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FIDH Recommendations to the 17th Session of the Assembly of States Parties to the ICC Statute

The Hague, 5-12 December 2018

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INTRODUCTION

The 17th session of the Assembly of States Parties (“ASP” or “Assembly”) to the Statute of the International Criminal Court (“ICC” or “Court”) will take place from 5 to 12 December 2018 in The Hague, the Netherlands.

The upcoming session of the ASP will conclude a year of reflections and stocktaking on the work of the Court and the challenges it continues to face twenty years after the adoption of its founding treaty. The Assembly is a platform for States Parties to reaffirm their commitment in a collective effort to bring constructive and positive attention to the challenges facing the Court today.

As highlighted earlier this year by FIDH¹, among the main challenges to an effective and independent court remain in particular: a standstill in the quest for universality, an insufficient level of cooperation with the Court, an inconsistent implementation of victims’ rights, inadequacy of resources made available to the Court, a need to strengthen the Court’s investigations and prosecutions, particularly in relation to sexual and gender based crimes; the perception of the Court in affected communities, in particular after Jean-Pierre Bemba’s acquittal, a need to elect ICC Judges and Prosecutor on merits only, and the attacks against human rights defenders.

Most recently, the hostile position taken by US government vis-a-vis the Court as illustrated by US National Security Advisor John Bolton and subsequently by US President Donald Trump has become another grave concern that should be addressed by ICC States Parties, the Assembly, and the international community.

FIDH has closely monitored the work of the Court and its States Parties in 2018 and presents in this position paper its views on issues closest to FIDH’s mandate.

1. FIDH, Report, The Rome Statute at Twenty (1998-2018): 10 Challenges to an Effective and Independent International Criminal Court, 16 July 2018 July 2018.

I. AN OVERVIEW OF ICC-RELATED DEVELOPMENTS IN 2018

1. The opening of preliminary examinations in the situations of the Philippines, Venezuela and Myanmar/Bangladesh

Republic of the Philippines & the Bolivarian Republic of Venezuela

The ICC Prosecutor announced on 8 February 2018 that her Office is opening two preliminary examinations in the situations of the Philippines and Venezuela². The human rights situation in the Philippines has been deteriorating ever since President Duterte took office on 30 June 2016 and declared a hard campaign against drug offenders. The ICC Prosecutor will analyse crimes against humanity allegedly committed since at least 1 July 2016. In Venezuela, the preliminary examination comes in the context of demonstrations and related political unrest, and will analyse crimes allegedly committed since at least April 2017³. Among these crimes are the alleged use of excessive force against demonstrators, the arrest and detention of thousands of people, many of whom were subjected to serious abuse and ill-treatment, and the alleged injury or killing of members of security forces by some groups of protesters.

FIDH welcomed the opening of both preliminary examinations and urges both the Philippines and Venezuela to cooperate with the Court and to work closely with the Office of the Prosecutor to ensure accountability for the alleged international crimes⁴. However, briefly after the opening of the preliminary examination, the ICC was officially notified by the United Nations that on 17 March 2018 the Philippines had deposited a written notification of withdrawal from the Rome Statute.

Myanmar/Bangladesh

On 18 September 2018, the Prosecutor announced the opening of a preliminary examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh⁵. The preliminary examination focuses on the alleged deportation of the Rohingya people from Myanmar to Bangladesh, as well as potentially other crimes under article 7 of the Rome Statute. The preliminary examination was opened after months of deliberations following the request of the Office of the Prosecutor for a Ruling on Jurisdiction under Article 19(3) of the Statute⁶ seeking to affirm the Court's jurisdiction over the alleged deportation of Rohingya people from Myanmar to Bangladesh. The ICC Prosecutor argued that an essential part of the deportation of Rohingya people, the enforced displacement of individuals across an international border, occurred in Bangladesh, a State Party to the ICC. Accordingly, it opined the Court had territorial jurisdiction over the alleged crime. The majority of Pre-Trial Chamber I judges agreed with the Prosecutor's argument and found that the Court may also exercise its jurisdiction with regard to any other crimes set out in Article 5 of the Rome Statute, such as the crimes against humanity of persecution and/or other inhumane acts, if at least one element of these crimes occurred on the territory of Bangladesh.

2. Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018.

3. Ibid.

4. FIDH Press Release, In the face of brutal crackdowns, the International Criminal Court opens preliminary examinations into Venezuela and the Philippines, 8 February 2018.

5. Office of the Prosecutor, 18 September 2018.

6. Office of the Prosecutor, ICC-RoC46(3)-01/18-1, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute; Office of the Prosecutor, ICC-RoC46(3)-01/18-1, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018; Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018.

FIDH and its member organisations commended the ICC Office of the Prosecutor's innovative efforts towards accountability for the crimes allegedly committed against the Rohingya people, and welcomed the opening of the preliminary examination as a glimmer of hope for Rohingya victims⁷, while maintaining that the international community should still work together towards a referral of the situation to the ICC among other options for justice⁸.

