

Recommendations to the seventh Assembly of States Parties to the Rome Statute

The Hague, 14-22 November 2008
Position Paper No. 13

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognizing that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their prosecution must be ensured effective by taking measures at the national level



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INTRODUCTION

The year 2008 has marked the tenth anniversary of the adoption of the Rome Statute. Six years after its entry into force, the International Criminal Court (ICC or Court) is investigating crimes committed in four situations: the Democratic Republic of Congo (DRC); Uganda; Darfur, Sudan; and the Central African Republic (CAR). The Court has issued 12 public arrest warrants. Four persons have so far been arrested; two of them were surrendered to the ICC since the last session of the Assembly of States Parties (ASP or Assembly).

Over 2008, we have witnessed a new era in the activities of the Court. Trial Chamber I has decided to stay the proceedings in relation to the preparation of the first trial, until it is assured that the respect of Thomas Lubanga's right to a fair trial can be ensured. Following the arrest and surrender of Mr. Mathieu Ngudjolo Chui and the joinder of his case to the one against Mr. Germain Katanga, charges were confirmed and the accused have been committed for trial. For the first time, crimes of sexual violence will be prosecuted before the ICC.

In 2008, we have also seen that the Court's actions have been taken to a higher level. An arrest warrant against a former vice-president was sought and executed. Jean-Pierre Bemba, former vice-president of the DRC, and leader of the *Mouvement de Libération du Congo*, was arrested in Belgium on 24 May 2008 and surrendered to the ICC on 3 July 2008. Preparations for a confirmation of charges hearing are under way at the time of preparing this report. It is expected that the proceedings in the Bemba case will have a major impact both in CAR and the DRC.

In July 2008, the Prosecutor requested the first ICC arrest warrant against a sitting head of State, Sudan's President Omar al-Bashir. This significant step, which constitutes a major landmark in the implementation of the Rome Statute, is a promise for justice to the victims of the devastating conflict in Darfur.

In 2008, FIDH has also seen with great satisfaction the development of a new policy of the Office of the Prosecutor, in relation to the situations under analysis (in particular Colombia and Georgia). We believe that the ability of the Office to speak publicly about those situations can have a major deterrent effect and be a factor to encourage national prosecutions in the countries concerned, and elsewhere.

The chambers of the Court have continued to issue decisions on a number of key matters, including victims' participation in the proceedings, the rights of the accused, disclosure of evidence, and the confirmation of charges. Moreover, for the first time, the Board of Directors of the Trust Fund notified the Chambers of its intention to undertake projects to provide physical and psychological assistance and material support, to victims of the crimes within the jurisdiction of the Court. The chambers concluded that the proposed activities would not pre-determined any issue to be determined by the judges of the Court.

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The seventh session of the ASP will be held in The Hague from 14 to 22 November 2008. At this session, the Assembly will consider and make decisions on the Court's budget for 2009, and on preparations for the Review Conference, among other matters. The Assembly will also consider the advances made by the Court in relation to the implementation of the strategic plan, and the assessment of the Regulations of the Trust Fund for Victims. The Special Working Group on the Crime of Aggression will also meet during this session of the ASP. Further, this session of the

Assembly offers an excellent opportunity for States Parties to assess advances made in the field of cooperation.

This position paper looks into some of the issues to be covered by the seventh session of the Assembly. It puts forward specific recommendations to the ASP and raises other matters to the attention of the Assembly. We address a number of issues of special concern to FIDH, related in particular to the implementation of the rights of victims.

In addition, as an active member of the thematic teams of the Coalition for the International Criminal Court (Coalition or CICC), FIDH fully endorses the CICC Teams' Papers to which it has contributed actively. The CICC Teams' Papers are available at: <http://www.iccnw.org/?mod=asp7>
This position paper is complementary to the recommendations contained in those papers.

I. RECOMMENDATIONS IN RELATION TO THE COURT'S PROPOSED BUDGET FOR 2009 AND THE REPORT OF THE COMMITTEE OF BUDGET AND FINANCE ON THE WORK OF ITS ELEVENTH SESSION

FIDH has carefully considered the Proposed Programme Budget for 2009¹ and the Proposed supplementary budget for the Bemba case², as well as the Report of the Committee of Budget and Finance (CBF or Committee) on the work of its eleventh session³.

The budget proposal is for a total of €102.63 million. This reflects an increase of €12.24 million or 13.5 % over the 2008 budget. The increase is largely due to the adjustment of the vacancy rate, and the resources necessary for the second trial, which is projected to begin in the first half of 2009. Important investments were proposed in the area of witness and victim protection, and legal aid. Additionally, the supplementary budget for the Bemba case amounts to €2.5 million.

When considering the budget, States Parties should bear in mind that the budget is not only a financial document, but also a document which defines the activities which the Court will be able to undertake the next year. Discussions on the budget thus have implications for setting priorities and imposing limitations to the Court's daily work.

Some passages of the CBF report indicate that the Court's budget should not continue to increase in the coming years⁴. It must be noted, however, that the Court is still a very young institution, which has not yet reached its full capacity: the first trials have not started yet. FIDH considers that it is unrealistic to put a cap to the Court's budget at this time.

