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FIDH Recommendations for the 18th Session of the ICC Assembly of States Parties

The Hague, 2-7 December 2019

Table of contents

Introduction	4
I An overview of ICC-related developments in 2019	5
1. Afghanistan: rejection of an investigation by Pre-Trial Chamber II and ongoing appeals	5
2. Côte d'Ivoire: the acquittals of Laurent Gbagbo and Charles Blé Goudé.....	6
3. DRC: Bosco Ntaganda found guilty of all counts, a ground-breaking conviction.....	7
4. Mali: Charges against Al Hassan confirmed	7
5. CAR II: SGBC charges brought against Patrice-Edouard Ngāïssona	7
6. Myanmar/Bangladesh: ICC Prosecutor to proceed with an investigation into crimes against the Rohingya population.....	8
II. FIDH's Five Recommendations for States Parties at the 18th Session of the ASP	9
1. Guarantee an Independent Expert Review of ICC performance and functioning that is purposeful, transparent and inclusive.....	9
2. Reaffirm fundamental support to and cooperation with the ICC.....	10
3. Amend Article 8 of the Rome Statute as proposed by Switzerland to codify the crime of starvation as war crime in non-international armed conflicts	12
4. Allow the Court the financial resources needed to carry out its mandate.....	12
5. Ensure election of the next ICC Prosecutor and Judges are based on merits only and that election processes remain transparent	14

Introduction

The 18th session of the Assembly of States Parties (“ASP” or “Assembly”) to the Statute of the International Criminal Court (“ICC” or “Court”) will be held from 2 to 7 December 2019 in The Hague, the Netherlands.

This session takes place while the performance and functioning of the Court and the Rome Statute system are under a spotlight. In 2019 alone, the jurisprudence of the Court in relation to the situations of Côte d'Ivoire and Afghanistan provoked controversy and discussions on the Office of the Prosecutor's (“OTP”) case building and selection on the one hand, and on the judiciary's manner of and consistency in interpreting the ICC Statute on the other. Political threats by the United States' government against the Court continue, and a visa ban has been imposed on the ICC Prosecutor since April 2019. Limited resources and cooperation from States Parties continue to affect the full implementation of the Court's mandate, hindering the progress in new or existing cases, investigations and preliminary examinations before of the Court.

Nevertheless, the Court's central role in the fight against impunity at the international level continues. Notwithstanding the seriousness of the aforementioned concerns, the Court has advanced the cause of justice across numerous situations. In 2019, charges of war crimes and crimes against humanity have been brought and confirmed in the case against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud in the situation of Mali. Judges found Bosco Ntaganda guilty of 18 counts of war crimes and crimes against humanity that were committed in the Ituri province of the Democratic Republic of Congo (“DRC”) in 2002-2003. Charges were brought in the second situation of the Central African Republic (“CAR II”) against anti-Balaka leaders Alfred Yekatom and Patrice-Edouard Ngaissona, the first case in this ongoing investigation. Further, ICC judges authorised the opening of an investigation into the situation of Bangladesh/Myanmar.

Given the broad consensus that the ICC can and must perform better, multiple stakeholders have called for a reflection on the Court's performance by external, independent experts. Consequently, this year's ASP will launch an Independent Expert Review (“IER”) of the Court's performance that is part of a broader assessment of both the Court, and the Rome Statute system. The IER should be independent, purposeful, inclusive and transparent for it to genuinely lead to the strengthening of the ICC. Moreover, States Parties should articulate at this ASP session clear steps that lead to a genuine reflection on the functioning of the Rome Statute system beyond the IER.

This year's ASP session will also see a plenary discussion on cooperation, the consideration of a resolution on judicial nominations and elections, and the election of six board members of the Committee on Budget and Finance (“CBF”). A proposal will be discussed to amend the founding texts of the ICC, which would ensure the codification of starvation as a war crime in non-international armed conflicts. Finally, the ASP will adopt the Court's budget for 2020. Regrettably, the pressure on the Court to adhere to a zero nominal growth of its annual budget, as opposed to needs-based budgeting, has led to a budget proposal from the Court that will, at the very least, challenge the Court in conducting its growing operations.

FIDH has closely monitored the work of the Court and its States Parties in 2019 and presents in this position paper its views and key recommendations on issues relevant to FIDH's mandate.

I. An overview of ICC-related developments in 2019

1. Afghanistan: rejection of an investigation by Pre-Trial Chamber II and ongoing appeals

On 12 April 2019, Pre-Trial Chamber II (“PTC II” or “Chamber”) of the ICC, unanimously rejected the request of the Prosecutor to investigate alleged war crimes and crimes against humanity committed in the situation of the Islamic Republic of Afghanistan.¹ Despite finding that requirements of jurisdiction and admissibility were met, judges at PTC II found that an investigation into the situation on Afghanistan at this stage would not serve the interests of justice.² In its determination, the Chamber found that the time elapsed since the commission of the crimes, States’ scarce cooperation and the issue of access to evidence and suspects make “prospects for a successful investigation and prosecution extremely limited”³, and that using the Court’s limited resources in pursuing such investigation “will go to the detriment of other scenarios [...] which appear to have more realistic prospects to lead to trials”⁴. The Chamber stated that “an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame”⁵.

