



**fidh**

# The Rome Statute at Twenty (1998-2018): 10 Challenges for an Effective and Independent International Criminal Court



## Introduction

The year of 2018 marks the 20th anniversary of the adoption of the founding treaty of the International Criminal Court (ICC). This once thought unachievable dream of having an international, permanent and independent court, tasked with prosecuting mass atrocities, was finally realized in 1998 with the adoption of the Rome Statute. In 2002, the Court became a reality with the Statute entering into force after having been ratified by 60 states. Today, the Court exists. It investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. Presently, 123 states are Party to the founding treaty of the International Criminal Court. The representatives of these states form the Assembly of States Parties (ASP) which acts as the management oversight and legislative body of the Court, collectively and on an equal basis.

But going from vision to reality has been far from easy. The Court has been faced from its inception with high expectations and has been seen as the primary answer to countless grave crimes committed around the world. Today the Court and its limitations is somehow better understood. But even as the Court of last resort that it is, victims, civil society organisations and states, continue to call on it to act in response to grave crimes in situations where impunity prevails and local justices fail. The increasing work load of the Court has been visible<sup>1</sup> and is proof of the Court's readiness to act, yet numerous challenges to the Court's effectiveness and independence prevail.

While the 20th anniversary is an occasion to celebrate the Court, it is perhaps an even better occasion to engage in a collective effort to bring constructive and positive attention to the work of the ICC. Reflecting on the challenges facing the court today is a much-needed exercise to aid the Court in its work in the coming years in an increasingly challenging environment. To this purpose, The International Federation for Human Rights (FIDH) addresses and formulates recommendations to 10 challenges to an effective and independent International Criminal Court. These challenges are:

1. The Quest for Universality Is at a Standstill
2. Cooperation with the Court Is Insufficient
3. Investigations, Prosecutions and the Public Image of the Office of the Prosecutor Need To Be Strengthened
4. Sexual and Gender-Based Crimes Must Be Investigated and Prosecuted Systematically
5. Victim Participation and Legal Aid Warrant an Increased Attention
6. The Rapid Provision of Reparations and Assistance Is Lacking
7. Human Rights Defenders and Intermediaries Need Better Protection
8. To Some Victims and Affected Communities, the ICC Is Invisible
9. ICC Judges & Prosecutor Must Be Elected Based on Merits Only
10. Fragile Institution: An Increasing Workload without an Increasing Budget

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<sup>1</sup>See first table on page 4.

The Rome Statute at 20: what does the Court look like today?		
Preliminary Examinations	10	Afghanistan, Colombia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine, The Philippines, Ukraine, Venezuela
Investigations	11	Burundi, Georgia, Central African Republic II, Mali, Côte d'Ivoire, Libya, Kenya, Darfur/Sudan, Central African Republic, Uganda, Democratic Republic of the Congo
Total number of cases		26 cases
Stage of Proceedings	Pre-trial Trial Appeals Reparation/Compensation Closed	12 cases 4 cases 1 case 3 cases 6 cases
Suspects in custody	6 defendants	
Suspects at large	9 defendants	
Not in ICC custody	3 defendants	

A glimpse into victims participation in ongoing and concluded cases	
Defendant and Situation	Number of victims participating or authorised to participate
Katanga (DRC)	366
Ongwen (Uganda)	4107
Ntaganda (DRC)	2148
Bemba (CAR)	5229
Gbagbo & Ble Goude (Côte d'Ivoire)	727
Al Mahdi (Mali)	9
Abu Garda (Darfur, Sudan)	87
Al Bashir (Darfur, Sudan)	12
Abdallah Banda (Darfur, Sudan)	103
Harun & Abd Al Rahman (Darfur, Sudan)	6
Kenyatta (Kenya)	725
Mbarushimana (DRC)	130
Ruto & Sang (Kenya)	628

## 1. The Quest for Universality Is at a Standstill

Advancing the universality of the ICC has been long recognized as imperative to fight impunity, to prevent the most serious crimes of international concern, and to guarantee lasting respect for international justice. In recognizing the need for concerted efforts to achieve universality and full implementation of the ICC Statute, a Plan of Action was adopted by the ASP in 2006<sup>2</sup> and continues to be monitored and facilitated by ad country co-focal points appointed by the Bureau of the ASP. However, little progress has been seen in achieving universality in the past few years. Specific regions, namely Asia, the Middle East and North Africa, continue to be underrepresented in the ICC system. Countries harbouring the world's largest populations, including India, China, Russia, Indonesia and the United States, also fall out of the ICC scope. Major political powers, namely the United States, Russia and China, still refrain from joining the ICC – if not reject it entirely.

