

INTERNATIONAL CRIMINAL COURT

RECOMMENDATIONS TO
THE TWELFTH SESSION OF
THE ASSEMBLY OF STATES
PARTIES (20 TO 28
NOVEMBER 2013)

**AMNESTY
INTERNATIONAL**



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RECOMMENDATIONS TO THE TWELFTH SESSION OF THE ASSEMBLY OF STATES PARTIES

INTRODUCTION

The twelfth session of the Assembly of States Parties of the International Criminal Court (Assembly) will take place in The Hague from 20 to 28 November 2013.

At this session, the Assembly will:

- Conduct a General Debate about the International Criminal Court (“ICC” or “Court”) and the Rome Statute system;
- Adopt the 2014 budget for the ICC;
- Elect one judge and six members of the Committee on Budget and Finance;
- Conduct plenary discussions on cooperation and the impact of the Rome Statute system on victims and affected communities;
- Consider resolutions on cooperation, complementarity, victims and the Independent Oversight Mechanism, among others;
- Consider amendments to the Rules of Procedure and Evidence.

In addition to these issues, the session is expected to be dominated by the African Union’s calls to suspend the ICC’s trials of Uhuru Kenyatta and William Ruto in view of their official status as President and Deputy President of Kenya respectively. In particular,

- A special segment requested by the African Union to discuss the “Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation” will take place on 21 November.
- Proposals to amend Rule 134 of the Rules of Procedure and Evidence to incorporate new provisions on presence at trial, including through communications technology, will be considered.
- Proposals to amend a number of articles of the Rome Statute, including Article 27 and Article 63 have been submitted to the Working Group on Amendments. Even though these proposals cannot be adopted at this session, they are expected to be discussed in detail, including during the special segment.

In this paper, Amnesty International sets out a series of recommendations in relation to these issues which urge states parties to continue to support the work of the ICC towards ending impunity and to protect the integrity of the Rome Statute. A summary of the recommendations can be drawn from the contents page above.

Amnesty International will have a delegation present throughout the session whose

members will be available to discuss any of these issues and recommendations with government delegations. In advance of the session, delegates may contact Amnesty International's Centre for International Justice [E-mail: cij@amnesty.nl, Phone: +31 (0)70 304 7111/2/4].

GENERAL DEBATE

1. STATES PARTIES SHOULD MAKE STRONG STATEMENTS IN SUPPORT OF THE ICC DURING THE GENERAL DEBATE

The General Debate is a forum where states can discuss a range of issues concerning the Rome Statute system. It presents an important opportunity for all states parties to: affirm their support for the ICC and commitment to the Rome Statute system; present their views on key issues on the agenda; and report on steps that they have taken or are planning to take to support the work of the ICC, the Trust Fund for Victims and the Rome Statute system generally.

This year the President of the Assembly has encouraged states parties to consider cooperation and the impact of the Rome Statute system on victims and affected communities in their statements, which will also be the subject of separate plenary discussions, as well as the issue of complementarity.¹ States may also wish to express their views on the concerns raised by the African Union.

Amnesty International recommends that, in their statements, states parties:

- Recognize the importance of the ICC's existing investigations and cases and its efforts to provide justice to victims of the most serious crimes of concern to the international community as a whole;
- Affirm their commitment to supporting the ICC's work and protecting the integrity of the Rome Statute;
- Express continued support for the full implementation of the rights of victims contained in the Rome Statute and the need for effective outreach to victims and affected communities;
- Announce voluntary contributions to the ICC Trust Fund for Victims, pledge to make annual voluntary contributions and urge other states to do so;
- Commit to cooperate promptly and fully with the ICC, including in the execution of all arrest warrants, and urge all states to do the same;
- Pledge to enter into bilateral agreements with the ICC to cooperate effectively with the relocation of acquitted persons, interim release of accused persons and victim and witness relocation.
- Commit to ratify or accede to the Agreement on Privileges and Immunities of the ICC and implement it into national law, if they have not done so;
- Acknowledge that complementarity is the cornerstone of the Rome Statute system and urge the Assembly, the ICC and states to continue to work towards strengthening the ability of states to fulfil their obligations to investigate and prosecute crimes under international law genuinely;

¹ Letter from the President on the General Debate, dated 8 October 2013.

- Welcome the updated draft Strategic Plan of the ICC for 2013 to 2017 and the Strategic Plan of the Office of the Prosecutor for 2013 to 2017 and stress that the Assembly must provide the ICC with sufficient resources to implement these strategic plans effectively; and
- Welcome progress made this year towards operationalizing the Independent Oversight Mechanism, recognizing that it is a crucial part of the Rome Statute system for ensuring transparency and accountability within the ICC.

OTHER PLENARY DISCUSSIONS

Separate plenary discussions on victims and affected communities, cooperation and a special segment requested by the African Union on the “Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation” will also take place during the twelfth session. Amnesty International encourages all states parties to take part in these important discussions, taking into account the recommendations below.

SPECIAL SEGMENT ON THE “INDICTMENT OF SITTING HEADS OF STATE AND GOVERNMENT AND ITS CONSEQUENCES ON PEACE AND STABILITY AND RECONCILIATION”

Amnesty International is concerned that the commencement of the ICC’s trial of Kenya’s Deputy President and the scheduled start of the trial of its President (in February 2014) has prompted a major political backlash against the ICC. There is a risk that the backlash may lead to the victims of the 2007-8 post-election violence being denied justice and that support for the ICC in Africa will be undermined.