2. State referral of Palestine and first inter-state referral on Venezuela

Two situations were referred to the Prosecutor of the ICC in 2018.

On 22 May 2018, the State of Palestine referred its situation to the ICC, in which it specifically requested the Prosecutor "to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine"⁹.

On 26 September 2018, Argentina, Canada, Chile, Colombia, Paraguay and Peru referred the situation of Venezuela to the ICC, asking the Court to investigate crimes against humanity committed in Venezuela since 12 February 2014¹⁰. This move marks the first state referral of another State Party's situation in the history of the ICC and the first collective referral by States Parties to the ICC Statute.

Both referrals concern situations that are already under preliminary examinations by the ICC Office of the Prosecutor. While the referring states attempt to accelerate the course of the preliminary examination, the Prosecutor emphasised that both preliminary examinations will follow their usual course, and that an investigation will only be opened once her office is satisfied that all the legal requirements for doing so are met¹¹. That being said, the referrals will enable the Prosecutor to open an investigation without seeking the authorisation of the ICC Pre-Trial Chamber, a potentially lengthy process best exemplified by the still pending authorisation from Pre-Trial Chamber judges to open an investigation into the situation of Afghanistan, requested on 20 November 2017¹².

3. Surrender of two suspects to the ICC: Al- Hassan (Mali) and Yekatom (Central African Republic)

On 31 March 2018, the Malian authorities surrendered Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Al Hassan) to the ICC, following an arrest warrant issued by Pre-Trial Chamber I on 27 March 2018¹³. Al Hassan is facing multiple charges of crimes against humanity and war crimes including six charges of sexual and gender-based crimes, specifically rape and

7. FIDH Press Release, A glimmer of hope for Rohingya victims, as ICC says it has jurisdiction over alleged deportations, 6 September 2018.

8. FIDH Press Release, New report urges international action on accountability for crimes, 17 September 2018 ; FIDH report, No stone unturned - Q&A on accountability for crimes in Myanmar, 17 September 2018.

9. The State of Palestine, Referral under article 14 of the Rome Statute submitted by the Government of the State of Palestine, 15 May 2018.

10. Referral, Referral of the situation in Venezuela under Article 14 of the Rome Statute submitted by the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, 26 September 2018.

11. Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by a group of six States Parties regarding the situation in Venezuela, 27 September 2018.

12. FIDH Press Release, The Long Wait for Justice: Will the ICC Investigate Crimes in the Afghanistan Situation?, 20 November 2018.

13. Chambre préliminaire I, ICC-01/12-01/18, , 27 March 2018. The Chamber considered that there were reasonable grounds to believe that Mr. Al Hassan is criminally responsible under article 25(3)(a) or 25(3)(b) of the Rome Statute for crimes against humanity (torture, rape and sexual slavery; persecution of the inhabitants of Timbuktu on religious and gender grounds; and other inhumane acts) and for war crimes (rape and sexual slavery; violence to person and outrages upon personal dignity; attacks intentionally directed against buildings dedicated to religion and historic monuments; and the passing of sentences without previous judgement pronounced by a regularly constituted court affording all judicial guarantees which are generally recognized as indispensable) committed in Timbuktu between April 2012 and January 2013.

sexual slavery. The hearing for the confirmation of charges against Al Hassan is scheduled to take place on 6 May 2019¹⁴. FIDH and its member organisations welcomed this first prosecution of war crimes and crimes against humanity against individuals in the Mali situation before the ICC, and in particular for charges of sexual and gender-based violence, namely rape, sexual slavery and for the first time before the Court, persecution on gender grounds, at a time when the national judicial proceedings appear to be at a standstill¹⁵.

The second surrender to the ICC¹⁶ in 2018 is of Alfred “Rombhot” Yekatom¹⁷ on 17 November. The anti-balaka militia leader is the first accused transferred to the ICC in the context of its investigation into the crimes committed since 2012 between the Seleka and the anti-balaka in the Central African Republic. On 23 November 2018, Alfred Yekatom appeared before Pre-Trial Chamber II of the ICC¹⁸. Yekatom is accused of crimes against humanity and war crimes, the latter including the enlistment of children under the age of 15 years and their use to participate actively in hostilities. FIDH and its member organisations welcomed this first case, hoping it will be followed by other cases including against former Seleka in order to better reflect the reality of the crimes committed, and that crimes of sexual violence be also investigated. The organisation also praised the State cooperation, days after the Special Criminal Court’s inauguration¹⁹.

4. The acquittal of Jean-Pierre Bemba

On 8 June, the Appeals Chamber of ICC decided, by majority of 3 to 2, to overturn the 2016 conviction by Trial Chamber and acquitted Jean-Pierre Bemba from all charges of war crimes and crimes against humanity²⁰. FIDH, LCDH, OCDH, and at that time OCODEFAD, its partners in the Central African Republic (CAR), which had documented the crimes attributed to Bemba’s troops committed in CAR in 2002 and 2003²¹, and submitted various communications to the ICC, all strongly regretted that this judgment exonerates the warlord and leaves the victims without redress²².