Universality is additionally challenged by few withdrawals of States Parties from the ICC Statute. Resistance to the anti-impunity norm has manifested particularly since the ICC sought cooperation from a number of States Parties in the execution of the long-standing arrest warrant against the president of Sudan, Al-Bashir. In late 2016, three African states announced that they would leave the ICC system: Burundi, Gambia and South Africa. While South Africa is still in the midst of domestic discussions on the withdrawal bid, Gambia has since reversed its decision,<sup>3</sup> while Burundi followed through with its withdrawal.<sup>4</sup> In March 2018, shortly after the ICC Prosecutor announced the opening of a Preliminary examination into the situation of The Philippines, the latter deposited a written notification of withdrawal from the Rome Statute.

A third challenge to the universal image of the Court is its perceived bias, arising from its record of conducting investigations mostly in the Africa region. This portrays the Court as a region-specific court as opposed to a universal one. Accusations to this effect ignore the fact that several of the ICC situations in Africa were at the request of the states, such as the situations of the Democratic Republic of Congo (DRC), Uganda, both situations of the Central African Republic (CAR), and Mali. They equally ignore the fact that serious crimes have been committed in the region with a high scale of repetition and impunity.

Recently, the Office of the Prosecutor (OTP) has been demonstrating its reach to wherever there is or there may be jurisdiction over Rome Statute crimes. Notably, its current investigation in Georgia (the first outside Africa), its request to open an investigation into the situation of Afghanistan, its announcement of new preliminary examinations into the situations of the Philippines and Venezuela, and its request for ruling on whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, all assert the Court's quest to universal reach. This presents the Court, the ASP and States Parties with a much-needed opportunity to pro-actively engage with underrepresented regions and non-States Parties on accountability and international justice, with the goal of galvanizing interest in and support to a universal ICC system.

<sup>2</sup>ASP Plan of Action for achieving universality, (ICC-ASP/5/32), part III, ICC-ASP/5/Res.3, para. 2, and annex I, 1 December 2006.

<sup>3</sup>FIDH press release, "Gambia and South Africa to remain in the International Criminal Court", 24 February 2017: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/gambia-and-south-africa-to-remain-in-the-international-criminal-court>.

<sup>4</sup>FIDH-Ligue ITEKA press release, "Burundi withdraws from the ICC: an attempt to shield perpetrators from prosecution", 27 October 2017: <https://www.fidh.org/en/region/Africa/burundi/burundi-withdraws-from-the-icc-an-attempt-to-shield-perpetrators-from>.

## 2. Cooperation with the Court Is Insufficient

The adoption of the ICC Statute came about through the alliance between progressive states and civil society organisations who recognized the need for an international, permanent and independent court. This collective action leading to the creation of the ICC needs to be sustained with constant and multi-faceted support and cooperation from states, regional organisations, the United Nations, and other relevant actors, to collectively ensure the effective functioning of the ICC. This is what has been envisioned in Rome and what was laid in the ICC Statute. The ICC Statute makes it a legal obligation<sup>5</sup> for States Parties to cooperate with the ICC in multiple ways<sup>6</sup> and a possibility for non-States Parties to cooperate with or assist the ICC via ad hoc agreements.<sup>7</sup>

The failure to comply with the Court's cooperation requests for the arrest and surrender of persons has become the most notable example of states' non-cooperation. In the situation of Darfur, the Court received no cooperation from Sudan, and neither from various States Parties in the execution of the arrest warrant against Sudanese president Al-Bashir, including Chad, Kenya, Djibouti, Malawi, the Democratic Republic of Congo, Uganda and Jordan. Non-compliance in the situations of Kenya and Libya by the respective governments has similarly been observed. Several measures have been taken to address findings of non-cooperation, including the appointment of focal points on non-cooperation from among all States Parties, on the basis of equitable geographical representation. But more should be done at the ASP level to address this issue, including routinely responding to findings of non-cooperation made by the ICC, and requesting wherever necessary the UN Security Council and the UN General Assembly to take measures against the states in question.

With regards to situations referred to the ICC by the United Nations Security Council (UNSC) acting under Chapter VII of the UN Charter, the UNSC must play a bigger role in supporting the effective implementation of its own resolutions and ensuring that obligations arising from these resolutions, particularly the arrest and transfers of ICC suspects, are honoured. The United Nations as a whole must cooperate with the ICC and refrain from any action that would undermine the Court and its decisions. Particularly, the UN Guidance on Contact with Persons Who are subject of Arrest Warrants or Summons issued by the ICC entails that no meetings between UN Officials and persons who are the subject of arrest warrants should take place, unless it is "absolutely necessary". The meeting of the UN Secretary General with Al-Bashir at the margins of the AU Summit on the 28th of January 2018 raised questions and concerns over the UN's public support to the ICC.

Other regional bodies, such as the African Union (AU), the European Union (EU), and the Latin American and Caribbean Group must foster cooperative ties with the Court and publicly support its mandate and judicial activities. This hasn't been the case for the AU, which continues to chal-

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<sup>5</sup>See Part 9 of the ICC Statute.