Amnesty International therefore welcomes the decision to organize this special segment which focuses on the African Union’s key concerns and its assertion in its Assembly’s *Decision on Africa’s relationship with the ICC* of 12 October 2013 that “no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.”²

2. STATES PARTIES SHOULD STRONGLY AFFIRM THEIR SUPPORT FOR THE PRINCIPLE SET OUT IN ARTICLE 27 THAT NO-ONE, REGARDLESS OF THEIR STATUS, IS EXEMPT FROM PROSECUTION BY THE ICC FOR CRIMES UNDER ITS JURISDICTION

The African Union Assembly’s Decision of 12 October, which states that sitting heads of state must not be prosecuted by the ICC, is inconsistent with Article 27 of the Rome Statute, which Kenya and 33 other African Union member states have ratified.³ Indeed, some African states parties, including Burkina Faso and South Africa have incorporated Article 27 into national law. The Kenyan Constitution also provides: “[t]he immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.”⁴ The principle reflected in Article 27 that no-one, regardless of their status, can be exempt from prosecution before the ICC for crimes under the jurisdiction of the Court is a fundamental element of the Rome Statute system which is essential to

² Ext/Assembly/AU/Dec.1(Oct.2013), available at: http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf

³ Kenya ratified the Rome Statute on 15 March 2005.

⁴ Article 143(4), Constitution of Kenya, 2010.

realizing states parties' aim of ensuring that "the most serious crimes of concern to the international community as a whole must not go unpunished."⁵ All states parties are urged to affirm their commitment to this principle during the discussion and to oppose proposals to weaken Article 27 (see recommendation 16 below).

Even though this is the first time that a trial is planned to commence against a sitting head of state, Article 27 clearly provides for such trials. Sudanese President Omar al-Bashir and Libyan head of state Colonel Muammar al-Gaddafi both held office at the time that arrest warrants were issued against them by the ICC. The Special Court for Sierra Leone also issued an indictment against Charles Taylor while he was president of Liberia. In the Kenyan cases, the ICC issued a summons instead of an arrest warrant for both Uhuru Kenyatta and William Ruto, which provides them with the opportunity to hold the offices they have subsequently been elected to while the trials proceed.

If sitting heads of state were exempt from prosecution by the ICC while they hold office, it would not only obstruct justice for the most serious crimes of concern to the international community and delay or deny access to justice for victims and possibly reparation before the ICC, but would also be open to abuse. While in power, those accused would be able to commit crimes under the jurisdiction of the ICC with impunity. Furthermore, heads of state may seek to hold onto power at any cost to avoid prosecution by the ICC in the future.

3. STATES PARTIES SHOULD HIGHLIGHT THAT THERE IS NO EVIDENCE OF "THE POLITICIZATION AND MISUSE OF INDICTMENTS AGAINST AFRICAN LEADERS BY THE ICC"

Although all eight situations that the ICC has dealt with to date have been on the African continent, there is no evidence to support the argument that there has been "politicization and misuse of indictments against African leaders by the ICC."

The ICC must expand its investigations and prosecutions to situations in other regions, some of which have been in preliminary examination for long-periods. However, that does not mean that the current situations are without basis or that the ICC has been discriminatory in focussing on African situations. Crimes under the jurisdiction of the ICC have been committed in all eight of the situations. Moreover, five of the situations were referred to the ICC by the governments of African countries who claimed they were unable to investigate and prosecute the crimes before national courts (Central African Republic, Côte d'Ivoire, Democratic Republic of Congo, Mali and Uganda). Two situations (Darfur and Libya) were referred by the UN Security Council acting under Chapter VII of the UN Charter with the support of its African members. The only situation where the first ICC Prosecutor decided to seek an investigation on his own initiative was Kenya. The decision was taken after giving the national authorities every opportunity to investigate and prosecute the crimes genuinely before national courts, which they failed to do.⁶

There is also little basis to imply that the Office of the Prosecutor (OTP) is specifically

⁵ Preamble, Rome Statute.

⁶ In particular, on two occasions, efforts failed at the Kenyan parliament to establish a special tribunal to prosecute those believed responsible for the post-election violence (i.e. on 12 February 2009 and 11 November 2009). Furthermore, under sec. 8(2) of the International Crimes Act 2008, the Kenyan High Court has jurisdiction over Rome Statute crimes. Despite this, in its Decision on the admissibility challenge filed by Kenya against the ICC cases in 2011, the Appeals Chamber agreed with the Pre-Trial Chamber's decision that Kenya could not be said to have been conducting investigations into the same acts and same persons accused by the ICC; ICC01/09-02/11OA, paragraph 69.

targeting leaders. Of the 28 arrest warrants and summonses issued since 2002, the ICC Prosecutor has commenced proceedings against two sitting heads of state (Sudanese President Omar al-Bashir and Libyan head of state Muammar al-Gaddafi) and one former head of state (former President of Côte d'Ivoire Laurent Gbagbo). Summonses against Uhuru Kenyatta and William Ruto were issued a year before they were elected to office. In the three other situations where the ICC has charged persons (Central African Republic, Democratic Republic of Congo and Uganda), the ICC Prosecutor has so far only focussed on crimes committed by armed groups.

All arrest warrants and summonses have been approved by panels of independent judges. Furthermore, ICC judges determine at the pre-trial stage whether or not the OTP had presented "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged."⁷ In a number of cases, including those against two persons accused of crimes in Kenya's post-election violence, the Pre-Trial Chamber declined to confirm charges because they were not satisfied that this evidentiary threshold had been met. In the cases against Uhuru Kenyatta and William Ruto, the Pre-Trial Chamber decided that the cases should proceed to trial.

4. STATES PARTIES SHOULD AFFIRM THE FINDINGS OF THE REVIEW CONFERENCE THAT "THERE CAN BE NO LASTING PEACE WITHOUT JUSTICE AND THAT PEACE AND JUSTICE ARE THUS COMPLEMENTARY REQUIREMENTS"

Arguments raised in the African Union Assembly's Decision of 12 October that the prosecution of a sitting head of state could undermine peace and stability and reconciliation ignore the devastating impact that impunity can have following serious political violence, especially on victims and affected communities. Such notions of the relationship between peace and justice have been firmly rejected in recent years, most notably by states during the 2010 Review Conference of the Rome Statute which stated in the Kampala Declaration that they are "convinced that there can be no lasting peace without justice and that peace and justice are thus complementary requirements."⁸ States parties should affirm these principles during the discussions and highlight that the ICC's cases are an important opportunity to address impunity for the crimes committed in 2007-8 and ensure that these crimes are never again committed against Kenya's people.

