



# Human Rights Watch Memorandum for the Twelfth Session of the International Criminal Court Assembly of States Parties

November 2013

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## Introduction

The Assembly of States Parties session in November 2013 takes place at a time of intense strain on the mandate of the International Criminal Court (ICC).

Criticism of the court has grown more vociferous since the March election of Kenya's new president, Uhuru Kenyatta, and deputy president, William Ruto, both of whom face charges before the ICC for crimes against humanity for their alleged roles in the country's 2007-2008 post-election violence. Although President Kenyatta's trial has been postponed until February 2014, it is unclear whether he and Deputy President Ruto will continue voluntarily appearing before the ICC; their failure to do so would present a serious challenge to its authority and test the degree to which states parties and other international partners will back the court.

Leaders of some ICC states parties and others have made calls for the ICC's Kenya cases to be dropped, attempting to politicize the court's work. Some of these same leaders have charged that the ICC is a "tool of Western imperialism," challenging perceptions of the court's legitimacy. This claim lacks a basis in fact—the court's eight situations under investigation are all located within Africa, but five were referred to the ICC prosecutor by an African government and two others by the United Nations Security Council. But it has gained traction due to the lack of accountability during colonial rule and because the ICC and the international justice system operate on uneven terrain today; some powerful governments continue to hold themselves outside the Rome Statute system, shielding their officials from prosecution.

Against this backdrop, in October 2013, an African Union (AU) summit decision asserted the immunity of sitting government officials from international prosecution. This attacks the heart of the Rome Statute of the ICC, which ensures that no one remains above the law. Reports that a few states parties in Africa have considered withdrawing from the Rome Statute have also cast a shadow over essential efforts to promote the treaty's universality.

These developments, explored in detail below, present the ICC and its supporters with the biggest set of challenges since the efforts of the United States under the George W. Bush administration sought to discourage states parties' participation in the court. But it should

not be surprising that the ICC once again faces challenges to its mandate. The ICC was set up to tackle the world's worst crimes in situations of entrenched impunity. In doing its job, it is inevitable that the ICC will run into powerful interests working against justice.

These challenges require a demonstration of the ICC's mettle by court officials and a strong response by ICC states parties and supporters. For court officials, it is imperative that the ICC continually strives to improve its own performance. A court that is seen to be fair, effective, credible, and which takes seriously the views and concerns of victims and affected communities provides the best basis for support for the court's mandate within the international community. For states parties, it is clearer than ever that strong support for the court in its work, thoughtful adherence to principle, fidelity to the Rome Statute, and forthright diplomacy deployed on its behalf are crucial for the ICC to be able to effectively exercise its judicial mandate without interference.

Even as challenges have mounted, some steps have already been made with regard to court performance and state party support over the past year.

When it comes to the court's own performance, the Office of the Prosecutor has made public its new Strategic Plan, covering the period 2012-2015, since the new ICC prosecutor, Fatou Bensouda, was sworn into office.<sup>1</sup> The plan is critically important in that it announces significant changes in the office's policies and practices, particularly with regard to improving the quality of investigations and prosecutions (see Part VI below). Given concern about weaknesses in investigations, thrown into sharp relief as the office's first cases have been tested in court, the plan is a welcome indication of the office's determination to seek out improvements, even as these will take time to implement.

As discussed below, states parties have made progress in pushing forward sustained attention within the Assembly to cooperation issues, and a focus on arrest strategies is particularly welcome. States parties this year have also shown a willingness to examine not only the court's performance, but their own, reviewing and making a number of concrete recommendations aimed at strengthening the methods of the Bureau and its

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<sup>1</sup> International Criminal Court Office of the Prosecutor (OTP), "Strategic Plan, June 2012-2015," October 11, 2013, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf) (accessed October 28, 2013).

working groups.<sup>2</sup> Although ultimately it will be up to states parties to ensure that they implement in actual fact a commitment to the election of the “highest-qualified individuals ... as judges of the International Criminal Court,” the Assembly’s Advisory Committee on Nominations has begun work, issuing its first evaluation of two candidates in the context of the upcoming election at this Assembly session of one judge.<sup>3</sup> While these may seem like small steps, ensuring that court officials and states parties have the ICC’s house in order is an essential prerequisite to meeting the larger, political challenges facing the court.