<sup>6</sup>In 2015, seven key areas requiring attention by States have been identified by the ASP: arrest and surrender; cooperation in support of preliminary examinations, investigations, prosecutions and judicial proceedings (including with the Defence); identification, tracing, freezing or seizing of assets of ICC suspects or other relevant persons; diplomatic and public support in national, bilateral, regional and international settings; inter-State cooperation in the context of the Rome Statute system, i.e., exchanges of experiences and mutual assistance or sharing of information with other State(s); enacting the legal mechanisms set in the Rome Statute and setting up effective procedures and structures regarding cooperation and judicial assistance; and voluntary cooperation.

<sup>7</sup>Voluntary cooperation takes place by signing bilateral cooperation agreements that address aspects of the Court's activities, including but not limited to the protection of victims and witnesses, enforcement of sentences, interim release and release of persons.

lenger the ICC particularly on the issue of immunity for heads of states,<sup>8</sup> and has even gone as far as to call for collective withdrawals of AU states from the ICC.<sup>9</sup> As for the EU, the civil society campaign for the establishment of an EU Special Rapporteur for International Humanitarian Law and International Justice must be considered, particularly as it could put into effective action the commitment made by the EU region to deter and repress the most serious crimes of international concern in a time where cooperation with the Court is not taken for granted.<sup>10</sup>

### 3. Investigations, Prosecutions and the Public Image of the Office of the Prosecutor Need To Be Strengthened

The tenure of the first ICC Prosecutor from 2003–2011 were years where the foundations had to be laid for a robust office through establishing policies and manuals that form the necessary tools for investigating the most serious crimes of international concern. But these first few years of the OTP's functioning were marked with misconceptions, challenges and severe criticism over the lack of sufficient public communication about the work of the Office. This was only remedied at the end of the Prosecutor's tenure through public communication on the work of the OTP including on situations in preliminary examinations.<sup>11</sup>

Despite the rocky road, the OTP achieved progress in several areas, including interpreting the 'interest of justice' principle,<sup>12</sup> asserting the ICC mandate to achieve peace through justice, and galvanizing, to a certain extent, support to and cooperation with the Court. Yet a number of concerns remained and were passed on to the next prosecutor to address. These include: investigating all parties to the conflict and going up the chain of command in all situations, implementing a policy that pursues the most serious crimes of concern and types of victimization, delivering justice to victims and concluding preliminary examinations within a reasonable time, and strengthening the Office's public communications on selections of cases and investigations.<sup>13</sup>

Fatou Bensouda, former Deputy Prosecutor of the ICC from 2003–2011 was well abreast of the challenges facing the OTP when elected to become the second Prosecutor of the ICC from

<sup>8</sup>See African Union Summit decisions seeking opinion on head of state immunities from the International Court of Justice, 28–29 January 2018, available at: [https://au.int/sites/default/files/decisions/33908-assembly\\_decisions\\_665\\_-689\\_e.pdf](https://au.int/sites/default/files/decisions/33908-assembly_decisions_665_-689_e.pdf).

<sup>9</sup>See Resolution of the African Union collectively supporting a strategy to withdraw from the ICC in its 28th session: [https://www.hrw.org/sites/default/files/supporting\\_resources/assembly\\_au\\_draft\\_dec\\_1\\_-19\\_xxviii\\_e.pdf](https://www.hrw.org/sites/default/files/supporting_resources/assembly_au_draft_dec_1_-19_xxviii_e.pdf) (30–31 January 2017).

<sup>10</sup>For further information, see Joint NGO Concept Note for an EU Special Representative on International Humanitarian Law and International Justice: <https://www.hrw.org/news/2018/07/06/joint-ngo-concept-note-eu-special-representative-international-humanitarian-law-and>.

<sup>11</sup>FIDH called upon the ICC Office of the Prosecutor at numerous occasions to communicate on the situations under preliminary examination. See, for example, FIDH Statement to the prosecutorial strategy of the ICC Office of the Prosecutor, 26 September 2006: [https://www.fidh.org/IMG/pdf/FIDH\\_Strategy OTP\\_EN.pdf](https://www.fidh.org/IMG/pdf/FIDH_Strategy OTP_EN.pdf).

<sup>12</sup>See various FIDH papers commenting the OTP policy paper on the "interest of justice", for example in September 2006: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/FIDH-Comments-on-the-OTP-draft,3987>.

<sup>13</sup>FIDH, "The Office of the Prosecutor of the ICC – 9 Years On: Analysis of the Prosecutorial Strategy and Policies of the Office of the Prosecutor (2003–2011), Recommendations to the Next ICC Prosecutor", December 2011: <https://www.fidh.org/IMG/pdf/cpiproc579ang.pdf>.

