

*Cooperation plenary session for the 15th session
of the Assembly of States Parties*

**Effective cooperation and accountability for Rome Statute crimes: the
contribution of national, regional and intergovernmental initiatives
18 November 2016**

**“The role of civil society and first responders
in contributing to enhanced accountability”
Antoine Bernard, FIDH, CEO**

Check against delivery (in English and French)

1) Thank you for this opportunity to share some of our experience of cooperation and complementarity drawn from the specificity of FIDH : a world movement owned by 184 domestic member organisations and national civil society actors in 112 countries, working. On a daily basis, FIDH frontliners document, advocate domestically, regionally, internationally, publicise and alert, they litigate too, including and may be first of all in support of victims of international crimes.

FIDH understands quite well complementarity since itself is based on that key principle and methode of work : justice is first to take place at the local level, fueled by local actors.

Let's face it though : international crimes, because of their international nature, their gravity, the type of actors involved, their funding, the victims targetted, are not only crimes of concern of the whole international community. They hardly can be appropriately answered to by domestic actors only, often confronted with genuine unability and extreme unwillingness of many actors and powers.

Relying on effective international cooperation, based on clear needs assessment, shared understanding and mutual respect of each actors rôle and responsibility, is key to overcome resistance to progress, obstacles to justice. In our cooperation, victims, as rights holders, are the key drivers, alongside their defenders, NGOs and other first respondents.

2) Link between cooperation and complementarity:

Within the ICC system, **Cooperation** is just vital, a prerequisite to effectiveness. This is why it was made a legal obligation at all stages, and part of the Court's core mandate. This is why FIDH has been pushing for effective cooperation efforts and for sanctions for non-cooperation.

Our recommendations to State parties in that regard are based on our daily experience of and confrontation to unability and unwillingness :

- Cooperate with the ICC at every stage of investigation and proceedings, *including providing access to territory, cooperating during an investigation, and taking all measures necessary to implement arrest warrants and transfer suspects to the seat of the Court;*
- Adopt implementing legislation at the national level, including the cooperation provisions of Part IX of the Rome Statute;
- Adopt voluntary and framework agreements on witness relocation, interim and final release, and the enforcement of sentences;
- Avoid non-essential contacts with suspects wanted by the ICC;
- Refrain from inviting suspects under arrest warrant by the ICC onto their territories;
- Support the Office of the Prosecutor's investigation, implement arrest warrants related to the situations in Darfur and Libya, pursuant to UN Security Council Resolutions 1593 and 1970;
- Urgently discuss non-cooperation decisions and sanction States that have refused to cooperate with the ICC, including Uganda, Djibouti and Kenya.
- Refrain from taking any decision on Article 97 until final judicial determinations on South Africa's cooperation in the Al Bashir case have been emitted by the ICC.

La coopération est déterminante aussi pour promouvoir la complémentarité, qui est autant le fondement du mandat de la Cour, qu'un de ses objectifs principaux.

Incontestablement, elle a permis d'augmenter la mobilisation et la réponse des justices pénales nationales dans plusieurs Etats, des progrès largement passés sous le radar des observateurs.

(Elle a permis, cette complémentarité positive, d'encourager ou autrement soutenir la capacité de justices nationales face aux crimes de masse.

Elle a aussi permis de sensibiliser des Etats et d'autres acteurs à manifester leur volonté d'agir et de laisser agir les justices nationales, parce que c'est leur obligation, mais aussi car ils en découvrent progressivement l'intérêt.)

Pourquoi ces avancées?

L'expérience le montre: la CPI peut être vue comme une Epée de Damoclès, une incitation forte ou un partenaire, selon les cas, pour les justices nationales, les autorités et les acteurs concernés.

L'«ombre de la Cour», cette expression chère à Kofi Anan, se déploie de fait dans de nombreuses situations. Une ombre qui inspire à certains une forme de crainte, un risque pénal, qui incite à agir ; à d'autres une ombre bienveillante, sous laquelle les acteurs nationaux peuvent tenter de s'abriter et d'agir.