Amnesty International is, however, concerned that the widespread efforts by the Kenyan and other governments to politicize and misrepresent the ICC's justice process are potentially inflammatory and should be condemned.

Amnesty International recognizes that the very serious attacks committed at the Westgate Shopping Mall in Kenya on 21-24 September 2013 pose specific and serious challenges for the Kenyan government. However, its efforts to respond to this situation must co-exist with and should not override Kenya's obligations under international law to cooperate with the ICC's efforts to address impunity for the equally very serious crimes committed in 2007-2008.

⁷ Article 61(5), Rome Statute.

⁸ Paragraph 7, Preamble, *Kampala Declaration*, Declaration RC/Decl.1, 1 June 2010.

5. STATES PARTIES SHOULD INSIST THAT THE TRIALS OF UHURU KENYATTA AND WILLIAM RUTO MUST PROCEED WITHOUT POLITICAL INTERFERENCE

The special segment coincides with renewed requests for the United Nation Security Council to defer the cases against the Uhuru Kenyatta and William Ruto in accordance with Article 16 of the Rome Statute. Amnesty International opposes the request for deferral under Article 16 because it would delay justice and reparation for victims of the 2007-2008 election violence; amount to political interference in the ICC's cases; and expand the use of Article 16 to situations where it was never intended to be used with far reaching consequences.⁹ The deferral request is a decision for the Security Council and not the Assembly. However, in the event that the initiative is raised in this discussion, Amnesty International encourages states parties, in particular those that are, or are about to become, members of the Security Council to put forward the concerns of their government about the request for a deferral and to ensure that the records of the discussions could not be interpreted as the Assembly supporting a deferral in any way.

Amnesty International is also concerned that the African Union Assembly's Decision of 12 October supports the non-appearance of Uhuru Kenyatta at trial until the African Union's concerns have been addressed by the Security Council and the ICC. States parties should urge the African Union and President Kenyatta not to employ threats of non-cooperation as a tactic. They should note that, if the President refuses to attend trial, it may lead to the ICC issuing an arrest warrant against him.

6. STATES PARTIES SHOULD URGE UHURU KENYATTA AND WILLIAM RUTO TO CONTINUE TO COOPERATE WITH THE ICC AND PARTICIPATE IN THEIR TRIALS; IF CONFLICTS ARISE THEY SHOULD RAISE THEM WITH THE TRIAL CHAMBER

The ICC's decision to allow Uhuru Kenyatta and William Ruto to participate in proceedings voluntarily under summons provides them with the opportunity to continue to hold the offices they have been elected to during their trials. Although Amnesty International recognizes that the trials may pose challenges to the performance of their official roles, this is not a sufficient basis to exempt them from prosecution while they hold office and delay the justice process for victims of the 2007-8 post-electoral violence. Uhuru Kenyatta and William Ruto should attend trial proceedings when required, tailoring their professional schedules accordingly.

When significant conflicts arise between the trial schedule and their professional responsibilities, they may request the Trial Chamber to schedule hearings around their obligations, to adjourn hearings or, in exceptional circumstances, to excuse them from attending some hearings. It is notable that, following the Westgate Shopping Mall attack, the ICC granted William Ruto's request for the adjournment of his trial. Further, on 25 October, the ICC Appeal Chamber confirmed that Article 63(1) grants a Trial Chamber discretion, allowing it, in exceptional circumstances, to permit an accused person to be absent from Court during the proceedings. On the same day, William Ruto made an application to be excused from his trial for three days. That application and a subsequent

⁹ See: Amnesty International, Letter to the UN Security Council, Kenya: African Union's request for the United Nations Security Council to defer the trials of President Uhuru Kenyatta and Deputy President William Ruto, AFR 32/010/2013, 30 October 2013, available at: <http://www.amnesty.org/en/library/asset/AFR32/010/2013/en/oc100658-036a-4687-bd35-6cc09b1bd653/af320102013en.pdf>. The drafting history of Article 16 shows that the purpose of the provision was to enable the United Nations to undertake delicate peace negotiations in situations where the prospect of investigations or prosecutions by the ICC would impede such peace-making efforts.

one were granted. These decisions demonstrate that the ICC is balancing, on the one hand, the need for speedy and fair trials and the interests of victims and witnesses and, on the other hand, the rights as well as the responsibilities of the accused.

DISCUSSION ON THE IMPACT OF THE ROME STATUTE SYSTEM ON VICTIMS AND AFFECTED COMMUNITIES

Amnesty International welcomes the inclusion of a plenary discussion on these important issues for the first time, which is scheduled to take place on Friday 22 November. The discussion comes at an important moment following the ICC's development of a Revised Strategy in relation to victims and at a time when the ICC continues to face significant challenges in giving effect to the rights of victims set out in the Rome Statute in some areas. Amnesty International hopes that the plenary session will reaffirm states support for the victims' mandate, consider key challenges the ICC is facing and identify measures that states can take to support the Rome Statute's positive impact on victims and affected communities.

