

INTERNATIONAL CRIMINAL COURT

RECOMMENDATIONS TO THE
ELEVENTH SESSION OF THE
ASSEMBLY OF STATES PARTIES
(14 TO 22 NOVEMBER 2012)

**AMNESTY
INTERNATIONAL**



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RECOMMENDATIONS TO THE ELEVENTH SESSION OF THE ASSEMBLY OF STATES PARTIES

INTRODUCTION

The eleventh session of the Assembly of States Parties of the International Criminal Court (Assembly) will take place in The Hague from 14 to 22 November 2012.

Fourteen years after the adoption of the Rome Statute of the International Criminal Court (Rome Statute), more than 60% of states have ratified it and the eleventh session of the Assembly takes place in the context of a functioning International Criminal Court (Court), which has completed its first trial this year. Two other trials are in progress with another two trials scheduled to commence in April 2013. The Court has opened investigations in seven situations and has commenced preliminary examinations in at least eight others in four continents.

This year, the Assembly marks the tenth anniversary of the Court. Although much has been achieved in this time, the Court is facing many challenges that require the Assembly's consideration and support to address. As the Court's oversight body, the Assembly has a vital role to play in achieving the success of the Court.

At this session, the Assembly will:

- Conduct a General Debate, which will focus significantly on the tenth anniversary;
- Adopt the 2013 budget for the Court;
- Elect key officials, including the Deputy Prosecutor for Prosecutions, the Advisory Committee on Nominations and the Board of Directors of the Trust Fund for Victims;
- Make recommendations on the appointment of the next Registrar of the Court;
- Conduct, as part of its formal agenda for the first time, important discussions on complementarity and cooperation;
- Consider a resolution highlighting significant challenges in relation to victim participation;
- Consider an amendment to the Rules of Procedure and Evidence;
- Consider its Plan of Action for Achieving Universality and Full Implementation of the Rome Statute.

In this paper, Amnesty International sets out a series of recommendations in relation to these issues for the Assembly's consideration. A summary of the recommendations can be drawn from the contents page above.

Amnesty International will have a delegation present throughout the eleventh session. Members of the delegation are available to discuss any of these issues with government delegations.

GENERAL DEBATE

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

States parties are urged to mark the 10th anniversary of the Court in their statements to the General Debate by strongly affirming their support for the effective functioning of the Court and oversight by the Assembly, including:

- Supporting sufficient funding of the Court in 2013, recognizing that the increase requested arises from a projected increase in judicial activities next year and other new costs;
- Opposing efforts to impose “zero-growth” or other arbitrary cuts on the Court’s budget, especially when its activities increase and new costs arise;
- Committing themselves to vote for the highest qualified candidates for officials of the Court and subsidiary bodies of the Assembly, without entering into reciprocal vote-trading agreements with other states;
- Committing themselves to cooperate promptly and fully with the Court - including in the execution of all arrest warrants - and expressly to reject claims that heads of state charged by the Court with genocide, crimes against humanity and war crimes have immunity;¹
- Reporting on national efforts to implement the Assembly’s 66 recommendations on cooperation;²
- Urging the Assembly to continue developing efforts to promote complementarity aimed at encouraging states to fulfil their obligations to investigate and prosecute crimes under international law genuinely;
- Re-affirming support for the outreach and public information functions of the Court and urging the Assembly to support this important work with sufficient resources;
- Highlighting the importance of the rights of suspects and the accused to a fair trial at all stages of the proceedings, including the provision of effective legal aid for defence counsel;
- Supporting the full implementation of the rights of victims recognized in the Rome Statute, including the provision of effective legal aid for victim representatives, and opposing any efforts to scale back on those rights;
- Acknowledging the importance of the first reparation process currently being conducted in the *Lubanga* case;

¹ See Amnesty International, *Bringing Power to Justice: Absence of immunity for heads of state before the International Criminal Court*, IOR 53/017/2010, 9 December 2010, available at: <http://www.amnesty.org/en/library/info/IO53/017/2010/en>

² Resolution ICC-ASP/6/Res.2, Strengthening the International Criminal Court and the Assembly of States Parties, Annex II, adopted on 14 December 2007.

3 Recommendations to the eleventh session of the Assembly of States Parties

- Recognizing the need for states parties to make annual voluntary contributions to the Trust Fund for Victims and announcing contributions their government has made or intends to make; and
- Reporting on national measures to implement the Assembly's Plan of Action for Achieving Universality and Full Implementation of the Rome Statute.

THE 2013 BUDGET

Amnesty International is seriously concerned by the significant – and in some cases arbitrary – cuts imposed by the Assembly on the Court's budget request for 2012 and their impact on the Court's work this year. For three of the last four years, the integrity of the budget process has been undermined by a group of the highest contributing states demanding that the Assembly go beyond the recommendations of the Assembly's Committee on Budget and Finance in an effort to impose "zero-growth" on the budget.