The upcoming Assembly session offers a number of opportunities to address the challenges posed to the court’s legitimacy and mandate arising out of tensions over the Kenya cases, while pushing forward the Assembly’s work on standing priorities. The challenges need to be addressed seriously. States parties, however, should pursue an approach at the upcoming Assembly session that favors thoughtful adherence to principle and a search for constructive dialogue. The balance of this memorandum makes recommendations to states parties in five key areas: (1) making use of the General Debate; (2) addressing the ICC’s relationship with African countries during the special segment requested by the African Union on “Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation;” (3) amendments that may be proposed for the Assembly’s discussion at this session; (4) cooperation; and (5) complementarity. In addition, we offer some initial observations on the office of the prosecutor’s new Strategic Plan, which is relevant to the Assembly’s consideration of the court’s proposed budget for 2014.<sup>4</sup>

Finally, in light of the challenges currently posed to the court’s mandate to deliver justice for the world’s worst crimes, it is particularly appropriate that this year’s Assembly session will feature, for the first time, a plenary session on victims. This continues the Assembly’s evolution toward ensuring its sessions focus real attention on the substantive issues raised in the ICC’s work and provides an opportunity to continue discussions initiated

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<sup>2</sup> Assembly of States Parties (ASP), “Report of the Bureau: Evaluation and rationalization of the working methods of the subsidiary bodies of the Bureau,” (draft), October 30, 2013, unpublished document on file with Human Rights Watch.

<sup>3</sup> ASP, “Report of the Advisory Committee on Nominations of Judges on the work of its second meeting,” ICC-ASP/12/47, October 29, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-47-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-47-ENG.pdf) (accessed November 11, 2013).

<sup>4</sup> In addition to the recommendations in this memorandum, Human Rights Watch joins in team papers prepared by the Coalition for the International Criminal Court in advance of this Assembly session. The papers will be available on their release from <http://iccnow.org/?mod=asp12>.

during the stocktaking exercise at the 2010 Kampala review conference of the impact of the Rome Statute system on victims and affected communities.

Victims and affected communities have a crucial interest in the success of the court. The plenary session should highlight the high expectations of victims for justice from the ICC and the contributions made through court's innovative system of victim participation to the effective functioning of the court. At the same time it should identify where improvements are needed to more effectively guarantee victims' rights to truth and justice, and the more specific rights of victims to participation and reparations under the ICC treaty. The latter should include support for meaningful victim participation, outreach, field presence, the Trust Fund for Victims, and attention to the court's legacy.

In rejecting criticism of the ICC's mandate, former United Nations Secretary-General Kofi Annan recently stated that, "We must always have the courage to ask ourselves 'who speaks for the victims?'"<sup>5</sup> The Assembly's discussions this year provide the opportunity for ICC states parties to ensure that, in this court, the voices of victims will be heard, and will be met with unstinting support for the court's delivery of justice.

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<sup>5</sup> "Strong and Cohesive societies: the foundations for sustainable peace," Kofi Annan, Third Annual Desmond Tutu International Peace Lecture, University of the Western Cape, October 7, 2013, <http://kofiannanfoundation.org/sites/default/files/Tutu%20Lecture%20Final.pdf> (accessed November 7, 2013).

## Summary of Recommendations for the Twelfth Session

In statements to the **General Debate** and in the **special segment requested by the African Union on “[i]ndictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation,”** states parties to the Rome Statute should:

- Affirm their commitment to the mission and mandate of the International Criminal Court to end impunity for the crimes of most concern to the international community;
- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference, and underscore the need to avoid such interference in the court’s judicial operations, whether by the African Union or any other political body;
- Commit to work to expand the reach of justice for victims, including through heightened attention to the Assembly’s universality work, and make reference to the plenary session on victims as an opportunity to debate measures the court and states parties can take to better support the ICC’s delivery of justice;
- Highlight important positive impacts of the court in Africa to date;
- Call for and support with adequate resources increased efforts by the court to intensify its public information and outreach activities within Africa, and particularly within situation countries, to promote dialogue between the court and affected communities and better understanding of the court’s mandate and activities; and
- Emphasize the importance of seeking out additional points of entry for the ICC within Africa; this could include committing to hold more meetings of states parties in African capitals, including as part of the Assembly’s intersessional work on cooperation and complementarity; organizing public debates in Africa to bring attention to the court’s mandate and jurisprudential developments, as a means of raising awareness and fostering informed discussion; and calling on the host state government to work toward opening the ICC liaison office in Addis Ababa.

With regard to **the plenary discussion on victims**, states parties should:

- Support meaningful victim participation, outreach, field presence, the Trust Fund for Victims and attention to the court's legacy as elements of the court's work that are particularly relevant to victims and impact among affected communities, while pledging increased cooperation and support to the court in carrying out its mandate to deliver justice.

With regard to the **plenary discussion on cooperation**, states parties should:

- Welcome the emerging practice of the Assembly in addressing cooperation issues through its identification of priorities, focused follow-up over the course of the year, including through intersessional expert seminars, and use of the plenary session to bring broad attention to cooperation issues;
- Express support for the continued inclusion of cooperation as a standing item on the Assembly's agenda at its annual sessions; and
- Contribute actively and seek to better understand the court's needs with regard to witness and victim protection and support, exchange best practices in the conclusion of voluntary agreements or other measures to facilitate the court's programs of witness and victim protection and support, and identify potential areas for follow-up through the cooperation facilitation in the coming year.