This is the first time a Pre-Trial Chamber invokes the ‘interests of justice’ concept in a decision rejecting the authorisation of an investigation by the OTP.⁶ By denying the authorisation of an investigation into the situation of Afghanistan, the decision deprived tens of thousands of victims in Afghanistan, along with victims of US torture, of any prospects for truth, justice and reparations.⁷

This decision is currently under appeal by the Prosecutor⁸ and legal representatives of victims⁹. The Prosecution’s and the victims’ appeals submit that Pre-Trial Chambers can not carry out an interests of justice assessment, and deny an investigation on its basis. The OTP and the legal representatives of victims disagree on the procedural standing of victims: the OTP asserts that victims are not entitled to appeal the decision of PTC II.¹⁰ FIDH and a number of Afghan and international human rights organisations made submissions to the Appeals Chamber arguing in support of victims have standing to bring an appeal in exceptional circumstances¹¹, including as in the present case.

Given the significance of this appeal and the novel issues it raises, more than a dozen of *amici curiae* requests have been granted by the Court. The Appeals Chamber invited States to be heard as well on issues raised in this appeal but none have requested to make observations. The Office of Public Counsel for Victims (“OPCV”) also requested to appear before the Appeals Chamber,¹² and so did the Office of Public Counsel for the Defence (“OPCD”), arguing that the outcome of the present appeal may affect the rights of potential suspects.¹³

1. ICC Press Release, ICC judges reject opening of an investigation regarding Afghanistan situation, 12 April 2019.

2. ICC Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019.

3. *Ibid.*, para. 96.

4. *Ibid.*, para. 95.

5. *Ibid.*, para. 89.

6. See FIDH-Armanshahr/OPEN ASIA-TJCG, *amicus curiae* observations to the ICC Pre-Trial Chamber II, ICC-02/17-58, 11 July 2019.

7. FIDH-Armanshahr/OPEN ASIA-CCR press release, ICC Refuses to Investigate Crimes in Afghanistan, including US Torture: An Unacceptable and Shameful Decision, 12 April 2019.

8. ICC Office of the Prosecutor, Prosecution Appeal Brief, ICC-02/17-74, 30 September 2019.

9. Legal Representatives of Victims, Corrigendum of Updated Victims’ Appeal Brief, ICC-02/17-73-Corr, 02 October 2019.

10. ICC Office of the Prosecutor, Consolidated Prosecution Response to the Appeals Briefs of the Victims, ICC-02/17-92, 22 October 2019, para.12 to para. 27 and para. 28 to para. 55.

11. Armanshahr/OPEN ASIA, International Federation for Human Rights (“FIDH”),Afghanistan-Transitional Justice Coordination Group (“TJCG”),European Center forConstitutional and Human Rights (“ECCHR”),Human Rights Watch (“HRW”),No Peace Without Justice (“NPWJ”), The Center for Justice & Accountability (“CJA”), REDRESS, Women’s Initiatives for Gender Justice, *Amicus Curiae* Observations, ICC-02/17-114. 15 November 2019, paras. 2-11.

12. Office of Public Counsel for Victims, Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court, ICC-02/17-67, 20 September 2019.

13. The ICC Appeals Chamber, Decision on the participation of amici curiae,the Office of Public Counsel for the Defence and the cross-border victims, ICC-02/17-70, 25 September 2019.

The hearing before the Appeals Chamber is scheduled to take place from 4 to 6 December 2019.¹⁴ The paramount importance of this appeal cannot be understated. Not only will it have an impact on potential future investigations by the Court, it arguably affect the Court's legitimacy and authority as well.

2. Côte d'Ivoire: the acquittals of Laurent Gbagbo and Charles Blé Goudé

"Between the amnesty decree issued by President Ouattara and the acquittal of Laurent Gbagbo and Blé Goudé at the ICC, there is a risk of wholesale impunity for the 2010-11 crimes. The Ivorian government and the international community are leaving 3000 victims and their families with no recourse to justice. Eight years after the tragic crisis experienced by our country, those same actors risk fueling the antagonism of the past and the political violence which ensued."

Drissa Traoré, Vice-President of FIDH, 15 January 2019

On 15 January 2019, Trial Chamber I (TC I^o) of the ICC decided, in a majority decision, to acquit Laurent Gbagbo and Charles Blé Goudé of all charges of crimes against humanity. The Prosecutor had alleged that Gbagbo, former President of Côte d'Ivoire, and members of his inner circle, including former youth leader Blé Goudé, created and executed a common plan to hold on to power after losing the country's 2010 presidential election by encouraging attacks against supporters of then rival candidate, Alassane Ouattara. The OTP had brought against Gbagbo and Blé Goudé charges of crimes against humanity (murder, rape, other inhumane acts or – in the alternative – attempted murder, and persecution). However, the majority of TC I concluded in an oral decision that the OTP failed to satisfy the burden of proof in accordance with Article 66¹⁵ of the ICC Statute. It said, in particular, that the OTP failed to demonstrate the existence of a common plan to keep Gbagbo in power and a deliberate policy of attacking civilian population.¹⁶ Following the acquittals, Gbagbo and Blé Goudé were released from ICC detention upon conditions set by the Appeals Chamber.