2. STATES SHOULD ENSURE THAT THE COURT IS ALLOCATED SUFFICIENT RESOURCES IN 2013 TO CONDUCT ITS WORK EFFECTIVELY

For 2013, the Court has requested an increase of €9.6 million to pay additional costs arising from the transfer of interim premises costs from the Host State to the Assembly, two new trials in the Kenya situation, increases in legal aid and staff costs. The Committee on Budget and Finance (Committee) has reviewed the budget request and recommended that the Court's request be cut by €3.28 million.

As a member of the Coalition for the Court's Budget and Finance Team, Amnesty International endorses the Team's Comments and Recommendations on the 2013 Budget.³ In particular, Amnesty International urges states parties to:

- re-commit to the effective functioning of the Court by supporting sufficient resources for the Court in 2013 and expressing their opposition to the 'zero-growth' approach in their statements to the General Debate and in the Working Group on the Budget;
- insist that the Working Group on the Budget focuses on reviewing the recommendations of the Committee and reject any efforts to go beyond the cuts recommended by the Committee;
- ensure that the Working Group considers, with the input of the Court and the Trust Fund for Victims, the impact of the Committee's recommendations in deciding whether or not to adopt them;
- reject proposals for the Court to absorb major new costs arising this year.

ELECTIONS

3. THE ASSEMBLY SHOULD ELECT THE MOST HIGHLY QUALIFIED CANDIDATES FOR THE DEPUTY PROSECUTOR FOR PROSECUTIONS, THE ADVISORY COMMITTEE ON NOMINATIONS AND THE BOARD OF DIRECTORS OF THE TRUST FUND FOR VICTIMS

The eleventh session is scheduled to elect the Deputy Prosecutor for Prosecutions,

³ Available at: <http://www.iccnw.org/?mod=budget>

nine members of the new Advisory Committee on Nominations and five members of the Board of Directors of the Trust Fund for Victims. Amnesty International does not support or oppose candidates for elections. However, the organization stresses that it is essential for states parties to focus on voting for those they consider to be the most highly qualified candidates for these positions and not to engage in vote-trading in relation to these and other international elections.

(i) Election of the Deputy Prosecutor for Prosecutions

The election of the Deputy Prosecutor is a vital decision that will contribute to the success of the Court in the next decade. The Deputy Prosecutor bears a significant responsibility for ensuring the quality of prosecutions conducted by the Office of the Prosecutor. It is essential that the strongest candidate is elected (applying the criteria set out in Article 42 (3) of the Rome Statute) in a process that establishes the confidence of all those following the important work of the Court.

At the time of writing, with less than two weeks until the Assembly's session starts, the Bureau is conducting informal efforts to identify one consensus candidate from the short-list of three submitted to it by the Prosecutor. During the informal process, states parties should focus first and foremost on supporting the most highly qualified candidate for the position and not to support a candidate merely for the sake of consensus. In reviewing candidates, states parties should consider the following additional criteria that are essential for the position:

- first and foremost, recognition in his or her jurisdiction as an outstanding lawyer;
- second, recognized excellent management experience at the highest levels of his or her national criminal justice system;
- third, experience in preparing and conducting large, highly complex trials in a professional way consistent with the internationally recognized right to fair trial, preferably prosecutions involving crimes under international law; and
- fourth, demonstrated impartiality, independence, integrity and good judgment.

If a consensus candidate cannot be identified forthwith, the Bureau should proceed immediately to organize the election, required by Article 42 (4), to elect the Deputy Prosecutor "by secret ballot by an absolute majority of the members of the Assembly of States Parties."

(ii) Election of Advisory Committee on Nominations

Amnesty International welcomed the Assembly's decision last year to establish an Advisory Committee on Nominations of judges foreseen in Article 36 (4) of the Rome Statute. The body has the potential to provide valuable input into the election of judges process, including protecting the effectiveness and credibility of the Court by acting as a safeguard to ensure that candidates meet the qualifications set out in Article 36 (a), (b) and (c).

The election of independent and highly qualified members of the Advisory Committee from all regions of the world, including a "fair representation of both genders" as required by its Terms of Reference, is vital to its ability to work effectively and with the confidence of the Assembly. In particular, recognizing that the impartiality of the Advisory Committee must be beyond reproach, states parties should ensure that the current employment of elected members does not cast doubt

on whether they “serve in their personal capacity, and would not take instructions from States Parties.”