A. Observations on the Committee of Budget and Finance's recommendations regarding financial implications of judicial decisions

FIDH has noted the recommendations contained in paras. 52 to 54 of the Report of the Committee of Budget and Finance on the work of its eleventh session:

“[...] costs were being driven by underlying judicial and policy decisions, many of which were not visible to the Committee or the Assembly [...] In addition, the Committee was concerned

1 ICC-ASP/7/9

2 ICC-ASP/7/17

3 ICC-ASP/7/15 [hereinafter “CBF Report on its 11th session”]

4 *Id.* para. 76

with the lack of visibility of the costs of judicial decisions [...] **In order to improve transparency, the Committee recommended that the Registrar should provide a statement of financial implications to Chambers on matters under consideration, preferably prior to decisions being taken. The Committee also recommended that the Presidency should advise Chambers of the need to take appropriate account of costs in their deliberations. Further, the Committee recommended that the Registrar report to the Committee and the Assembly, in the context of performance reports and annual budget proposals, on all judicial decisions which have significant impacts on the budget (with due regard to confidentiality)."**

FIDH agrees that there is a need for greater visibility and understanding of judicial decisions with financial implications by the Committee and the Assembly, and, therefore, supports the set-up of communication channels to improve information-sharing in this regard. However, we are seriously concerned about the recommendation that judges should take the financial impact of future decisions into account in their deliberations. The implementation of the Rome Statute should be based on the application of the highest legal standards, and it would be completely inadequate for judges to make decisions on the basis of costs rather than through an impartial interpretation and application of the law⁵. The budget should be adapted and adequate resources should be allocated in order to implement the judges' decisions.

Although we understand that there might be some advantages to having judges generally involved in the practical considerations related to the implementation of their decisions, we are concerned that the Committee's recommendation could set a dangerous precedent. Should the Assembly decide to endorse the CBF recommendation in relation to the provision of information on costs to judges, FIDH recommends that it be made clear that provision of information on financial implications should be made for judges' awareness, as opposed to for them to take into account in their deliberations. Alternatively, the Assembly could request the Court to put mechanisms in place in order to make financial information available to judges when they request it.

For these reasons, FIDH recommends that the Assembly:

- **Endorse the CBF recommendation in relation to the provision of further information by the Registrar to the Committee and the Assembly on financial implications of judicial decisions.**
- **Recall that the implementation of the Rome Statute should be based on the legal principles.**

5 The Report of the CBF on the work of its eight session contained a similarly worrying recommendation in relation to the management of the legal aid system: "The Committee emphasised the importance of the maintaining a consistent, transparent and economical system of legal assistance, and noted that ad hoc judicial decisions could prejudice the overall integrity of the legal aid system as administered by the Registrar", ICC-ASP/6/2, para. 82. The CICC Budget and Finance Team, of which FIDH is an active member, reacted to this recommendation as follows: "The Team agrees that a large number of judicial ad hoc decisions could potentially unsettle the legal aid system. However, the Team wants to point out that the principle of fair trial and independence of judges need to be taken into account by the Committee. Reviewing Registry's decisions on legal aid matters is part of the natural role of judges. The legal aid system, as conceived by the Registry, cannot foresee all the situations that might arise. Judicial decisions allow for flexibility to address specific needs in particular cases. In addition, judicial decisions allow the system to develop further since the Chambers might identify areas that are not properly addressed by the Registry's system, thus leading to a violation of the right to a fair trial or the right to access justice", Submission to the Ninth Session of the CBF, 7 September 2007, http://www.iccnw.org/documents/CICC_Submission9thSessionofCBF_eng.pdf

B. Legal aid for victims: need for a scheme adapted to the situation of victims

According to the Court's core legal texts, victims have a right to choose a legal representative and indigent victims are entitled to receive legal assistance paid by the Court. FIDH believes that an effective and comprehensive legal aid system is crucial to guarantee effective participation by victims. In particular, we have advocated for the Court to establish a legal aid scheme for victims which takes into consideration the specific needs of victims' legal representatives. We have, therefore, taken particular interest in the CBF recommendations discussed below.

1. Revision of the legal aid scheme for victims

In 2004, the Registry established the ICC legal aid scheme⁶. In 2007, the Registry decided that the legal aid system needed to be reviewed to take into consideration the experience gained by the Court during the first proceedings⁷. With respect to legal aid for victims, the Registry established a “loose” system, largely based on the Registrar's discretion⁸. While we agree that a certain degree of flexibility is necessary in the management of the legal aid system by the Registry, FIDH has expressed concerns about the lack of certainty and transparency that such system implies, and has advocated for greater clarity in relation to the criteria that are applied by the Registry in order to make decisions on the extent of legal aid⁹.

FIDH notes that the regime for victim participation has advanced further over the last year¹⁰. Also, the number of victims' request for legal aid has increased in 2008. Only one victim benefited from legal aid up until 2007, while at least 42 victims have been declared indigent and granted access to legal aid as of today¹¹. As new cases are opened and as the Court's proceedings advance further, this number is likely to continue to increase, given the conditions in which victims live.

FIDH has been advocating for an thorough review of the legal aid scheme for victims. We consider

6 ICC-ASP/3/16, Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons, http://www.icc-cpi.int/library/asp/ICC-ASP-3-16-defence_counsel_English.pdf

7 ICC-ASP/6/4, Report on the operation of the Court's legal aid system and proposals for its amendment, http://www.icc-cpi.int/library/asp/ICC-ASP-6-4_English.pdf

8 *Id.*, para. 53

9 *Observations de la FIDH sur le « Projet d'ajustement du système d'aide judiciaire »*, 15 March 2007, http://www.fidh.org/IMG/pdf/note_aide_judiciaire_FIDH_mars_2007.pdf; FIDH Position Paper No. 12, Recommendations to the sixth session of the Assembly of States Parties to the Statute of the International Criminal Court, November 2007, <http://www.fidh.org/IMG/pdf/ICCpospaper12eng-novembre2007.pdf> [hereinafter “FIDH Position Paper No. 12”], p. 12

