note verbale to the President of the Assembly of States Parties, dated 4 September*,<sup>17</sup> the government of Kenya has proposed an agenda item to discuss the Trial Chamber's 'Decision on Prosecution Request for Admission of Prior Recorded Testimony' issued on 19 August 2015 in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*.<sup>18</sup> Kenya argues that the application of the amended rule 68 of Procedure and Evidence (amended in 2013) violates the principle of non-retroactivity and infringes the fair trial rights of the accused.

FIDH is concerned by the ongoing attempts to politicise these judicial proceedings. We recall that the utilisation of Rule 68 in the Ruto and Sang case is currently under appeal. Concerns about the application of this rule and the necessary respect of the rights of the accused should be dealt with by the ICC judges. **States should therefore refrain from attempting to unduly influence judicial independence in these proceedings.** FIDH will continue to monitor the application of Rule 68.

*In a second note verbale to the President of the ASP, dated 16 October*, the Kenyan government forwarded a petition signed by 190 Kenyan parliamentarians, which makes serious allegations that the Office of the Prosecutor has interfered or coached witnesses and calls for an audit of the office. It requests President Kaba "to immediately appoint an independent mechanism to audit the Prosecutor's witness identification and recruitment process" and asks the ICC to suspend the cases while awaiting the determination of the audit.

FIDH is concerned that this audit would risk serious political interference in the Office of the Prosecutor. We believe that the correct procedure would be to refer all credible allegations of misconduct on the part of officers in the OTP to the Independent Oversight Mechanism (IOM), in accordance with the procedure established pursuant to Article 112(4) of the Rome Statute and Assembly Resolutions ICC-ASP/8/Res.1 and ICC-ASP/12/Res.6.

FIDH is seriously concerned that a discussion of these matters during the ASP, a purely political body, would amount to interference in judicial proceedings at the ICC. States parties should vocally opposed these attempts to undermine the ICC.

### 2) South African Proposed Agenda Item

On 5 October, the South African government requested that the Registrar include an additional agenda item on, "Application and Implementation of Article 97 and Article 98 of the Rome Statute." This arises from South Africa's failure to execute the ICC arrest warrant for President Bashir in June 2015. South Africa has requested discussion on rules of procedure for consultations under Article 97.

16. The President of the Assembly of States Parties meets with the Chairperson of the African Union Commission and with the Bureau of the Committee of Representatives, ICC Press Release, 14 August 2015, available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1138.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1138.aspx)

17. List of supplementary items requested in the agenda of the fourteenth session of the Assembly, ICC-ASP/14/35, 27 October 2015, Annex II.

18. Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11-1938-Corr-Red2

FIDH insists that amendments to the Rules of Procedure should only be adopted where they serve the purpose of the Rome Statute and any discussion of amendments should be based on concrete proposals. Therefore this item should not be discussed until South Africa provides such details. In any case changes to the Rules of Procedure should not infringe on the role of the Court under Article 119 (1) to urgently settle “any dispute concerning the judicial functions of the Court.”

South Africa has also asked the ASP to discuss the correct interpretation and application of Articles 27 and 98 of the ICC Statute as they affect immunity of non-party Heads of state.

FIDH strongly opposed this proposal, which is a question already pending before the judicial organ of the ICC. South Africa could present its observations before the relevant ICC Chambers. The ASP should not discuss purely judicial matters that are before the ICC as this could constitute interference with the independence of the court.

### **3) Threats from States Parties to withdraw from the ICC Statute**

In 2015 some States have once again threatened to withdraw from the Rome Statute. FIDH condemns these short-sighted threats, which only serve to undermine the principles of justice and accountability committed to by the international community in Rome.

Additionally, FIDH reminds States considering withdrawal that under Article 127 of the Rome Statute, *“A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.”*

### **4) States Use of ASP Proceedings in their National Interest**

FIDH continued to observe attempts by States Parties to use ASP proceedings in their national interest, specifically to have ASP resolutions drafted in such a way so as to reduce the chances that the Court intervenes in relation to crimes committed on their territories. It is imperative that States Parties defend the Rome Statute and its integrity at every opportunity throughout the ASP. It is equally important that they send a strong message that attempts to interfere with the Court’s judicial and prosecutorial independence cannot be tolerated.

#### **Recommendations to the ASP**

- **Defend the integrity and universality of the Rome Statute, including the Court’s judicial and prosecutorial independence, at every opportunity throughout the ASP.**
- **Oppose the inclusion of the agenda items proposed by the governments of Kenya and South Africa. Ensure ASP processes are not driven by political interests to weaken the ICC as an institution, but rather by commitments to accountability for those most responsible for the most serious crimes of international concern.**

FIDH is a member of the Coalition for the ICC (CICC) and the Victims’Rights Working Group (VRWG) and fully endorses the 2015 CICC team and VRWG papers submitted to the 14<sup>th</sup> ASP. These papers are available at: [www.iccnw.org](http://www.iccnw.org) [www.vrwg.org](http://www.vrwg.org)



### III. Making Victims' Rights a Reality

#### **1) Ensuring Victims' Participation in the Proceedings before the ICC**

##### *a) The Need to Harmonize the Application Process*

The victims' application process at the ICC has evolved over the years. Victims seeking to participate in proceedings before the ICC first had to submit a full application form<sup>19</sup> to the Registrar, following which each single application form was redacted and transferred to both the Defence and the Prosecutor, and the Chamber would then determine if each applicant qualified as a victim under Rule 85 of the Rules and Procedures of the ICC, taking into consideration observations by other parties. This process enables an extensive judicial examination of each application from victims.

However, in the absence in particular of adequate resources within the Registry and the Court, this process proved to be excessively timely and costly and led to a continued backlog in processing victims' applications. The system needed to be reviewed. Different Chambers have thereafter tried various alternative processes, including a partially collective application form (Gbagbo case), a simplified application form (Kenya and Ntaganda cases), or a partial delegation of the Chamber's assessment under Rule 85 to the Legal Representative for Victims (Kenya cases) or the Registrar (Ntaganda case). There is an urgent need for harmonizing victims' application process before the ICC so as to ensure all victims have equal access to justice and equal rights before the Court no matter which case they participate in.