The way in which the decision was delivered was unusual to say the least: a brief oral decision from a divided bench, contrasting with a 21-page dissenting opinion issued by Judge Olga Carbuccia.¹⁷ To FIDH and member organisations from Côte d'Ivoire, the absence of a written decision and the delay in providing a full justification for the acquittals disregard victims' right to information, particularly as the Court's outreach and public information sections could not adequately engage with or explain the decision, or any potential legal remedies, to victims and affected communities in absence of the decision's full justification. The written reasons for the acquittal were filed six months after the pronouncement of the acquittal in an 8-page document¹⁸ that refers to the reasons of Judge Henderson, a member of the bench, for the majority's analysis of the evidence.

On 17 October, the Prosecutor filed her appeal against the acquittal decision.¹⁹ In the meantime, the Presidential Amnesty adopted in August 2018 in favor of 800 persons implicated in the crisis²⁰ challenges the prospects for justice in Côte d'Ivoire. Victims of this crisis will impatiently wait to see the outcomes of the Prosecutor's appeal against this decision²¹, as well as whether cases will emerge against those bearing the highest responsibility in the pro-Ouattara forces²².

14. ICC Press Release, Afghanistan: ICC Appeals Chamber schedules a hearing on 4-6 December 2019 to hear oral arguments, 27 September 2019.

15. Article 66(3) states: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."

16. ICC Office of the Prosecutor, Prosecution's urgent request for extension of time limits under rule 150(1) and regulation 58(1), ICC-02/11-01/15, 16 July 2019.

17. Judge Herrera Carbuccia, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, ICC-02/11-01/15-1234, 15 January 2019.

18. ICC Pre-Trial Chamber I, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and, ICC-02/11-01/15, 16 July 2019.

19. ICC Office of the Prosecutor, Prosecution Document in Support of Appeal, ICC-02/11-01/15-1277-Red, 17 October 2019.

20. FIDH-LIDHO-MIDH Press Release, ICC/Côte d'Ivoire: Towards total impunity for 2010-2011 crimes after acquittal of Laurent Gbagbo and Charles Blé Goudé, 15 January 2019.

21. ICC-02/11-01/15

22. Op-Ed by Mausi Segun and Drissa Traoré, A Shrinking Window for Justice in Côte d'Ivoire, 1 February 2019.

3. DRC: Bosco Ntaganda found guilty of all counts, a ground-breaking conviction

On 8 July 2019, Trial Chamber VI found Bosco Ntaganda, deputy chief of staff and commander of military operations of the Forces Patriotiques pour La libération du Congo ("FPLC"), guilty beyond reasonable doubt of all 18 counts of war crimes and crimes against humanity, committed in Ituri, the DRC, in the period of 2002-2003.²³ The case against Ntaganda is the first in the situation of the DRC to include charges of sexual and gender-based crimes ("SGBC"), and the first time that the ICC has charged acts of rape and sexual slavery committed against child soldiers under an official's command within a militia group. This was possible because judges on the case provided a new interpretation²⁴ of the war crimes of rape and sexual violence, affirming that the protection against sexual violence under international law also applies to members of the same armed forces as those responsible for the crimes. If the verdict is upheld on appeal, it will be the first final conviction for crimes of sexual violence at the ICC.²⁵ This case is a testament to the OTP's improved strategy regarding accountability for SGBC and holding high level perpetrators to account.²⁶

On 7 November 2019, Trial Chamber VI, unanimously, sentenced Bosco Ntaganda to a total of 30 years of imprisonment, the highest imprisonment sentence to have ever been handed down by the Court.²⁷

4. Mali: Charges against Al Hassan confirmed

On 30 September 2019, charges against Al Hassan were confirmed by the ICC Pre-Trial Chamber I ("PTCI").²⁸ On 27 March 2018, the OTP issued an arrest warrant against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud for crimes against humanity and war crimes. Al Hassan, an alleged member of the Ansar Eddine, was the chief of the Islamic police in Timbuktu during the city's occupation by Jihadist groups in 2012 and 2013. He was transferred to the seat of the Court on 31 March 2018.

According to information gathered by FIDH and its member and partner organisations in Mali, Al Hassan was directly involved in crimes committed against the civilian population in Timbuktu. FIDH and its member organisations brought cases before Malian courts against Al Hassan and others involved in the criminality exercised in Timbuktu, but these proceedings have been halted²⁹. This is the second case in the Mali situation at the ICC, and the first prosecution of crimes against humanity (Torture, rape, sexual slavery, other inhumane acts, including, inter alia, forced marriages, persecution). It is also the first time that the OTP charges persecution on gender grounds.³⁰

5. CAR II: SGBC charges brought against Patrice-Edouard Ngaïssona

Considered the most senior leader and the "National General Coordinator" of the Anti-Balaka in CAR, Ngaïssona is alleged to be responsible for war crimes and crimes against humanity committed across various locations in CAR, between at least 5 December 2013 and December 2014. His case was joined with the case against Alfred Yekatom, another Anti-Balaka commander. The SGBC charges brought against Ngaïssona include rape and attempted rape as constituting a crime against humanity and war crimes.³¹

While these developments are progress in themselves, it remains to be seen whether these charges will be confirmed. Further, cases against individuals bearing the most responsibility for the crimes committed by the Seleka group are yet to emerge from this investigation.

23. ICC Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, 08 July 2019.

24. ICC Appeals Chamber, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06 OA5, 15 June 2017.

25. See, Press Release by FIDH and its member organisations in the DRC: ASADHO, Groupe Lotus and Ligue des Electeurs: Ntaganda found guilty: a Day of Joy for Ituri Victims, a Day of Hope for others, 8 July 2019.