2012–2021. In her tenure, many improvements continue to be seen at the policy level. This includes the development of OTP Policy Papers on Preliminary Examinations (2013),<sup>14</sup> Sexual and Gender-Based Crimes (2014),<sup>15</sup> Case Selection and Prioritisation (2016),<sup>16</sup> and Policy on Children (2016).<sup>17</sup> Though these new tools and methodologies developed by the OTP are positive, it remains unclear how the Office measures or ensures the implementation of or compliance with these policies. It furthermore remains unclear how and when should these policies be reviewed and updated with best practices and lessons learned.

Additional progress is seen in the area of complementarity where the initiation of preliminary examinations impacted the activation of justice at the national level. For instance, preliminary examinations have in a number of situations triggered the adoption of national legislations that incorporate international crimes at the domestic level. Where such legislations already existed, preliminary examinations laid the pressure on national authorities to implement such legislations and to make justice at home possible.

Yet, several challenges prevail. Firstly, the lack of cooperation from relevant states coupled with a fragile security in a number of ICC situations has limited, if not completely prevented, the OTP's ability to carry out investigations on the ground (particularly in the situations of Sudan, Libya and Burundi). Secondly, the OTP's investigations budget continues to be underfunded, resulting in the OTP often having to balance its limited resources, and impacting its ability of carrying out preliminary examinations and investigations in a reasonable time. Finally, investigating all parties to the conflict continues to be a challenge, which is particularly seen in the situation of Ivory Coast.

New challenges arose as well. The recent acquittal of Jean Pierre Bemba after a lengthy trial has raised questions on the OTP's case selection and case building that need to be addressed and reflected upon under a lessons learned exercise. That being said, the impact of the Bemba Appeals Judgment on future work of the OTP cannot be underestimated, particularly on issues of command responsibility and the level of detail required from the Prosecutor in the Document Containing the Charges. As pointed out by the Prosecutor following the acquittal:

*"the level of detail that the Prosecution may now be required to include in the charges may render it difficult to prosecute future cases entailing extensive campaigns of victimisation, especially where the accused is not a direct perpetrator, but a commander remote from the scene of the alleged crimes but who may bear criminal responsibility as the superior having effective control over the perpetrators, his subordinates."*<sup>18</sup>

Other new challenges include the issue of witness tampering<sup>19</sup> and withdrawals from the ICC as a response to the OTP's cooperation requests or investigative activities. Finally, the elephant in the room: the rumors<sup>20</sup> about the conduct of former Prosecutor including involvement in cases related to the Kenya and Libya situations implicating two then current ICC staff members. Whether

<sup>14</sup>Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, available at: [https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11\\_2013](https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11_2013).

<sup>15</sup>Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, available at: [https://www.icc-cpi.int/iccdocs/otp/Policy\\_Paper\\_on\\_Sexual\\_and\\_Gender-Based\\_Crimes-20\\_June\\_2014-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf).

<sup>16</sup>Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, September 2016, available at: [https://www.icc-cpi.int/itemsDocuments/20160915 OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915 OTP-Policy_Case-Selection_Eng.pdf).

<sup>17</sup>Office of the Prosecutor, Policy on Children, November 2016, available at: [https://www.icc-cpi.int/iccdocs/otp/20161115 OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/iccdocs/otp/20161115 OTP_ICC_Policy-on-Children_Eng.PDF).

<sup>18</sup>Statement of ICC Prosecutor: <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat> (13 June 2018).

<sup>19</sup>For more information on the challenge of witness tampering, see part 4 of FIDH Recommendations to the 16th Session of the Assembly of States Parties to the Rome Statute, 4-14 December 2017, available at: <https://www.fidh.org/IMG/pdf/asp16th707aweb-2.pdf>.

<sup>20</sup>See Spiegel Online: International Criminal Court Scandal Widens, 17 October 2017, available at: <http://www.spiegel.de/international/world/international-criminal-court-scandal-widens-a-1173156.html>.

or not these rumors will prove to be true remains a question. The fact is that they have negatively impacted the public image of the OTP, a matter that can only be restored through continued public communication on measures taken to investigate and respond to such allegations.

## 4. Sexual and Gender-Based Crimes Must Be Investigated and Prosecuted Systematically

When the ICC Statute was adopted in Rome in July 1998, it was heralded as a model for gender justice that addresses many of the legal, institutional, and evidential pitfalls that had plagued the ad hoc tribunals, and many national legal frameworks in post-conflict jurisdictions. The Statute and its accompanying documents incorporate the broadest range of Sexual and Gender-Based Crimes (SGBC) in the history of international law and contain a number of other important gender justice principles.<sup>21</sup>

However, thus far the ICC has been unpredictable in its implementation of provisions relating to SGBC, and many victims in situations under investigation by the Court have been disappointed. To date, and twenty years after the adoption of the ICC Statute, there has not been a single successful conviction for sexual and gender-based crimes at the ICC. The overturn of the first ever conviction of SGBC at the ICC in the Bemba case by the Appeals chamber left justice for the victims of conflict-related sexual violence undelivered. Acquittals of SGBC charges also took place in the Ngudjolo and Katanga cases.