The requirement in the Terms of Reference that the nine members be “designated by the Assembly of States Parties by consensus on recommendations made by the Bureau of the Assembly also made by consensus” presents challenges.⁴ At present, a Working Group of only five states - one from each region - is currently working to identify nine candidates for recommendation by the Bureau and election by the Assembly. As the process continues, it is essential that genuine consensus is achieved. In particular, adequate time must be provided and effective mechanisms put in place to ensure that candidates identified by the Working Group are reviewed and approved by the whole Assembly.

(iii) Election of five members of the Board of Directors

Amnesty International fully supports the work of the Trust Fund and its Board of Directors. However, our organization opposes clean slate elections for any bodies of the Assembly and is disappointed that, at the closing of the nomination period for the five members of the Board, states parties had nominated only five candidates. The practice of regions nominating the bare minimum number of candidates for the number of available positions means that there is little examination of the candidates’ qualifications and experience. Given the importance of this expert body, the Assembly should review its practice and ensure that for each election, the Assembly has a choice of highly qualified candidates for all regions, including a fair representation of women and men nominees, by requiring that there must be a minimum of two nominations for each of the five posts.

4. THE ASSEMBLY SHOULD RECOMMEND CLEAR CRITERIA FOR THE JUDGES TO CONSIDER IN ELECTING THE NEXT REGISTRAR

In accordance with Article 43 (4), the Assembly may provide recommendations to the judges on the forthcoming election of the Registrar of the Court. Eleven candidates have been shortlisted. In the previous two elections, the Assembly has not taken a position on any candidates. However, at its sixth session, the Assembly recommended that the judges consider a number of elements in making their decision.⁵ Although it is important that the Assembly respects the criteria for the

⁴ Report of the Bureau on the Establishment of an Advisory Committee on Nominations of judges of the International Criminal Court, ICC-ASP/10/36, Annex, Terms of reference for the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, para. 1.

⁵ Recommendation concerning the election of the Registrar of the International Criminal Court, ICC-ASP/6/Recommendation 1, recommends states consider the following elements.

- (a) the highest standards of efficiency, competency and integrity;
- (b) the criteria set forth in Article 36, paragraph 8, on the election of judges which apply *mutatis mutandis* to the employment of staff, namely,
 - i. the representation of principal legal systems of the world;
 - ii. equitable geographical representation;
 - iii. a fair representation of female and male persons;
 - iv. the need for a candidate with legal expertise on specific issues, including, but not limited to, violence against women, would be an asset.
- (c) Proven managerial skills, whether required within relevant international or national organizations;

position set out in the vacancy announcement, the Assembly should also take the opportunity of making recommendations to the judges highlighting key skills that it considers essential to the effective performance of the role. In particular, the Assembly should consider stressing the importance of the elected Registrar having demonstrated experience of results based budgeting and developing complex budgets. Experience in managing and developing effective legal aid systems, managing outreach initiatives and victim support functions should also be considered highly desirable. In addition, emphasis should be given to the need for the Registrar to have experience in dealing with international criminal law, gender issues and issues regarding children.

5. THE ASSEMBLY SHOULD CONDUCT A REVIEW TO ADDRESS THE LACK OF HIGHLY QUALIFIED WOMEN APPLYING OR BEING NOMINATED FOR ELECTED POSITIONS

The election processes this year highlight the continuing failure to ensure that highly qualified women are put forward for elections. For the positions of Deputy Prosecutor and Registrar, which were both advertised by the Court and circulated to states, the statistics clearly indicate that information about the vacancies is not reaching potential women candidates.

- Only 28 of the 120 applicants for the position of Deputy Prosecutor were women and only 3 women were among the short-list of 15 candidates.⁶
- Only 21 of the 67 applications for Registrar were women and only three women were among the 11 candidates shortlisted.⁷

In respect to many of the elections organized by the Assembly, requiring nominations by states parties, the balance is even more problematic. Despite an express requirement that the Advisory Committee on Nominations be composed of a “fair representation of both genders,” states parties only nominated two women for the nine posts. The situation risks undermining the legitimacy of the Advisory Committee.

Although two women have been nominated for the five posts of Board of Directors of the Trust Fund for Victims, clean slate elections in many cases ignore the principle of gender balance. For example, the Committee on Budget and Finance, which is regularly appointed by clean slate elections, only has three women among its 12 members.

-
- (d) Familiarity with both governmental and inter-governmental processes and possession of requisite diplomatic skills;
 - (e) The candidate should be a national of a state party and, in the case of a candidate with dual or multiple nationalities, application of the principle set out in resolution ICC-ASP/1/Res.10, as amended by ICC-ASP/Res/4/Res.4;
 - (f) The Registrar and Deputy must not be from the same regional group, neither should the Registrar and Deputy Registrar be of the same nationality;
 - (g) Qualifications of the candidate, including relevant experience, and especially with respect to the duties contained in the [vacancy announcement]

Ability to cooperate well with others, as well as work within and have the ability to lead a Team

⁶ Election of the Deputy Prosecutor of the International Criminal Court, ICC-ASP/11/17, 12 September 2012, Appendix 1.

