

## AMNESTY INTERNATIONAL PUBLIC STATEMENT

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# ASP 20<sup>TH</sup> SESSION: STATES MUST CONSIDER THE IMPACT OF THEIR CURRENT DECISIONS ON THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT

*At the Twentieth Session of the Assembly of States Parties to the Rome Statute (ASP), it is critical for states parties to consider how the decisions and positions they adopt now - in The Assembly and outside of it - may fatally undermine the future of the International Criminal Court (ICC) and Rome Statute system. Unfortunately, a number of states parties' actions and positions seem at odds with the ideals they express publicly on the ICC, including within the general debate at each ASP session, in terms of providing the Court with adequate political support, cooperation or budget to function.*

[See here](#) for Amnesty International's Key Recommendations for ASP20.

## THE IMPACT OF STATES PARTIES' CURRENT DECISIONS ON THE FUTURE OF THE ICC

In April this year, Amnesty International and the TMC Asser Instituut released the '**Rome Statute at 40 report**'. The report reflects the views of experts and practitioners who met to critically assess how the Rome Statute's objectives of ending impunity and offering redress to victims could be better realized over the next twenty years. In particular, the experts discussed the future of the International Criminal Court (ICC) and the Rome Statute *system* more generally and considered what these may look like at the 40th anniversary of the Rome Statute. The final report contains key findings and recommendations on the future of the ICC and the 'system' of international justice created by the Rome Statute.

As we look ahead, it is critical for the States Parties to consider how the decisions and positions they adopt now - in The Assembly and outside of it - may fatally undermine the future of the ICC and Rome Statute system. Unfortunately, a number of states parties' actions and positions seem at odds with the ideals they express publicly on the ICC, including within the general debate at each ASP session, in terms of providing the Court with adequate political support, cooperation or budget to function.

However, in a deeply concerning development, which goes beyond not providing the Court with adequate support, in 2021 a number of states parties actively opposed the Office of the Prosecutor's decision to open an investigation in the Palestine situation, following a determination by the Pre-Trial Chamber on the Court's jurisdiction. In doing so, they further contradict their own outwardly supportive positions on the ICC, in order to protect a political ally. These states parties seem willing, if not eager, to cement a selective system of international justice, which would prioritize the interests of powerful states over the interests of victims. We therefore take this opportunity to remind members of the ASP that regardless of whether they agree with the ICC's decision on its jurisdiction, all states parties to the Rome Statute are obligated to comply with their Rome Statute obligations.

## THE INCOHERENCE OF ZERO-GROWTH BUDGET POSITIONS WITH DEMANDS ON THE COURT

This year the Office of the Prosecutor ('OTP') has opened investigations in Palestine, The Philippines, and Venezuela – all of which will require significant resources to be effective. These developments clearly demonstrate the incoherence of a 'zero-growth' budget approach (that a number of states parties continue to adopt) with the growth of the OTP's workload and expectations placed upon it – including by those states pursuing a 'zero-growth' budget policy.

It is crucial to recognize that the severest impacts of the Court's underfunding are felt – not in The Hague – but in situation countries, where the Court's ability to fulfil its mandate to carry out investigations; to provide meaningful access to justice for victims or; to provide effective outreach to affected communities has been acutely damaged. Indeed, the impact of the Assembly's chronic underfunding of the Court is starkly upon us.

In the past year a lack of resources has been given as a justification for the Prosecutor to 'hibernate' concluded preliminary examinations in Nigeria and Ukraine, despite determining that full investigations are warranted. The 'hibernation' approach is deeply problematic. It is likely to shut the door on victims' only hope of justice; further politicize the ICC; leave civil society, victims and witnesses vulnerable to threats, intimidation and attacks by perpetrators seeking to take advantage of delays to undermine the ICC and destroy evidence; and render future investigations impossible.

Similarly, the OTP has resorted to arguments of resource scarcity to pursue a deeply-flawed selective justice approach in Afghanistan. As we have said many times, a selective approach presents an overwhelming threat to the fulfilment of the Court's mandate and its future, particularly where the decisions may be perceived as politically motivated.