Additional setbacks to fully capitalise on the unique legal provisions available to the Court are the failure in bringing charges of SGBC or having these charges confirmed, including in situations where SGBC were massively and systematically committed. The Lubanga and Al-Mahdi cases present missed opportunities for achieving justice for SGBC victims in the DRC and Mali. In other cases, where the OTP sought to include SGBC charges, these charges were not confirmed by the Pre-Trial Chambers where the evidence presented by the OTP was not deemed sufficient for retaining those charges against the accused. This was the case in the Mbarushimana and Ali cases, where none of the charges (including charges of SGBC) were confirmed, and in the Bemba, Katanga and Ngudjolo cases, where some of the SGBC charges, namely sexual violence as outrages upon personal dignity and torture, were not confirmed. Even when SGBC charges were brought by the OTP and confirmed by the judges, they have in a number of cases been later withdrawn, such as in the Gbagbo and Blé Goudé case, or dropped as in the Kenyatta and Muthaura case.

The OTP has taken steps to improve its strategy regarding accountability for SGBC and to address the said shortfalls. This includes the earlier mentioned Policy Paper on Sexual and Gender-Based Crimes reflecting a genuine commitment to giving priority to SGBC by current Prosecutor, Fatou

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<sup>21</sup> Such principles include 'fair representation' of gender in the election of judges, inclusion of a special adviser to the Prosecutor on sexual and gender-based violence, procedural protections for witnesses and victims taking into account gender as well as expertise within the Victims and Witnesses Section (VWS) on trauma related to sexual violence, a commitment to gender-sensitive measures aimed at inclusive victim and witness participation in proceedings, and particular rules of procedure and evidence to protect victims of sexual violence.

Bendoua. This is in addition to the creation of a gender analysis<sup>22</sup> tool, a ‘living document’ comprised of guidelines regulating the collection, analysis, and reporting on information specifically related to the gender dimensions relevant in a particular context and regarding alleged crimes.

The impact of these developments can already be seen in the wider range of charges for sexual and gender-based crimes based on expanded evidence and additional investigations. Most notably, the cases against Ntaganda (DRC), Ongwen (Uganda) and Al Hassan (Mali) that finally introduce charges of sexual slavery and forced marriage, give a positive sign in increasing the visibility of SGBC against earlier failures of including SGBC charges other than the crime of rape. While this is progress in itself, it remains to be seen whether any of these charges will result in convictions.<sup>23</sup>

## 5. Victim Participation and Legal Aid Warrant an Increased Attention

The ICC Statute grants victims the right to participate in proceedings where their personal interest is affected,<sup>24</sup> remedying their earlier exclusion from international judicial proceedings. This feature of victim participation is considered one of the most innovative features of the ICC Statute as it is the first to grant victims the right to participate in international criminal proceeding. Under this novel feature, victims enjoy the right to be heard and considered, at stages of the proceedings determined to be appropriate, and the Court has the duty to effectively enable them to exercise this right.

Yet, what was envisioned in Rome under the system of victim participation in ICC proceedings continues to be tested. With the growing number of victims seeking to participate in the ICC, different judicial approaches on modalities for participation have been explored and the situation is constantly evolving. Identifying modalities for effective victim participation without compromising the efficiency of the proceedings and the rights of other parties is essential, but it must not risk reducing victim participation in proceedings as merely symbolic. Because, if appropriately implemented, it provides an essential link between the trials in The Hague and the national level. It is also a first step in the reparation or restorative justice process since it addresses real damage caused by real atrocities.

Additionally, the system of victim participation continues to be subjected to various misconceptions that undervalue its purpose and portray it as a burdensome, cost-driven exercise that further

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<sup>22</sup>Gender Analysis is defined in the 2014 OTP Policy Paper on Sexual and Gender Based Violence as : “Gender analysis’ examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities”.

<sup>23</sup>Read soon to be released FIDH report “Increasing Accountability for Sexual and Gender-Bases Violence at the ICC and Beyond”, 2018.

<sup>24</sup>Rome Statute of the International Criminal Court, Art. 68(3), July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute] “[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

burdens proceedings with delays and additional practicalities. Further, there is a lack of awareness of the field work that victim participation entails, as well as lengthy discussions on who victims should be legally represented by.<sup>25</sup>

The right of victims to participate in ICC proceedings is additionally impacted by the legal aid for victims system, which specifically impacts their ability to have intensive consultations with their representatives. Adjustment of the legal aid system has been on the agenda of the Court since early 2017, resulting in an expert report on the Court's legal aid system, a concept note, as well as a number of consultations with key experts and stakeholders starting from June 2017. Since early 2018, however, these discussions have been halted, with clear lack of appetite of states to resume these discussions evident from the fact that no focal point on legal aid has been established. Consequently, and given the fact that the implementation of the legal aid adjustments was envisioned to take place in 2019, the Committee on Budget and Finance expressed its concern in May 2018 over the review processes and the readiness of addressing it in the upcoming ASP. Given the crucial impact of the Legal Aid discussions on both victims and the defense, it is crucial that these consultations resume as soon as possible.