To this end, it is crucial to conduct a thorough and comprehensive consultation of victims, their legal representatives and other actors involved to have a clear assessment on the legal and practical impact of the existing application systems on victims' effective participation in the proceedings. The decision regarding acceptance or rejection of victims' applications is the entryway to participation in ICC proceedings, and thus any decision about the process must be carefully considered, using a victim-centered approach.

FIDH encourages the Judges to further analyze the various application systems put in place so far by the different Chambers by taking into account views and concerns of the main stakeholders, the victims. An harmonized application process for future situations and cases needs to carefully balance limitation of the resources and time constraint of the procedure with the respect of victims' participatory rights and calls for innovative mechanisms.

##### *b) The Need to Ensure Victims Have Adequate Legal Representation from Earliest Stages*

Legal representation of participating victims and applicants seeking to participate must be ensured from the earliest stage during the pre-trial phase. Chambers have not been consistent with regards to the timeline for appointing legal representation and have sometimes considered that applicants are not entitled to such representation; however access to a lawyer is fundamental from the start of the proceedings in order to protect victims' rights and interests also during the application process as well as regarding the development of the investigation.

With regards to appointment of legal representatives of victims (LRVs), one must acknowledge the need to balance the practical necessity of organizing collective legal representation with victims' right to choose their own counsel. FIDH therefore calls on the ICC Judges to duly take into account victims' views and concerns in the appointment of their legal representation.

Finally, FIDH wishes to stress the importance of ensuring that legal representatives regularly meet with victims they represent. Without regular communication between victims in countries distant from the seat of the Court and their legal representative, victims participation is meaningless. In that regard, LRVs or members of their teams must have a permanent presence in the country

<sup>19</sup> A 'standard' application form is minimum 7-pages long.

where victims reside and must have the means to conduct regular consultations with victims. This constitutes a prerequisite to ensure any meaningful representation of victims' views and interests in the proceedings.

#### *c) Denial of Justice for Victims in Cases That Have Stalled*

Participating victims before the Court rightly expect the ICC to effectively investigate and prosecute the authors of the grave crimes they have suffered. When charges against a suspect are dropped or when an investigation is indefinitely suspended, with little hope for action by the ICC in the near future, it amounts in fact to preventing victims to participate in the proceedings and to obtain justice. The Kenya cases are a blatant example of this problem. Indeed, hundreds of Kenyan victims of the post-electoral violence of 2007-2008 have been granted the right to participate in the proceedings before the ICC, i.e. they were recognized as victims under Rule 85, however the cases against Kenyatta and Muthaura have since collapsed and the Prosecution announced this year that she had suspended "active investigation" into the situation. Victims lost their trust in the ICC as they were left with no means to obtain justice or reparations.<sup>20</sup> FIDH calls on the Prosecutor to take into account victims' right to truth and justice in the conduct of her investigations and on the States to assist the Prosecutor in her mandate.

#### *d) Providing Victims with Adequate, Effective and Prompt Reparations<sup>21</sup>*

Major developments regarding reparations for victims before the ICC occurred in 2015. In March 2015, the Appeals Chamber issued a landmark decision on principles to be applied to reparations.<sup>22</sup> It establishes five principles, notably that an order for reparations must (i) be made against the convicted person, (ii) establish and inform the convicted person of his or her liability, (iii) specify and provide reasons for the type of reparations ordered, either collective, individual or both, (iv) define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the appropriate modalities of reparations based on the circumstances of the case, and (v) identify the victims eligible to benefit from reparations or set out the criteria of eligibility. In parallel, and taking into account these newly established principles, the Trust Fund for Victims will present its first implementation plan on 3 November 2015 in the Lubanga case; and Trial Chamber II is expected to issue its decision on reparations in the Katanga case in due course. FIDH welcomes these steps forward in defining and implementing the reparation mandate of the ICC and the TFV.

FIDH wishes to stress the importance of consultation of victims in the reparation process, as highlighted in the Appeals Chamber's decision as well. Victims' views, needs and concerns must be duly considered at every stage of the reparation phase, from the design to the implementation phase, to ensure that reparations truly fulfil their goal of providing a remedy to the prejudice suffered in a "adequate and effective" manner.

FIDH recalls the CICC TFV team submission to the TFV last July to insist on the Trust Fund 's mandate to contribute to all forms of reparation (collective *and* individual) that may be ordered by the Court, opposing its restrictive interpretation of Article 56 of its Rules.<sup>23</sup>

20. See LRV's submission *Victims' request for review of Prosecution's decision to cease active investigation*, 3 August 2015, ICC-01/09-154, available at : <http://www.icc-cpi.int/iccdocs/doc/doc2027787.pdf>. LRV Fergal Gaynor expresses victims' frustration : "thousands of victims of crimes against humanity were led to believe in a justice process at the Court for over five years, to endure three failed prosecutions without a single day of trial, and to then face the further anguish of learning that the Prosecutor has decided to cease to actively investigate".

21. This formulation refers to the 2005 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, adopted by the UN General Assembly, A/RES/60/147. Principle 11 reads: "Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to [...] *adequate, effective and prompt reparation* for the harm suffered". (emphasis added)

22. ICC Appeals Chamber, *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparation" of 7 August 2012 with amended order for reparations*, 3 March 2015, ICC-01/04-01/06-3129, available at: [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/court%20records/chambers/appeals%20chamber/Pages/3129.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/court%20records/chambers/appeals%20chamber/Pages/3129.aspx)

23. Comments and Recommendations to the ICC Trust Fund for Victims regarding its reparation mandate, July 2015, <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/comments-and-recommendations-to-the-icc-trust-fund-for-victims>

## 2) ReVision

FIDH has closely monitored the progress of the Registrar since 2014. In November 2014, FIDH shared its comments and concerns on the ReVision proposals in relation to victims participation and legal representation, and called for an open, transparent and structured consultation process.<sup>24</sup> On 23 and 24 March 2015, FIDH participated in the the Expert Conference on the Establishment of an ICC Victims and Defence Office organised by the Registrar in The Hague. Following this meeting, the Coalition for the International Criminal Court Legal Representation Team, including FIDH, submitted its comments and recommendations to the Registrar on the new proposed Victims' Office, in July 2015. We focused in particular on the timing for the appointment of the external counsel, the status and location of the external counsel, the supporting staff within the Victims' Office assigned to the external counsel.<sup>25</sup>

The ReVision process undertaken by the ICC's Registrar has led to debate among the States and the Court's other stakeholders, including civil society organisations.<sup>26</sup>

FIDH reaffirms its support to a reform of the Registry that will enhance its performance and efficiency, while promoting solid implementation of the rights of both victims and the accused. We appreciate that the Registrar and the ReVision team took into consideration many of the points regarding legal representation for victims raised regarding victims' counsel, particularly the right of victims to choose their own external counsel and to have that counsel appointed as early as possible in the proceedings.