10 See for example: Decision on victims' participation of 18 January 2008, ICC-01/01-01-06-111; Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08 of 2 April 2008, ICC-01/04-01/07-357; Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case of 13 May 2008, ICC-01/04-01/07-474; Judgement on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, of 11 July 2008, ICC-01/04-01/06-1432

11 *Décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par la victime a/0105/06* of 3 November 2006, ICC-01/04-01-06-650; Registrar's Decision on the Indigence of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06 of 28 March 2008, ICC-01/04-490; Registrar's Decision on the Indigence of Victims a/0001/06, a/0002/06 and a/0003/06, 9 June 2008; Registrar's Decision on the Indigence of Victims a/0011/08, a/0012/08, a/0013/08, a/0015/08 and a/0016/08, of 18 June 2008, ICC-01/04-01/07-606; Registrar's Decision on the Indigence of Victims a/0015/08, a/0023/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08 of 18 June 2008, ICC-01/04-01/07-607; Registrar's decision on the indigence of Victim a/0110/08 of 26 June 2008, ICC-01/04-01/07-652; Decision on the Indigence of Victims a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07 and a/0038/07 of 13 August 2008, ICC-02/05-153

that both the system for determining indigence and the content of the legal assistance afforded to victims needs to be considered in detail. In relation to the process for determining indigence, FIDH - together with other non-governmental organisations (NGOs) - has recommended that the presumption of indigence be established for certain categories of victims¹². As for the extent of legal aid, FIDH believes the victims' scheme should take into consideration the particular needs of victims' legal representatives, which differ considerably from those of accused persons' legal representation teams. For example, victims' legal representatives will have to deal with groups of clients based in remote locations, as opposed to one client likely to be based in The Hague. This undoubtedly has an impact in the resources needed to maintain contact and consult with clients.

FIDH has carefully reviewed the Court's Interim report on different legal aid mechanisms before international criminal jurisdictions¹³. We have found it disappointing that this report focused exclusively on legal aid for the defence. The Court could have used this opportunity to explore further the matter of legal aid for victims, including through comparative studies of different countries' programmes funding legal assistance for victims at the domestic level.

We have also noted the CBF recommendation that the Court, the Committee and the Assembly enter into detailed dialogue "on the legal and financial aspects of victims' participation"¹⁴. Although we very much welcome the recommendation that there be further dialogue among all relevant stakeholders on the victims' legal aid scheme, in particular on its financial, management and policy aspects, we would like to point out that the legal aspects of victim participation are within the remit of the Court's judges.

FIDH has expressed its willingness to discuss the issue of victims' legal representation and legal aid further with the Court, States Parties and the CBF. We look forward to continued dialogue on this matter.

FIDH recommends that the ASP:

- **Endorses the recommendation of the CBF, and call for the Court to study the matter of legal aid for victims in 2009, in full consultation with States Parties, with civil society organisations and with members of the legal profession, and to present a progress report to the Assembly at its eight session.**

2. CBF comments in relation to the number of legal teams for victims per case

In light of the situation described in the previous section, FIDH finds the CBF recommendations in relation to the number of legal teams per case, premature. In its report, the Committee's stated that:

"[...] the Registry's intention to fund two legal teams for victims per defendant appeared likely to be costly. The Committee recommended that the Court and the Assembly consider the potential to have one legal team for victims per case."¹⁵

First of all, FIDH believes that conclusions on the legal aid scheme for victims should be deferred to a later moment, once the Court has undertaken a complete study on legal assistance to victims and presented its plans in this regard.

12 Victims' Rights Working Group, Application forms for legal aid, <http://www.vrwg.org/Publications/01/VRWG%20paper%20on%20indigence%20forms%20FINAL.pdf>, p. 4-5

13 ICC-ASP/7/12. The final version of the report was not available at the time of writing

14 CBF Report on its 11th session, para. 129

15 *Id.*

In addition, FIDH fears that the Committee's recommendation to have one legal team per case could have serious implications for the proper defence of victims' rights. In particular, FIDH believes that grouping victims should not be driven by financial reasons, but rather by other criteria to be determined by judicial decisions. Furthermore, having only one team of legal representatives would not give the Court sufficient flexibility to ensure that the distinct interests of victims are represented and to address situations of conflicts of interests among different groups of victims.

For these reasons, FIDH recommends that the ASP:

- **Defer discussions on the composition and numbers of victims' legal aid teams, to the next session of the Assembly, once the Court has presented an in-depth report on the matter.**

C. Observations on other aspects of the proposed programme budget presented by the Court : strengthening investigations

FIDH wishes to call the attention of the Assembly on a number of policy decisions which have financial implications.

1. Number of investigators

Over the past years, FIDH has been critical of the policy of the Office of the Prosecutor regarding the limited number of investigators assigned to each case.

A comparative analysis conducted by FIDH showed that the number of investigators at the ICC is extremely low in relation to the amount of people employed at investigation divisions at other international tribunals. There are currently 46 professional posts at the ICC Investigations Divisions¹⁶ to handle three active investigations. This means an average of 15 positions per situation, including investigators and analysts.

A review of the Office of the Prosecutor at the International Criminal Tribunals for Rwanda (ICTR) and for the Former Yugoslavia (ICTY), conducted before these tribunals entered the completion strategy phase, indicated that there were 108 positions at the Investigations Division at the ICTR and 288 positions at the same division at the ICTY¹⁷, to deal with a single situation each.

FIDH is concerned over this disproportion, given the immense task assigned to the Investigations Division, namely to investigate massive crimes, as well as the serious logistical challenges investigators must face.

FIDH understands this is not a budget matter but rather a policy problem. The prosecutorial strategy will be revised in 2009. We will use this opportunity to advocate for a revision of this policy.