The judgement reversed the decision handed down on 21 March 2016 by Trial Chamber III²³, which had found Bemba – commander-in-chief of the rebel group Mouvement de Libération du Congo (MLC) and former vice-president of the Democratic Republic of Congo – guilty of war crimes and crimes against humanity committed by troops in an MLC operation to suppress a 2002 coup d’état in the CAR. At the time of the acquittal, Mr. Bemba had been serving an 18-year sentence as a result of that original decision.

The Appeals Chamber concluded²⁴ that Trial Chamber III had erroneously convicted J-P

14. Situation in the Republic of Mali, ICC-01/12-01/18, Decision Postponing the Date of the Confirmation Hearing Decision Postponing the Date of the Confirmation Hearing, 20 July 2018.

15. FIDH, AMDH Press Release, “Al Hassan to the ICC, a milestone for justice”, 3 April 2018.

16. FIDH Press Release, In the Central African Republic, an anti-balaka leader transferred to the International Criminal Court : new momentum in the fight against impunity?, 17 November 2018.

17. ICC Press Release, ICC-CPI-20181117-PR1418, Situation in Central African Republic II: Alfred Yekatom surrendered to the ICC for crimes against humanity and war crimes, 17 November 2018.

18. ICC Press Release, ICC-CPI-20181123-PR1419, Alfred Yekatom makes first appearance before the ICC, 23 November 2018.

19. FIDH, LCDH, OCDH Press Release, “In the Central African Republic, an anti-balaka leader transferred to the International Criminal Court : new momentum in the fight against impunity?”, 17 November 2018.

20. ICC Press Release, ICC-CPI-20180608-PR1390, ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity, 8 June 2018.

21. Report of the FIDH Legal Action Group (LAG), FIDH and the situation in the Central African Republic before the International Criminal Court, The case of Jean-Pierre Bemba Gombo, July 2008; Report of the FIDH and LCDH, Central African Republic The ICC verdict in the Jean-Pierre Bemba Case, 15 years of FIDH action :from field investigations to Prosecutor’s conclusions, March 2016.

22. FIDH, Acquittal of Jean Pierre Bemba on appeal: an affront to thousands of victims, 8 July 2008.

23. Trial Chamber III ICC, ICC-CPI-20160321-PR1200, ICC declares Jean-Pierre Bemba Gombo guilty of war crimes and crimes against humanity, 21 March 2016.

24. ICC Press Release, ICC-CPI-20180608-PR1390, op. cit.

Bemba for specific criminal acts that were outside the scope of the case. The majority further judged that J-P Bemba had faced limitations in investigating and prosecuting crimes committed by his troops in Central African Republic as a remote commander sending troops to a foreign country. Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański issued a joint dissenting opinion, disagreeing with the findings of the majority, and stating that they would have confirmed the conviction²⁵.

The finding on command responsibility of the majority of the Appeal Chamber has been widely criticised, in particular for lacking a legal reasoning and contradicting well established principles of international law on this matter²⁶.

The elements of evidence collected in the field by FIDH and its members organisations, then by the Office of the Prosecutor of the ICC, and confirmed by the Trial Chamber, attested to the *modus operandi* of the MLC: J-P Bemba, as the military commander, had knowledge of these crimes and had done nothing to prevent them or punish the perpetrators. FIDH had specifically given the ICC the proof of a letter sent by Bemba to the FIDH President in which he acknowledged the existence of the crimes committed by his troops, without trying to take measures²⁷.

Bemba's acquittal was a devastating outcome for the 5,229 victims who participated in the trial and the reparation proceedings, and who had waited 15 years to see justice done and to receive some form of redress²⁸. FIDH fears that the decision may have a negative impact on the perception of the ICC in the country and in the eyes of victims and witnesses of future proceedings at the ICC and other courts, including the Special Criminal Court in the Central African Republic²⁹.

For this reason, FIDH welcomes the decision of the Trust Fund for Victims (TFV), announced following Bemba's acquittal, to accelerate the launch of a programme under its assistance mandate³⁰. One million euros from the voluntary contributions will be earmarked for medical, psychological and material assistance programmes for the victims of the Bemba case, as well as other victims of sexual and gender based violence in the 2002-2003 conflict. To achieve its desired objective, the assistance programme should be designed in consultation with victims on their priorities and needs. The role of victims' legal representatives, who maintain a trusting relationship with the victims, should be ensured by the Court in such consultations³¹.

25. ICC, ICC-01/05-01/08-3636-Anx1-Red, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, 8 June 2018.

26. See for instance Leila Saddat, Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo, 12 June 2018; and Amnesty's International Justice Team's series of opinion pieces examining key issues arising from the Bemba Appeals Judgment, available at: <https://hrij.amnesty.nl/lessons-must-be-learned-from-the-bemba-case/>

27. Report of the FIDH and LCDH, Central African Republic The ICC verdict in the Jean-Pierre Bemba Case, op. cit.; FIDH Press Release, Acquittal of Jean Pierre Bemba on appeal, op. cit.