Again looking to the future, it is clear that a new budgetary approach is needed. Annual demands for zero-growth in the Court's budget are unacceptable and unsustainable, and we urge the 'silent majority' of states parties who have not actively pursued a zero-growth budget position to make themselves heard. The Assembly must urgently discuss the medium, and long-term resource requirements for an effective ICC, as well as how the Court can achieve at least a baseline capacity level of staff and resources, where it can respond to demands without undermining quality and efficiency.

## THE INDEPENDENT EXPERT REVIEW EXERCISE

In relation to the Independent Expert Review exercise, Amnesty International had urged the Experts to interpret their mandate broadly, and not to shy away from highlighting where failures in states parties support or management oversight have led to the Court and its organs being unable to fulfil their mandate - as well as calling on them to address other broader political questions in providing recommendations to the Assembly. The Experts' failure to do so was deeply disappointing, and until States Parties recognize their own governance shortcomings and their impact on the Court's performance, the Experts' recommendations will remain fatally limited to one-side of the ICC-ASP equation.

Amnesty International remains extremely wary of states parties seeking to use the Independent Expert Review, and discussions within the ASP's intersessional working groups, as a vehicle through which states can unduly interfere with the Court's independence. This year, we have been particularly alarmed by a states party in a working group declaring that discussions on complementarity - as part of the Independent Review - provided states with the opportunity to 'put things straight' and 'correct the OTP'. Similarly, in an egregious letter of 9 April 2021, UK Prime Minister Johnson equated his opposition to the ICC's investigation in Palestine with the UK's and other countries work 'to bring about positive change at the Court' and his hopes that '[t]he election of two highly qualified UK nationals, Judge Joanna Korner QC and Karim Khan QC [...] respectively, *will help serve reform*' [emphasis added]. In our view, the UK Prime Minister's letter highlights the dangers of states party overreach in the name of 'reform', and we urge all states parties to be vigilant to such dangers in their work on the Independent Expert Review and in their Rome Statute governance roles more broadly.

We also remain deeply concerned that the Independent Expert Review ('IER') was defined by a lack of engagement by the independent experts with stakeholders at the national-level and a lack of involvement of people from the field, including victims' communities and other stakeholders. As one participant stated in the 'Rome Statute at 40' report; 'where are the local voices, where are their interactions, where are their views?' In our view, it is imperative that the ongoing work related to the IER urgently includes the participation of stakeholders from situation countries and affected communities. We understand that the Independent Experts had been requested and invited to visit situation countries and to conduct consultations within those countries – with a view to meeting with people from affected communities and those who have dealt with the ICC. While the impact of the Covid-19 pandemic has been raised as a reason for the Independent Experts having been unable to consult with those in situation countries, we firmly believe that the Experts should have exhausted all avenues to gather the input of stakeholders in situation countries, including travelling to those countries. Indeed, in the 'Rome Statute at 40' report, a number of participants described that while the Independent Experts had met with international NGOs, in The Hague, with some participants joining the meeting 'online', that this was 'manifestly insufficient' for the Independent Experts to access those groups 'that actually do the work' in situation countries. In this regard, and going forward, we urge states parties and all those engaging on the IER not to consider meetings solely in New York or The Hague as sufficient for stakeholder engagement with the IER, and to consider how the meaningful participation of stakeholders in situation countries can be included in any future work on the IER and in the consideration of the Experts' recommendations.

## RECOGNISING WHERE SIGNIFICANT IMPROVEMENTS ARE NEEDED TO STRENGTHEN ICC COOPERATION

This year's Assembly session once again provides for a standalone session to discuss states parties cooperation with the Court, an area which the Independent Experts highlighted 'is only increasing with the growing number of situations, more suspects at large, the need to obtain evidence from witnesses located abroad, and increased use of digital evidence (e.g. online banking, messaging, social media, email platforms).' Unfortunately, and in keeping with their seeming unwillingness to critique states parties, the Experts did not provide substantive recommendations to the Assembly on how cooperation could be improved, other than providing that '[t]he OTP and the ASP should consider improvements in cooperation' and that 'cooperation between the Court and the ASP needs to be encouraged'.

However, in their Final Report, the Independent Experts highlighted the negative impacts of a lack of states parties' cooperation on the Court's operations, which results in the Court being unable to fulfil its mandate or being severely delayed in doing so.