16 Proposed Programme Budget for 2009 of the International Criminal Court, ICC-ASP/7/9 [hereinafter "Proposed Budget for 2009"], table 26, p. 46

17 Report of the Secretary-General on the activities of the Office of the Internal Oversight Services, Financing of the ICTR and the ICTY, A/58/677, table 3, p. 6. These figures include both administrative and professional staff. According to the figures at the Investigation Division at the ICC, around 6% of the total number of position are general staff. If the same proportion is applied to the ICTR and ICTY, we can conclude that there were 102 professional posts at the ICTR and 271 at the ICTY.

2. Appointment of a deputy prosecutor for investigations

FIDH has also noted that the proposed programme budget for 2009 does not mention the recruitment of a deputy prosecutor for investigations. It is recalled that this Assembly elected two Deputy Prosecutors, which were assigned to the Investigation and Prosecution Divisions respectively.

A deputy prosecutor for investigations was elected in September 2003 to serve for six years¹⁸. However, in June 2007 he submitted his resignation; this after having been on leave for 18 months to serve as the Commissioner of the UN International Independent Investigation Commission into the assassination of former Lebanese Prime Minister Rafiq Hariri.

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Over the past year, the Office of the Prosecutor has been criticised by the chambers of having abused of the provision in article 54-3-e, which allows the Prosecutor to use information obtained from other sources upon condition of confidentiality. The proceedings leading to the trial of Thomas Lubanga have shown that the Office of the Prosecutor has over-relied on documentation obtained from third parties.

FIDH believes that increasing the number of investigators and appointing a deputy prosecutor for investigations, could contribute to reinforcing the capacity of the Office of the Prosecutor to collect evidence in an independent way.

FIDH recommends that the Assembly:

- **Encourage the Office of the Prosecutor to revise its policies in respect of the size of investigation teams in the context of the development of the prosecutorial strategy for 2009-2011.**
- **Call upon the Prosecutor to initiate the process for the election of a deputy prosecutor for investigators.**

II. RECOMMENDATIONS IN RELATION TO VICTIMS' AND AFFECTED COMMUNITIES

A. Implementation of the ICC victims' mandate

1. A victims' strategy for the ICC

The fifth session of the Assembly took note of the Court's Strategic Plan and requested that the Court further developed certain aspects, in particular the "position of victims"¹⁹.

FIDH has followed the development of a "court-wide victims' strategy" for the last two years. We understand that progress has been made over 2008. The Court has shared a first draft of the Victims' Strategy with States and NGOs. However, the Court has been unable to work on this draft in order to incorporate comments and finalise it before the seventh session of the Assembly.

FIDH is concerned by the little progress made in the development of a victims' strategy, over the

¹⁸ ICC-ASP/2/10, paras. 23-26

¹⁹ ICC-ASP/5/Res.2, Strategic Planning Process of the Court, in ICC-ASP/5/32, p. 338

last two years. The rights of victims as recognised in the Rome Statute are unprecedented, and the success of the ICC will be measured by the extent to which the Court is able to fulfil its mandate in respect of victims' rights. We, therefore, understand that time and dedication are necessary to come up with a strategy involving all organs of the Court and concerning all policies in relation to victims.

FIDH is and will remain engaged in dialogue with the Court and States on this very important matter. The Victims' Rights Working Group, of which FIDH is an active member, has issued a number of recommendations on the Court's first draft²⁰. These recommendations include:

- The Court should articulate its vision with regard to its victims' mandate.
- A mission statement, as well as clear strategies and clear objectives, should be set.
- Better and improved dialogue among the different organs and units of the Court, is needed.
- The victims' strategy should provide further clarity in a number of areas, including the relationship with intermediaries, common legal representation, legal aid for victims and the role of the Office for Public Counsel for Victims.

FIDH recommends that the ASP:

- **Takes notes of the progress made by the Court in the development of a victims' strategy.**
- **Call for the Court to present a finalised victims' strategy at the eighth session of the ASP.**
- **Encourage the Court to develop such a document in close consultation with States and civil society.**

2. Field positions for the Victims' Participation and Reparations Section

In previous reports to the Assembly, FIDH raised concerns about the low number of field staff at the Victims' Participation and Reparations Section (VPRS)²¹. The VPRS currently has two professional staff members based in the field (one in Kampala and one in Kinshasa).

FIDH regrets that the VPRS does not have staff present in the Abéché office. Although resources for the creation of a post have been granted, recruitment has not yet been finalised. FIDH encourages the Registry to accelerate the recruitment process in order to make sure that that position be filled without further delay.

With respect to CAR, we have taken note of the following paragraph in the budget:

“One GS-OL Field Assistance (CAR, 6 months, new). As applications start to be received from the CAR, VPRS will not be able to assist victims and collect and follow up on applications without this resource. Following the pattern of the other situations, VPRS would first appoint a locally recruited Field Assistance and a P-2 Field Officer only once the workload justifies it.”²²

FIDH recalls that an investigation in CAR was opened in May 2007. There have been major developments in relation to this situation in 2008: the first accused was surrendered to the Court and a confirmation of charges hearing is scheduled to take place from 8-12 December 2008. If the charges are confirmed, 2009 will be devoted to preparations for trial. This is a critical time for victims to apply to participate in the proceedings.