## 6. The Rapid Provision of Reparations and Assistance Is Lacking

The establishment of a reparations mandate under the ICC Statute is a major advancement in international criminal justice and a victory for victims of mass atrocities in making reparative justice a reality. The creation of the Trust Fund for Victims (TFV) in 2004 by the ASP is a further step toward implementing programmes that address harms resulting from genocide, crimes against humanity, and war crimes.

Under the reparations mandate, ICC judges order reparation awards for victims of a convicted person. With the cases of Lubanga<sup>26</sup>, Katanga<sup>27</sup> and Al-Mahdi<sup>28</sup> having reached the stage of reparations, it became evident that the provisions of the ICC Statute on reparations are not detailed and were left to be based on the jurisprudence of the Court. This entailed the establishment of principles and processes to be applied for awarding reparations to victims. Since the Al-Mahdi case, the Chamber opted to appoint experts to assist on issues relevant to reparations. Once that process was concluded, and the chamber handed down reparations awards, other process were still needed for the implementation of these awards. This included the TFV drawing an implementation plan that was to be approved by the Chamber, identifying partners on the ground for the

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<sup>25</sup>FIDH report, "Five Myths about Victim Participation in ICC Proceedings", December 2014: <https://www.fidh.org/IMG/pdf/cpi649a.pdf>; and FIDH report, "Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court", November 2013: [https://www.fidh.org/IMG/pdf/fidh\\_victimsrights\\_621a\\_nov2013\\_ld.pdf](https://www.fidh.org/IMG/pdf/fidh_victimsrights_621a_nov2013_ld.pdf).

<sup>26</sup>See FIDH-LE-GL-ASADHO press release, "DRC: ICC's appeal on reparations in Lubanga case should enshrine a comprehensive approach to reparations for victims", 2 March 2015: <https://www.fidh.org/en/region/Africa/democratic-republic-of-congo/drc-icc-s-appeal-on-reparations-in-lubanga-case-should-enshrine-a>.

<sup>27</sup>FIDH-LE-GL-ASADHO press release, "DRC: For the First Time, ICC Awards Symbolic Individual Reparations", 24 March 2017: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/for-the-first-time-icc-awards-symbolic-individual-reparations>.

<sup>28</sup>See FIDH press release, "ICC orders reparations for destruction of cultural heritage: a limited step in the prosecution of crimes committed in Timbuktu", 17 August 2017: <https://www.fidh.org/en/region/Africa/mali/icc-orders-reparations-for-destruction-of-cultural-heritage-a-limited>.

implementation of the award, and in the case of Al-Mahdi, screening victims eligible for receiving reparations. In summary, it takes time for victims to obtain reparations, particularly after what are often lengthy investigations and proceedings.

In addition to implementing the Court's ordered reparations, the TFV has an 'assistance' mandate that is to provide physical, psychological, and material support to victims and their families. This second mandate is of high value, particularly when coming to terms with the fact that international justice and reparation awards take time. While victims eagerly await justice, the TFV can deliver some assistance that may soothe their suffering and alleviate their life conditions. The TFV also announced that its assistance mandate will be utilised after the full acquittal of Bemba which has taken the thousands of victims waiting for reparations by surprise.

However, implementing assistance programmes beyond the situations of the DRC, Uganda, and launching assistance programmes in and beyond Ivory Coast and CAR by the TFV has been very lengthy and limited by the financial and human resources available to the Fund. At the same time, demand for assistance continues from other situations that the Court is investigating. In response to that, the Fund put forward a request for an increased budget and called for voluntary contributions to enable it to meet these increasing demands. It is now up to states to make the necessary contributions and allow the necessary budget that the Fund needs.

## 7. Human Rights Defenders and Intermediaries Need Better Protection

As recognised by the ASP recently,<sup>29</sup> human rights defenders working on the ICC continue to face intimidation, reprisals, threats, and attacks due to their work on the ICC and international justice. The attacks and harassments are multi-faceted, ranging from violent death threats to intimidation at international fora including at the ASP.<sup>30</sup> In addition to enduring protection risks, some human rights defenders struggle with accessing the Court due to imposed travel bans as punitive action for working on justice issues, or have difficulties in obtaining the necessary visa to travel to the Court or attend the ASP. It is imperative that States Parties and the host state protect human rights defenders and enable them to work on the advancement of international justice without fear. As for the protection offered by the Court, this can be described as insufficient as it extends only to victims and witnesses of a case. Until that changes, the Court must be vocal in condemning attacks on human rights defenders working on bringing justice for victims of Rome Statute crimes.