For example, the Experts provide that delays in Preliminary Examinations 'may be manifested by the provision of minimal cooperation, and inconsistent, insufficient, irrelevant, or delayed information' and in relation to the tracking and arrest of Court fugitives, the Experts state that '[i]n 2013, the ASP appointed a Rapporteur on arrest strategies, who delivered a comprehensive action plan for the ASP and the Court that was based on the lessons learnt from national and international jurisdictions. The ASP has taken note of the Rapporteur's reports, and held a number of consultations, as well as information sharing and awareness raising activities. Unfortunately, these efforts do not appear to have had significant positive consequences.' Regarding ICC investigations, 'the Experts heard serious concerns from some OTP staff to the effect that there remain troubling situations in which there is a serious lack of cooperation and inordinate delays in responding to requests for information.' The Experts provide that '[w]ell before the pandemic, investigative staff frequently encountered difficulties in collecting evidence due to lack of cooperation.' This was replicated in relation to cooperation required for interviewing witnesses and realising investigative opportunities, where the Experts 'were informed of the increasingly burdensome requirements placed by some states on the OTP to enable it to carry out witness interviews [which regrettably] also applies to some States Parties. Delayed interviews not infrequently result in the loss or dilution of investigative opportunities'.

Given the need for further improvement in states parties cooperation with the Court, around many of the issues highlighted above, in our view, the standalone session on cooperation may provide an excellent opportunity to discuss practical solutions to the cooperation challenges the Court is facing. This year, discussions on the seizing and freezing of assets would provide the opportunity to discuss how such assets could be used for reparations awards.

In a similar manner, states parties should recognize that the 'voluntary' cooperation is an unfortunate misnomer, in its implication that such cooperation is not essential to the proper functioning of the Court. In fact, the Court can only function if states parties are willing to enter into 'voluntary' agreements with the Court, and we continue to urge states parties to do so. One area of significant concern surrounds the lack of willingness of states parties to enter into voluntary agreements with the Court in relation to defence matters, or to matters relating to accused persons and acquitted persons.

## **ENSURING THE HIGHEST STANDARDS OF HUMAN RIGHTS COMPLIANCE AT THE ICC**

In our view, the International Criminal Court and its states parties must also be judged on how they ensure the highest standards of human rights compliance at the ICC, particularly in relation to fair trial rights of accused and acquitted persons. In this regard, the ongoing situation of Mr. Charles Ble Goudé following his acquittal is of significant concern. Amnesty International understands that despite being acquitted, Mr Ble Goudé has not been able to leave the Netherlands, nor even allowed to leave The Hague - as such he is not fully at liberty. Mr Ble Goudé's case highlights the stark need for the ICC and states parties to consider the rights of acquitted persons, and how they can be fully realised, including through acquittal relocation agreements, which should allow for an acquitted person to be fully at liberty in states who have entered into such agreements. Amnesty International particularly calls on The Netherlands to consider its obligations as the ICC's host state as requiring it to ensure the right to liberty - to the fullest extent possible - of acquitted persons who may practically have to remain in The Netherlands following acquittal in the courtroom.

The human rights of accused persons cannot remain at the mercy of states who may be inclined to budget for them. We note in particular the critically low-level of the Trust Fund for Family Visits, which remains a perennial problem and where the full realisation of the rights of indigent detainees to family visits remains dependent on whether states parties are willing to provide donations to the Trust Fund. In our view and given the ongoing inadequacy of the voluntary funding approach, further serious consideration should be given to including Family Visits for indigent detainees in the regular budget of the Court.

## **CALLING ON THE ICC-OTP AND STATES PARTIES TO REDRESS SELECTIVE APPROACHES TO INTERNATIONAL JUSTICE**

In March this year, ahead of [Prosecutor Khan's assuming office](#), we welcomed the removal of [egregious sanctions](#) imposed by the US administration on the Office of the Prosecutor. The US [sanctions](#) directly threatened the independence of the Prosecutor and were applied with the overt intention of halting investigations into US nationals – despite the Court having clear territorial jurisdiction to do so. With this in mind, we remain seriously concerned by the current Prosecutor's deeply unconvincing explanations for his Office's [one-sided](#) approach to the investigation in Afghanistan, as demonstrated by his Office's de-prioritisation of investigations into crimes allegedly committed by the then government forces, the Afghan

National Security Forces, and its international allies. We continue to call on Prosecutor Khan to conduct a full investigation into all parties to the Afghanistan conflict and to ensure that prioritization of cases is led by the evidence and not prejudged in a manner that suggests political expediency. In our view, a selective approach to international justice that gives the impression of politicisation jeopardises the future of the ICC. In this regard, we concur with the Pre-Trial Chamber's recent statement 'that a proper investigation [in the Afghanistan situation] should focus first on crimes, and then on identifying who the responsible persons of those crimes are. Not only impartiality, but also appearance of impartiality, is a *sine qua non* requirement for justice'.