²⁰ www.vrwg.org

²¹ Position Paper No. 11 – Recommendations to the fifth session of the Assembly of States Parties to the Statute of the International Criminal Court, http://www.fidh.org/IMG/pdf/icc_asp112006a.pdf [hereinafter “FIDH Position Paper No. 11”], p. 16-17 ; FIDH Position Paper No. 12, p. 9

²² Proposed Budget for 2009, para. 360

Further, we believe that the functions of the VPRS field staff should not be limited to collecting applications. They should also play an active role in reaching out to victim communities - in cooperation with the Public Information and Documentation Section - in order to inform them of the unprecedented rights recognised in the Rome Statute.

FIDH held a mission to CAR in September-October 2008. We noted that, at that time, very few victims were aware of their rights, in particular in relation to the Bemba case. This was only a few weeks before the date initially planned for the commencement of the confirmation of charges hearing²³.

We believe, therefore, that the appointment of a permanent professional staff in the Bangui field office is of crucial importance. This is why FIDH regrets that the VPRS not made that request at this time.

FIDH believes that these issues should be properly accounted for in the development of the victims' strategy, as well as in planning activities and the budget for 2010. Additionally, we believe that flexibility should be given to the Court to create such a position in the course of 2009 if required.

FIDH recommends that the ASP:

- **Encourage the Court to take these matters into consideration in the development and implementation of the Victims' Strategy.**
- **Authorise the Court to address the appointment of VPRS field staff through flexibility, in the course of 2009, should that be required.**

B. Trust Fund for Victims

FIDH supported the establishment of the Trust Fund for Victims (Trust Fund or Fund) since the very beginning. We are particularly glad to see the progress which has been made since the Trust Fund became operational in 2007.

FIDH strongly advocated for the Trust Fund to be enabled to undertake assistance projects benefiting victims of crimes within the jurisdiction of the Court, before a conviction by the Court's chambers. We have followed the developments which have taken place in 2008, in particular the notification made by the Board of Directors to the Chambers of the Court in respect of a number of assistance projects that it intends to undertake in Uganda and the DRC. Following this, Pre-trial Chambers I and II decided that the projects did not pre-determine on any issues to be determined by the judges.

FIDH has carefully considered the report of the Board of Directors to the ASP²⁴. We regret that this report is unclear as to the current status of the assistance projects. We understand that implementation of most projects has not yet been made possible due technical reasons related to procurement processes and finalisation of contracts. While it is understandable that the process be slower during the first cycle of the Trust Fund, FIDH deeply regrets that lack of implementation of projects is ultimately affecting groups of victims on the ground. We have encouraged the Fund's Board of Directors and Secretariat to work towards a solution in order to overcome the difficulties

23 The hearing had initially been scheduled to start on 4 November 2008. It was postponed according to a decision issued on 17 October 2008

24 Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2007 to 30 June 2008, ICC-ASP/7/13 [hereinafter "Report of the Board of Directors"]

that prevent immediate implementation of projects.

FIDH would like to call the attention of the Assembly to matters related to the Trust Fund for Victims, to be considered at its seventh session:

1. Assessment of the implementation of the Regulations of the Trust Fund

The Regulations of the Trust Fund were adopted at the fourth session of the ASP. At the time, the Assembly decided to “assess the implementation of the Regulations not later than at its seventh regular session”²⁵.

As recalled above, the Fund became started its operations in 2007 with the appointment of the Executive Director of the Secretariat. The Trust Fund has been operational for less than two years and its first assistance projects have not yet been fully implemented. The Trust Fund does not yet have experience in the field of implementing reparations' orders because no ICC proceedings have reached that phase yet.

For these reasons, FIDH believes that it is yet too early to make a full assessment of the implementation of the Trust Fund Regulations. We recommend that this be deferred to a later session of the ASP.

However, FIDH believes that States Parties could take this opportunity to recall a number of principles in relation to the functioning of the Trust Fund and to the implementation of the Regulations.

Having followed the operations of the Trust Fund, FIDH submits the following observations in relation to its work, which States might want to consider in order to articulate principles which the Trust Fund should follow.

- The Trust Fund has been created by the Rome Statute. States Parties have given it the mandate to provide physical and psychological assistance and material support to, and to implement reparations' orders benefiting victims of the crimes within the jurisdiction of the Court. It is essential that all projects address specifically the harm suffered by victims as a result of those crimes.
- The Trust Fund is an autonomous entity, falling within the remit of the Registry for administrative purposes. The Fund, therefore, follows the procedures for selecting the types of projects and beneficiaries, established by the Board of Directors. However, it must comply with the administrative procedures in place at the Court, in particular the Financial Regulations. As stated in the Regulations of the Trust Fund, implementation of assistance projects is subject to approval by the Court's relevant chambers²⁶.
- The Board of Directors must exercise effective oversight over the activities of the Funds' Secretariat. It defines the strategies, proceedings and activities of the Fund, which the Secretariat executes.
- Donors, beneficiaries, other stakeholders and the Trust Fund itself would greatly benefit from greater visibility and transparency in relation to the Funds' plans, operations, procedures and activities. It would be positive for the Trust Fund to make public its plans and priorities in relation to each of the situation countries.
- The Trust Fund must develop an outreach and communications strategy in relation to potential

25 ICC-ASP/4/Res.3, in ICC-ASP/4/32, p. 320

26 Regulation 50

beneficiaries as well as the donor community and other interested persons and institutions, on the activities of the Fund. This is particularly important in the context of the calls for proposals that the Fund intends to launch in 2009.

– The Fund should develop strategies in order to make sure that adequate funds are available to implement reparations awards in the future (establishment of a reserve or other mechanisms, such as launching specific fund-raising campaigns in advance of reparations proceedings).