Additionally, the ICC continues to function with limited resources in complex situations with varying sets of security, accessibility, conflicts, cultures and languages. For that reason, the ICC has relied and continues to rely in its work on intermediaries who facilitate its field activities. Yet the benefits of working with intermediaries do not come free of cost and often entail protection- and other- risks to individuals or organisations working with the Court. This complex relationship between the Court and intermediaries has been subject to concerns and controversies, particularly

<sup>29</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, Resolution ICC-ASP/15/Res.5, para. 37, 16-24 November 2016, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-20-vol-I-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-20-vol-I-ENG.pdf).

<sup>30</sup> See in particular FIDH press release, "The Independence of the International Criminal Court must be enhanced", 27 November 2015: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/the-independence-of-the-international-criminal-court-must-be-enhanced>.

on the role and use of intermediaries by the Court and the OTP in particular. The 2014 Guidelines Governing the Relations between the Court and Intermediaries<sup>31</sup> has been a step in the right direction of formalising the cooperation between the Court and intermediaries. Yet there remains unclarity on whether these guidelines have achieved their purpose. For that reason, it is essential that a monitoring process is established, involving the Court, intermediaries and external experts, to assess compliance with and the impact of the guidelines. Finally, the ASP should consider appointing at the earliest possible a dedicated intermediaries facilitator who takes on the task of monitoring the Court's relationship and guidelines in working with intermediaries.

## 8. To Some Victims and Affected Communities, the ICC Is Invisible

Under the ICC's legal framework,<sup>32</sup> and as reiterated numerous times by the ASP and several ICC chambers:<sup>33</sup> "victims have the right to provide information to, receive information from and communicate with the Court, regardless and independently from judicial proceedings, including during the preliminary examination stage".<sup>34</sup> Particularly, to give effect to the unique mandate of the Court towards victims, it is crucial to ensure effective outreach to victims and affected communities that ensures accessibility to accurate information about the Court, its mandate and activities, as well as about victims' rights under the Rome Statute, including their right to participate in judicial proceedings and claim for reparations.<sup>35</sup>

Additionally, early outreach is necessary for the Court to better understand the concerns and expectations of victims, so that it can respond more effectively and clarify, where necessary, any misconceptions.<sup>36</sup> With that, the Court will foster support, public understanding and confidence in its work.

Despite this recognised importance of outreach activities for the benefit of victims and the Court, the right of victims to provide and receive information is not always implemented, and is often linked to judicial proceedings. For instance, civil society organisations in Georgia, where as of recently a field office exists, have raised concern over the fact that victims cannot go to this office

<sup>31</sup> Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, March 2014, available at: <https://www.icc-cpi.int/iccdocs/l/GRCI-Eng.pdf>.

<sup>32</sup> See, for example, Article 15(1), (2) and (6) of the Statute and Rule 49 of the Rules; Article 53 and Rule 104 of the Rules; Rule 92(1) and (2) of the Rules. See also footnote 17 of ICC Pre-Trial Chamber 1, Decision on Information and Outreach for the Victims of the Situation, the Situation of Palestine, 13 July 2018, available at: [https://www.icc-cpi.int/CourtRecords/CR2018\\_03690.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03690.PDF) referring to Rule 92(2) of the Rules which provides for the notification of victims who have communicated with the Court with respect of the situation, "envisaging communication between victims and the Court even before the Prosecutor's decision as to whether to initiate an investigation has been taken".

<sup>33</sup> ICC Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of the Pre-Trial Chamber I of 7 December 2007 and in the appeal of the OPCD and the Prosecutor against the decision of the Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, para. 53; Pre-Trial Chamber II, Situation in the Republic of Uganda, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, paras 93-95.

<sup>34</sup> ICC Pre-Trial Chamber 1, Decision on Information and Outreach for the Victims of the Situation, the Situation of Palestine, 13 July 2018, available at: [https://www.icc-cpi.int/CourtRecords/CR2018\\_03690.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03690.PDF).

<sup>35</sup> ASP, The impact of the Rome Statute system on victims and affected communities, 8 June 2010, RC/Res.2, para. 3.

<sup>36</sup> See ICC-ASP, "Strategic Plan for Outreach of the International Criminal Court", 29 September 2006, ICC-ASP/5/12, [https://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCAСП512\\_English1.pdf](https://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCAСП512_English1.pdf) paras 1-3 (last accessed on 15 July 2018).

to submit information nor to receive information on the ICC's mandate or their rights.<sup>37</sup> In other situations, where the ICC does not have field offices or cannot access the field altogether, victims have in some situations (Libya, Sudan, Kenya, among others) often reported that they either do not know what the ICC is, or have not seen anyone from the Court in years. In these situations, victims feel as if they have been forgotten.

Against this backdrop, civil society organisations and other groups have in some cases intervened to remedy this lacuna of information. In some cases, this experience and knowledge has been helpful, in others, it led to misconceptions—either unintentionally or on purpose. Here, it is worth reminding that outreach activities fall under the responsibility of the ICC and the Registry in particular, and while local civil society organisations are crucial to the development of outreach strategies, they cannot carry the burden of implementing them.