We are also concerned about the impact that the OTP's approach to the Afghanistan investigation will have on the Assembly's efforts towards universality of the Rome Statute. The unjustified deprioritisation of investigations into a major-power plays directly into the hands of a number of states who have been unwilling to ratify or accede to the Rome Statute based on their characterisation of the Court as a political institution.

However, we note from the Prosecutor's statement of 27 September, that '[i]n relation to those aspects of the investigation that have not been prioritised [investigations into the Afghan National Security Forces, as well as the CIA and US military] that the OTP 'will remain alive to its evidence preservation responsibilities, to the extent they arise, and promote accountability efforts within the framework of the principle of complementarity.'

In this regard, we call on the Assembly of States Parties to pursue how the OTP can share information or evidence it has preserved of crimes under international law in the Afghanistan situation, including crimes committed by the ANSF, CIA and US military. States parties must cooperate with the Court and assess how their national authorities can operationalise any information or evidence gathered by the OTP in the Afghanistan situation. States parties have the obligation and capacity to ensure investigations into the heinous crimes committed in the Afghanistan situation and are yet to do so – we note for example that the OTP had specifically examined CIA black-sites in states parties Lithuania, Poland, and Romania.

Ultimately, if the ICC is to be seen as part of a broader Rome Statute or international justice *system*, states parties must step-up to ensure investigations of all parties and persons suspected of committing crimes under international law, including those traditionally seen as allies.

## **ABSENCE OF ANNUAL REPORT ON PRELIMINARY EXAMINATIONS - A BACKWARD STEP ON TRANSPARENCY**

At this ASP session, we regret the OTP's decision not to publish its annual report on preliminary examinations, which we hope does not mark a regressive precedent away from transparency, an issue which was specifically highlighted by the Independent Expert Review, as a means to 'improve the prospects of cooperation from States Parties and non-States Parties and assist in mobilising the civil society organisations in situation countries.' While we recognise that the number of preliminary examinations beyond 'phase one' has decreased this year, we maintain that regular OTP reporting is a crucial requirement during the preliminary examination phase, above all to provide information for stakeholders and affected communities in situation countries who may only receive such updates once a year. The annual report also provides a key opportunity for the OTP to publish updates on a number of phase one preliminary examinations and article 15 submissions the Office has received – which serve to provide the OTP's analysis on certain factual and legal situations, which is invaluable for information providers who are pursuing justice in relation to particular situation countries, types of criminality, or modes of perpetration.

In our view, rather than ceasing its annual preliminary examination reports, the OTP should consider how its reporting practice – perhaps not just in relation to preliminary examinations - can be strengthened further to: highlight states party (in)activity in any given (preliminary examination) situation and to put pressure on states parties to meet their Rome Statute obligations. Indeed, the OTP's reports can serve to increase the Court's leverage and possibly impact, as well as perhaps serving a 'catalysing' function, if the OTP provides robust findings on Rome Statute crimes which may have been committed in particular states parties, as well as on any complementary national level proceedings (or the lack thereof) in line with those states' Rome Statute obligations.

## **RECOGNISING AND DEFENDING THE CRUCIAL ROLE OF HUMAN RIGHTS DEFENDERS IN THE ROME STATUTE SYSTEM**

In conclusion, we remind all states parties that this year – as in every year of the Court's operations – we have seen threats and [attacks](#) made against civil society and human rights defenders who engage with the Court. **We call on the Assembly to recognize the crucial role that civil society and human rights defenders play in the Rome Statute system**, and to condemn ongoing attempts to curtail the activities of stakeholders whose work is vital to the success of the Court and the Office of the Prosecutor.