However, we still await further clarification on the proposals related in particular to the composition of the team of the victims' counsel and its functioning in the field, its capacity to liaise directly with victims, the establishment of a restructured Victims' Office as well as any proposal that is sent to the Advisory Committee on Legal Texts regarding any changes to the Rules of Procedure and Evidence that would affect Legal Aid and victims' counsel.

FIDH welcomes ReVision measures intended to strengthen the field presence of the ICC in situation countries. The creation of a new Division on External Affairs and Field Operations is intended to better address the Registry's multi-faceted engagements with stakeholders. The proposed recruitment of Chiefs-of-Office to lead strengthened field offices in the countries where the ICC has permanent presence could raise the level of coordination among Registry teams, as well as increase dialogue and capacity to respond to misinformation surrounding the Court's actions.

It is important that these measures also strengthen, rather than weaken, outreach and support to victims as part of the Court's core mandate. FIDH encourages the Court to identify further strategies for reaching providing outreach to affected communities in situation countries where the ICC does not have a permanent field presence.

A staggered approach to implementation and recruitment of new positions, both in the field offices and at headquarters, would severely undermine any potential progress in creating stronger relationships with affected communities. Recruitment for any field and outreach posts reclassified during the ReVision process should be enacted as soon as possible, and not restricted or staggered.

FIDH will continue to monitor ReVision proposals and implementation, particularly those that will impact victims and affected communities. FIDH also continues to insist on genuine consultations with victims and victims' counsel as part of any study mandated by the Court or States on victims' applications, participation, representation and/or reparation.

24. FIDH concerned about ICC Registrar's reform, 19 November 2014, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/16493-fidh-concerned-about-icc-registrar-s-reform>; FIDH: 5 myths about victims participation in ICC proceedings, 05 December 2015, available at: <https://www.fidh.org/IMG/pdf/cpi649a.pdf>

25. CICC Team Paper Comments and Recommendations on the «Proposal of the ICC Registrar on the Principles Guiding the Establishment of a Victims Office and a Defence Office», 03 July 2015, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/comments-and-recommendations-on-the-proposal-of-the-registrar-on-the>

26. Major Changes at the ICC: the Registry's ReVision, International Justice Monitor, 24 August 2015, available at: <http://www.ijmonitor.org/2015/08/major-changes-at-the-icc-the-registry-s-revision/>

### Recommendations to the ASP

- Ensure that any discussion regarding improvements on victims application process is based on consultations and insights provided by victims, their legal representatives and other relevant stakeholders.
- Guarantee that each victim enjoys the fundamental right to legal representation and that the procedure of legal representation appointment is consistent in the course of all proceedings, duly taking into account victims' views and concerns.
- Support the Trust Fund for Victims to ensure that victims' views, needs and concerns are duly considered at every stage of the reparation phase, from the design to the implementation phase, and to adopt a comprehensive, gender-sensitive and non-discriminatory approach to the reparation process.
- Provide the resources necessary to strengthen field offices and outreach capacity under the new ReVision structure in 2016

## IV. Cooperation and Non-Cooperation

Cooperation continues to be one of the most important ways that States can effectively support the ICC. Over the course of 2015, several positive examples of cooperation may be noted as having concrete impacts on the functioning of the Court. For example, the unexpected surrender to the ICC of Dominic Ongwen in January 2015 was the result of effective cooperation by countries including Uganda, Central African Republic, the United States of America, Belgium and the Netherlands, as well as the United Nations and MINUSCA, and the African Union.<sup>27</sup>

In September 2015, both Niger and Mali also worked with the ICC to facilitate the surrender of the suspect Ahmed Al Faqi Al Mahdi to the ICC, one week after the warrant for his arrest was issued by the Pre-Trial Chamber.<sup>28</sup>

Additionally, FIDH acknowledges the importance of diplomatic statements of support for the ICC, particularly from regions where ICC support is controversial. In June 2015, Malawi reiterated its commitment to the Rome Statute by stating it would not take heed of calls to withdraw from the ICC.<sup>29</sup> In October, Botswana followed suit by making strong public statements at the U.N. General Assembly reiterating its unwavering support of the ICC and calling for unambiguous cooperation with the Court.<sup>30</sup> Such statements are crucial to demonstrate that those wishing to debilitate the ICC do not represent a consensus, and that States Parties to the Rome Statute remain firm in their support of international criminal justice.

FIDH also welcomes the renewed discussions about implementation of the 66 Recommendations on Cooperation adopted in 2007.<sup>31</sup> FIDH recommends further reporting on individual States' engagement with the recommendations, including advances or challenges to implementation legislation, the establishment of clear and efficient channels of communication and national focal points, voluntary agreements and public and diplomatic support.

### 1) Voluntary Agreements

FIDH welcomes the plenary discussion on cooperation issues, including voluntary agreements, during this session FIDH recalls that when effective cooperation measures are implemented by States, including framework agreements for the relocation of witnesses and other measures, the Court can be more efficient and cost-effective. As the number of cases before the ICC grows, so does the number of witnesses and victims involved in the Court's work. As witness intimidation and corruption continues to occur, it is even more imperative for States to ease the burden on the resources of the Court by cooperating to relocate and provide adequate protection to victims and witnesses as necessary. By entering into framework agreements, States can streamline the efficient handling of such requests, without incurring any obligation to respond positively to each and every request.

In a similar vein, FIDH believes that the proposed inclusion of language to the 2015 Cooperation Resolution regarding mandating a pilot coordinating mechanism of national authorities to be convened at the 16<sup>th</sup> ASP would allow assistance requests to be handled with greater ease and agility.