With the current preliminary examinations and investigations, the ICC will become increasingly challenged and will likely be less able to carry out activities on the ground. As a result, misconceptions, public lash outs and the lack of understanding of the Court will likely increase. For this reason, the ICC must systematically initiate its outreach activities as early as possible starting from the preliminary examinations phase. Creative outreach means can be identified, including utilising the ICC's digital communication tools for the benefit of outreach endeavors. This will help to ensure that victims and affected communities continue receiving the necessary information on the Court, their rights and the relevant ICC developments.

## 9. ICC Judges & Prosecutor Must Be Elected Based on Merits Only

The chambers of an independent, fair and effective international Court must be composed of a gender-balanced, impartial and highly qualified judges that represent the geographical distribution as well as the legal systems of the Court's States Parties. The criteria established under the ICC Statute that judge nominees must demonstrate is not a simple one; it is equivalent to the appointment of the nominee at the highest judicial offices in their home countries. Judges shall be chosen from among persons of high moral character, impartiality and integrity, who have competence in criminal law and procedure, the necessary experience whether as a judge, prosecutor, advocate or in other similar capacity, and competence in relevant areas of international law, such as international humanitarian law, the law of human rights. Candidates must also be fluent in at least one of the working languages of the Court. Additional expertise in the areas of victims' rights and sexual and gender-based crimes is desired.

However, and despite the clear stipulation of a demanding portfolio for judicial candidates, some states have often nominated candidates based on political considerations as opposed to merit-based criteria. More problematic is when these candidates are elected through reciprocal political agreements or 'vote-trading'. The impact of political nominations on ICC proceedings is devastating to the Court's increasing and challenging- including novel- litigation work which should be carried out by the most competent, candidates, rather than those who have political backing.

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<sup>37</sup> Read in particular FIDH-HR IDC press release, "Georgia: the International Criminal Court has the potential to be a game changer in the region", 20 April 2018: <https://www.fidh.org/en/region/europe-central-asia/georgia/georgia-the-international-criminal-court-has-the-potential-to-be-a>.

As for the process of identifying and nominating candidates for the position of the 3rd ICC Prosecutor, given the impact that a prosecutor has on almost every aspect of the ICC, this must be taken up swiftly by states and the ASP Bureau. A similar Search Committee for the position of the Prosecutor of the ICC that was established by the ASP Bureau in 2010 should be considered with the aim of identifying and nominating at least three suitable candidates, where possible for consideration by the Bureau. So far this process has not been initiated but should be swiftly launched as the end of tenure for the current Prosecutor approaches.

## 10. Fragile Institution: An Increasing Workload without an Increasing Budget

The budget of the ICC, proposed by the Court and adopted annually by the ASP with the help of the Committee on Budget and Finance (CBF), sets out the framework for the functioning of the ICC. The Court is limited by the approved budget in what it is allowed to have in implementing its mandate under the Rome Statute. This heavily affects critical areas of work, including, but not limited to, investigations, outreach, victim and witness protection, and legal representation. As evident from recent years, the Court's budget has not increased as a result of the 'zero-growth policy' championed by a number of contributing states despite the clear increase in the Court's workload, including new cases, preliminary examinations, and investigations.

To state this in a numerical example, the 2018 ICC budget is €147,431,500, while that of the Special Tribunal for Lebanon (STL), focusing on one situation, is just over €56 million – more than one third of the ICC's overall budget, which has 10 preliminary examinations, 11 situations under investigations, 26 cases and 3 ongoing trials concerning crimes committed in or by nationals of states parties of at least 26 different countries. While it is positive to see that the STL is equipped with the resources it needs given the complexity of its work, this comparison demonstrates the level of underfunding of the ICC and the impact that that may have on the Court's implementation of its mandate.

Beyond the underfunding of the ICC for carrying out its mandate, the Court's budget is additionally burdened by a series of complaints made against it before the Administrative Tribunal of the International Labour Organisation (ILOAT). Some of the complainants have already been awarded moral compensation, so far adding up to over a million euros. It remains unclear how the Court has managed to budget these financial compensation awards, and more transparency in that needs to be demonstrated.

Budgetary challenges should be addressed at multiple levels. To start, States must accept and contribute to enabling the ICC in delivering its mandate by making the necessary resources available. Also, the Court should not, because of an unfavorable context, restrain itself from asking what it needs by opting for a limited budget increase instead. Further, members nominated and elected to serve in the CBF Committee must have the technical expertise and full understanding of the complexity and needs required to implement the Court's mandate and activities, both in The Hague and in the field. Moreover, to the extent possible, flexibility should be permitted in using the approved budget in allowing unused resources to be utilised where they may be of need.

# Keep your eyes open



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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 Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.



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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**

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