In statements during the **General Debate and other relevant Assembly discussions and side events on complementarity**, states parties should:

- Stress the importance of supporting national justice for ICC crimes in the fight against impunity, and underscore that it is essential to provide assistance to build capacity for national prosecutions in ICC situation countries as early as possible to address the cases that the ICC will not prosecute;
- Share experiences about initiatives taken to promote national justice for atrocity crimes, particularly in ICC countries under analysis or investigation;

- Commit to further mainstreaming the importance of accountability initiatives with diplomatic and development staff on the ground;
- Highlight the importance of engaging in capacity building projects that could support and measure both ability and willingness, where willingness is defined as creating and maintaining a climate conducive to realizing independent and impartial justice;
- Recognize a productive overlap between the ICC's completion strategies in situation countries and complementarity initiatives;
- Call on the ICC to continue to move forward in the development of completion strategies, including in order to provide clear indication to states parties as to what kinds of strengthened capacity for the national investigation and prosecution of ICC crimes would be most relevant;
- Acknowledge that the court is a key resource in complementarity initiatives and recognize the important role of field offices when it comes to developing completion strategies to maximize the court's legacy and impact;
- Express support for the inclusion of complementarity as an agenda item at next year's Assembly session;
- Call for the development of a strong Assembly work plan on complementarity for 2014, including continued attention to the relationship between the development of ICC completion strategies and complementarity initiatives;
- Give priority to attendance at side events on complementarity, given the absence of a plenary session on this topic; and
- Appoint a rapporteur to attend all side events on complementarity in order to prepare a written summation that can be distributed to all ICC states parties. The report should also include relevant excerpts from General Debate statements.



With regard to a **stand-alone resolution on cooperation**, the Assembly should:

- Adopt the proposed annex concerning a roadmap for achieving an “operational tool” to better support arrest strategies for the ICC;
- Adopt proposed language requesting the Bureau to report at the Assembly’s thirteenth session on the establishment of a permanent coordinating mechanism of national central authorities or focal points for cooperation with the court;
- Express support for the Bureau in preparing such a report to consider how to consolidate the Assembly’s emerging practice in addressing cooperation issues into the establishment of an intersessional working group, alongside the establishment of a permanent coordinating mechanism of national central authority or focal points;
- Adopt proposed language keeping the Assembly’s non-cooperation procedures under review in order to secure their effectiveness and stressing the importance of early notification to states parties of opportunities to avoid non-cooperation;
- Express support for the Assembly, as part of that review, to elaborate the actual modalities, beyond an Assembly resolution, of a “formal response” to be taken by the Assembly following dialogue with a state subject to a court finding of non-cooperation;
- Revisit the issue of “non-essential contacts” in consultations next year with a view to identifying language that better conveys the extent to which non-essential contacts are important to advancing ultimate surrender and signaling respect for victims;
- Adopt proposed language requesting the Bureau to report to the Assembly at its thirteenth session on the implementation of Kampala review conference pledges; and
- Express support for such a report to also identify a more durable framework for states to report on implementation and to make new pledges, for consideration and adoption at the Assembly’s thirteenth session.

With regard to the **Working Group on Amendments**, states parties should:

- Maintain the irrelevance of official capacity under article 27 of the statute;
- Consider carefully proposals to amend the Rules of Procedure and Evidence with regard to the presence at trial of defendants, bearing in mind the need to ensure sufficient consultation on proposals and their consistency with the Rome Statute, and whether adopting amendments at this time would be premature given evolving practice at the court.

With regard to **adoption of a 2013 budget** for the International Criminal Court, states parties should:

- Give particular consideration to ensuring that the Office of the Prosecutor has the additional resources it needs to bolster its investigative capacity, while signalling support in future years to investing in other areas where the court continues to have inadequate resources to carry out its mandate and to protect the equality of arms.

## **I. General Debate**

Human Rights Watch recommends that states parties and observers make the most of statements during the Assembly's General Debate to set out common points of principle and affirm commitment to the mandate of the ICC. While in recent years some states parties have questioned the utility of the General Debate, and the addition of plenary discussions devoted to specific themes have marked a positive evolution in the Assembly's practices, the General Debate remains an important moment to set the tone of the Assembly session from the outset and lay groundwork for these other more specific discussions.

In the absence of a plenary discussion on complementarity, the General Debate provides a particularly good opportunity to highlight developments in practice and policy in this area, as well as whether further attention and improvement is needed to make the

complementarity principle increasingly operational in practice. We set out recommendations to this end below in Part V.

When it comes to broader principles, in General Debate statements, states parties should:

- Affirm commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Recognize the central role of the ICC as a court of last resort in the absence of genuine action by national authorities, and the need for efforts to expand the reach of justice, including through working toward the universality of the Rome Statute;
- Underscore the obligation of ICC states parties to cooperate fully with the court, including in carrying out arrests;
- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference; and
- Commit to ensuring adequate resources for the ICC to carry out its mandate.