27. Dominic Ongwen transferred to The Hague, ICC Press Release, 20 January 2015, available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1084.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1084.aspx)

28. Situation in Mali: Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu, ICC Press Release, 26 September 2015, available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1154.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1154.aspx)

29. Malawi rebuffs Mugabe's call for ICC withdraw, NyasaTime Reporter, 01 June 2015, available at: <http://www.nyasatimes.com/2015/06/01/malawi-rebuffs-mugabes-call-for-icc-withdraw/>

30. Botswana calls on international community to respect ICC, eNews Channel Africa, 02 October 2015, available at: <http://www.enca.com/africa/botswana-calls-international-community-respect-icc>

31. Strengthening the International Criminal Court and the Assembly of States Parties, Resolution ICC-ASP/6/res.2, annex II.

FIDH further highlights the importance of other voluntary agreements, including acquittal and interim release agreements. In 2015, the first final acquittal of an ICC suspect occurred<sup>32</sup>, highlighting the need to proactively plan for and respond to such eventualities.

Entering into these voluntary agreements ensures that the rights of both victims and the accused are respected. However, no new agreement on the enforcement of sentences has been signed since 2012; no agreement on the relocation of persons released by the Court has been signed despite the fact that a draft agreement was finalized last year; and only one agreement for interim release currently stands.

## **2) Non-Essential Contacts**

All State Parties to the Rome Statute have a responsibility under ASP Resolution<sup>33</sup> to avoid contact with persons subject to a warrant of arrest issued by the International Criminal Court. Furthermore, in line with the UN Guidance,<sup>34</sup> contacts with persons subject to an ICC arrest warrant should be limited to those which are strictly necessary for carrying out essential UN mandated activities. This implies that the presence of United Nations officials at any ceremonial or similar occasion that is attended by any person who is subject to warrants of arrest issued by the International Criminal Court should be avoided. When contacts are deemed absolutely necessary at the operational level, every effort should be made to liaise with alternative representatives.

Despite the obligations resulting from these legal commitments, representatives of some States Parties have not heeded their commitment to avoid all non-essential contacts with those accused of Rome Statute crimes by the ICC.

In 2015, Sudanese President Omar Al-Bashir who is currently subject to two arrest warrants issued by the International Criminal Court for genocide, crimes against humanity, and war crimes was welcomed at four official State-organized events. FIDH condemns the invitations extended to Al-Bashir in defiance of his arrest warrants, and the fact that high-level UN and government representatives disregarded their obligations not to attend such events alongside an ICC fugitive.<sup>35</sup>

FIDH further denounces that the world leaders who are representatives of State Parties to the Rome Statute and claim to support international justice and peace, also participated in these ceremonies. The presence of these leaders at the ceremony along with a leader of a regime that continues to perpetrate massive and systematic violations of international humanitarian law in Darfur, Blue Nile, and South Kordofan, is an insult to the victims of these mass atrocities, and to international justice in general.<sup>36</sup>

The first event attended by Sudanese President Omar Al-Bashir took place on 13-15 June 2015 in South Africa which is a State Party to the Rome Statute, at the occasion of 25th AU Summit. Afterwards, on 26 July the Government of Mauritania welcomed the visit of Sudanese President for a summit of the Great Green Wall of the Sahara and the Sahel Initiative. A month later, on 6th August, during an inauguration of an extension of the Suez canal, not only was Omar Al-Bashir invited to attend the event, but was also pictured in an official photo alongside UN member states and Rome Statute parties heads of state who participated at the ceremony.

Most recently, on 3 September, the Government of China welcomed the visit of Omar Al-Bashir at a ceremony commemorating the end of WWII. FIDH sent open letters to the Government of China to

32. Mathieu Ngudjolo Chui's acquittal was confirmed on appeal. However, as no acquittal agreements had been entered into by any States, Mr. Ngudjolo Chui was returned to the DRC by authorities, despite warnings by his legal representatives that Mr. Ngudjolo Chui could face harm. See, for example: Duerr, Benjamin, "Acquitted but Not Free" Foreign Affairs (22 July 2015) available at: <https://www.foreignaffairs.com/articles/democratic-republic-congo/2015-07-22/acquitted-not-free>

33. ASP Resolution on Cooperation, ICC-ASP/13/Res.3 of 17 December 2014

34. UN guidelines on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court: A/67/828-S/2013/210

35. FIDH Press release: World leaders attend China ceremony with war criminal, disregarding victims and international justice, 03 September 2015, <https://www.fidh.org/en/region/Africa/sudan/world-leaders-attend-china-ceremony-with-war-criminal-disregarding>

36. FIDH Press release: World leaders attend China ceremony with war criminal, disregarding victims and international justice, 03 September 2015, <https://www.fidh.org/en/region/Africa/sudan/world-leaders-attend-china-ceremony-with-war-criminal-disregarding>

withdraw Al-Bashir's invitation and arrest him should he land on Chinese soil and to a number of State Parties to the Rome Statute, participating at the commemoration, to refuse to attend a celebration where Al-Bashir would be present.<sup>37</sup> However, its calls for the ethical action were not heeded.

Contact with ICC fugitives contravenes the spirit and purpose of the Rome Statute and sends the wrong message to victims and their families. It is simply inconsistent to foster respect for human rights in one forum and then celebrate with those who have been indicated with war crimes, crimes against humanity and genocide in another. Avoiding contact with persons subject to an ICC arrest warrant is also essential to long-term strategies of arrest by isolating the fugitive and thus maintaining the authority of the Court's arrest warrants.

### **3) Non-Cooperation**

Non-cooperation has been a serious obstacle for the ICC in 2015. The International Criminal Court was designed as the legal mechanism of a system that includes the Assembly of States Parties and the UN Security Council. The Court can only function when its orders are enforced by States. The Court's only recourse when orders are not implemented is a finding of non-compliance and a referral of the unwilling State back to the ASP or to the UN Security Council, if appropriate. The Court is only as strong as the weakest link in this system.

The cooperation of States is essential for the implementation of the OTP policy as well as the enforcement of decisions rendered by chambers of the Court, including warrants of arrest. States must adequately support investigation and prosecution of international crimes by the ICC, including by facilitating evidence collection, protecting the interest of victims and cooperating in relation to witness protection, executing arrest warrants and providing strengthened political support to end impunity and prevent recurrence of such crimes.<sup>38</sup> The hurdles encountered in attempting to secure the cooperation required for investigations result in delay and frustration of the course of justice for the victims and not only deprive them of the accountability they deserve, but inevitably lead also to undermining of the mandate of the Court.