7. STATES PARTIES SHOULD AFFIRM THEIR COMMITMENT TO ENSURE THAT THE ROME STATUTE SYSTEM HAS A POSITIVE IMPACT ON VICTIMS AND AFFECTED COMMUNITIES

As the ICC has faced challenges in implementing some areas of victims' rights, some commentators have suggested that the Rome Statute's approach to victims is too ambitious and should be scaled back. Amnesty International opposes this view. Instead, creative solutions should be explored to address these challenges effectively and ensure that the ICC has a positive impact on those who suffer greatly as a result of these crimes. Amnesty International urges states to support this approach during the discussions, in particular by:

- Noting the rights of victims before the ICC strengthens the Rome Statute system and support for the Court;
- Recognizing that victims can have a positive impact on proceedings before the ICC;
- Welcoming the ICC's Revised Strategy in relation to victims and calling for the ICC to keep it under regular review and to provide updates on its implementation;
- Urging the Assembly to focus on identifying recommendations for states parties to support the positive impact of the Rome Statute system; and
- Recognizing the importance of effective outreach and public information and supporting the ICC in taking a progressive approach to its review of the 2006 Strategic Plan on outreach.

8. STATES PARTIES SHOULD URGE THE ICC TO TAKE MEASURES TO DEVELOP AND IMPROVE THE SYSTEM OF PARTICIPATION FOR VICTIMS IN 2014 TO ENSURE THAT IT IS MEANINGFUL AND EFFECTIVE

Recognizing that the ICC is facing particular challenges in giving effect to the rights of victims to participate in proceedings, in April 2013, Amnesty International and REDRESS sought to assist the ICC by convening a panel of nine independent experts to consider the challenges and to make recommendations for the Court's consideration. In July 2013, the Panel issued its final report setting out general observations and comments on the ICC's current victim participation system, seven key principles that it recommends the ICC

should apply in further developing the participation system and detailed recommendations for informing victims of their right to participate; ensuring victims can apply to participate; processing applications; assigning legal representation; consulting victims and taking instructions; and keeping victims informed of the proceedings.¹⁰ The ICC is currently studying the recommendations. Amnesty International welcomes the plan to focus on victim participation in the framework of The Hague Working Group facilitation on victims, affected communities and reparation in 2014. Amnesty International urges states parties to discuss with the ICC, in the context of that facilitation, its plans to implement the recommendations in the Independent Panel of Experts' Report and other measures to improve the system.

9. STATES PARTIES SHOULD SEEK TO INCREASE THE RESOURCES OF THE TRUST FUND FOR VICTIMS

The Trust Fund, through its projects of assistance and its possible role in implementing ICC reparation orders, is an essential mechanism to ensure the positive impact of the Rome Statute system for victims. However, despite generous contributions by a number of states since its establishment, it requires a significant increase in resources to expand its projects of assistance in relation to all situations under investigation by the ICC and to be prepared for the first reparation orders of the Court. States parties are encouraged to consider, in their discussions, ways in which the Assembly can:

- Encourage more states parties to make voluntary contributions, in accordance with their financial abilities;
- Encourage regular annual contributions to ensure the consistency of funds available; and
- Support the development of the Trust Fund's fundraising capacity to reach out to "international organizations, individuals, corporations and other entities" for voluntary contributions.¹¹

DISCUSSION ON COOPERATION

Throughout the year, the Hague Working Group has discussed important challenges the ICC faces regarding cooperation and considerable progress has been made in areas such as asset tracing, arrest strategies and avoiding situations of non-cooperation. Amnesty International particularly welcomes the initiative of the Facilitator to organize two seminars on witness protection in Dakar and Arusha during the year. At the twelfth session, the Assembly will hold its second plenary debate on cooperation which will include a focus on witness protection.

10. STATES PARTIES SHOULD COMMIT TO SUPPORT AND COOPERATE WITH THE ICC'S EFFORTS TO PROVIDE EFFECTIVE VICTIM AND WITNESS PROTECTION, IN PARTICULAR, BY ENTERING INTO RELOCATION AGREEMENTS

Witness protection is vital to the effective functioning of the ICC and its credibility. In many circumstances, it requires substantial cooperation from states, including from third states to relocate victims and witnesses at serious risk. Amnesty International urges all states parties to cooperate fully with the ICC's efforts to provide effective protection and

¹⁰ Independent Panel of experts report on victim participation at the International Criminal Court 26 July 2013, IOR 53/001/2013, available at: <http://www.amnesty.org/fr/library/info/IO53/001/2013/en>.

¹¹ Resolution ICC-ASP/1/Res.6, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, para. 2(a).

to also provide assistance to relevant national authorities to enhance their ability to cooperate effectively with the ICC. Most importantly, more states should consider entering into relocation agreements with the ICC to accept and protect victims and witnesses who are at such serious risk in their own countries that they must be relocated to another state.

11. STATES PARTIES SHOULD COMMIT TO SUPPORT AND COOPERATE WITH THE RELOCATION OF ACQUITTED PERSONS OR INTERIM RELEASE OF ACCUSED PERSONS, IN PARTICULAR, BY ENTERING INTO BILATERAL AGREEMENTS

Amnesty International is concerned by the total absence of bilateral agreements between states and the ICC to provide for relocation of acquitted persons and acceptance of persons granted interim release by the ICC. The negotiation and conclusion of such agreements is urgently required to ensure that the ICC can give effect to decisions by the ICC to order interim release and to relocate persons who have been acquitted by the Court. Only one state has entered into discussions with the ICC following its circulation of a model agreement for interim release according to the Report of the Court on cooperation, and no state has yet signed such an agreement.¹² Amnesty International agrees with the ICC that “[t]he signature of such agreements would be a clear sign by States that they want a Court that is impartial and respectful of the right of the defence” and urgently calls on all states parties to enter into discussions with the Court.¹³

THE 2014 BUDGET

For 2014, the ICC has requested a budget of €126.07 million, including an increase of €10.95 million over the 2013 budget.¹⁴ The additional funds were requested to reflect a rise in staff costs, costs related to the Mali situation (which started in January 2013 and has so far been funded by the Contingency Fund), the Banda trial (which is scheduled to start in May 2014), necessary increases in victims and witness protection capacities and efforts to improve the capacity of the OTP to conduct high-quality preliminary examinations, investigations and prosecutions. The Committee on Budget and Finance reviewed the budget request in September and has recommended that the ICC’s request be reduced overall by approximately €4.5 million.¹⁵

12. STATES PARTIES SHOULD ENSURE THAT THE ASSEMBLY PROVIDES THE ICC WITH SUFFICIENT RESOURCES TO FUNCTION EFFECTIVELY AND INDEPENDENTLY IN 2014

In reviewing the Committee’s recommendations, Amnesty International urges states parties to:

- Consider the views of the ICC on how the reduction recommended by the Committee may affect its work, if it is implemented. In particular, recognizing that significant increases were requested to implement the OTP’s Strategic Plan for 2013 to 2017 and to provide related victim and witness protection services, states should pay careful attention to the implications of accepting the Committee’s proposed adjustments for these aspects of the ICC’s work.