## **II. Africa and the ICC**

The relationship between the ICC and some African governments and the African Union (AU) faced intensified challenges in 2013. In this context, the General Debate and the Assembly session's scheduled special segment requested by the African Union on the "[i]ndictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation" provide important opportunities for African ICC states parties to reaffirm support to the ICC, while expressing any concerns in a manner that respects the parameters set out within the Rome Statute regarding the authority of the court and the Assembly.

The discussion is also an important opportunity for African and other ICC states parties to commit to work to extend the reach of justice for grave crimes, to affirm the importance of

protecting the court from political interference in its independent judicial operations, and to highlight important positive impacts of the ICC in Africa.

In the advance of this session, the government of Kenya has proposed amendments to the Rome Statute, including to article 27 of the Rome Statute. Articles 121 and 122 of the Rome Statute determine the procedure to be followed for amendments to the Rome Statute, and the Assembly has also established a Working Group on Amendments to consider and make recommendations on amendment proposals.<sup>6</sup> The 90-day notice period required under the Rome Statute for consideration of amendments to the treaty precludes the adoption of any amendment to the treaty at this Assembly session. However, as discussed below, when it comes to the merits of any such proposal, allowing immunity for sitting officials would run counter to the Rome Statute's objective of ensuring justice for the most serious crimes, and international law and practice, and should not be adopted.

Proposed amendments to the Rules of Procedure and Evidence, which are not subject to the same 90-day notice period, are also expected at this session; these are discussed in Part III.

Background and analysis of recent AU decisions, claims that the ICC is targeting Africa, positive impacts of the ICC in Africa, and concerns regarding immunity for sitting officials follow below. We also provide recommendations to ICC states parties for action at this Assembly session to promote a strong, principled relationship between Africa and the ICC.

## A. Background

The election in March 2013 of ICC suspects Uhuru Kenyatta as Kenya's president and William Ruto as deputy president led to increased denunciations of the court from some African leaders and the AU.<sup>7</sup> Claims that the ICC is targeting Africa increased significantly,

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<sup>6</sup> ASP, "Report of the Working Group on Amendments," ICC-ASP/11/36, November 13, 2012, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-36-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-36-ENG.pdf) (accessed October 29, 2013), Annex II ("Draft terms of reference").

<sup>7</sup> This followed a several year period of strain between the AU and the ICC in the wake of the court's issuance of arrest warrants for Sudanese President Omar al-Bashir for crimes in Darfur as the AU sought a UN Security Council deferral of his case under article 16 of the Rome Statute. Assembly of the AU, Thirteenth Ordinary Session, "Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) – Doc. Assembly/AU/13 (XIII)," Assembly/AU/Dec.245(XIII) Rev.1, Sirte, July 3, 2009, [http://www.au.int/en/sites/default/files/ASSEMBLY\\_EN\\_1\\_3\\_JULY\\_2009\\_AUC\\_THIRTEENTH\\_ORDINARY\\_SESSION\\_DECISION\\_S\\_DECLARATIONS\\_%20MESSAGE\\_CONGRATULATIONS\\_MOTION\\_o.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISION_S_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_o.pdf) (accessed November 7, 2013), para. 9.

while questions arose, especially in the media, as to whether Kenya and other African ICC states parties might consider withdrawing from the Rome Statute.<sup>8</sup>

It is important to highlight that no concrete steps toward withdrawal have in fact taken place and Kenya has denied that withdrawal was being pursued.<sup>9</sup> Nevertheless, recent AU decisions challenge the court's independent judicial role and justice for victims of Kenya's 2007-08 violence. Meanwhile, African ICC states parties have remained largely silent in the face of attacks on the court, with the notable exception of Botswana.

## B. 2013 AU decisions on the ICC

In May, the AU adopted a decision that calls for the ICC's cases on Kenya to be referred to the country's national system.<sup>10</sup> However, a referral may only happen as a result of a determination by the ICC judges in response to an admissibility challenge under article 19 of the Rome Statute, and only on the basis of credible domestic proceedings. The ICC judges in 2011 rejected a challenge by the Kenyan government in these cases, finding no evidence that national authorities were conducting genuine national investigations and prosecutions.<sup>11</sup> There are presently no pending admissibility challenges to the cases.

In October, the AU convened an extraordinary summit on the ICC, where it adopted a decision 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"; Kenyatta and Ruto's trials "should be suspended until they complete their terms of office"; and Kenyatta "will not

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<sup>8</sup> See, for example, "African Union accuses ICC of 'hunting' Africans," *BBC*, May 27, 2013, <http://www.bbc.co.uk/news/world-africa-22681894> (accessed October 23, 2013); "African Union summit on ICC pullout over Ruto trial," *BBC*, September 20, 2013, <http://www.bbc.co.uk/news/world-africa-24173557> (accessed October 23, 2013); "AU summit to decide whether to exit from ICC," *AFP*, October 9, 2013, <http://www.africareview.com/News/AU-summit-to-decide-whether-to-exit-from-ICC/-/979180/2024850/-/36lgvz/-/index.html> (accessed October 23, 2013).