At no time has the lack of compliance and cooperation with the Court been more clearly highlighted as in 2014 and 2015.

#### *a) Kenya*

On 3 March 2015, Trial Chamber terminated proceedings against Kenyan President Uhuru Kenyatta,<sup>39</sup> following a withdrawal of charges by the ICC Prosecutor during the 2014 ASP on 5 December 2014.<sup>40</sup>

The Chamber confirmed that the Kenyan Government's non-cooperation compromised the Prosecution's ability to thoroughly investigate the charges and was partly responsible for the collapse of the case against Uhuru Kenyatta.<sup>41</sup> It held that:

[The] approach of the Kenyan Government [...] falls short of the standard of good faith cooperation required under Article 93 of the Statute. The Chamber considers that the failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute. [...] The Chamber, therefore, finds that Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately

37. FIDH Press release: World leaders must not welcome Al Bashir to commemorative event in China, 01 September 2015, <https://www.fidh.org/en/region/Africa/sudan/world-leaders-must-not-welcome-al-bashir-to-commemorative-event-in>

38. FIDH, Position Paper "Recommendations to the 13th session of the Assembly of States Parties to the ICC Statute" (November 2014), <https://www.fidh.org/IMG/pdf/asp-13-650a2014.pdf>, p. 19

39. Decision on the withdrawal of charges against Mr Kenyatta, ICC-01/09-02/11, 13 March 2015, available at: <http://www.icc-cpi.int/iccdocs/doc/doc1936247.pdf>

40. Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, Office of the Prosecutor, ICC-01/09-02/11-983, <http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf>

41. Trial Chamber V(B) ("Trial Chamber") of the International Criminal Court in the case of The Prosecutor v. Uhuru Muigai Kenyatta, Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, 03 December 2014, available at: <http://www.icc-cpi.int/iccdocs/doc/doc1878157.pdf>, paras. 78-79

impinged upon the Chamber's ability to fulfill its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute.

In its decision, Trial Chamber rejected the application for referral of the matter of non-cooperation to the Assembly of State Parties.<sup>42</sup> Following the Prosecutor's appeal,<sup>43</sup> the Appeals Chamber reversed the judgment on 19 August 2015 and remanded it for the Trial Chamber for a new determination.<sup>44</sup>

#### *b) Libya*

In December 2014, the Pre-Trial Chamber once again found Libya in non-compliance with the Court for refusing to surrender Saif al-Islam Gaddafi, despite him being held in custody.<sup>45</sup> Even though Mr Gaddafi's case remains admissible before the Court, a Libyan court sentenced the ICC- suspect to death in June 2015.<sup>46</sup> The ICC Prosecutor has requested that the Court order Libya to surrender Mr Gaddafi to the ICC immediately, and to report his death sentence to the UN Security Council.<sup>47</sup>

FIDH would like to recall that another ICC suspect, Abdullah Al-Senussi, was also sentenced to death in Libya in June 2015. The former intelligence chief's case was declared inadmissible by the Appeals Chamber of the ICC in 2014 because of the ongoing domestic proceedings.<sup>48</sup> Considering continued allegations of lack of fair trial standards, FIDH has repeatedly called on the Prosecutor to request that the Pre-Trial Chamber reevaluate whether his case is admissible before the ICC.<sup>49</sup>

All States Parties to the Rome Statute and the UN Security Council who referred Libya to the ICC should take the measures necessary to ensure Libya cooperate with the Court, upend the death sentences rendered against Mr. Gaddafi and Mr. Senussi, and immediately transfer Mr. Gaddafi to the ICC.

Allowing an ICC suspect to be executed would be an irreversible demonstration of a failure to cooperate.

#### *c) Sudan*

The Court continues to struggle with States' unwillingness to implement arrest warrants for those accused of the most serious international crimes, including President Omar Al- Bashir of Sudan. There are currently five outstanding arrest warrants in connecting with the Darfur investigation, and three Government of Sudan indictees continue to hold public office.<sup>50</sup>

In 2015, the Pre-Trial Chamber found that Sudan had failed to cooperate with the ICC on multiple occasions.<sup>51</sup> In both cases the Pre-Trial Chamber decided to inform the United Nations Security Council to take the necessary measures it deemed appropriate.

42. Trial Chamber V(B) in the case of The Prosecutor v. Uhuru Muigai Kenyatta, Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, 03 December 2014, Paras. 80-90

43. Prosecution appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", 20 March 2015, ICC-01/09-02/11-1006

44. Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s «Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute», 19 August 2015, ICC-01/09-02/11OA 5

45. ICC-01/11-01/11-577 Available at: [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/court%20records/chambers/pretrial%20chamber%20i/Pages/577.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/court%20records/chambers/pretrial%20chamber%20i/Pages/577.aspx)

46. FIDH condemns Libyan Court's decision to sentence nine Gaddafi-era officials to death, 28 July 2015, available at: <https://www.fidh.org/en/region/north-africa-middle-east/libya/fidh-condemns-libyan-court-s-decision-to-sentence-nine-gaddafi-era>

47. ICC-01/11-01/11-611, 30 July 2015 available at: <http://www.icc-cpi.int/iccdocs/doc/doc2026849.pdf>

48. Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, 11 October 2013, available at: <http://www.icc-cpi.int/iccdocs/doc/doc1663102.pdf>

49. FIDH condemns Libyan Court's decision to sentence nine Gaddafi-era officials to death, 28 July 2015, available at: <https://www.fidh.org/en/region/north-africa-middle-east/libya/fidh-condemns-libyan-court-s-decision-to-sentence-nine-gaddafi-era>

50. FIDH Press release, UN Security Council and States Must Cooperate with ICC on Darfur Investigation and Arrest Warrants, 30 June 2015, available at: <https://www.fidh.org/en/region/Africa/sudan/un-security-council-and-states-must-cooperate-with-icc-on-darfur>

51. Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, ICC-02/05-01/09-227, 09 March 2015, available at: <http://www.icc-cpi.int/iccdocs/doc/doc1919142.pdf>, ICC-02/05-01/12-33, Decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan, 26 June 2015; Available at: <http://www.icc-cpi.int/iccdocs/doc/doc2003150.pdf>



FIDH has urged all States, as well as the UN Security Council to fully cooperate with the Court and to take concrete steps to address Sudan's non-compliance, and to execute all arrest warrants against President Al-Bashir and other suspects before the ICC.<sup>52</sup>

#### *d) South Africa*

FIDH remains extremely concerned by the position taken by South Africa regarding cooperation with the ICC, particularly as it regards Sudan. Sudanese President Al-Bashir, charged was invited to attend an African Union Summit held in Johannesburg from 13-15 June 2015.