¹² ICC-ASP/12/35, para.39.

¹³ *Ibid.*, para. 29.

¹⁴ Proposed Programme Budget for 2014 of the International Criminal Court, ICC-ASP/12/10, 29 July 2013.

¹⁵ Report of the Committee on Budget and Finance on the work of its 21st session, ICC-ASP/12/15, 3 October 2013.

- Seek clarification from the Committee on the basis for some of its recommendations. In particular, in calculating a recommendation to reduce the OTP's budget by €2.2 million, the Committee applied a figure of €1.31 million as the average cost per case for the OTP without explaining how that figure was reached or whether it takes into account unique factors which may require additional costs in some situations, such as the need for additional security.¹⁶ The Committee also recommended that the budget of the Registry be cut by €1.1 million based on an historical ratio of about 2:1 between the budget of the OTP and the needs of the Registry.¹⁷
- Request information from the ICC about further increases which it has indicated will be requested in the next years. This information will enable states parties to understand the direction that the ICC intends to take and ensure that states parties are prepared for future increases.¹⁸

AMENDMENTS

At the time of writing, amendments to Rules 68, 100 and 134 of the Rules of Procedure and Evidence have been submitted for the Assembly's consideration. In addition, Kenya has made a number of proposals to amend the Preamble, Article 27, Article 63, Article 70 and 122 of Rome Statute. However, since proposals to amend the Rome Statute must be submitted to UN Secretary-General three months in advance of the ASP session, they can only be discussed (and not adopted) at this session. This paper comments only on Kenya's proposals to amend Article 27 and 63 of the Rome Statute. Amnesty International may submit additional comments on the other proposals separately to states parties in advance of or during the twelfth session.

13. IF THE ASSEMBLY ADOPTS THE PROPOSED AMENDMENT TO RULE 68, STATES PARTIES SHOULD REQUEST THE ICC TO MONITOR ITS IMPLEMENTATION TO ENSURE THAT THE RIGHTS OF THE ACCUSED ARE FULLY RESPECTED

Amnesty International is concerned that the proposed amendment to Rule 68 removes the requirement that prior-recorded testimony be challenged through cross-examination. Even if it only "goes to proof of the matter other than the acts and conduct of the accused", such statements could still be used to corroborate other evidence without the possibility of the defence cross-examining the statement giver. Moreover, in instances concerning the introduction of prior-recorded testimony from a witness who has been subjected to interference, the proposed Rule permits such evidence even when it goes to the acts and conduct of the accused. This could result in evidence being introduced which tends to inculcate the accused, without an opportunity for cross-examination, from a witness despite the fact their credibility has been undermined as a result of them accepting a bribe or withdrawing their cooperation due to an inducement or threat. Amnesty International recognizes that the proposal originated from the ICC, that it is based on similar rules applied by other international criminal tribunals and that the Working Group on Amendments has recommended its adoption. If it is adopted, Amnesty International urges the Assembly to request the ICC to monitor the

¹⁶ *Ibid.*, para. 60.

¹⁷ *Ibid.*, para. 65.

¹⁸ Amnesty International endorses the *Initial Recommendations to the Hague Working Group on the Budget* issued by Coalition for the ICC's Budget and Finance Team on 4 November (available at: http://www.iccnw.org/documents/CICC_Budget_and_Finance_Team_-_THWG_Recommendations.pdf). The statement explains these recommendations in more detail.

implementation of the amendment, to ensure that, in practice, the rights of the accused are not undermined. The Assembly should further request the ICC to report to the Assembly on the implementation of the rule at its thirteenth session.

14. STATES PARTIES SHOULD SUPPORT THE ADOPTION OF THE PROPOSED AMENDMENT TO RULE 100 AND SEEK CLARIFICATION ON WHETHER THE PARTIES CAN APPEAL A DECISION REGARDING THE PLACE OF THE PROCEEDINGS

Amnesty International urges states parties to support the proposed amendment to Rule 100. Where it is possible to do so, holding ICC hearings closer to affected communities can be a positive step towards making the justice process accessible to victims and affected communities. It is particularly significant that the proposed changes ensure that the views of all the parties concerned – including those of the victims – are taken into account by the judges in making a recommendation to move the place of proceedings.

Amnesty International notes that it was confirmed during discussions of the proposed amendment that decisions taken by the Trial Chamber are intended to be subject to the right of the parties to appeal issues going to the "fair and expeditious conduct of the proceedings or the outcome of the trial" pursuant to Article 82(1)(d) of the Statute. Given the importance of decisions about the place of the proceedings, states should seek clarification whether decisions of the President pursuant to the amended rule can also be appealed. The Assembly should clarify its intention to allow a decision taken by the Trial Chamber under Rule 100 to be appealed in the final report adopted by the Assembly.¹⁹

15. STATES PARTIES SHOULD ENSURE THAT ANY AMENDMENTS TO RULE 134 OR ANY FUTURE AMENDMENTS TO ARTICLE 63 ARE CONSISTENT WITH THE PRINCIPLE THAT THE ACCUSED MUST BE PRESENT DURING TRIAL AND CONSIDER THE VIEWS OF THE ICC

A number of proposals have been put forward to amend Rule 134 by Botswana/Lichtenstein/Jordan, Kenya and the United Kingdom respectively regarding the presence of the accused at trial. Some proposals purport to codify the decision of the recent ruling of the Appeals Chamber that, in exceptional circumstances, the accused may be excused from attending trial hearings in person.²⁰ They also seek to recognize the possibility of accused persons to be present at trial via communications technology. In addition to proposing amendments to Rule 134, Kenya also proposes to amend Article 63(2) of the Statute in the future.