FIDH and the CICC Team on the Trust Fund for Victims, of which FIDH is an active member, have raised these issues with the Fund's Secretariat and the Board of Directors, and will continue to remain engaged in dialogue with them. FIDH really appreciates the openness to dialogue and consultation from the part of Secretariat's staff and the Board of Directors. We are strong supporters of the Trust Fund and we are willing to everything we can -within our mandate- to see it succeed.

For these reasons, FIDH recommends that the ASP:

- **Defer assessment of the implementation of the Regulations of the Trust Fund to a later session of the Assembly.**
- **Take this opportunity to recall a number of principles that must guide the work of the Trust Fund, in particular: transparent proceedings, increased visibility, strategic planning, and effective oversight by the Board of Directors.**

2. Call for contributions

As of 2008, the Trust Fund had collected €3,050,000. The Fund has already started the process of selecting and approving assistance projects. It has developed a fund-raising strategy for the next three years²⁷. In particular, in September 2008, the Fund launched a global appeal to assist victims of sexual violence. The projects and activities of the Trust Fund will indeed require further contributions from all sectors, including States.

FIDH recommends that:

- **The ASP calls for voluntary contributions to the Trust Fund for Victims in its omnibus resolution.**
- **States consider making further contributions to the Trust Fund, in particular regular rather than occasional ones.**
- **States consider pledging funds in their statements during the General Debate.**

C. Outreach and public information activities

FIDH has been following the Court's work on outreach. We have noted that the development of an outreach strategy in 2006 and the increased investment made by the Assembly has contributed to a relative reinforcement of outreach activities. However, we believe that much more needs to be done.

The number of outreach activities and the variety of tools used has increased. However, the visibility of the Court continues to be very poor - even non-existent - in certain regions.

In 2008, the situation in the DRC presented particular challenges for outreach. The stay of the proceedings and subsequent developments in the Lubanga case have brought about confusion among the population. Although the Public Information and Documentation Section (PIDS) - in particular, through its field offices - has undertaken activities to engage in dialogue with key

²⁷ Report of the Board of Directors, para. 32

audiences, reactions have not always been timely.

In CAR, the level of outreach has been very poor since the opening of the investigation in May 2007. Although very few workshops were carried out in the beginning of 2008, there has been little or no follow-up. The recruitment of PIDS field staff has taken far too long. At the time of writing, a Field Outreach Assistant had only recently been recruited, while the position of Field Outreach Coordinator remained vacant. This is particularly serious considering that the first suspect was transferred to the Court in mid-2008 and the first confirmation of charges hearing is scheduled to take place before the end of the year. During its mission in September-October 2008, FIDH noted that a large part of the population and affected communities, in particular those living outside Bangui, were unaware that an investigation had been opened. Many did not know what the focus of the investigation was or that Jean-Pierre Bemba had been arrested.

In previous reports to the Assembly, FIDH underscore the importance of conducting outreach from the earliest possible opportunity, in order to avoid misconceptions and misunderstandings, which are more difficult to counter once they have started to circulate²⁸. We also believe that outreach in general, and in particular timely and early outreach activities, help strengthen the proceedings and legitimacy of the ICC.

Outreach has also been limited with regard to the situation in Darfur. Although we understand that there are security constraints, FIDH believes that more could be done in refugee camps in Chad, as well as in relation to the Darfurian community abroad. In particular, following the Prosecutor's application for an arrest warrant against President al-Bashir, there has been a need to address a series of concerns. Numerous challenges remain in relation to public information activities, as well as on the outreach front. For example, one of the most common misunderstandings with regard to the al-Bashir case has been that an arrest warrant had already been issued by the Court. In addition, much needs to be explain in relation to the role of the Court, the principles governing it, the role of the Security Council, and the fact that the ICC is not a "Court against Africa", as it has been labelled by some African leaders and become a widespread comment in the public opinion.

FIDH believes that it would be positive for the PIDS to review its outreach strategy. Strategies are live documents which must be adapted to the changing needs of the Court. Additionally, PIDS could greatly benefit from a revision of the strategy since this would allow it to incorporate the lessons learned over the first years of implementation.

FIDH has also considered the resources requested for the PIDS in the Proposed Programme Budget for 2009²⁹. We believe that the request of resources to fund an Audio-video team is justified. The videos that the PIDS started to produce in 2008, have proven very useful. This is part of a policy of diversifying outreach tools, which FIDH and NGOs in general, have advocated for. We, therefore, welcome the production of audio-visual materials on trials and judicial proceedings, to be screened in the field.

Nevertheless, we share the CBF concerns in relation to recruitment delays³⁰. However, we would like to highlight that the position requested does not respond to a "changing public information need" but rather to a policy which flows from the implementation of the outreach strategy.

FIDH, together with the CICC Communications and Outreach Team, of which it is an active

28 FIDH Position Paper No. 12, p. 7

29 Proposed Budget for 2009, para. 342

30 CBF Report on its 11th session, para. 91

member, advocated strongly for resources for the creation of field positions. We are concerned that those resources could be utilised to cover the cost of the audio-video producer and technical assistant. This is why FIDH strongly recommends that redeployment of resources does not affect precious field positions or other key resources.

For these reasons, FIDH recommends that the Assembly:

- **Calls for a revision of the outreach strategy.**
- **Encourages the Court to reinforce its outreach and public information activities in particular in relation to the situations in CAR and Darfur.**
- **Urge the Court to fill the outreach positions, in particular those based in the field, for which resources have been allocated in the past.**
- **Provide the Court with the necessary flexibility to fund the positions for audio-visual production, through reallocation of resources, as long as such exercise does not affect outreach positions in the field or other key resources.**

D. *In situ* hearings

In previous reports to the Assembly, FIDH highlighted the importance of holding hearings in the countries where crimes were committed³¹. *In situ* hearings can help bridge the gap between the Court and the affected communities. They can complement outreach activities, as they can bring about greater understanding of the Court and its mandate. Such hearings could also contribute to maximizing the impact of the ICC on crime deterrence.