26. See OTP Policy Paper on Sexual and Gender-Based Crimes, 20 June 2014; and FIDH Report, Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond, December 2018.

27. Press statement by FIDH and member organisations from the DRC, DRC: ICC sentences Bosco Ntaganda to 30 years for war crimes and crimes against humanity, 13 November 2019.

28. ICC Press Release, Pre-Trial Chamber I confirms charges of war crimes and crimes against humanity and commits suspect to trial, 30 September 2019.

29. See press release by FIDH and AMDH, Al Hassan to the ICC: a milestone for justice, 3 April 2018.

30. FIDH Report, Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond, 2018, p.25.

31. ICC Office of the Prosecutor, Public redacted version of "Document Containing the Charges", ICC-01-14/01-18-282-Conf-AnxB1, 19 August 2019, ICC-01/14-01/18, 18 September 2019.

6. Myanmar/Bangladesh: ICC Prosecutor to proceed with an investigation into crimes against the Rohingya population

"The scandal of international inaction has to end. (...) The military operations against the Rohingya in 2017 - as exceptionally intense and brutal as they were - are part of a bigger, longer, more general pattern of extreme military violence. Unless the United Nations and the international community take effective action this time, this sad history is destined to be repeated."³²

Christopher Sidoti, Expert at the UN Fact-Finding Mission on Myanmar, 16 September 2019

On 4 July 2019, the OTP concluded its preliminary examination in the situation of Myanmar/Bangladesh and requested authorisation to investigate crimes within the jurisdiction of the ICC. On that day, the OTP notified victims or their legal representatives, informing them that they have until 28 October 2019 to submit representations to Pre-Trial Chamber III ("PTC III"), a process in which victims can submit their views on the Prosecutor's request, and particularly on whether they favor an investigation by the ICC. On 14 November 2019, the PTC III granted the Prosecutor her request and an investigation was initiated.

The Bangladesh/Myanmar investigation will cover crimes against humanity committed by Myanmar nationals against the Rohingya population. These crimes began on the territory of Myanmar but an essential part of them occurred in Bangladesh, a State Party to the ICC Statute. They include the alleged deportation of the Rohingya from Myanmar to Bangladesh and persecution on grounds of ethnicity and/or religion. Additional crimes that may fall under the Court's jurisdiction may be identified in the course of the Prosecutor's investigation, so long it is allegedly committed at least in part on the territory of Bangladesh (or on the territory of any other State Party or State accepting the ICC jurisdiction); it is sufficiently linked to the situation as described in the present decision, and it was allegedly committed on or after the date of entry into force of the Rome Statute for Bangladesh or other relevant State Party. FIDH and its member organisations welcomed an ICC investigation into the situation of Myanmar/Bangladesh as an integral part of holding to account those responsible for atrocities inflicted upon the Rohingya population, including individuals bearing the highest responsibility as well as the state of Myanmar.³³

32. UN Press Release, Myanmar's Rohingya Persecuted, Living under Threat of Genocide, 16 September 2019

33. See FIDH-Odhikar press release: "ICC to investigate crimes against Rohingya, the Court's first investigation in Asia", 14 November 2019.

II. FIDH's Five Recommendations for States Parties at the 18th Session of the ASP

FIDH makes five recommendations to States Parties for the upcoming session of the ASP on issues relevant to its mandate.

1. Guarantee an Independent Expert Review of ICC performance and functioning that is purposeful, transparent and inclusive

Twenty years have passed since the adoption of the ICC's founding instrument, the Rome Statute. The establishment of the Court represents a significant stride towards the end of impunity and a commitment to international justice. But the Court has been increasingly criticised. Some of the criticism against the Court relates to its lengthy preliminary examinations, flawed operational management, perceived selectivity or politicisation of investigations and/or cases and limited field presence. The PTC II's refusal to authorise an investigation for the situation of Afghanistan, and the acquittals of Charles Blé Goudé and Laurent Gbagbo in 2019 have further brought into question the Court's performance.

Renowned individuals,³⁴ States, and civil society organisations, including FIDH, have called for an assessment of the Court's performance. On 10 May 2019, the ICC President, Prosecutor, and Registrar accepted a 'comprehensive external review of the Court's overall performance and capabilities, including those factors – internal and external – that impact its performance.'³⁵ FIDH seeks to ensure that the assessment is carried out for the purpose of strengthening the Court and enabling it to carry out, to the fullest extent, its mandate as set out in the preamble of the Rome Statute system. The assessment must be carried out in accordance with the principles of the Rome Statute, including the principle of prosecutorial independence and discretion.

Since then, the States Parties to the Rome Statute have begun to lay the foundation for an assessment of the ICC and the Rome Statute system. The States Parties have prepared three documents related to the assessment, in anticipation of the 18th session of the ASP: an Assembly **resolution** on the review of the ICC and the Rome Statute system, the **terms of reference** for the expert review and a **Matrix**, that is a living document, of issues for review identified primarily by States Parties.