Jugeons-en à partir de notre expérience – et je ne me référerai ici qu'à nos actions dans quelques pays africains. La FIDH et son Groupe d'action judiciaire actif notamment en Guinée, en Côte d'Ivoire, au Mali, en RCA et au Sénégal, y représentent près de 1000 victimes de crimes internationaux devant les juridictions nationales dans 11 procédures, mettant en cause formellement, par des inculpations ou des mandats d'arrêt 282 suspects de crimes les plus graves parmi lesquels de très hauts responsables politiques ou militaires suspectés ou poursuivis pour les crimes les plus graves.

Quel bilan peut-on d'ores et déjà en tirer?

- des procédures judiciaires ont été ouvertes là où le manque de volonté et/ou de capacité semblaient devoir ruiner un tel espoir.
- des avancées spectaculaires sont intervenues dans le respect de la liberté d'association: plutôt que d'être accusées de trahison, des ONG ont pu aller jusqu'à se constituer partie civile dans des procédures judiciaires ouvertes grâce à elles, et souvent pour la première fois. Elles travaillent désormais en grande partie librement.
- des milliers de victimes ont pu se constituer partie civile dans les procédures et participer ainsi pleinement, s'approprier, un processus de justice dans une histoire dramatique qui est avant tout la leur.
- des avancées significatives ont pu être relevées pour la prise en compte des crimes sexuels dans les procédures nationales, avec des parquets sensibilisés, et un plus grand accès des victimes de crimes sexuels aux procédures en cours.

3) In our effort to improve victims' access to effective, fair and independent justice, key challenges have been met:

a) → The **complementarity check challenge**, accompanying victims of international crimes before national courts, shows:

(Ex: Guinea – Conakry (29 Sept 2009; 2010 torture cases; 2007 repression)

Ex: CIV (ongoing cases against 150 pro-Gbagbo, 20 pro-Ouattara)

Ex: Mali

- crimes of the North: 2 complaints filed by FIDH-AMDH & Co (80 victims of SGBV in Nov 2014 and Tombouctou in March 2015) ; opening of around 120 proceedings against alleged perpetrators
- 2 proceedings against military junta: missing red bérets (Sanogo trial opening on 30 November) and Kati mutinery)

- Weak national justice mechanisms under political influence : national justice systems have unequal capacity to face investigations on international crimes, including sexual and gender based crimes, that are complex and involve high level perpetrators. They are not always unable to investigate, prosecute and adjudicate, but under important political or military influence. So we are often dealing with very politicized, conflicting cases.
- Difficult to provide legal and sustained support to victims of massive crimes, especially in conflict or post conflict situations

- Documentating international crimes in conflict and post-conflict situations with no institutional protection
- Ensuring security for victims and witnesses, human rights defenders and NGOs but also national judges and prosecutors, sometimes under threat (lack of legislations on protection, but also of effective security measures)
- Within proceedings, difficulty to move from the investigation to the prosecution phase in such critical and sensitive cases. Also difficulty to make sure trial proceedings are respectful of international standards concerning fair trial and victims rights, reflect the reality of the crimes committed and the correct legal qualifications (ex: Mali: terrorism instead of international crimes).
- Reconcile justice efforts and peace efforts, which should go hand in hand but are still sometimes presented as contradictory by some States

Among our recommendations to State parties:

- To command and support the important role of NGOs, victims organisations in initiating proceedings, feed investigations and push for effective prosecutions
- To support the development of strong and specialised investigative units within national jurisdictions, as well as sustainable training and experience sharing with ICC, and peer-to-peer cooperation
- To support a strong and pro-active permanent outreach by ICC
- Not least, to back up a strong cooperation between the ICC and national justice systems on ongoing cases and situations in a complementarity effort.