FIDH has noted the efforts that were made by the Court in 2008 to enquire into possibly holding part of the Lubanga trial in the DRC. We were disappointed to learn later in the year that the of the first trial in its entirety would take place in The Hague.

The 2008 Budget included a provisional budget summary for a hearing *in situ*³², although the Court would have had to access the contingency fund to finance that activity. FIDH has noted that the Court did not include such a summary in the Proposed Budget for 2009. The Court could have benefited from the experience it acquired following the enquiries it made in 2008, to present an updated budget. We believe that an updated estimation of costs could have been helpful to States Parties. Resources would in any case be drawn from the contingency fund, and the final decision to hold hearings in the situation countries lies with the judges. However, by not including the latest information on *in situ* hearings, one could have the impression that the Court is not ready to pursue this option in 2009.

FIDH recommends that the ASP:

- **Acknowledge the efforts made by the Court in 2008 to hold *in situ* hearings in the DRC.**
- **Encourages the Court to continue to consider the possibility of holding *in situ* hearings.**

31 FIDH Position Paper No. 11, p. 20-21

32 Proposed Programme Budget for 2008, ICC-ASP/6/8, Annex XII

III. OTHER ISSUES: SUPPORTING THE ICC AND UPHOLDING ITS INTEGRITY AND INDEPENDENCE

A. Implementation of the 2007 Report on Cooperation

During 2007, the Assembly did a comprehensive work on the issue of cooperation. The Report of the Bureau on cooperation³³ put forward a long list of very useful recommendations to reinforce States' and intergovernmental organisations' cooperation with the Court. In 2008, we have monitored implementation of those recommendations.

1. Overview of cooperation over 2008

FIDH considers that 2008 has seen both positive and negative actions in the field of State cooperation with the ICC.

On the positive side, we have followed with much interest the excellent cooperation by Belgium in the execution of the arrest warrant for Jean-Pierre Bemba. This unprecedented operation - conducted under the risk that the suspect could flee from Belgium - required immediate action, which Belgium was able to carry out as required.

FIDH notes however that, by the end of 2008, there are eight outstanding arrest warrants. The escalation of violation in the DRC in the weeks leading up to this session of the ASP (in which Joseph Kony and his allies, and Bosco Ntaganda, among others, are involved) underscores the importance of executing the outstanding arrest warrants without delay, in order to deter commission of further crimes.

In addition, the number of cooperation agreements for the relocation of witnesses and enforcement of sentences remains unsatisfactory low³⁴.

Furthermore, over the past year, cooperation through political support has been weak at some instances. In particular, some States Parties have failed to uphold the integrity of the Rome Statute system in discussions and negotiations concerning a possible deferral of proceedings in relation to the situation in Darfur. FIDH has strongly opposed the application of article 16 to the Darfur situation, considering that the conditions for such a deferral are far from being met³⁵.

In relation to article 16 discussions, we have also noted the request by the CAR government that a deferral apply to the analysis that the Office of the Prosecutor is carrying out in relation to the situation in the north of the country. This request is not only legally ill-founded but it also shows the desire of a State to control the activities of the Court, which is unacceptable in our view.

Overall, we are particularly concerned that many States Parties have failed to do their utmost to reject the unfair attacks and criticism directed at the Court over 2008. We would have expected firm commitment with the principles of the Rome Statute, support for the Court's independence and

33 ICC-ASP/6/21

34 There are currently only two agreements on execution of sentences and ten agreements on witness relocation

35 Security Council, Sudan and the ICC: Moving towards both Peace and Justice, FIDH Open Letter to the Security Council, 30 July 2008 <http://www.fidh.org/spip.php?article5756>; The International Criminal Court and Darfur: Questions and Answers, 23 July 2008, <http://www.fidh.org/spip.php?article5733>; FIDH Open letter to the League of Arab States and the African Union (co-signed by more than 25 civil society organisations based in Sub-Saharan and North Africa, and the Middle-East), 17 July 2008, <http://www.fidh.org/spip.php?article5722>

rejection of any sort of political interference in the Court's judicial work.

FIDH recommends that States Parties:

- **Do their utmost to fully implement the recommendations contained in the Bureau's Report on Cooperation submitted at the sixth session of the ASP.**
- **In particular, intensify their efforts to politically support the ICC in both bilateral contacts with other actors, and multilateral fora.**
- **Re-affirm their firm commitment to cooperate fully with the ICC, including through political and diplomatic support, in their statements during the General Debate at this session of the ASP.**
- **Engage in concrete efforts to execute arrest warrants and to conclude agreements on witness relocation.**

2. Focal point on cooperation

At its sixth session, the Assembly decided to appoint a focal point to follow up “to continue the work on cooperation in close coordination and dialogue with the Court”³⁶. FIDH has taken note of the report on the activities of the focal point over 2008³⁷.

We welcome the actions undertaken by the focal point, as well as his recommendations and suggested future activities. We attach particular importance to the activities in relation to financial investigation and freezing of assets, and protection of victims and witnesses. We hope that the seminars mentioned will be organised in the near future and they will be appropriately follow up. FIDH has also taken interest in the recommendations related to intensified contacts between the Court and international and regional organisations. We believe that such contacts are essential to promote better understanding and support of the ICC within other institutions. In particular, due to the strong backlash experienced this year, efforts directed at reinforcing links with the African Union and the League of Arab States must be undertaken without delay.