South Africa is a party to the Rome Statute of the International Criminal Court. Pursuant to the terms of the Statute governing international cooperation and judicial assistance,<sup>53</sup> South Africa was required to facilitate the arrest and surrender of President Al-Bashir to the International Criminal Court. Furthermore, as a result of the South Africa's domestication of the Rome Statute of the ICC, the government's failure to arrest President Omar Al-Bashir violated also its domestic law. On 13 June 2015, ICC Judge Cuno Tarfusser issued a decision declaring that "there exists no ambiguity or uncertainty with respect to the obligation of the Republic of South Africa to immediately arrest and surrender Omar Al-Bashir to the Court, and that the competent authorities in the Republic of South Africa are already aware of this obligation."<sup>54</sup>

FIDH strongly commends the achievement of South African civil society in obtaining an interim order issued by the High Court in Pretoria to prevent Al-Bashir's departure from the territory. Such action, coupled with the efficiency and independence of the judicial system in South Africa, led to the High Court subsequently ruling that the Government of South Africa's actions were inconsistent with the Constitution of the Republic of South Africa.<sup>55</sup> The High Court's ruling in South Africa represented a landmark demonstration that its domestic judicial system recognizes obligations to uphold the commitments under the Rome Statute.

Nevertheless, FIDH condemns the fact that South African officials, instead of taking steps to arrest President Al-Bashir, allowed him to leave the country in direct defiance of the order by the Pretoria High Court. The South African government's continued violation of court orders seriously damages and undermines the rule of law.

This non-compliance ignores the victims of international crimes committed in Darfur and their right to justice, and has a more devastating effect on the authority of the ICC.<sup>56</sup>

Furthermore, FIDH is seriously concerned about South African's Ruling party African National Congress (ANC)'s vote to withdraw from the Rome Statute and urges the party to reconsider its view. Withdrawal from the Rome Statute would present a severe step backwards in South Africa's commitment to protection of human rights, fight against impunity and establishing accountability.

#### **Recommendations to the ASP**

- **Express support for the Court's investigations and prosecutions and recognise the importance of cooperation, including by making specific pledges and/or political statements in relation to specific cooperation instances. Enact voluntary agreements, including framework agreements, inter alia on witness relocation, interim release and final release/acquittal. Avoid all non-essential contacts with suspects before the ICC.**
- **Present a united diplomatic front in order to pursue more effective follow-up, including**

52. FIDH Press release, UN Security Council and States Must Cooperate with ICC on Darfur Investigation and Arrest Warrants, 30 June 2015, available at: <https://www.fidh.org/en/region/Africa/sudan/un-security-council-and-states-must-cooperate-with-icc-on-darfur>

53. Part 9 of the Rome Statute, Art. 86 and following

54. Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, ICC-02/05-01/09-242, 13 June 2015.

55. UN Security Council and States Must Cooperate with ICC on Darfur Investigation and Arrest Warrants, 30 June 2015, available at: <https://www.fidh.org/en/region/Africa/sudan/un-security-council-and-states-must-cooperate-with-icc-on-darfur>

56. FIDH Press release: Al Bashir's escape: South African government should be held accountable for flouting court orders, 16 June 2015, <https://www.fidh.org/en/region/Africa/south-africa/al-bashir-s-escape-south-african-government-should-be-held>

- the imposition of sanctions on individuals and States by the UN Security Council.
- Review procedures for handling cases of non-cooperation to hold non-compliant states accountable, reflect on lessons learned from the past years, and work to fully utilize its enforcement powers.

## V. Challenges and Advances in Complementarity

In 2015, FIDH continued supporting the investigation and prosecution of international crimes in domestic jurisdictions in line with the principle of complementarity. This year we have supported legal cases on international crimes, including sexual and gender-based crimes in particular in Guinea, Mali, Cote d'Ivoire, Central African Republic, Democratic Republic of Congo and Peru.

FIDH therefore encourages the initiative by Botswana and Sweden to organise a special segment at this ASP to exchange views on strategic action to enhance national capacity to investigate and prosecute Sexual and Gender-Based crimes that may amount to Rome Statute Crimes.

FIDH will facilitate a further discussion on opportunities and challenges derived from pursuing domestic proceeding through a side event on complementarity on 24 November 2015, which focuses on situations in three countries: Côte d'Ivoire, Mali and Guinea. Panelists will discuss challenges related to implementation of the Rome Statute into domestic legal system, the role and legal representation of victims in the proceedings and the cooperation between domestic judiciary and the Office of the Prosecutor of the ICC.

In Côte d'Ivoire, over 150 people have been charged by the Special Commission of Inquiry and the judicial investigation and proceedings are on-going. FIDH represents almost 200 victims in these proceedings. In Mali, at the domestic level, several investigations have been initiated while 3 proceedings are focused on international crimes. In Guinea, the national judiciary has indicted 14 people, including former head of state Moussa Dadis Camara, and the trial is scheduled to being in 2016. The FIDH represents 398 victims in these proceedings.

Furthermore, FIDH has supported the law by Central African Republic's National Transitional Council establishing a Special Criminal Court within the national justice system. The special court will investigate and prosecute those responsible for war crimes and crimes against humanity in the Central African Republic since 2003 in complementarity with ICC proceedings. Given that the investigations will touch on atrocities committed by armed groups still operating in the Central African Republic, the Special Criminal Court will also play an important role in facilitating the protection and safety of judicial staff, victims, and witnesses.<sup>57</sup>

FIDH also supports proposals to the Omnibus resolution made by State Parties encouraging States to exercise their jurisdiction over Rome Statute crimes and mandating peacekeeping and special political missions to contribute to the strengthening of national justice systems.