⁷ Appendix to the Letter from the President of the Court to the President of the Assembly on the shortlist of candidates for election to the post of Registrar with the statistical overview of the gender and geographic representation of the candidates, 1 October 2012.

This situation should not continue. A review should be conducted by the Assembly to ensure that more highly qualified women apply and are nominated for elections to senior positions at the Court and Assembly bodies. The review should consider:

- ways to improve the distribution of the Court's vacancy announcements and nomination processes through advertisement, states parties and other networks;
- ways to engage civil society further in distributing information and identifying highly qualified candidates;
- whether mechanisms employed in the election of judges, including minimum nomination requirements, should be adopted in other elections;
- prohibiting clean slate elections for bodies of the Assembly.

COOPERATION

As recognized by the Review Conference in the Kampala Declaration and the Declaration on Cooperation, cooperation from states is essential for the effectiveness of the Court.⁸ There is significant potential for the Assembly to promote cooperation and to respond effectively to non-cooperation, when it occurs. Amnesty International, therefore, welcomes that, for the first time in its history, the Assembly has included a formal discussion on cooperation on the agenda of the eleventh session. The discussion follows informal meetings organized this year by the Bureau's Facilitator on Cooperation with The Hague Working Group on a number of important issues, including: identification, freezing and seizure of assets; channels of communication; and developing databases on implementing legislation and national focal points reflected in the Bureau's Report on cooperation.⁹ The Facilitator reports that states parties also considered privileges and immunities for Court staff following the detention of staff in Libya in June/July 2012.¹⁰

⁸ In the Kampala Declaration, states parties stated:

"We, high-level representatives of States Parties to the Rome Statute of the International Criminal Court, gathered in Kampala, Uganda, at the first Review Conference under this Statute, held from 31 May to 11 June 2010, . . . Stressing the importance of full cooperation with the International Criminal Court, . . .
7. Further resolve to continue and strengthen our efforts to ensure full cooperation with the Court in accordance with the Statute, in particular in the areas of implementing legislation, enforcement of Court decisions, execution of arrest warrants, conclusion of agreements and witness protection, and to express our political and diplomatic support for the Court[.]"

Kampala Declaration, Declaration RC/Decl.1, adopted by consensus at the 4th plenary meeting, on 1 June 2010..

In the Declaration on cooperation, the states parties declared:

"The Review Conference, . . .
5. Emphasizes the crucial role that the execution of arrest warrants plays in ensuring the effectiveness of the Court's jurisdiction and further emphasizes the primary obligation of States Parties, and other States under an obligation to cooperate with the Court, to assist the Court in the swift enforcement of its pending arrest warrants[.]"

Declaration on cooperation, RC/Decl.2, adopted by consensus at the 9th plenary meeting, on 8 June 2010.

⁹ Report of the Bureau on cooperation, ICC-ASP/11/28.

¹⁰ Report of the Bureau on cooperation, Section D.

Regrettably, the Assembly's discussion will not benefit from an updated report of the Court on the status of cooperation as the next report has been requested for the twelfth session. Nevertheless, the discussion on cooperation is an important opportunity for the Assembly to review its efforts to date, to share national experiences and to focus on what further steps the Assembly can take in the next years. All members of the Assembly are encouraged to participate actively in the discussion (either individually or through their regional groups) and to consider raising the recommendations set out below.

6. THE ASSEMBLY SHOULD CONTINUE TO DISCUSS COOPERATION AT EACH FUTURE SESSION AND ESTABLISH AN INTER-SESSIONAL MECHANISM ON COOPERATION

As the Bureau's Report on cooperation notes, there exists a "wide scope of pertinent subjects to address in the area of cooperation."¹¹ The Assembly will, therefore, need to establish a long-term approach to promoting cooperation and prioritize key issues that it will seek to address each year, in consultation with the Court and other actors. The Assembly should, therefore, include cooperation as a regular agenda item for all future sessions and request annual reports from the Court on the status of cooperation to facilitate its discussions and efforts. In addition, the Assembly should also establish an effective inter-sessional mechanism to:

- review the proposed annual report prepared by the Court on the status of cooperation;
- review the implementation of the Review Conference Declaration on Cooperation, the Kampala Declaration and the 66 recommendations on cooperation adopted at the Assembly's sixth session,¹² as well as consider measures that the Assembly can take to encourage more states to implement them;
- discuss key issues of concern that arise (such as weak provisions in some legislation and a pattern of problems with cooperation in certain areas).