The resolution before the ASP addresses, albeit insufficiently, the purpose, scope, and content of an assessment. In general, FIDH supports a genuine, independent, transparent, and broadly inclusive and victim-centered assessment of the Rome Statute system, including the organs of the Court and the ASP. The resolution clarifies that the assessment will be composed of at least two parallel components, being a) an assessment by the ASP Bureau and its Working Groups and facilitations on cooperation, non-cooperation, complementarity, and equitable geographical representation and gender balance, and b) an Independent Expert Review by a Group of Independent Experts on issues identified in, but not limited to, a working paper titled "Meeting the challenges of today for a stronger Court tomorrow".³⁶

FIDH is concerned that the assessment by the ASP Bureau and its sub-bodies will not be effective and fail to result in concrete action and positive change: this component of the assessment is essentially an assessment by States Parties on issues that relate to the duties and responsibilities of States Parties. In addition, the ASP Working Groups and facilitations have been mandated to look into the issues identified in the Matrix over the past years with little to no success. Clarity on how and if these two components will engage with each other and merge their findings ahead of the 19th session of the ASP in 2020 is lacking.

The work of the Group of Independent Experts is elaborated on in the so called "Terms of Reference for an Independent Expert Review for the International Criminal Court." This document is also placed

34. Prince Zeid Raad Al Hussein *et al*, 'The International Criminal Court needs fixing', The Atlantic Council, 24 April 2019.

35. Letter from President Eboe-Chile, on behalf of the Principals of the Court, to President Kwon of the Assembly of States Parties, 10 May 2019, on file with FIDH.

36. Bureau of the ASP, Draft Working paper: "Meeting the challenges of today for a stronger Court tomorrow, Matrix over possible areas of strengthening the Court and the Rome Statute system," 11 October 2019, on file with FIDH.

before the ASP, through the above mentioned resolution that, if adopted, will lead to its creation. The Independent Expert Review is divided over three clusters. Namely, the:

- 1. Governance Cluster**, to look into *inter alia*
 - a. Unified governance and leadership (the so called One-Court Principle)
 - b. ASP oversight and audit bodies
 - c. Staff engagement
 - d. The budget process
 - e. Fair trial, defence, and legal aid

- 2. Judiciary and the judicial process Cluster**, to look into *inter alia*
 - a. The election of the President and Vice-President of the ICC
 - b. Efficiency of the judicial process
 - c. Working methods of the judiciary
 - d. Victims (participation)
 - e. Reparations

- 3. Preliminary examinations, Investigations and prosecutions Cluster**, to look into *inter alia*
 - a. Preliminary examinations
 - b. Prosecutorial strategies
 - c. Investigations and case-preparation
 - d. Structure of the organ
 - e. Completion strategies

Two-three experts are to be appointed to each cluster. The Presidency of the ASP shall facilitate the work of the experts.

Names of experts are presented by the President of the ASP to the Assembly. FIDH has, and continues to, call for the appointment of entirely independent experts, both from the ICC and the States themselves. These experts should have relevant experience in the management of supranational courts or comparable institutions, as well as the prosecution and investigation of international crimes, including sexual and gender-based crimes, and complex cases. The experts should also have experience engaging with victims and affected communities, as well as civil society organisations.

FIDH calls upon States Parties to:

- **Adopt the resolution establishing the framework for the review of the Court and the Rome Statute system, without entering into negotiations that hinder the assessment from being anchored in the Rome Statute principles;**
- **Welcome and adopt the mandate of the Independent Expert Review (IER), as well as the names of experts identified by the presidency of the ASP; as recommended by the Bureau;**
- **Commit financial resources that enable the prompt work for the IER as recommended by the Bureau.**

2. Reaffirm fundamental support to and cooperation with the ICC

According to the ICC Statute³⁷ the States Parties are under a legal duty to cooperate with the Court.³⁸ The ICC Statute also provides avenues for the cooperation between non-States Parties and the Court including through *ad hoc* agreements.³⁹ Moreover, when “the prospects of securing meaningful

37. Part IX of the Rome Statute specifically addresses international cooperation and judicial assistance.

38. In 2015, seven key areas relating to cooperation and requiring particular attention of 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.

39. 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.

cooperation⁴⁰ is evoked among the reasons to deny the investigation in the situation of Afghanistan, it becomes crucial that cooperation, and non-cooperation, are fully and effectively addressed by States Parties. FIDH encourages States Parties to use the ASP's plenary on cooperation to reaffirm their full commitment to support the Court, address the issue of non-cooperation, and condemn past, current and any future threats against the Court, as well as the visa ban imposed by the US Administration on the ICC Prosecutor since April 2019⁴¹.

Thus far there are 15 outstanding arrest warrants for persons accused of having committed war crimes, crimes against humanity and genocide. States' non-compliance with the Court's cooperation requests for the arrest and surrender of persons has become one of the biggest challenges to the implementation of the Court's mandate. Pending arrest and surrender to the Court, victims experience frustration with the course of justice and delays in seeing accountability materialise. FIDH encourages States, regional, and international organisations, to avoid non-essential contacts with suspects, and to issue statements disapproving the visit of such suspects and reaffirming their commitment to the execution of ICC arrest warrant.