<sup>9</sup> See Edmund Blair, "Kenya says not lobbying Africans to quit Hague court," *Reuters*, October 9, 2013, <http://uk.reuters.com/article/2013/10/09/uk-kenya-icc-africa-idUKBRE9980KU20131009> (accessed October 23, 2013); see also Aaron Maasho, "African leaders to hold summit on Kenya's ICC cases," *Reuters*, September 19, 2013, <http://www.reuters.com/article/2013/09/19/us-kenya-icc-trial-idUSBRE98loGD20130919> (accessed October 23, 2013).

<sup>10</sup> Assembly of the AU, Twenty-First Ordinary Session, "Decision on International Jurisdiction, Justice, and the International Criminal Court (ICC) – Doc. Assembly/AU/13(XXI)," Assembly/AU/Dec.482(XXI), Addis Ababa, May 27, 2013, [http://iccnow.org/documents/AU\\_decisions\\_21st\\_summit\\_May\\_2013.pdf](http://iccnow.org/documents/AU_decisions_21st_summit_May_2013.pdf) (accessed October 23, 2013), para. 7.

<sup>11</sup> *Situation in the Republic of Kenya*, International Criminal Court (ICC), ICC-01/09, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 20 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), August 30, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf> (accessed October 23, 2013).

appear before the ICC until such time as the concerns raised... have been adequately addressed by the UN Security Council and the ICC.”<sup>12</sup>

There is no legal basis for the AU to bind the ICC prosecutor’s hands in the pursuit of cases or to negate the provisions of the Rome Statute. Moreover, article 143(4) of the Kenyan constitution, adopted in 2010, specifically prohibits the president’s immunity from criminal prosecution for “crime[s] for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.”<sup>13</sup>

Kenyatta is not subject to an ICC arrest warrant and is appearing voluntarily before the court. He has previously pledged to continue cooperating. In the event Kenyatta does not appear for trial, this could lead to the court issuing an arrest warrant, which states parties would be obligated to enforce consistent with their requirements to cooperate with the court under part 9 of the Rome Statute.

The October AU decision also requests that African ICC states parties seek an agenda item related to “indictments” of African heads of state at the Assembly and amendments to the Rome Statute, presumably with regard to the issue of immunities. Finally, the decision provides for a follow-up summit to be convened toward the end of November.<sup>14</sup>

### **C. Claims the ICC is targeting Africa and the ICC’s positive impact in Africa**

A persistent claim by some African leaders is that the ICC is targeting Africa.<sup>15</sup> The facts do not support this conclusion: the majority of situations before the court came about because African governments asked the ICC to become involved or the United Nations (UN)

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<sup>12</sup> Assembly of the AU, Fifteenth Extraordinary Session, “Decision on Africa’s Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1(Oct.2013),” Addis Ababa, October 12, 2013, [http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20\\_E.pdf](http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf) (accessed October 23, 2013), paras. 10(i)-(ii), 10(xi).

<sup>13</sup> “The Constitution of Kenya,” Revised Edition 2010, <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> (accessed November 12, 2013), para. 143(4).

<sup>14</sup> Assembly of the AU, Fifteenth Extraordinary Session, “Decision on Africa’s Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1(Oct.2013),” para. 10(xii).

<sup>15</sup> See, for example, “Remarks by H.E. Dr. Tedros Adhanom Ghebreyesus, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia and Chairperson of the Executive Council of the African Union at the 15th Extraordinary Session of the Executive Council,” Addis Ababa, October 11, 2013, <http://summits.au.int/en/speeches/remarks-he-dr-tedros-adhanom-ghebreyesus-minister-foreign-affairs-federal-democratic-republic-of-ethiopia> (accessed October 23, 2013).

Security Council referred a situation to the court.<sup>16</sup> At the same time, it should be recognized international justice is applied on an uneven terrain: some powerful governments and their allies are able to evade the reach of international justice by not joining the ICC or threatening the use of the veto held by permanent members of the Security Council.

It is essential that all ICC states parties press for justice for serious crimes wherever they are committed, especially where politics threaten to block accountability, such as to ensure justice for crimes committed in Syria,<sup>17</sup> and such failures need to be acknowledged. But justice should not be undermined where it can be achieved because it is not yet possible to ensure justice in all situations.