To a large degree, this work is being conducted by the Bureau's facilitator on Cooperation summarised in the Report of the Bureau on cooperation.¹³ However, those discussions on substantial and complex issues are informal and limited to The Hague Working Group. Amnesty International, therefore, calls again for the Assembly to establish a formal inter-sessional mechanism that is accessible to all states parties and observers to give in-depth consideration to the many important elements of cooperation, which can feed into and strengthen the Assembly's annual discussion.

7. THE ASSEMBLY SHOULD PRIORITIZE INCREASING THE NUMBER OF VICTIM AND WITNESS RELOCATION AGREEMENTS WITH THE COURT IN 2013

Amnesty International is deeply concerned for the safety of victims and witnesses who are at serious risk because states are failing to enter into relocation agreements with the Court. The Report of the Bureau on cooperation notes:

¹¹ ICC-ASP/11/28, para. 4.

¹² Resolution ICC-ASP/6/Res.2, Strengthening the International Criminal Court and the Assembly of States Parties, Annex II, adopted on 14 December 2007.

¹³ ICC-ASP/11/28.

Despite efforts by the Registry, no relocation agreements were signed in 2012. This is despite the existence of a Trust Fund for Relocations which allows for relocation agreements and/or arrangements to be entered into on a cost-neutral basis. The Court describes this absence of new agreements as an alarming shortfall in its ability to protect victims and witnesses potentially under threat.¹⁴

All states have an obligation under Article 86 and Article 93 (1) (j) of the Rome Statute to cooperate with the protection of victims and witnesses. The Assembly is, therefore, urged to commit itself to taking immediate action, in coordination with the Court, to increase the number of agreements in 2013, including by: setting a target of ten new agreements by the end of the year;¹⁵ placing the issue at the top of agenda of the proposed inter-sessional mechanism on cooperation; organizing awareness raising and information sharing forums; and otherwise supporting the Court's efforts to encourage states to enter into agreements.

8. THE ASSEMBLY SHOULD CONSIDER ADDITIONAL ISSUES RELATING TO NON-COOPERATION

Amnesty International welcomed the Assembly's recognition at its ninth session in 2010 of the "negative impact that the non-execution of Court requests can have on the ability of the Court to execute its mandate"¹⁶ and the Report on potential Assembly procedures relating to non-cooperation adopted by the Assembly last year.¹⁷ The Report focussed on:

1. instances of non-cooperation where the Court has referred a matter to the Assembly in accordance with Article 87 (7); and
2. exceptionally a scenario where the Court might not yet have referred the matter...but there are reasons to believe that a specific incident of non-cooperation in respect of a request for arrest and surrender of a person is about to occur or is currently on-going and urgent action by the Assembly may help bring about cooperation.

It sets out a number of important formal responses that could be conducted in the first scenario and informal responses to the second scenario. However, there are still a number of outstanding questions that merit further examination, including:

- How will non-cooperation that has yet to be referred by the Court to the Assembly be monitored and what safeguards can be put in place to ensure that the Bureau acts consistently in deciding to which instances of non-cooperation to respond?
- Are there failures to provide other forms of cooperation, apart from arrest and surrender, which may warrant exceptional action without a referral by

¹⁴ Ibid., para. 12.

¹⁵ Amnesty International recognizes that the identity of states that have entered into agreements must be kept confidential for security reasons.

¹⁶ Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/9/Res.3, para. 12.

¹⁷ Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5, para. 9.

the Court? For example, failure to take effective protection measures for witnesses.

- Should public measures always be excluded before non-cooperation is referred by the Court under Article 87 (7)?
- Are there instances when the Assembly should respond to United Nations Security Council's inaction in relation to a referral from the Court under Article 87 (7) regarding a situation referred by the Council? If so, how?

The Assembly is encouraged to continue its consideration of the full range of issues and possible procedures regarding non-cooperation, in consultation with the Court and civil society.

9. THE ASSEMBLY SHOULD STRENGTHEN ITS PROPOSED RESOLUTION ON COOPERATION

Although Amnesty International welcomes the initiative for the Assembly to once again issue a separate resolution on cooperation, the text should be strengthened in the following ways.

- The resolution should expressly call on states to intensify their cooperation with the Court by implementing the 66 recommendations on cooperation adopted by the Assembly at its sixth session;
- The resolution should recognize the importance of implementing the Assembly's Plan of Action for Achieving Universality and Full Implementation of the Rome Statute towards ensuring cooperation;
- The resolution should provide a clear mandate, including setting priorities, for the future work of the Assembly in promoting cooperation;¹⁸
- Inaccurate and inappropriate references to "voluntary cooperation" in the resolution should be deleted, in particular in relation to interim release and victim and witness relocation. Both forms of cooperation are essential to the investigation and prosecution of crimes within the jurisdiction of the Court and, therefore, fall within the mandatory general obligation to cooperate set out in Article 86 of the Rome Statute; and
- Rather than request that the Court report again on cooperation at its twelfth session, the resolution should request the Court to report annually on these very important issues.