28. FIDH Report, « All I want is reparation » Views of victims of sexual violence about reparation in the Bemba case before the International Criminal Court, November 2017.

29. FIDH Press Release, Acquittal of Jean Pierre Bemba on appeal, op. cit.

30. Trust Fund for Victims, Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic, 13 June 2018.

31. FIDH Press Release, The Bemba Case: Heavily criticised, the ICC must maintain victims' legal representation as the establishment of assistance programmes for victims is awaited, 1 October 2018.

5. Bemba et al appeals decision and re-sentencing

On 17 September 2018, Trial Chamber VII delivered the sentences against Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo following the ICC Appeals Chamber Judgment that had reversed the initial sentences against them and remanded the matter to Trial Chamber VII for a new determination³². The convictions and acquittals in relation to all five accused are final. In its new decision, Trial Chamber VII sentenced M. Bemba to one year imprisonment and fined him EUR 300,000. M. Kilolo and M. Mangenda were each sentenced to a total of 11 months of imprisonment. M. Kilolo was also fined EUR 30,000. The Chamber ordered the deduction from the convicted persons' sentence of the time they have spent in detention, pursuant to an order of the Court and, accordingly, considered the sentences of imprisonment as served. The fines were ordered to be paid to the Court within 3 months of its decision and thereafter transferred to the Trust Fund for Victims.

6. Attacks on the Court, its personnel and 'companies' associated with it

In his first official address, national security adviser John Bolton took aim at the International Criminal Court³³, and its potential investigation of U.S. citizens in Afghanistan for potential torture and ill-treatment of detainees, mostly in 2003 and 2004, during the United States-led invasion of the country. He additionally spoke against any ICC investigation against US allies, and announced the closure of the PLO's office in Washington. The main reason that Mr. Bolton and the State Department gave was Palestinians' use of the ICC³⁴. This hostile language was reiterated by US President Donald Trump at the United National General Assembly³⁵.

32. Situation in the Central African Republic in the case of the Prosecutor v. Jean-pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13, Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, 17 September 2018.

33. Aljazeera, Full text of John Bolton's speech to the Federalist Society, 10 September 2018.

34. The Guardian, John Bolton threatens war crimes court with sanctions in virulent attack, 10 September 2018.

35. The Atlantic, Full Transcript: Donald Trump at the United National General Assembly, 25 September 2018

II. KEY PRIORITIES FOR STATES PARTIES AT THE ASSEMBLY OF STATES PARTIES

In the upcoming session, the Assembly will consider matters fundamental to the Court through a General Debate on the ICC and its operations, holding plenary discussions on cooperation, the twentieth anniversary of the ICC Statute, and on victims' participation and legal representations. The Assembly will also adopt a number of resolutions on matters such as cooperation, complementarity, and universality. Finally, the ASP will elect five members of the Board of Directors of the Trust Fund for Victims, members of the Advisory Committee on nominations of judges, and a member of the Bureau.

FIDH recommends five key issues to be addressed in the Assembly.

1. Defending the integrity of the Rome Statute, publicly denouncing all attacks on the Court's legitimacy and independence

"We will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC. We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us." - excerpt from John Bolton's speech to the Federalist Society³⁶.

John Bolton has a long history of opposition to the ICC. Although the US signed the ICC Statute under president Bill Clinton, it was not ratified by Bolton, then an under-secretary of state in the George W Bush administration. Bolton helped secure, in what he described as one of his 'proudest achievements'³⁷ around 100 bilateral agreements with other countries to prevent them from delivering US personnel to the ICC. Those agreements were often extracted under pressure, with the US threatening to cut off military and other aid to countries that refused to sign.

Under the Obama administration, relations between the US and the ICC improved, with the US offering support to the two Security Council's referrals to the ICC, one in relation to atrocities committed in Sudan, the other in respect of the crimes committed in Libya. Bolton's attack is aimed at reversing those gains – with measures aimed directly at the Court and its staff.

Bolton's threats against the ICC include: (i) negotiating 'even more binding, bilateral agreements to prohibit nations from surrendering US persons to the ICC'; (ii) banning ICC judges and prosecutors from entering the US, sanctioning their funds in the US financial system and prosecuting them in US criminal courts (and doing the 'same for any company'³⁸ or state that assists an ICC investigation of Americans'); and (iii) 'taking note if any countries cooperate with ICC investigations of the United States and its allies, and remember[ing] that cooperation when setting US foreign assistance, military assistance and intelligence sharing levels'.

These are serious threats – they are made to discredit the Court and would potentially undermine its work. The ICC prosecutor and its judges would be barred entry to the US to attend to vital work of the Court. Other groups, including legal representatives, NGOs, and human rights defenders may also fall under this threat.