The presence of the accused is essential to ensure that the rights of the accused and the credibility of the ICC's proceedings are protected. The accused should be present in court during a trial to hear the full prosecution case, to put forward a defence or assist their counsel in doing so, to refute or provide information to enable their counsel to refute evidence and to examine witnesses or to advise their counsel in the examination of witnesses. Proceedings where the accused is absent for much of the trial may deny their rights, including those under Article 67, and lead to decisions on guilt or innocence being discredited based on information the accused did not present or did not challenge at trial.

¹⁹ Report of the Study Group on Governance Cluster I: Expediting the Criminal Process Working Group on Lessons Learnt Recommendation on a proposal to amend rule 100 of the Rules of Procedure and Evidence (Place of the Proceedings, paragraph 15, contained in Annex I.A of the Study Group on Governance Working Group on Lessons Learnt second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1.

²⁰ Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial.

The Appeals Chamber has recently considered this issue and affirmed that the accused must be present at trial. However, it did find that there may be exceptional circumstances where a trial chamber may excuse an accused person temporarily from being present at some hearings.

It is, in principle, useful to codify the Appeal Chamber's findings to facilitate future consideration of requests to be excused from hearings. However, some aspects of some proposals do not fully reflect the Appeals Chamber's decision. In particular, Amnesty International stresses that any amendment to Rule 134 should:

- Clearly reflect the five point test adopted by the Appeals Chamber. In particular, it should expressly state that the absence of the accused must not become the rule and that alternative measures should be considered first; and
- Not go beyond the Appeal Chamber's decision by allowing a Trial Chamber to make broad decisions excusing an accused person from being present at trial. The Appeal Chamber clearly states that "any absence must be limited to that which is strictly necessary" and each request for excusal must be considered on "a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested."²¹

In addition, the proposals seek to allow an accused person to be present during trial through communications technology, such as video link. This issue is not addressed in the Appeal Chamber's ruling or other rulings to date by the ICC. Although Amnesty International agrees that this is an option that should be further explored in some exceptional circumstances, it is concerning that some of the proposals suggest that such technologies may be used broadly during trials, without considering the impact that such practices may have on trials. This requires careful consideration. For example, the use of such technologies may not be appropriate during closed proceedings. Furthermore, a thorough evaluation of whether using such technologies creates additional security risks for protected witnesses should be conducted before it is employed.

States parties should also consider whether the ICC's technology is sufficient to allow accused persons to be present during trials through such technologies before establishing rules relating to its use. For example, if video link is used, it should be possible for the accused to view the whole courtroom, including to observe evidence, and to communicate privately with counsel during proceedings.

Amnesty International therefore urges states parties to review the proposals to ensure that the principle that the accused shall be present during the trial in Article 63(1) is not undermined. States parties should also invite comments from the ICC – in particular the judges and Registry – to ensure that the text is consistent with the Appeal Chamber's decision, clarify the extent to which participation by communications technology is possible and consider the possible cost implications for such a facility.

16. STATES PARTIES SHOULD REJECT ANY PROPOSAL TO WEAKEN ARTICLE 27

Kenya has proposed that Article 27 be amended to exempt its application to heads of state while they hold office. As explained in recommendation 2 above, Article 27 sets out

²¹ ICC-01/09-01/11 OA 5, at paras 61-62.

the fundamental principle that no-one, regardless of their status, can be exempt from prosecution by the ICC. This principle should not be weakened under any circumstances. The amendment contradicts the very purpose of the article that there can be no exemptions from prosecution. All states parties should insist that there can be no amendment to Article 27.

RESOLUTIONS

Amnesty International has already provided input on the text of a number of resolutions to the Hague Working Group. There are, however, some outstanding issues that may be submitted to the Assembly for consideration and areas where we consider draft resolutions should be strengthened.

17. STATES PARTIES SHOULD ADOPT THE DRAFT RESOLUTION ON VICTIMS AND AFFECTED COMMUNITIES

Amnesty International has reviewed the draft resolution on “Victims and affected communities, reparations and Trust Fund for Victims” and welcomes the many positive elements that respect the victims’ mandate of the respective organs of the Court and the Trust Fund for Victims. Our organization has provided comments throughout the drafting of the resolution, including through the Victims’ Rights Working Group and in particular welcomes state’s commitment to discussing the system of victim participation in 2014.²² States should adopt the resolution at the session, including language noting the outcomes of the plenary session on victims.

18. STATES PARTIES SHOULD CALL FOR ELEMENTS OF THE DRAFT RESOLUTION ON COOPERATION TO BE STRENGTHENED

Amnesty International has reviewed the draft resolution on cooperation and welcomes many positive elements that promise to strengthen cooperation with the ICC. In particular, paragraphs calling for the creation of an inter-sessional mechanism on cooperation through the establishment of a network of focal points among states parties; highlighting the importance of cooperation with requests transmitted by the ICC on behalf of the defence; and supporting the adoption of a roadmap to develop an operational tool on Arrest Strategies in 2014 in order to improve cooperation with requests for arrest and surrender received from the ICC are important. However, our organization notes that portions of the draft resolution remain bracketed, and recommends that the resolution can be strengthened in a number of respects. In particular, the resolution should:

- Affirm the Assembly’s previous decisions to have a standing agenda item on cooperation each year²³ and support the exploration, in 2014;
- Be consistent with the resolution on cooperation adopted at ASP11, which noted “that contacts with persons in respect of whom an arrest warrant issued by the ICC is outstanding should be avoided when such contacts undermine the objectives of the Rome Statute.”²⁴

²² The Victims’ Rights Working Group, of which Amnesty International is an active member, presented comments on the draft resolution to The Hague Working Group on 4 September 2013. Available at <http://www.vrwg.org/downloads/130904vrwgcommentsondraftresolutionhighlight.pdf>.