COMPLEMENTARITY

Amnesty International welcomes that the Assembly has also included in its agenda, for the first time, a formal discussion on complementarity. Complementarity is the foundation of the Rome Statute system, as recognized both in the Preamble and in the Review Conference Resolution on Complementarity, which "*stresses the*

¹⁸ For example, paragraph 16 of the Resolution on Cooperation adopted at the Assembly's eighth session (ICC-ASP/8/Res.2) identifies 11 priority issues for the Facilitator to examine.

obligations of States Parties flowing from the Rome Statute” with regard to complementarity. The greatest impact the Rome Statute system can have in the fight against impunity will be to prompt states to fulfil their obligations under the Rome Statute and ensure justice, truth and reparation at the national level for victims. As the Review Conference recognized, this requires the Court, states parties and other stakeholders, including international organizations and civil society, to:

further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern as set out in the Report of the Bureau on complementarity, including its recommendations.¹⁹

Since Kampala, discussions have developed in a number of fora and the Court has reported on the strategies and activities that are being employed by the Presidency, the Office of the Prosecutor and the Registry to have an impact in the fight against impunity, including beyond the cases being prosecuted by the Court.²⁰ This year, the Court has also provided its views to the Assembly on measures that other actors could take to promote complementarity, which merit the Assembly’s consideration.²¹

All members of the Assembly are encouraged to participate actively in the discussion on complementarity (either individually or through their regional groups) and to consider raising the recommendations set out below.

10. THE ASSEMBLY SHOULD CONTINUE TO DISCUSS COMPLEMENTARITY AT EACH FUTURE SESSION AND ESTABLISH AN INTER-SESSIONAL MECHANISM

The Assembly’s discussion on complementarity should be the key forum for developing a holistic approach to promoting complementarity, including reviewing the activities and initiatives of all actors and examining key obstacles to complementarity experienced by states. It should, therefore, become a regular agenda item for each session.

The Assembly should also consider whether its current inter-sessional mechanisms are sufficient. Although Amnesty International welcomes the work of the Bureau’s Facilitators on complementarity, a more formal dialogue should be established that is open to all states and civil society to make progress on these important issues.

11. THE ASSEMBLY SHOULD EXAMINE, AS A PRIORITY IN 2013, WAYS IN WHICH THE ASSEMBLY, STATES AND OTHER ACTORS CAN PROMOTE COMPLEMENTARITY DURING PRELIMINARY EXAMINATIONS

Given the broad scope of complementarity issues, it will be important for the Assembly to prioritize its efforts each year by focussing on specific issues. As a first priority, it is recommended that the Assembly should consider how to promote complementarity in situations under preliminary examination by the Court. The preliminary examination phase, when the Office of the Prosecutor is seeking to establish jurisdiction, admissibility and make a determination on whether to step in, will be the biggest opportunity to promote complementarity in most situations. At this stage, the national authorities are most likely to take measures to avoid

¹⁹ Complementarity, RC/Res.1, adopted at the ninth plenary meeting on 8 June 2010: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf.

²⁰ Report of the Court on complementarity, ICC-ASP/10/23, 11 November 2011.

²¹ Report of the Court on complementarity, ICC-Asp/11/39, 16 October 2012.

international investigations and prosecutions in an attempt to demonstrate that they are able and willing genuinely to investigate and prosecute crimes within the jurisdiction of the Court. With the Office of the Prosecutor currently revising its draft strategy on preliminary examinations, it is an important moment to consider ways in which the Assembly, states and other actors, including inter-governmental organizations and civil society, can most effectively encourage states to ensure justice, truth and full reparation at the national level and offer capacity building support, when required.

12. THE ASSEMBLY SHOULD INVEST MORE IN TOOLS AIMED AT PROMOTING COMPLEMENTARITY

Despite welcome efforts by the Secretariat to develop its activities, including establishing an extranet on complementarity, Amnesty International is concerned that the requirement for the Secretariat to perform this work “within existing resources” – when no specific resources were originally allocated to these tasks - is unrealistic and precludes such tools from achieving their potential. For example, the Report of the Secretariat on Complementarity notes that it had received “very limited information for posting” on the extranet.²² With additional resources, the Secretariat could expand its current efforts to promote information sharing, including identifying and gathering information.