States Parties' obligation in executing the Court's cooperation requests are not limited to arrest warrants. Pursuant to Article 93 of the Rome Statute, States Parties shall comply with requests by the Court in relation to investigations and prosecutions in the areas of: evidence collection and sharing, financial investigation, seizure of assets and the protection of victims and witnesses.⁴²

Several measures have been made to address incidents of non-cooperation, including the appointment of focal points on non-cooperation among States Parties. But more should be done at the ASP level to address this issue: States Parties should respond adequately to findings of non-cooperation made by the ICC. With regard to situations referred to the ICC under Chapter VII of the UN Charter, the UN Security Council ("UNSC") must play a bigger role in supporting the effective implementation of its own resolutions and ensuring that obligations arising from these referrals, particularly the arrest and surrender of ICC suspects, are honoured. The United Nations as a whole must cooperate with the ICC and refrain from any action that would undermine the Court and its decisions. Other regional bodies, such as the African Union (AU), the European Union (EU), and the Organisation of American States (OAS) must foster cooperative ties with the Court and publicly support its mandate and judicial activities.

FIDH encourages States Parties to:

- **Cooperate with the ICC at every stage of the criminal process, including by providing access to territory and information, cooperating during an investigation, and taking all measures necessary to execute arrest warrants and transfer suspects to the seat of the Court;**
- **Improve and strengthen ASP Procedures related to non-cooperation;⁴³ and include a standing agenda item on non-cooperation at the ASP;**
- **Create pressure and momentum to reform the relationship between the ICC and the UNSC, with a view of enhancing cooperation with the Court, in particular in relation to the situations referred to the Court by the UNSC;**
- **Increase and advocate for continued cooperation agreements with the ICC on witness relocation, interim release, enforcement of sentences and relocation of acquitted persons;**

40. ICC-02/17-33, para. 94.

41. See UN Press Release, US "threats" against International Criminal Court must stop, say UN experts, 22 March 2019, and Press Statement by US Department of State, U.S. Policy on the International Criminal Court Remains Unchanged, Michael R. Pompeo, Secretary of State, October 9, 2019

42. Article 93 of the Rome Statute: "Other forms of cooperation: 1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: (a) The identification and whereabouts of persons or the location of items; (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; (c) The questioning of any person being investigated or prosecuted; (d) The service of documents, including judicial documents; (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court; (f) The temporary transfer of persons as provided in paragraph 7; (g) The examination of places or sites, including the exhumation and examination of grave sites; (h) The execution of searches and seizures; (i) The provision of records and documents, including official records and documents; (j) The protection of victims and witnesses and the preservation of evidence; (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court."

43. ICC, Resolution ICC-ASP/17/Res.5, 12 December 2018.

- **Defend the mandate of the Court and voice political backing and commitment to cooperate with the ICC in any and all of its situations.**

3. Amend Article 8 of the Rome Statute as proposed by Switzerland to codify the crime of starvation as war crime in non-international armed conflicts

On 20 April 2018, Switzerland proposed an amendment to Article 8 of the Rome Statute, in accordance with Article 121, adding a paragraph 2 (e) on:

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies.

This amendment would add the intentional use of starvation of civilians as a method of warfare among the the list of war crimes committed in the context of **non-international armed conflicts**. The starving of civilians is already a war crime under the Rome Statute in **international armed conflicts**, pursuant to Article 8(2)(b)(xxv):

*Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.*⁴⁴

This amendment will be considered by the Assembly at this 18th session. The amendment can only be adopted following a 2/3 of States Parties vote in favor of it, pursuant to Article 121(3) of the ICC Statute. FIDH fully supports Switzerland's proposed amendment. The absence of the crime of starvation in non-international armed conflicts from Article 8 of the Rome Statute, despite its recognition as a crime during an international armed conflict, creates an unjustifiable legal vacuum. This is deeply troubling as instances of starvation frequently occur in conflicts that are non-international in nature. Examples of starvation being used as a weapon of war are numerous and growing in their magnitude and devastating effects on already vulnerable populations.

If adopted, the new subparagraph to Article 8(2)(e) of the Rome Statute would stand as a springboard towards possible accountability and justice for victims of this crime.

FIDH encourages States Parties to:

- **Vote in favor of the amendment proposal and promptly ratify or accept this amendment.**
- **Avoid confirming the understanding included in the adoption of earlier article 8 amendments. Such understanding would result in preventing the Court from exercising its jurisdiction over this crime if committed by nationals of states non-parties to the ICC or on the territory of non-member states.**⁴⁵

4. Allow the Court the financial resources needed to carry out its mandate

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)⁴⁶, sets out the framework for the functioning of the ICC. While independent, the Court's capacity in implementing its mandate under the ICC Statute can be constrained by the approved budget.

International criminal investigations, prosecutions and trials cannot be conducted effectively unless the OTP is provided the necessary financial and human resources. In addition to supporting the Court's investigations, prosecutions and judicial activities, the budget should also allow for the Court to implement activities that ensure the criminal process is meaningful to affected communities and

44. This change in the wording is due to a mere technicality, inserted to ensure a correct reference of the prohibition of starvation in the context of internal conflicts, where the Geneva Conventions of 1949 do not apply (apart from Common Article 3 to the Geneva Conventions). See Global Rights Compliance, Policy Paper in Support of the Proposed Amendment, May 2019, footnote 15 and ICC-ASP/17/35, Annex IV: Non-paper submitted by Switzerland, 29 November 2018, para.14.

45. See: Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court, 14 December 2017.

46. CBF, Report of the Committee on Budget and Finance on the work of its thirty-third session, ICC-ASP/18/15, 13 November 2019.

respectful of victims' rights as enshrined in the ICC Statute. The Court risks reputational harm and loss of legitimacy if its direct beneficiaries and greatest allies cannot relate to and be part of the criminal process.