African civil society has repeatedly stressed the need for governments to work to expand the reach of justice and emphasized the importance of African ICC states parties supporting the ICC as the only permanent court of last resort.<sup>18</sup>

It should also be noted that the ICC has had significant positive impact in Africa. This includes bringing a measure of justice to victims of crimes the court is prosecuting in its situations under investigation, including through the court's innovative system of victim participation which provides some victims with the opportunity to have their views and concerns represented before the court. This also includes the Office of the Prosecutor's work to catalyze efforts to ensure perpetrators of serious crimes are held to account before domestic courts under the principle of complementarity, such as in Guinea.<sup>19</sup>

In addition, the ICC's Trust Fund for Victims is an unprecedented development in international justice, which to date has offered assistance to victims in northern Uganda

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<sup>16</sup> The situations in Uganda, Democratic Republic of Congo, Central African Republic, Côte d'Ivoire, and Mali came before the court as a result of requests by the states where the crimes were committed; two other situations (Libya and Darfur) were referred by the UN Security Council. Kenya is the only situation where the ICC Office of the Prosecutor acted entirely on its own initiative, and only after Kenya failed to take action to ensure justice domestically and with the approval of an ICC pre-trial chamber.

<sup>17</sup> See "UN Security Council: Seize Chance for Justice in Syria," Human Rights Watch news release, September 17, 2013, <http://www.hrw.org/news/2013/09/17/un-security-council-seize-chance-justice-syria>.

<sup>18</sup> See, for example, "130 groups across Africa call for countries to back ICC," Southern Africa Litigation Centre press release, October 7, 2013, <http://www.southernafricalitigationcentre.org/2013/10/09/news-release-130-groups-across-africa-call-for-countries-to-back-icc/#> (accessed October 23, 2013).

<sup>19</sup> See Human Rights Watch, *Guinea - Waiting for Justice*, December 2012, [http://www.hrw.org/sites/default/files/reports/guinea1012forUpload\\_o\\_o.pdf](http://www.hrw.org/sites/default/files/reports/guinea1012forUpload_o_o.pdf), pp. 47-50.

and the Democratic Republic of Congo, in particular to children affected by conflict and individuals that have suffered sexual violence. The Trust Fund estimates that 42,300 victims are benefiting directly from projects in these two countries, including counseling and vocational training for former child soldiers and victims of sexual violence, support to farming cooperatives to assist formerly displaced persons to rebuild their communities, and reconstructive surgery for victims of mutilation.<sup>20</sup> African countries—including Burkina Faso, Comoros, Uganda, Kenya, South Africa, Central African Republic, Mauritius and Senegal—also have adopted legislation to implement the Rome Statute, which help extend the potential reach of justice by making genocide, war crimes and crimes against humanity crimes under domestic laws.

#### D. Concerns regarding immunity for sitting officials

While any state may offer amendments to the ICC pursuant to article 121, the irrelevance of official capacity under article 27 of the Rome Statute is part and parcel of the court’s mission that “the most serious crimes of concern to the international community as a whole must not go unpunished.”<sup>21</sup> The alternative risks an impunity gap at the highest levels and creating a perverse incentive for alleged perpetrators to hold onto power indefinitely or to gain power to avoid prosecution.

The irrelevance of official capacity has been a regular feature of international courts since the post-World War II trials at Nuremberg, including the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone.<sup>22</sup> Allowing

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<sup>20</sup> See “The Trust Fund for Victims Projects,” <http://www.trustfundforvictims.org/projects> (accessed October 24, 2013). Projects in the Central African Republic have been derailed by the security situation in the country. See <http://www.trustfundforvictims.org/news>.

<sup>21</sup> Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2013, preamble, para. 4.

<sup>22</sup> See *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC, Case No. 02/05, “Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir,” December 12, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf> (accessed October 24, 2013), paras. 22-43; UN Economic and Social Council, “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” E/CN.4/2005/102/Add.1, February 8, 2005, <http://www1.umn.edu/humanrts/instreet/HR-protection2005.html> (accessed November 7, 2013), principle 27. See also, for example, “President Milosevic and Four other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo,” International Criminal Tribunal for the Former Yugoslavia press release, May 27, 1999, <http://www.icty.org/sid/7765> (accessed November 7, 2013); and “Charles Taylor is subject to criminal proceedings before the Special Court,” Special Court for Sierra Leone press release, May 31, 2004, <http://www.sc-sl.org/LinkClick.aspx?fileticket=Yss7mvKkrsM%3d&tabid=113> (accessed October 24, 2013).



official capacity to bar prosecution would thus represent a major retreat in international criminal law and practice.

In addition, instead of impeding negotiations or a peaceful transition, remaining firm on the importance of justice—or at least leaving the possibility for justice open—can yield short- and long-term benefits. In Bosnia and Herzegovina the indictment of Radovan Karadzic by the International Criminal Tribunal for the former Yugoslavia is credited with contributing to the success of the Dayton negotiations to end the Bosnian war by marginalizing an abusive leader. Similarly, the unsealing of the arrest warrant for Liberian President Charles Taylor at the opening of talks to end the Liberian civil war was ultimately viewed as helpful in moving negotiations forward.