IMPACT OF THE ROME STATUTE SYSTEM ON VICTIMS AND AFFECTED COMMUNITIES

Amnesty International is looking to the Assembly to fulfil and build upon the important commitments states gave to victims and affected communities in the Review Conference Resolution on the impact of the Rome Statute on Victims and Affected communities.²³ Regrettably this year, although there has been major progress with the Court conducting its first reparation process, states are increasingly questioning the victims’ mandate. This is strongly reflected in the Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims and Reparations.²⁴ States parties are, therefore, urged to affirm their strong support for the victims’ mandate during the General Debate and to support the following measures towards achieving it.²⁵

13. THE ASSEMBLY SHOULD COMMIT TO IMPROVING VICTIM PARTICIPATION IN 2013

Amnesty International is concerned that the Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims and Reparations notes that some states are questioning the sustainability of victims’ participation.²⁶ Amnesty International shares concerns expressed in the draft Resolution on Victims and Reparations regarding “the persistent backlogs the Court has had in processing applications from victims seeking to participate in proceedings.”²⁷ The system is not functioning effectively and victims are losing out. However, states parties should

²² ICC-ASP/11/25, para. 8.

²³ RC/Res.2

²⁴ ICC-ASP/11/32.

²⁵ Amnesty International is an active member of the Victims’ Rights Working Group, which will issue a more detailed paper on victims’ issues in advance of the Assembly. This paper seeks only to identify a few of Amnesty International’s key priorities.

²⁶ ICC-ASP/11/32.

²⁷ ICC-ASP/11/32, Part III, Recommendations.

proceed carefully in seeking solutions. In particular, quick-fixes aimed at addressing growing concerns over costs by scaling back on participation should be rejected. Instead, effective solutions must be developed that address the current problems while giving effect to the rights of victims as guaranteed in the Rome Statute and other international law and standards that must be respected by all Court organs.

In September, the Court issued a Report on the review of the system for victims to apply to participate in the proceedings, which sets out six options for addressing some of these problems.²⁸ Amnesty International's initial review of the options identifies both welcome and concerning aspects, which the organization will report on in detail shortly. It is important that sufficient time is allocated to consider these options and other solutions in the lead up to the twelfth session of the Assembly. In particular, the views of experts on victim issues should be sought to ensure that any changes to the current approach, including amendments to the legal framework, actually improve the experience of victims who participate in proceedings. The review should also look more broadly at ensuring the system as a whole works effectively for victims, including women who face specific barriers to accessing justice.

14. STATES PARTIES SHOULD MAKE ANNUAL VOLUNTARY CONTRIBUTIONS TO THE TRUST FUND FOR VICTIMS

The Trial Chamber's decision on principles and procedures for reparation in the *Lubanga* case, which is currently being appealed, indicates that, in addition to its general assistance mandate, the Trust Fund could play a significant role in developing and implementing reparation orders in accordance with Article 75. The potential role highlights the need for additional voluntary contributions from states this year. Regrettably, however, the amount of voluntary contributions has fallen. It is particularly disappointing that states parties do not appear to have acted upon the Board of Director's request for an exceptional voluntary contribution to be pledged to collectively by states parties.

To ensure that the Trust Fund has sufficient resources to fulfil the Court's orders to provide reparations to victims and to conduct other projects of assistance for victims, Amnesty International urges each state party to make annual voluntary contributions to the Trust Fund and to announce their contribution or pledges in their statements to the Assembly's General Debate.

15. THE ASSEMBLY SHOULD INCLUDE A DISCUSSION ON VICTIMS AND AFFECTED COMMUNITIES ON THE FORMAL AGENDA OF ITS TWELFTH SESSION

The Assembly has a key role to play in ensuring the positive impact of the Rome Statute system for victims and affected communities. Regrettably, most of the discussions on this important issue are currently taking place informally in The Hague. Given the importance of these issues and the reviews expected to continue in the next year, it is essential that discussions on victims' issues are also included on the agenda of the Assembly's sessions and appropriate mechanisms are put in place to ensure that all states parties can engage in inter-sessional discussions to support this vital part of the Court's mandate.

²⁸ ICC-ASP/11/22.

AMENDMENTS

Amnesty International notes that no new proposals to amend the Rome Statute had been filed with the Secretary-General of the United Nations three months before this session.²⁹ However, the Court has proposed one amendment to the Rules of Procedure and Evidence that will be considered.

In considering amendments to the Rome Statute or the Rules of Procedure and Evidence, states parties are urged to commit themselves to:

1. Protect and promote the integrity of the Rome Statute and safeguard the existing mandate of the Court.
2. Protect and promote the credibility of the Court as an institution of international justice which is fair, effective, independent, impartial and free from political interference.
3. Promote universal support for the Court's work in prosecuting genocide, crimes against humanity and war crimes.