Overall, the Court is proposing a budget for 2020 amounting to €147,17 million euros, excluding the host state's loan, a 1.8 % increase of its 2019 budget, which amounted to €144.55 million euros.⁴⁷ The CBF recommended that the Assembly approve a budget of €146,939.7 thousand (€145.71 million), or a 0.65 % increase, compared to the 2019 approved budget.⁴⁸ If the CBF's recommendation is followed at this year's ASP, the Office of the Prosecutor will only see a 1.2 % increase of its budget, while the Registry and Judiciary will see decreases, similar to last year's dynamics, and in a context where the foreseen inflation rate in the Netherlands is more than 2.5% for the year 2019 and 1.6% for the year 2020.

To FIDH the 'zero nominal growth' approach promoted by a number of States Parties to the Court's budget and its negative impact on the operational capacity of the Court as a whole. FIDH reiterates that financial support to the Court must be needs-driven and not resource-driven. Adequate financial support would ensure that the Court has the capacity to implement its mandate, to prosecute those bearing the highest responsibility for grave crimes, and to enable a meaningful implementation of victims' rights.

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. It is, however, concerning to see the Court organs' "self-censorship" by not requesting a budget that corresponds with their growing needs.

The **OTP** requested a modest increase of €1.13 million, amounting to a 2.4 % increase from its 2019 budget to respond to the rising number of its ongoing preliminary examinations and investigations.⁴⁹ The OTP is currently conducting preliminary examinations into nine situations (Afghanistan, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, the Philippines, Ukraine and Venezuela), and investigating in twelve situations (Bangladesh/Myanmar, Burundi, CAR I and II, Côte d'Ivoire, Darfur/Sudan, DRC, Georgia, Kenya, Libya, Mali and Uganda). Considering the undergoing appeal in relation to Afghanistan, as well as the advancements in many preliminary examinations, the number of investigations might also increase in the up-coming year. Moreover, the investigation into the situation of Bangladesh/Myanmar was authorised after the Court submitted its proposed budget for 2020. The resources needed for such investigation therefore are not reflected in what the ASP will approve in terms of budget for 2020. FIDH urges States Parties to approve, as a minimum, the additional budget requested by the OTP.

FIDH deeply regrets that the **Registry** did not request any increase but rather proposed cuts to its budget.⁵⁰ Due to an intensification of operations with regard to the situations of CAR and Mali, the Registry proceeded to a severe reduction of staff and country support structures in DRC, Uganda and Côte d'Ivoire. FIDH believes that this proposed budget does not meet the actual needs of the Registry and could have deplorable consequences for the Court's work in these situations. For instance, in Côte d'Ivoire, the ongoing appeals against the acquittals of Gbagbo and Blé Goudé entail active outreach by the Registry to inform the population of developments in this case. If the acquittals are overturned, reparations proceedings will begin and victims would need to be informed of how to participate in such proceedings. In the DRC, reparations processes following the conviction of Ntaganda will require similar outreach by the Registry to victims. As evidenced by these examples, the role of field offices is crucial in ensuring that these activities are carried out effectively. Furthermore, knowing that the TFV depends on the support of the Registry and the field offices' support structures, such cuts would arguably impact the TFV's implementation of its reparations and assistance mandates.

For 2020, the **Trust Fund for Victims** requested an increase of € 0.2 million, or 6.5 %, compared to its 2019 budget.⁵¹ Over the past few years, it became evident that the role of the TFV is key the Court's mandate towards victims in implementing reparation orders and in designing harm-based assistance programmes to the benefit of victims of the situations before the Court. The TFV must now design and/or implement reparation orders in four cases, and is developing assistance programmes in several

47. ICC, Proposed Programme Budget for 2020, Executive Summary, ICC-ASP/18/INF.3, 25 July 2019, para. 22.

48. ICC, Report of the Committee on Budget and Finance on the work of its thirty-third session, ICC-ASP/18/15, 13 November 2019, para. 19.

49. ICC, Proposed Programme Budget for 2020, Executive Summary, ICC-ASP/18/INF.3, 25 July 2019, para. 28.

50. Ibid, para. 33.

51. Ibid, para.41.

situations, including most recently in CAR following Bemba's acquittal. FIDH 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.

FIDH encourages States Parties to:

- **Allow, as a minimum, the budget request put forward by the Court for 2020 and oppose any 'zero nominal growth' approach to the Court's budgeting, including in their ASP statements;**
- **Initiate a debate on reforms to the budget process, including on separating the budget discussion from other discussions taking place at the ASP, 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 in funding the Court for the expenses incurred due to referrals of the situations of Darfur/Sudan and Libya by the Council to the Court.**

5. Ensure election of the next ICC Prosecutor and Judges are based on merits only and that election processes remain transparent

Electing the Court's officials is among States Parties' most significant responsibilities when it comes to ensuring the ICC's independent, fair and effective functioning.

a. The election of the next Prosecutor

"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"⁵²

Prosecutor Fatou Bensouda in her solemn undertaking, June 2012

The nine-year mandate of current Prosecutor Fatou Bensouda, who took office in June 2012, ends in June 2021. The election of her successor at the 19th session of the ASP in 2020 comes at a critical time for the ICC. Given the impact that the Prosecutor has on almost every aspect of the Court, each step in the process of this election is crucial to ensure a comprehensive and transparent assessment of candidates.