In Kenya, as in countries as diverse as Afghanistan and DRC, an impunity crisis has led to cycles of violence. Those responsible for political assassinations under President Jomo Kenyatta’s post-independence government and the use of torture against political opponents and excessive use of force by the security services under President Daniel arap Moi were not prosecuted. The 2007-2008 election violence was preceded by similar episodes around the 1992 and 1997 elections. Government commissions named names, including prominent politicians, but no one was prosecuted. It is widely thought that this entrenched impunity encouraged politicians to believe in 2007 that they could get away with virtually anything in order to achieve their political ends.

## **E. Recommendations for this Assembly session**

In accordance with the above analysis and especially given recent questions over possible withdrawals by some African ICC states parties, we urge African ICC states parties to use the special segment requested by the African Union as well as the General Debate to affirm a commitment to the court.

In addition, we urge African and other ICC states parties during the plenary discussion, the General Debate and other relevant moments during the session to:

- Underscore the need to avoid such interference in the court’s judicial operations, whether by the AU or any other political body;

- Commit to work to expand the reach of justice for victims, including through heightened attention to the Assembly’s universality work, and make reference to the plenary session on victims as an opportunity to debate measures the court and states parties can take to better support the ICC’s delivery of justice;
- Highlight important positive impacts of the court in Africa to date;
- Call for and support with adequate resources increased efforts by the court to intensify its public information and outreach activities within Africa, and particularly within situation countries, to promote dialogue between the court and affected communities and better understanding of the court’s mandate and activities; and
- Emphasize the importance of seeking out additional points of entry for the ICC within Africa; this could include committing to hold more meetings of states parties in African capitals, including as part of the Assembly’s intersessional work on cooperation and complementarity; organizing public debates in Africa to bring attention to the court’s mandate and jurisprudential developments, as a means of raising awareness and fostering informed discussion; and calling on the host state government to work toward opening the ICC liaison office in Addis Ababa.

Furthermore, any proposals to amend the Rome Statute should maintain the irrelevance of official capacity under article 27 of the statute.

Finally, it should be noted that calls for deferrals of the ICC’s cases on Kenya are not within the purview of the Assembly. They should be directed to the Security Council as deferrals may only be granted by the UN Security Council under exceptional circumstances.

### **III. Amendments**

At this writing, Human Rights Watch is aware of three new amendment proposals or sets of proposals. These are in addition to proposals to amend the court’s Rules of Procedure and Evidence (“Rules”) approved in October 2013 by the Assembly’s Working Group on

Amendments pursuant to the recommendations of the court’s judge-led Working Group on Lessons Learned and The Hague Working Group’s Study Group on Governance.<sup>23</sup>

The first of these is a set of amendments to the Rome Statute, proposed by Kenya. These proposed amendments relate to the preamble (to include a reference to the ICC as complementary to regional, as well as national criminal jurisdictions) and article 27 (irrelevance of official capacity), article 63 (trial in the presence of the accused), and article 70 (offences against the administration of justice).<sup>24</sup> Human Rights Watch understands that these are not intended to be considered for adoption at this Assembly session. This is consistent with the procedure set out in article 121 of the Rome Statute for amendment of the treaty, which requires as a general rule a 90-day notice period for amendment proposals. As indicated above in Part II.D, however, any discussion during the session regarding a possible future amendment to article 27 should make clear that sitting officials should not be immune from prosecution before the court.

The second is an amendment to the Rules proposed by the governments of Botswana, Jordan, and Liechtenstein, to add a new rule (“rule 134 bis”) regarding presence at trial.<sup>25</sup>

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<sup>23</sup> In 2012, the Assembly endorsed a “roadmap” to consolidate discussions regarding possible amendments to the Rules of Procedure and Evidence. Under this roadmap, due to be revised at the upcoming Assembly session to increase the ability of states parties to consider additional amendments next year, proposals to amend the Rules are first considered in the court’s Working Group on Lessons Learned (WGLL), chaired by ICC vice-president Judge Sanji Monageng and open to all judges of the court. Proposals which receive the support of at least five judges are forwarded on to the Advisory Committee on Legal Text, and, from there, to the Assembly’s Study Group on Governance (SGG), a subgroup of The Hague Working Group, through its cluster on “insuring the efficiency of the criminal process.” Following further discussion, the SGG may endorse proposed amendments and forward them to the Assembly’s Working Group on Amendments. The roadmap, according to revisions expected to be adopted this year, sets 50 days from the Assembly session as a target for forwarding amendment proposals to the Working Group on Amendments, but notes that a shorter timeframe may be necessary in some cases. It also provides for the possibility of consulting with the Assembly’s Committee on Budget and Finance regarding budgetary implications of proposals. See ASP, “Report of the Bureau on Study Group on Governance,” ICC-ASP/12/37, October 15, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-37-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-ENG.pdf) (accessed October 28, 2013), annex I (“Roadmap on reviewing the criminal procedures of the International Criminal Court”). This year the Working Group on Amendments has so far recommended adoption of two amendments at the upcoming Assembly session. ASP, “Report of the Working Group on Amendments,” ICC-ASP/12/44, October 24, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-44-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-44-ENG.pdf) (accessed October 28, 2013). The proposed amendments are to Rule of Procedure and Evidence 68 (“Prior recorded testimony”) and Rule of Procedure and Evidence 100 (“Place of the proceedings”).