NB: FIDH will facilitate a discussion on opportunities and challenges derived from pursuing domestic proceeding through three side events on complementarity at this ASP15 on 23 and 24 November 2016, which focus on situations in Mali, Kenya, Guinea, DRC and Central African Republic.

b) → The **primary responsibility challenge**: the permanent temptation for concerned actors to escape their obligation requires a permanent effort to call for **strengthened capacities and ressources** for domestic justice mechanisms, and the ICC; but also for promoting means to effectively address States' **unwillingness** to investigate and prosecute

Ex: CAR, cf Special Criminal Court

Recommendations to SP:

- Reaffirm that States bear the primary responsibility to investigate and prosecute those responsible for international crimes under the Rome Statute and encourage the establishment of legal mechanisms and institutions to strengthen domestic jurisdiction over these crimes, including but not limited to specialised investigative units;
- FIDH encourages the ASP Bureau on complementarity to continue to support the exchange of views on strategic action to enhance national capacity, as well as willingness, to investigate and prosecute in international crimes, including particular emphasis on traditionally marginalised crimes, including those of sexual and gender-based violence.
- Support a strong ICC budget, needs-based driven and not ressources-based.

c) → The **“post-truth” area challenge** (cf Oxford Dictionary recent entry), with misinformation as a common practice to get to power, highlights how knowing facts and making them known is all the most essential. Accordingly, documenting situations of international crimes, issuing reports, conducting **advocacy actions**, calling for effective accountability responses at national but also international level; but also submitting **Art 15 communications** to the ICC, like on Mexico, Colombia, Ukraine, Palestine ; asking for opening of investigation or enlargement of scope of investigations or prosecutions ; facilitating as needed relations between ICC organs and national civil societies These actions are essential to feed the complementarity analysis and contribute to cooperation.

Ex: Colombia: The dialogue /cooperation between the Colombian authorities and the OTP in the context of this long preliminary examination has contributed to a peace agreement that includes from the scratch the issue of judicial accountability for the perpetrators of crimes against Humanity and of sanctions for them in the peace agreement. Even if much remains to be done. In the last 13 years FIDH has submitted 12 communications and contributed to put the Rome statute framework in the center of the discussion.

Ex: Mexico We have submitted two communications on the commission of crimes against humanity in Mexico and the total impunity of those crimes. The last one (in October 2014) was on torture in Baja California. We are now preparing two others (as we see very little effective progress locally to stop the commission of those crimes and to fight against their impunity). that we hope will contribute to stop the commission of those crimes and to the fight against their impunity

Ex: Ukraine

d) The **shrinking space challenge**, that require increased protection of victims, human rights defenders, first respondents as a whole, from repression and targeting. For it is clear from any situation under scrutiny of the ICC, or even from any situation only falling within its jurisdiction ahead of any ICC proceeding, that getting involved in support of justice has turned to be very or extremely dangerous. Beyond the very worrying cases of our colleagues from Kenya and Palestine referred in this ASP, many cases are to be reported on a permanent basis in many countries. Like we strongly encourage the Host State and the ICC to effectively develop the appropriate protection mechanisms for ICC-involved colleagues at risk based in the Host State, we consider this issue to be of universal interest for the ASP.

Accordingly we do recommend to State Parties to fully commit to protect human rights defenders in any situation, take effective preventive measures, investigate and sanction abuses. Eventually we recommend that an annual report be presented by the Registrar to the ASP, compiling information received from the ICC organs and partners such as our organisations, to be debated and acted upon annually.

Pour conclure, la coopération développée par la CPI avec les autorités et les justices nationales à toutes les phases de procédures judiciaires, livre un bilan prometteur. La complémentarité positive n'est plus un concept abstrait, mais devient une réalité au bénéfice des victimes et des acteurs judiciaires qui tentent de tenir tout leur rôle. Elle représente aussi bien une incitation à agir qu'un accompagnement dans la difficile tâche de juger les crimes les plus

graves. L'ASP peut en tirer un motif de fierté légitime et doit soutenir l'approfondissement de cet effort.