Nevertheless, this is not the first hostile attitude against the Court, and is unlikely to be the last. To recall, the level of hostility and political targeting of the Court in the Kenya situation led to the total collapse of all cases and to the Court ceasing its investigations in the situation. Similar hostilities are to be expected in case the Court's current and future situations have

36. Aljazeera, Full text of John Bolton's speech to the Federalist Society, op. cit.

37. *Ibid.*

38. Definition for 'companies' remains unclear but may include Civil society organisations and law-firms working on accountability for international crimes.

implications for the world's major powers. The Assembly has a vital role in countering threats to the Court and safeguarding the implementation of its mandate.

The statements made by ICC States Parties following the Bolton statement are commendable. A number of states and regional bodies rapidly countered Bolton's statement with statements of political support to the Court, some reiterating their support at the Mandela Peace Summit and the General Debate of the 73rd session of the United Nations General Assembly. Additionally, a statement in support of the International Criminal Court (ICC) was signed by 35 countries on the same occasion³⁹.

States Parties' Public support to the Court is vital for its ability to carry out its mandate, as emphasised by ICC President, Judge Chile Eboe-Osuji⁴⁰. What is more essential, however, is States Parties' unequivocal support for the Court if and when it announces judicial and prosecutorial developments in situations unfavored by major political powers. ICC States Parties and the Assembly must stand ready to defend the Court's judicial independence and promote cooperation with the Court.

Recommendations to States Parties:

- **Use the ASP General Debate and the plenary sessions on cooperation and the twentieth anniversary of the Rome Statute to affirm commitment to support the Court and announce readiness to act against any actions that may prevent the Court from implementing its mandate;**
- **Include language in the Omnibus resolution on the Assembly's collective readiness to back the Court in the implementation of its mandate and defend it against any threats.**

2. Ensuring cooperation and addressing non-cooperation

The collective action leading to the creation of the ICC needs to be sustained with constant and multi-faceted support and cooperation from States Parties and the Assembly to ensure the effective functioning of the Court. The ICC Statute makes it a legal obligation for States Parties to cooperate with the ICC⁴¹ and a possibility for non-States Parties to cooperate with or assist the ICC via ad hoc agreements⁴².

39. See: Austrian Foreign Ministry Ministry tweeted: "The #ICC is the world's first and only permanent international criminal court for the most serious crimes. We fully support the ICC & its impartiality and independence. EU Council Conclusions of 16 July 2018; Belgium Minister of Foreign Affairs, retweeted a tweet from the EEAS, adding, "Like its #EU partners, Belgium fully supports the #ICC and its work. As we enter the #UN Security Council soon, we are convinced that #accountability is essential in building the foundations for #peace @IntlCrimCourt"; European Union, Federica Mogherini, the high representative of the European Union for Foreign Affairs and Security Policy and vice president of the EU Commission, said in a speech to the European Parliament that the existence of the ICC was "not questioned by the European Union and that we will continue to strongly and fully support the ICC and its work" and that this "is the strong position of this Parliament and of all our Member States." She noted that while "[t]he Court may not be perfect," the "way forward for us is to make them stronger, and build a stronger and more effective multilateral system."; Finland: Finland's Embassy to the Netherlands commented on Twitter that Finland "supports the work" of the ICC. Additionally, the Finnish Embassy highlighted that it is "[i]mportant to continue to fight against #impunity for international crimes" and directed readers to the statement by President of the Assembly of States Parties to the ICC, O-Gon Kwon; The French Ministry for Europe and Foreign Affairs commented that the ICC "must be able to act and exercise its prerogatives without hindrance, in an independent and impartial manner, within the legal framework defined by the Rome Statute." It furthered that "France, together with its European partners," supports the ICC "through its budgetary contribution as well as its cooperation." The French Ministry added that the creation of the ICC "to try those responsible for the most serious crimes was an important step in the fight against impunity" to which both it and the United States "are very attached." (France Diplomatie, International Criminal Court - Excerpts from the daily press briefing, 11 September 2018) ; The German Foreign Office said on Twitter that, since its inception, the ICC has played a role in "enforcing international law in cases of the most serious crimes" and noted that it remains "committed to the work of the ICC – in particular when it comes under fire."

40. ICC Press Release, Statement of ICC President, Judge Chile Eboe-Osuji: States' public support reinforces the hope of countless victims and the Court's determination to deliver justice, 5 October 2018.

41. Part 9 of the ICC Statute.

42. 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.

The Assembly should continue to emphasise that cooperation also encompasses non-cooperation, which fundamentally undermines the work of the Court and should be sanctioned by the Assembly. FIDH welcomes the renewed attention to the execution of arrest warrants through the Court's recently launched campaign and the seminar convened by the Assembly's cooperation co-facilitators, Ambassador Philippe Lalliot (France) and Ambassador Momar Gueye (Senegal). This discussion and collective effort are important not only in terms of the mandate of the Court, but also as part of the broader context of the global fight against impunity.

Cooperation and support are key not only to the implementation of arrest warrants, as emphasised by the ASP in 2015⁴³, but extends to other areas including the identification and freezing of assets, cooperation in support of preliminary examinations, investigations, prosecutions and judicial proceedings, among other issues. FIDH urges States Parties and the Assembly to commit to furthering the discussion on cooperation and non-cooperation through continued consultations and strategies to support and strengthen the ICC system.