At its final meeting of 2018, the ASP Bureau decided to establish a committee tasked with overseeing the election of the Prosecutor.⁵³ Following consultations with States, Court officials and civil society, the Bureau adopted the Terms of Reference (TORs) on the Election of the Prosecutor, which set out a clear mandate, timeline and composition for the Committee on the Election of the Prosecutor (CEP) and establish a panel of experts to assist the CEP in carrying out its mandate.⁵⁴

Both the Committee members and the experts were named by the Bureau in June 2019. After the publishing of the vacancy announcement for the position on 2nd August 2019, the CEP has been receiving applications from candidates for the position. Before the submission of an unranked shortlist of three to six of the most highly qualified candidates by the CEP to the ASP Bureau, the panel of experts will put forth their independent assessment of the candidates to the Committee no later than June 2020. It is essential that the next Prosecutor is highly qualified, of high moral character and has strong expertise in handling complex criminal cases, institutional management experience and the ability to act independently and impartially. No political considerations, "vote trading", or any element other than merit must be considered when electing the next Prosecutor of the ICC.

FIDH encourages States Parties to:

- **Ensure that the selection process of the candidate for the ICC Prosecutor position remains fair, transparent and aimed at identifying the most highly qualified candidate for this role;**

52. ICC Press Release, Ceremony for the solemn undertaking of the ICC Prosecutor, Fatou Bensouda, 15 June 2012.

53. Bureau of the Assembly of State Parties, Twenty-second meeting, The Hague, 12 December 2018.

54. Bureau of the ASP, Election of the Prosecutor, Terms of Reference, 4 April 2019. On file with FIDH.

- **Avoid engaging in reciprocal political agreements or “vote-trading” in this key election of the next Prosecutor.**

b. The election process of Judges

While the Prosecutor plays a critical role in the ongoing and successes of the ICC’s investigations and cases, a successful judicial election cycle is a necessary step in ensuring that justice is granted to victims of grave crimes. The nomination and election of the most highly qualified candidates for the positions of judges is essential in order to protect the Court’s standards, independence, and impartiality as a judicial institution. Currently, States Parties are negotiating a resolution aiming at strengthening the process of judicial nomination and election, to be tabled for adoption at the upcoming Assembly session.

The timing for such resolution cannot be more appropriate. In 2020, six new judges will be elected at the 19th session of the ASP. The next judicial elections therefore mark a pivotal moment for the ICC’s future as it looks towards an almost complete turnover of leadership at the 2020 session. Following the regular three-year election cycle, the six newly elected judges will each serve a nine-year term from 2021-2030.

During the nomination period, State Parties, along with States that have started the process of ratification, may suggest candidates who will be assessed by the Advisory Committee on the Nomination of Judges (ACN). The ACN was activated in 2011/2012 and mandated to facilitate the nomination and election of the most highly qualified judges, to assess candidates and to determine whether or not they are qualified to serve on the bench of the ICC. The ACN formulates recommendations following their assessment of candidates that are published shortly before the elections take place. For the report of the ACN to influence States’ choice at judicial elections, it needs to be published at least three months prior to the judicial elections. For that to happen, the judicial cycle would have to commence earlier and in a more expedited manner, allowing the ACN sufficient time for its assessment and report writing.⁵⁵

The chambers of an independent, fair and effective international Criminal Court must be composed of a gender balanced, impartial and highly qualified judges that represent the geographical distribution as well as the legal systems of the Court’s States Parties. The criteria established under the ICC Statute that judge nominees must demonstrate is equivalent to the appointment of the nominee at the highest judicial offices in their home countries. Judges shall be chosen among persons of high moral character, impartiality and integrity, who have competence in criminal law and procedure, the necessary experience whether as a judge, prosecutor, advocate or in other similar capacity, and competence in relevant areas of international law, such as international humanitarian law and human rights law. Candidates must also be fluent in at least one of the working languages of the Court. Additional expertise in the areas of victims’ rights and sexual and gender-based crimes is desired.⁵⁶ FIDH believes that the mandate of the ACN should be broadened for it to conduct a more rigorous assessment of the qualifications of candidates to ensure that the ICC Statute requirements are adequately met.

FIDH urges States Parties not to engage in reciprocal political agreements, or “vote-trading” in these key elections. The impact of political nominations on ICC proceedings is devastating to the Court’s increasing and challenging- including novel- litigation work which should be carried out by the most competent candidates, rather than those who have political backing. Furthermore, it is essential that the next judges are not only highly qualified, have strong expertise in criminal law and procedure but also are able to act independently and impartially.

FIDH encourages States Parties to:

- **Improve the judicial nomination and election process by adopting a standalone resolution on judicial elections that broadens the mandate of the ACN and modifies the calendar for judicial elections;**

55. See for more on this: Open Society Justice Initiative Report, Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court, p. 48

56. FIDH Report, The Rome Statute at Twenty (1998-2018): 10 Challenges to an Effective and Independent International Criminal Court, 16 July 2018, p. 14.

- **Develop a national legal framework or, at a minimum, publish a set of fixed rules, for nominating judges to the ICC, ensuring a transparent, inclusive and fair process for shortlisting, interviewing, and selecting candidates;**
- **Consider only the most qualified and independent candidates for any of these positions that are so fundamental to the Rome Statute system.**



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

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

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

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ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

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