### Recommendations to the ASP

- **Reaffirm that States bear the primary responsibility to prosecute those responsible for the crimes under the Rome Statute and encourage establishment of legal mechanisms and institutions in order to exercise domestic jurisdiction over these crimes.**
- **Promote activities to address unwillingness to undertake investigations and prosecutions in addition to those aimed at strengthening the capacity of domestic jurisdictions.**
- **Abstain from imposing limitations to the Court's work on complementarity.**

57. FIDH: New Special Criminal Court: A Key Step Toward Justice, 24 April 2015, available at: <https://www.fidh.org/en/region/Africa/central-african-republic/new-special-criminal-court-a-key-step-toward-justice>

## VI. ICC Budget

During the 14th session of the Assembly, States Parties will also adopt the Court's budget for 2016, thus determining what activities the Court will be able to undertake next year.

For 2016, the Court requested a Budget of €153.27 million, representing an increase of €22.61 million (17.3 per cent) over the 2015 approved budget, including interest payment for the permanent premises of €2.2 million.<sup>58</sup> The Committee on Budget and Finance (CBF), however, has recommended supporting only a 7.1% increase, with budget reductions recommended for every major programme area.<sup>59</sup>

It must also be noted that as of 15 September 2015, the total outstanding contributions of States to the regular budget, the contingency fund and interest on the host state loan stood at €38,174,961, an amount that jeopardises the effective functioning of the Court and cannot be sustained.

FIDH believes that at this juncture, as more and more action towards strategic planning, restructuring, and efficiency measures are being taken by every organ of the Court, it is crucial for States to provide the Court with the resources it needs to effectively fulfill its mandate. This is particularly important as simultaneously, the Court is poised to have real impact on accountability in multiple situations before it under investigation or preliminary examination.

The Office of the Prosecutor, in its 2016-2018 Draft Strategic Plan and Basic Size Document, has outlined a modest growth pattern for its operations over the next three years. FIDH doubts that this basic size would truly enable the ICC to duly answer to the need for accountability in many situations before it, or that could lead to a preliminary examinations or investigation in the coming years. A more ambitious OTP capable of tackling the growing demand for accountability for ongoing atrocities would be needed. The OTP has further identified indicators as requested, in order to assess its progress, selecting 14 strategic indicators with which to begin evaluation.<sup>60</sup> However, it would be unreasonable to expect desired results, such as those related to prosecutorial success, without adequate resources. The proposal, for example, to delay recruitment for 40 positions within the OTP, as well as limiting its access to travel and training budget, would undoubtedly impact the performance of the Office as judicial proceedings will continue to increase in 2016.<sup>61</sup>

FIDH is also concerned by the recommendation issued by the CBF against establishment of new seven new posts in the field offices, including Uganda, Central African Republic and Mali, which might seriously impede outreach activities in these countries. This limitation of field positions, coupled with a push to stagger recruitment for field office and headquarters positions linked to outreach activities will have a substantial negative impact on the perception of the Court and its capacity to interact with victims and affected communities.

The CBF is also recommending substantial cuts to the proposed budget for legal aid, amounting to €450,900 for the defence and €215,300 for victims, suggested by the Registrar pursuant to structural changes.<sup>62</sup> It is unclear how such cuts will affect the legal aid system, and without further clarity, such substantial cuts to legal aid may undermine the rights of victims and the accused in the legal process.

Severely limiting the funds available to the ICC raises concerns that budget policies may be utilised as a mechanism to exert undue influence over the independence of the Court, restricting its abilities

58. ICC-ASP/14/15 para 10.

59. *Ibid* para 11. Programme areas include the Judiciary, Office of the Prosecutor, Registry, Secretariat of the Assembly of States Parties, Interim Premises, Trust Fund for Victims, Project Director's Office (permanent premises), Independent Oversight Mechanism, and Office of Internal Audit.

60. Office of the Prosecutor Strategic plan 2016- 2018, para. 104-106, available at: [http://www.icc-cpi.int/iccdocs/otp/070715-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](http://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf)

61. ICC-ASP/14/15 Annex III.

62. ICC-ASP/14/15 para 156.

to such a degree that investigations independent of implicit State approval through budgetary allocation would be impossible.

It is inappropriate to frame a budget discussion about a court mandated to try atrocity crimes with an appraisal of what is the barest minimum of resources the Court needs to survive. Even more concerning are rumours that some states plan to adhere to a zero nominal growth approach that will effectively move the Court backwards in 2016, despite the work the ICC and its stakeholders have done to streamline it and strategically move it forwards.

### **Recommendations to the ASP**

- **Abstain from adopting a zero nominal growth stance regarding the budget**
- **Abstain from adopting CBF recommendations that amount to arbitrary cuts to the ICC budget**
- **Support a needs-driven approach to providing an adequate budget to the Court, rather than requiring the Court to take a resource-driven approach to its actions against impunity**
- **Abstain from adopting CBF recommendations against establishment of the new seven field offices posts in Uganda, Central African Republic and Mali**
- **Engage in dialogue in relation to the proposed staggered implementation of recruitment under the ReVision reorganization and adapt it accordingly so to prevent its negative impact on the performance and effectiveness of the Court's activities**

## VII. Amendment to delete Article 124 from the Rome Statute

Article 124 of the ICC Statute allows States upon ratification to opt out from the ICC jurisdiction over war crimes committed by its nationals or on its territory for seven years after the Statute enters into force for that State.

Article 124 is a transitional provision. It was reexamined at the first Review Conference in 2010 who decided to defer a decision on whether to delete the Article until the 14<sup>th</sup> session of the Assembly. Some states argued that it could be a potentially useful tool to promote further ratifications of the Rome Statute.

The Working Group on Amendments proposed to delete Article 124 at this session.

FIDH believes that the ASP should take the decision to delete Article 124. Article 124 is neither a desirable nor an effective tool for promoting universality and it is appropriate to delete it at this juncture, particularly as it has only been used by two states, and contravenes the stated objective and purpose of the Rome Statute to fight impunity for international crimes.

### **Recommendation to the ASP**

- **Support the deletion of Article 124 and promptly ratify the amendment.**

## VIII. Omnibus Resolution

The Omnibus resolution covers a range of different matters and includes decisions on measures that aim to strengthen the work of the Court and that of the Assembly. In the following sub-section we discuss only a limited number of matters which FIDH follows closely and on which FIDH has specific expertise.