Overall, we have observed that the focal point has been in close contact with the different actors involved: the Court, States Parties, intergovernmental organisations, and civil society. His activities are and will continue to be crucial for the advancement of cooperation.

However, further cooperation from States Parties with the focal point is required. The report notes that only a small number of States have replied to his request to communicate the details of their respective contact point for cooperation. In general, the activities of the focal point will only be successful if States Parties work together with him.

FIDH recommends that the ASP:

- **Take note of the Report of Bureau on Cooperation.**
- **Call upon all States Parties to work closely with the Focal Point on Cooperation.**
- **Encourage the Focal Point to continue to undertake his activities in close dialogue with the Court, States Parties, intergovernmental organisations, and civil society.**

B. Decision on the venue of the Review Conference

At this session, the Assembly should make a decision as to the venue of the Review Conference. Last year, the ASP established a non-exhaustive list of objective criteria that it would take into

36 ICC-ASP/6/Res.2, in ICC-ASP/6/20, para. 40

37 ICC-ASP/4/18

consideration in order to make a decision on the venue of the Review Conference³⁸:

- The venue should allow for the broadest possible participation of as many States, as well as international organisations and civil society organisations;
- Financial implications;
- The positive impact in strengthening the work of the Court;
- The contribution to the outreach activities of the Court, especially as regards victims;
- The existence of national implementing legislation;
- The ratification or accession of the host State to the Agreement on the Privileges and Immunities of the International Criminal Court;
- Overall compliance and cooperation with the Court;
- Logistic capacity;
- Security;
- Implications of holding the Conference in a situation country;
- Extent to which the population of the country would welcome the Conference.

FIDH is concerned about the Review Conference possibly taking place in a situation country. In particular, we are worried about the potentially negative impact that holding the conference in Uganda could have for the perception of the Court as an impartial institution. Although we agree that there are obvious benefits to holding the conference in Africa, we remain seriously concerned that the Court might be exposing itself to the perception of being manipulated.

As FIDH expressed in previous occasions³⁹, we are concerned about the lack of clarity of the Agreement on Accountability and Reconciliation, including its Annexure, concluded between the Ugandan government and the Lord's Resistance Army. In particular, the Agreement and Annexure are unclear about the interplay among the ICC, national trials and traditional justice mechanisms. Together with our member the Foundation for Human Rights Initiative, FIDH has repetitively expressed doubts about the level of cooperation afforded by the Ugandan government to the Court, as well as its will to uphold the integrity of the Rome Statute⁴⁰.

We believe that these matters have not been fully discussed and properly taken into consideration in the deliberations leading to a decision on the venue of the Review Conference.

FIDH recommends that the Assembly:

- **Take these observations into consideration, and specifically address the potential consequences that holding the Review Conference in a situation country could have, before making a decision on the venue of the ASP.**

38 ICC-ASP/6/Res.2, in ICC-ASP/6/20, para. 56; ICC-ASP/6/WGRC/1, annex

39 FIDH and FHRI urge the Security Council to respect the independence of the International Criminal Court and protect the integrity of the Rome Statute”, 11 April 2008, <http://www.fidh.org/spip.php?article5429>; Political agreement to try the perpetrators of the most serious crimes in Uganda, 25 February 2008, <http://www.fidh.org/spip.php?article5256>; Crimes committed in Uganda must not go unpunished, 17 July 2007, <http://www.fidh.org/spip.php?article4488>

40 FIDH and FHRI urge the Security Council to respect the independence of the International Criminal Court and protect the integrity of the Rome Statute”, 11 April 2008, <http://www.fidh.org/spip.php?article5429>; Open Letter to Mr. Moreno Ocampo, Prosecutor of the International Criminal Court, 4 December 2006, <http://www.fidh.org/spip.php?article3885>; No Sustainable Peace without Justice, 4 September 2006, <http://www.fidh.org/spip.php?article3597>

C. Defining the crime of aggression

The Special Working Group on the Crime of Aggression (SWGCA) will meet during this seventh session of the ASP.

In previous reports to the Assembly⁴¹, FIDH has welcomed the commitment of some States Parties to try to reach an agreement on the definition of the crime of aggression. We have also noted that the most contentious area in the discussions of the SWGCA have been related the conditions for the exercise of the Court's jurisdiction with respect of the crimes of aggression.

FIDH remains seriously concerned about the proposal that the Security Council should make a pre-determination on the commission of an act aggression or otherwise consent to the Court's exercise of jurisdiction in respect of the crime of aggression. FIDH believes that the independence and impartiality of the Court must be preserved at all costs, and, therefore, any political interference in the determination of its jurisdiction must be avoided.

FIDH calls upon the States Parties to orient discussions to options which would fully respect the integrity of the Rome Statute and which would, in no way, infringe upon the Court's independence.

Therefore, FIDH recommends that the SWGCA:

- **Continue to seek in good faith to agree on a definition of the crime of aggression, including on conditions for the exercise of the Court's jurisdiction over that crime which fully respect the integrity of the Rome Statute and the independence of the Court.**

41 FIDH Position Paper No. 12, p. 15

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Fédération Internationale des ligues des Droits de l'Homme

17, passage de la Main d'Or - 75011 Paris - France

CCP Paris : 76 76 Z

Tel: (33-1) 43 55 25 18 / Fax: (33-1) 43 55 18 80

Site internet: <http://www.fidh.org>

Director of the publication: Souhayr Belhassen

Editor: Antoine Bernard

Authors: Karine Bonneau, Mariana Pena

PAO: Céline Ballereau

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and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, (...) Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court (...) with jurisdiction over the most serious crimes of concern to the international community as a whole, Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, Re-respect for

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