Recommendations to States Parties

- **Cooperate with the ICC at every stage of investigations 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;**
- **Capitalise on the twentieth anniversary of the Rome Statute to work together with Court as well as with national jurisdiction and use the Plenary on the 20th Anniversary to reaffirm support to the ICC Rome system and announce strategies to strengthen it;**
- **Commit to regularly review the Assembly's Procedures related to non-cooperation, with a view to further strengthening them - recognising the crucial role of the Assembly to respond to instances of non-cooperation provided in Article 87(7) of the Rome Statute to ensure that states parties fulfil their cooperation obligations;**
- **Include at the ASP a standing agenda item on non-cooperation**

3. Allowing the Court the Budget it needs to carry out its mandate

*"These countries are creating a double standard by touting the importance of the court, then underfunding its work. This will backfire. It will send a message to dictators, such as Mr. Al-Bashir, that the tribunal's strongest enthusiasts may be tempering their support."*⁴⁴- Erna Paris.

The budget of the ICC, proposed by the Court and adopted annually by the ASP with recommendations from the Committee on Budget and Finance (CBF)⁴⁵, sets out the framework for the functioning of the ICC. While independent, the Court's capacity in implementing its mandate under the ICC Statute is constrained by the approved budget.

43. 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

44. Erna Paris, In a dangerous world, the ICC needs support, 31 July 2017.

45. ICC, ICC-ASP/ 17/15, Report of the Committee on Budget and Finance on the work of its thirty-first session, 29 October 2018.

International criminal investigations, prosecutions and trials cannot be conducted effectively unless provided with the required financial and human resources. In addition to supporting the Court's investigations, prosecutions and judicial activities, the budget should also allow for making the criminal process meaningful to those who need it the most and who enjoy rights before it: victims and affected communities. If the direct beneficiaries of the Court and its greatest allies cannot relate to and be part of the criminal process, the Court risks reputational harm and loss of legitimacy.

FIDH and other organisations have long been calling on the Court's organs and on the Trust Fund for Victims (TFV) to request the resources needed to meet their growing responsibilities. The 'zero nominal growth' approach of some States Parties to the Court's budget and its negative impact on the operational capacity of the Court as a whole is a grave concern to our organisation. It is regrettable that the Court has not requested the budget increase that is adequate to its growing needs. In fact, the Registry's sections, mandated to interact with victims and affected communities the most, have not requested any budgetary increase, which is likely going to limit the Court's interaction with its beneficiaries for budgetary reasons. This is deeply concerning particularly as the Court is facing a wave of misinformation about its mandate and objectives, as well as increasing negative perception including, more often than usual, from victims and affected communities.

The only notable request for a budgetary increase comes from the **Trust Fund for Victims** (TFV), which is requesting a 58.5 per cent increase from its 2018 budget⁴⁶. This increase is to enhance its organisational capacity and to meet its rapidly growing responsibilities in implementing its reparations and assistance mandates. Over the past few years, it became evident that the role of the TFV is key in the implementation of the Court's mandate towards victims, and is bigger than what its current capacity allows. The TFV must now design and implement reparation orders in three cases, and is developing assistance programmes in several situations, including most recently in CAR following Bemba's acquittal. Our organisation supports the budgetary request of the TFV, finds it essential in enabling the fund to have an increased presence in situation countries, and urges States Parties to approve it. The **Office of the Prosecutor** (OTP) also requested an increase, albeit minimal, amounting to a 4.6 increase from its 2018 budget to respond to the increased number of its active investigations. Similarly, FIDH urges States Parties to approve the requested increase.

Overall, the Court is proposing a budget for 2019 amounting to **€147,55 million**, an increase of **3.70 million** or 2.6 percent of its 2018 budget. The CBF recommends States Parties to adopt only 144.7 million for 2019, an increase of 0.6 percent⁴⁷.

Recommendations to States Parties:

- **Allow, as a minimum, the budget request put forward by the Court for 2019 and oppose any 'zero nominal growth' approach;**
- **Initiate a debate on reforms to the Court's budgeting, including on separating the budget discussion from other discussions taking place at the ASP⁴⁸, as well as discussing the added value of multi-year budgeting;**
- **Engage with the United Nations Security Council on the role of the United Nations to fund the Court for the expenses incurred due to referrals by the Council.**

46. ICC, ICC-ASP/17/15, Report of the Committee on Budget and Finance on the work of its thirty-first session, op. cit.

47. Ibid.

48. Proposed programme budget of the Court (ICC-ASP/17/10) on the ASP seventeenth session.

4. Upholding and strengthening the central position of victims in the ICC Statute, promoting meaningful participation and legal representation of victims

*“Reiterating[...] that access to relevant information concerning violations and redress mechanisms are essential components of justice and, in this regard, emphasizing the importance of effective outreach to victims and affected communities in order to give effect to the unique mandate of the International Criminal Court towards victims”*⁴⁹-preambular paragraph to a 2014 ASP resolution.