²³ Strengthening the International Criminal Court and the Assembly of States Parties, 21 November 2012, ICC-ASP/11/Res.8, Paragraph 91.

²⁴ Resolution ICC-ASP/11/Res/ 5 Cooperation, at preambular paragraph 4.

- Urge states that have not yet done so to ratify the Agreement on Privileges and Immunities of the ICC without delay and to take steps to implement it in domestic law. States should oppose proposals to dilute this call by referencing the necessity of these steps, recognising the importance of the treaty for safeguarding the staff, assets and property of the Court; and
- Call on the UN Security Council to respond to instances of non-cooperation transmitted to it and express regret that it has not done so in the past.

19. STATES PARTIES SHOULD CALL FOR THE RESOLUTION ON COMPLEMENTARITY TO PROVIDE FOR A PLENARY DISCUSSION ON THE ISSUE AT THE 13TH SESSION OF THE ASSEMBLY

Complementarity is the cornerstone of the Rome Statute system. Amnesty International therefore regrets that the Assembly will not hold a separate plenary discussion on this issue at this session to continue discussions conducted last year. The Assembly should be the key forum to consider how to promote complementarity, including tackling persistent challenges, sharing information and experience and coordinating the activities of all actors. For example, this year it would have been particularly useful to have a plenary discussion on the Report of the Court on complementarity²⁵ and its separate report on the completion of ICC activities in a situation country.²⁶

20. STATES PARTIES SHOULD ENSURE THAT THE RESOLUTION ON THE INDEPENDENT OVERSIGHT MECHANISM CALLS AGAIN FOR THE ICC TO ADOPT AN ANTI-RETALIATION/WHISTLE-BLOWER POLICY

In 2013, major progress was made towards operationalizing the Independent Oversight Mechanism foreseen in Article 112(4) of the Rome Statute and ASP Resolution ICC-ASP/8/Res.1. At the twelfth session, the Assembly is due to adopt an operational mandate for the mechanism, in turn paving the way for recruitment of the necessary staff in 2014. Amnesty International urges states to support the operationalization of the Independent Oversight Mechanism, in recognition that it is a crucial part of the Rome Statute system for ensuring transparency and accountability within the ICC. In particular, the Assembly should repeat in the resolution its request last year for the ICC to adopt a policy on anti-retaliation and whistle-blower policy at the earliest possible time.²⁷ With progress towards operationalizing the Independent Oversight Mechanism, it is essential that an effective policy is adopted as soon as possible to protect those who bring to light allegations of misconduct or abuse of power.

21. STATES PARTIES SHOULD SUPPORT PROPOSALS TO STRENGTHEN ELEMENTS OF THE OMNIBUS RESOLUTION

The Omnibus Resolution contains provisions on many important areas relating to the Assembly and ICC's work that are not addressed elsewhere in the outcomes of the session. While a complete overview of the resolution that will be adopted at this year's session is beyond the scope of this paper, Amnesty International recommends that states parties:

- Support the proposal for the Assembly to encourage the Security Council to establish a subsidiary body that would address ICC matters as a useful tool for

²⁵ ICC-ASP/12/31

²⁶ ICC-ASP/12/32.

²⁷ ASP-ICC/11/Res.4.

dealing with issues that arise in the relationship between the Court and the Council;

- Support efforts to emphasize in the resolution the need to intensify dialogue between the Assembly and the AU and encourages states parties to elaborate concrete and targeted proposals in this regard in 2014, in particular by furthering diplomatic efforts to establish an ICC liaison office at the seat of the AU Commission in Addis Ababa;
- Support the inclusion of language which affirms the importance of outreach to effective implementation of the Court-wide mandate on victims and encourages the Assembly to further its efforts to build on this commitment with a view to ensuring strong support for outreach and public information in 2014 and beyond; and
- Support the inclusion of a paragraph which welcomes the ICC's Guidelines on Intermediaries and requests the ICC to report on their implementation at the next session.

ELECTIONS

During the twelfth session, one judge and six members of the Committee on Budget and Finance will be elected. Although Amnesty International does not support or oppose candidates for elections, our organization believes that it is essential that states parties nominate and vote for those they believe to be the most highly qualified candidates for these positions. Amnesty International is therefore disappointed that only two candidates, both male, have been nominated for the vacant judge position and that only seven candidates, only two of whom are women, have been nominated for the six vacant positions on the Committee.

22. STATES PARTIES SHOULD VOTE FOR THE CANDIDATES THEY CONSIDER TO BE THE MOST HIGHLY QUALIFIED FOR THE ELECTION OF ONE JUDGE AND SIX MEMBERS OF THE COMMITTEE ON BUDGET AND FINANCE

States should review the information about the candidates, in particular the evaluations conducted of the two judicial candidates by the Advisory Committee on Nominations of Judges and the candidates' responses to the Coalition for the International Criminal Court's Questionnaire.²⁸ States parties should vote for the candidate they consider is the most highly qualified, without engaging in vote-trading or other reciprocal agreements in relation to these or other elections.