### 1) *Victims' Rights*

FIDH welcomes the recognition of victims' rights and hails the Assembly's involvement in such relevant matters. We believe that the success of the Court will be determined by the extent to which it renders justice and redress to those who were affected by the crimes and their communities.

Nevertheless, FIDH regrets that the victims' rights have not been approached in a separate resolution, especially in light of the fact that not all rights have been adequately addressed in the Omnibus resolution and several parts, which were addressed in the last year's resolution on "Victims and affected communities, reparations and Trust Fund for Victims"<sup>63</sup> ("Resolution on Victims") are missing.

FIDH strongly recommends that all improvements to guaranteeing victims' rights and the victim participation system as a whole benefit from the experience of victims and those who represent them. In this regard, in order for the system to be adequately adapted to the needs of victims and for it to be successful, it would be important that victims can choose their legal representative, that the last one may be seconded by full time assistant in the countries concerned and in regular contact with victims. Furthermore, the ICC staff which is recruited to interact with victims and witnesses have the necessary expertise with working with victims and witnesses to take into account their particular cultural sensitivities and social needs.

Furthermore, it must be recalled that given that the nature and extent of the crimes prosecuted at the ICC is such that the damage caused, and consequently, also the reparations is significant. It is essential that States complement ICC reparations<sup>64</sup> by taking necessary measures to ensure availability of national reparations to victims. In this regard, FIDH brings attention to the fact that no reference has been made in the resolution on taking measures as regards tracing and freezing or seizure of any assets of the convicted person and impact on reparation for victims.

Furthermore, FIDH takes note that the language of the provisions relating to the victims' rights is more vague and less convincing in comparison with the last year's Resolution on Victims. This relates in particular to the adoption of victims-related provisions as part of domestic efforts to prosecute ICC crimes.<sup>65</sup>

### **Recommendations to the ASP**

- **Recall and reaffirm the centrality of the rights of victims in the Rome system and reiterate commitment and make concrete pledges to fully implement the right of victims to remedy, reparations and protection at the international and national levels.**
- **Engage in discussions on how to render the victims participation system more efficient and effective, bearing in mind the best interests of victims.**
- **Ensure that the staff which is recruited to interact with victims and witnesses have the necessary expertise with working with victims and witnesses.**

63. Resolution on Victims and affected communities, reparations and Trust Fund for Victims, ICC-ASP/12/Res.5 27 November 2013

64. ICC Review Conference: Renewing Commitment to Accountability, May 2010, p. 14, available at: <https://www.fidh.org/IMG/pdf/KampalaCPI543a-2.pdf>

65. Draft Resolution on Strengthening the International Criminal Court and the Assembly of States Parties, para. 4

## **2) Peace and Justice Process**

Victims of international crimes have an inherent right to justice. During conflict or post conflict situations, peace and justice may be perceived to be contrary. However it is widely acknowledged, as during the Revision Conference in Kampala, that peace and justice are not opposite but rather complementary goals.<sup>66</sup>

In this regard, in the context of the Colombian amendments on Peace and Justice in the draft Omnibus resolution, FIDH wishes to stress that peace and justice are indeed complementary requirements<sup>67</sup> and any discussions on the issue of peace and justice that would be held at the next Review Conference should reflect on this and reaffirm the inherent right to justice for crimes under the ICC jurisdiction.<sup>68</sup>

FIDH firmly believes that justice is an indispensable element of any solution to peace. We emphasize that accountability for the most serious crimes is crucial in order to ensure deterrence of future crimes and, consequently, lasting peace. Impunity for those crimes is often seen by the affected communities as an obstacle to move on in the process of the reconciliation. Mechanisms designed to grant impunity, such as amnesty, pardon and others, are often either evidence of complicity between the government and the beneficiaries of said mechanism, or the result of bargaining with the alleged perpetrators. The idea of amnesties for those most responsible for the most serious crimes, has been increasingly rejected under international law.<sup>69</sup>

### **Recommendations to the ASP**

- **Reaffirm that peace and justice are complementary objectives.**
- **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.**
- **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.**
- **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.**

## **3) Outreach**

In order for it to fulfill its mandate, the Court's judicial activities must be comprehensible for a variety of audiences. Reaching out to the communities affected by the situations that are subject to investigations or proceedings is therefore one of the main core functions of the Court. It serves the purpose of making the Court known, understood and reachable for the affected populations so that they can rely on 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 maximize 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.

### **Recommendations to the ASP**

- **Reaffirm the importance of effective outreach activities to victims and affected communities among the core activities of the ICC in order to give effect to its unique mandate.**

66. ICC-ASP/8/52, Report of the Bureau on Stocktaking: Peace and Justice, 20 March 2010 para. 4, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8R/ICC-ASP-8-52-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-52-ENG.pdf)

67. Draft Resolution on Strengthening the International Criminal Court and the Assembly of States Parties, para. 3 of the preamble

68. Draft Resolution on Strengthening the International Criminal Court and the Assembly of States Parties, para. 3 of the preamble, para. 14 abis; 88bis

69. ICC-ASP/8/52, Report of the Bureau on Stocktaking: Peace and Justice, 20 March 2010 para. 4, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8R/ICC-ASP-8-52-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-52-ENG.pdf)







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# Keep your eyes open

**fidh**

**Director of publications:**

Karim Lahidji

**Editor:**

Antoine Bernard

**Authors:** Carrie Comer, Alice Banens, Karine Bonneau

**Coordination:**

Karine Bonneau

**Design :** FIDH

**Establishing the facts** - Investigative and trial observation missions

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**For FIDH, transforming societies relies on the work of local actors.**

The Worldwide movement for human rights acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

Its primary beneficiaries are national human rights organisations who are members of the Mouvement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

**fidh**

## CONTACT US

**FIDH**

International Federation for Human Rights

17, passage de la Main d'Or  
75011 Paris

CCP Paris: 76 76 Z

Tel: (33-1) 78 56 90 54

Fax: (33-1) 45 67 32 12

[www.fidh.org](http://www.fidh.org)



FIDH  
represents 178  
human rights organisations  
on 5 continents

**fidh**

## 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.