Victims’ participation at the International Criminal Court (ICC) is heralded as one of the most innovative features of the ICC Statute, and an unprecedented achievement to victims’ rights in international criminal proceedings. The twentieth anniversary of the ICC Statute brought various moments of reflections on the diverse jurisprudence of this feature, ranging from commitment to keeping the ICC a ‘victims’ Court, to ensuring that victims’ participation is meaningful, and not merely symbolic, and that victims may effectively engage and benefit from the Court’s process⁵⁰.

Twenty years on from promising victims a central position at the ICC, important questions remain. These include: How can the ICC effectively enable thousands of victims of international crimes to voice their views and concerns before the Court? Who gets to decide who speaks for victims? What does meaningful participation look like?

FIDH is pleased to see the inclusion of a plenary session on victims’ participation⁵¹ and legal representation and considers it an important platform for States Parties to demonstrate their commitment to the implementation of victims rights in a meaningful manner. Based on a project on victims’ participation conducted this year, FIDH finds that victims’ participation rests on a number of crucial factors⁵². Below some of the key factors that enable meaningful participation are explored.

Public information and outreach activities are key to enabling victims to learn about their rights, including the right to participate in proceedings and the right to legal representation, and to learn how these rights can be fulfilled. This has been emphasised by the Assembly in various Omnibus resolutions, and was affirmed by Pre-Trial Chamber I in its recent decision on outreach:

*“(.)For the Court to be able to properly fulfil its mandate, it is imperative that its role and activities are properly understood and accessible, particularly to the victims of situations and cases before the Court. Outreach and public information activities in situation countries are quintessential to foster support, public understanding and confidence in the work of the Court. At the same time, they enable the Court to better understand the concerns and expectations of victims, so that it can respond more effectively and clarify, where necessary, any misconceptions”*⁵³.

The question of when the Court should commence its outreach activities is however subject to much debate. Generally speaking, outreach activities have been tied to judicial proceedings, mostly to explain to affected communities judicial developments, or to provide information that

49. ASP, Victims and affected communities, reparations and Trust Fund for Victims, 27 November 2013

50. FIDH report, five myths about victim Participation in ICC proceedings, December 2014.

51. At this Assembly session, states parties, under the leadership of the United Kingdom and Argentina as focal points within one of the clusters of the Study Group on Governance, will hold a plenary session on “Achievements and Challenges regarding Victim Participation and Legal Representation after 20 years of the adoption of Rome Statute.” [Draft] Report of the Bureau on the Study Group on Governance, 9 November 2018.

52. Read soon to be released FIDH report “Victims at the Center of Justice From 1998 to 2018: Reflections on the Promises and the Reality of Victims’ Role at the ICC”, to be released in the 17th session of the Assembly of States Parties to the ICC.

53. Situation in the State of Palestine: Decision on Information and Outreach for the Victims of the Situation, 13 July 2018.

facilitate victims' participation. The latter is mostly triggered once the ICC Prosecutor requests authorisation to open an investigation, under what is known as the 'victims' representations' phase, or in relation to victims' participation in a specific case following an arrest of an ICC suspect. Prior to the decision on outreach in the Palestine situation, the Court has had a policy of not engaging in any outreach activities in preliminary examination situations. Similarly, civil society organisations, in particular in situation countries where the Court is conducting investigations, with no cases yet, have complained of the limited outreach and victim-centered information provided by the Court (example: Burundi, Georgia). Still, the ICC Statute guarantees⁵⁴ victims' right to "receive information from and communicate with the Court, regardless and independently from judicial proceedings, including during the preliminary examination stage", and the Assembly must drive the Court to develop an outreach strategy that enables the Court to leave a legacy after its departure from situation countries.

Legal Representation of victims raises various issues that should as well be addressed by the Assembly to enable victims to participate in ICC proceedings in a meaningful manner. Victims, like defendants, have fundamental rights in ICC proceedings and have the right to access **legal aid** in the course of these proceedings. However, recent jurisprudence at the Court⁵⁵ and the ongoing discussion on the adjustments to the Court's legal aid policy raise concerns over when victims can benefit from the Court's legal aid scheme. Despite the need for a legal aid scheme that can be tailored to victims' particular needs, their interests, and the particular challenges their legal representation entail, the experience in the Ongwen case and the ambiguous language proposed in the draft legal aid policy show that there is a risk that some victims may be deprived from recourse to legal aid, for reasons related to victims' decision on who speaks on their behalf⁵⁶.

Another aspect worth reflecting on is how participation works and what resources are needed for its field activities to make it meaningful. Victims' legal representation activities primarily take place in the field, within the victim communities in affected areas in order to guarantee effective and meaningful victims' participation in the courtroom. States Parties should consider this aspect carefully in the upcoming ASP and when engaging with the Court on Legal Aid discussions. Any changes to the composition of legal representation teams and their field budget impact the ability of victims to have adequate consultations with their representatives.