23. STATES PARTIES SHOULD CALL FOR THE ASSEMBLY TO REFORM THE NOMINATION RULES FOR THE COMMITTEE ON BUDGET AND FINANCE TO END "CLEAN SLATE" ELECTIONS

The practice of regions nominating the bare minimum number of candidates for elections creates a risk that the Assembly may not have a wide enough pool of candidates with suitable qualifications and experience to consider. Given the importance of the

²⁸ Report of the Advisory Committee on Nominations of Judges, ICC-ASP/12/47, Annex I. The Coalition for the ICC questionnaire completed by Justice Geoffrey Andrew Henderson is available at: http://www.coalitionfortheicc.org/documents/Reply_Justice_Geoffrey_Henderson_TrinidadTobago_CICC_Judicial_Election_Questionnaire.pdf; Dr. Leslie van Rompaey's questionnaire is available at: http://www.coalitionfortheicc.org/documents/Dr_Van_Rompaey_Judicial_Questionnaire_2013.pdf

Committee and the repeated practice of “clean slate” elections of its members, the Assembly should review its nomination rules to ensure that it benefits from the best possible expert advice on budget and finance issues. In particular, the Assembly should consider amending the election procedure to require that a minimum number of candidates equal to twice the number of members of the Committee being elected from each region be nominated before an election can take place.

UNIVERSALITY OF THE ROME STATUTE: RATIFICATION, IMPLEMENTATION & WITHDRAWAL

24. STATES PARTIES SHOULD CALL ON THE ASSEMBLY TO INVEST MORE IN THE IMPLEMENTATION OF ITS PLAN OF ACTION FOR ACHIEVING UNIVERSALITY AND FULL IMPLEMENTATION OF THE ROME STATUTE

Since the eleventh session of the Assembly:

- only one state, Côte d’Ivoire, has ratified or acceded to the Rome Statute bringing the total number of states parties to 122;
- no states have ratified or acceded to the Agreement on Privileges and Immunities; and
- Moldova enacted amendments to its criminal code seeking to implement the Rome Statute.

There is still much more that the Assembly should do to implement the Plan of Action.

Given the importance of both universality and full implementation to both the success of the ICC and its broader impact in the fight against impunity, it is disappointing that the Assembly continues to under-invest in implementing the Plan of Action. In particular, since the Plan’s adoption, the Secretariat has been asked to perform its functions to implement the Plan “within existing resources”. Amnesty International has called for the Assembly to establish a unit within its Secretariat to provide the full-time commitment needed to coordinate the implementation of the Plan; to establish regular contact with states parties and non-states parties, as well as with civil society; to promote public information sharing; to develop and implement a resource database of information for states parties and non-states parties who are in the process of ratifying and/or implementing the Rome Statute, as well as for civil society; and to provide or coordinate technical assistance in a transparent manner when needed. States parties are urged to reconsider its approach to implementing the Plan of Action to ensure that it does not become obsolete.

Not all aspects of the Plan of Action entail costs. Information sharing is a particularly important and mostly cost-neutral element of implementing the Plan. Recognizing that many efforts are taking place at the national level and at the inter-government level, the Plan of Action emphasizes the importance of states and other actors reporting on their activities. Regrettably, in most years, only a small number of states parties have informed the Assembly of their activities at the national level to ratify and implement the Rome Statute and their efforts to promote the implementation of the Plan by other states. The rate of response to the Secretariat’s annual questionnaire on states activities this year has been low. Only ten states parties have replied so far. Most states have also failed to take the basic step set out in the Plan to appoint a national contact point. All states parties are encouraged to contribute to the Plan of Action by completing the questionnaire in the

lead up to the twelfth session.

States parties that are in the process of implementing the Rome Statute are urged to consider and apply the recommendations set out in Amnesty International's *Updated Checklist for Effective Implementation of the Rome Statute* which provides a comprehensive guide for implementing the Statute and other international criminal law obligations in law and practice.²⁹

25. STATES PARTIES SHOULD URGE AFRICAN STATES PARTIES NOT TO WITHDRAW FROM THE ROME STATUTE

Amnesty International is concerned by reports that, in response to the concerns highlighted in the AU Assembly's Decision of 12 October, the AU is considering calling on its member states to withdraw from the Rome Statute. States that withdraw would take away from their nationals one of the most important human rights protections and potentially allow crimes to be committed with impunity in the future. Amnesty International has therefore urged states parties that are members of the AU to oppose such a call.³⁰

Amnesty International is dismayed that the Kenyan Parliament has already voted to request the government to prepare to withdraw from the Statute and repeal its International Crimes Act, and calls on the government not to proceed.³¹

Even if the AU were to make such a decision, individual states will ultimately decide whether or not to withdraw from the Rome Statute and in most cases the step would need to be approved by their national parliaments. There is therefore a good opportunity now for the Assembly and states parties to engage with AU members urging them not to withdraw and to consider how they can support AU members that wish to remain states parties of the Rome Statute from resisting such pressure to do so.

²⁹ Available at: <http://www.amnesty.org/en/library/info/IOR53/009/2010>.

³⁰ See: African states must reject calls to withdraw from the ICC, 10 October 2013, available at: <http://www.amnesty.org/en/news/african-states-must-reject-calls-withdraw-icc-2013-10-10>

³¹ See: Kenya: Reject efforts to withdraw from the International Criminal Court, 4 September 2013, available at: <http://www.amnesty.org/en/news/kenya-icc-2013-09-04>. Although the Kenyan parliament passed motions to commence withdrawal in December 2010 and again in September 2013, no other state has followed suit and Kenya recently confirmed to the Court that it remains a state party at present. (See Submissions of the Government of Kenya, Pursuant to Rule 103 (1) of the Rules of Procedure and Evidence of the International Criminal Court, on the Proposed Motion by Kenya's National Assembly and Senate to Withdraw Kenya from the Rome Statute, available at <http://www.icc-cpi.int/iccdocs/doc/doc1666073.pdf>). However, were Kenya to withdraw, it would, in accordance with Article 127 of the Rome Statute, not affect ongoing proceedings in relation to the Kenyan situation before the Court; would not remove Kenya's obligation to cooperate with existing proceedings; and would not take effect until a year from the date of notification of withdrawal.

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