16. THE ASSEMBLY SHOULD NOT ADOPT A NEW RULE 132 *B/S* WITHOUT ENSURING THAT IT IS CONSISTENT WITH THE ROME STATUTE

Amnesty International supports in principle the Court's proposal to allocate less than three judges of the Trial Chamber to trial preparation "in order to expedite proceedings and to ensure cost efficiency," provided that there is adequate consultation with the rest of the Chamber and safeguards are put in place to ensure that the other judges on the Trial Chamber can participate in all key decisions and review any decision made by the single judge.

The proposal, however, faces a significant obstacle because Article 39 (2) (b) (ii) states without exception that "[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division." It is difficult to see how the proposal can be reconciled with this statutory requirement. Although it is argued that Article 64 (3) (b) resolves the issue by providing that the Trial Chamber shall "adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings," reading both articles together indicates that procedures adopted by Chamber must involve all three judges.

Furthermore, as currently drafted, the proposal raises some concerns. Firstly, the current text of paragraph 3 requires, in some instances, a decision by a majority of the Trial Chamber "to deal with issues that would otherwise be dealt with by the judge." Instead, any member of the Trial Chamber should be able to engage the full Chamber *proprio motu* when they consider it necessary. Secondly, there is currently no provision for the Trial Chamber to review decisions of the single judge.

²⁹ A number of proposals submitted to the eighth session that were not taken forward to the Review Conference, including adding crimes of drug trafficking, terrorism and expanding the list prohibited weapons as war crimes, as well as a proposal to amend Article 16, Amnesty International's position on these proposals is set out in Concerns at the ninth session of the Assembly of States Parties, IOR 53/016/2010, available at: www.amnesty.org/en/library/info/IO53/016/2010/en

States parties should determine whether an amendment of Article 36 (2) (b) (ii) is required before the proposal can be adopted and also consider amending the proposed rule to ensure that the role of the full Trial Chamber is not unduly restricted in responding to important issues arising in the trial preparation process.

RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE

17. THE ASSEMBLY SHOULD INVEST MORE IN IMPLEMENTING ITS PLAN OF ACTION FOR ACHIEVING UNIVERSALITY AND FULL IMPLEMENTATION OF THE ROME STATUTE

Six years after its adoption of the Plan of Action, there has been some progress made this year towards universality and full implementation of the Rome Statute:

- Guatemala ratified the Rome Statute bringing to total number of states parties to 121;
- Bosnia and Herzegovina and Switzerland ratified the Agreement on Privileges and Immunities of the International Criminal Court (APIC) bringing the total number of states parties to 72; and
- The Comoros and Luxembourg have enacted legislation with a view to implementing their complementarity and cooperation obligations under the Rome Statute.

However, 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 Court 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" - when no specific resources were allocated to these tasks when the Plan was adopted. Instead, 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 emphasises 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. Many states parties have yet to provide the Secretariat with copies of implementing legislation. Most states have failed to

take even the basic step set out in the Plan to appoint a national contact point. Furthermore, the number of responses to the Secretariat's annual questionnaire on states activities this year has been low. Only 15 states parties replied. All states parties are encouraged to contribute to the Plan of Action by completing the questionnaire in the lead up to the eleventh 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.³⁰

18. THE ASSEMBLY SHOULD REACT TO DECLARATIONS MADE BY A NUMBER OF STATES UPON RATIFICATION WHICH AMOUNT TO RESERVATIONS

As in previous years, Amnesty International is seriously concerned that declarations made upon ratification by some states amount to disguised reservations. Article 120 of the Rome Statute provides that no reservations may be made to the Statute (unilateral declarations which specify or clarify the meaning of certain provisions and not amounting to reservations are not expressly prohibited). In its report, *International Criminal Court: Declarations amounting to prohibited reservations to the Rome Statute*, the organization examines declarations made by states parties to date and concludes that a number of them amount to reservations, including unilateral declarations made by Australia, Colombia, France, Malta, United Kingdom and Uruguay.³¹ The legal analysis also calls on all states parties not to make any declaration that may amount to a reservation. The organization welcomed the decision by Uruguay on 26 February 2008 to withdraw its declaration and urges the other listed states to do the same.

The Assembly should urge states to withdraw any declarations or understandings that amount to reservations and declare that such reservations are without legal effect in order to ensure that those states remain bound by their obligations under the Rome Statute. Furthermore, it should be recognized that the Court should not be limited in the exercise of its jurisdiction by declarations made by states parties and should give its own interpretation of the Rome Statute in full independence.

³⁰ Available at: <http://www.amnesty.org/en/library/info/IOR53/009/2010>.

³¹ IOR 40/32/2005, November 2005, (also available in French and Spanish), available at: <http://web.amnesty.org/library/index/engior400322005>.

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