Adjustment to the legal aid system has been on the agenda of the Court and the Assembly since 2012. The recent consultation which started in 2017 resulted 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. No further consultations took place in 2018, but the Court will hold a consultation on 3 December 2018 on the draft legal aid policy circulated in October 2018. Our organisation is of the view that the current draft policy does not reflect the recommendations made in the expert report nor those made throughout the consultation process.

Recommendations to States Parties:

- **Use the ASP general debate, plenary session on victims and the Omnibus resolution to affirm the importance of court's outreach and engagement with affected communities, starting from the preliminary stage, echoing the ICC jurisprudence;**
- **Use the ASP plenary sessions on victims, as well as the General Debate to (re) affirm the importance of ensuring meaningful victim participation and direct legal representation closest to the needs and rights of victims, based on a fair and transparent legal aid policy;**

54. *Ibid*, para. 10

55. See, for example, Open letter to the ICC Registrar on Legal Aid for Victims in the Ongwen Case, 17 November 2016.

56. FIDH Press Release, Open Letter to the ICC Registrar on Legal Aid for Victims in the Ongwen Case, 17 November 2016.

- Support paragraph 97bis proposed by the United Kingdom on the revision of the Court's strategy in relation to victims once a judicial cycle is finished, requesting the Court to submit an updated strategy, including measures and time-bound objectives, to the Assembly in its 18th session.

5. Launching a merit-based search and vetting process for the next Prosecutor of the International Criminal Court

“There were millions all over the world looking to this Court with immense expectations, some with skepticism, worried about the next steps of an independent and impartial Prosecutor”⁵⁷ Prosecutor Fatou Bensouda in her solemn undertaking.

The mandate of current prosecutor, Fatou Bensouda, who was elected in 2011 ends in June 2021. Given the impact that the Prosecutor has on almost every aspect of the Court, the process of identifying and nominating candidates for the position of the 3rd ICC Prosecutor must be taken up swiftly by the Assembly. Electing the Court's officials are among States Parties' most significant responsibilities when it comes to ensuring the ICC's independent, fair and effective functioning.

On 9 July 2018 the Bureau of the Assembly recalled⁵⁸ that “[e]very effort shall be made to elect the Prosecutor by consensus”⁵⁹. The Bureau was invited to begin thinking about how it would proceed to assist the Assembly in its quest to select a new Prosecutor by consensus at its nineteenth session, in 2020.

It is essential to have a transparent process and to agree as early as possible on a well-defined timeline, as well as on the procedure to select a highly qualified individual. It is furthermore important to depoliticize the election process⁶⁰, candidates should be selected on the basis of merit and enjoy the full support of all States Parties⁶¹.

Following initial discussions⁶² with the Bureau, the Assembly's president has asked the coordinators of the New York and Hague Working Groups to consult States Parties on the composition and appointment of a “search committee”⁶³.

FIDH is following the discussions regarding the composition and mandate of the search committee, including by drawing lessons from the 2011 process⁶⁴. Many of the criteria set out along with other civil society organisations remain relevant to the next election⁶⁵. At this Assembly session, the Bureau should include in its annual report the progress to date, as well as initial indications of the search committee's mandate, composition, and timeline. This is crucial to ensure that there is broad awareness among States Parties and a collective commitment to a rigorous, merit-based process. The Terms of Reference for the Committee should be developed by all States Parties and civil society, and include outreach, identification, and assessment of candidates. The committee should be composed primarily, if not exclusively, of independent experts, and should conduct work in a manner that discourages campaigning by states and that seeks appropriate transparency.

57. ICC Prosecutor, Solemn Undertaking of Fatou Bensouda, 15 June 2012.

58. Bureau of the assembly of states parties, Fourteenth meeting, The Hague, 20 September 2018.

59. Resolution ICC -ASP/1/Res.25, Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, para. 29.

60. Kofi Annan, The Best Candidate for the Toughest Job, HuffPost, 13 October 2011.

61. FIDH, Rapport The Rome Statute at Twenty (1998-2018), op. cit.

62. Bureau of the assembly of states parties, Twelfth meeting, The Hague, 16 July 2018; Bureau of the assembly of states parties, Fourteenth meeting, The Hague, 20 September 2018.

63. Bureau of the assembly of states parties, Fifteenth meeting, New York, 22 October 2018.

64. ASP, Report of the Search Committee for the Position of Prosecutor, October 2011.

65. FIDH, International Crisis Group, Human Rights Watch, Institute for Security Studies, International Center for Transitional Justice and Open Society Justice Initiative, , 16 March 2011.

Recommendations to States Parties:

- States Parties need to support the work of the search Committee, including through disseminating notice of the position of Prosecutor nationally and providing other cooperation to the Committee as required, and recognise that the Committee will require adequate resources in order to fulfil its mandate;
- States Parties should make sure that the search process should be in place no later than mid-2019 to permit sufficient time for robust outreach to identify the most highly qualified nominees. A shortlist of candidates should be presented at least three months before the election.



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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.

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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.

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