<sup>24</sup> Letter of Koki Muli Grignon, Ambassador and Deputy Permanent Representative, Permanent Mission of Kenya to the United Nations to H.E. Ambassador Paul Seger, Permanent Representative of Switzerland to the United Nations, Chair of the Working Group on Amendments to the Rome Statute, November 7, 2013, unpublished document on file with Human Rights Watch.

<sup>25</sup> Letter of C.T. Ntwaage, Ambassador and Permanent Representative, Permanent Mission of the Republic of Botswana to the United Nations to H.E. Ambassador Paul Seger, Permanent Representative of Switzerland to the United Nations, Chair of the Working Group on Amendments to the Rome Statute, October 31, 2013, unpublished document on file with Human Rights Watch.

Unlike amendments to the Rome Statute, there is no notice period required under article 51(2) of the Rome Statute, which governs amendments to the Rules. According to article 51(3), any amendment to the Rules “shall be consistent” with the Rome Statute, and, under article 51(4), the Rome Statute prevails in the event of a conflict between it and the Rules.

This proposal has been forwarded to the Assembly’s Working Group on Amendments for possible adoption at the upcoming Assembly session. The proposal has been revised at least once, based on initial feedback from states parties and the court, including a further proposal put forward by Kenya.<sup>26</sup>

The third is an amendment to the Rules proposed by the United Kingdom on “the presence of the accused through the use of video technology.”<sup>27</sup>

Given that the texts may evolve, Human Rights Watch offers the following general observations to states parties in their consideration of these proposals. Such considerations may also apply as a general matter to other proposed amendments to the Rules before the Assembly at the upcoming session.

First, the Assembly has developed a “roadmap” to guide consideration of amendments to the Rules, involving a number of actors including the court’s Working Group on Lessons Learned and Advisory Committee on Legal Text, The Hague Working Group’s Study Group on Governance, and the Working Group on Amendments.<sup>28</sup> This procedure does not preempt the ability of states parties to introduce proposed Rules amendments to the Working Group on Amendments. But it suggests recognition of the merit of opportunities for more extensive examination and discussion of proposed amendments than is likely available in the limited period remaining before the Assembly session. It also risks opening the door to circumvention in the future of these procedures.

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<sup>26</sup> See “Revised Proposal for a new Rule on the question of presence at trial, including through communications technology,” November 6, 2013, unpublished document on file with Human Rights Watch; see also Letter of Macharia Kamau, Ambassador and Permanent Representative, Permanent Mission of Kenya to the United Nations to H.E. Ambassador Paul Seger, Permanent Representative of Switzerland to the United Nations, Chair of the Working Group on Amendments to the Rome Statute, November 4, 2013, unpublished document on file with Human Rights Watch.

<sup>27</sup> Letter of Sir Mark Lyall Grant, Permanent Representative, United Kingdom Mission to the United Nations to H.E. Ambassador Paul Seger, Permanent Representative of Switzerland to the United Nations, Chair of the Working Group on Amendments to the Rome Statute, November 8, 2013, unpublished document on file with Human Rights Watch.

<sup>28</sup> See note 25 above.

Second, the issue of the physical attendance of the president and deputy president of Kenya has received intense scrutiny. Some states parties expressed a view in advance of the appeals chamber decision that increased “flexibility” from the court was necessary under the circumstances. The appeals chamber accepted *amici* submissions from five African states on the issue,<sup>29</sup> and the African Union also sent a letter to the ICC presidency asking for the president and deputy president’s excusal from continuous physical attendance.<sup>30</sup> Under these circumstances, now that the appeals chamber has rendered a decision on the issue,<sup>31</sup> states parties should be cautious about appearing to amend the Rules in a manner that risks exacerbating perceptions of political interference in the court’s work and ensure consistency with the Rome Statute.<sup>32</sup>

Finally, states parties should consider whether an amendment to the Rules regarding presence or video link alternatives would be premature. The appeals chamber decision, handed down on October 25, is currently being applied by the trial chamber in the Ruto and Sang case. Deputy President Ruto has been excused on two occasions based on this decision, at this writing, each for several days. No ICC trial chamber has yet decided the issue of presence via video link. Rather than act now to amend the rules, it may be more prudent to examine this issue again in the future after increased practice in the trial chambers’ exercise of the criteria set down by the appeals chamber.

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<sup>29</sup> *Prosecutor v. William Samoei Ruto and Joshua arap Sang*, ICC, Case No. 01/09-01/11, “Decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence,” September 13, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1644765.pdf> (accessed November 11, 2013).

<sup>30</sup> Letter of the Chairperson of the African Union, H.E. Hailemariam Desalegn, and the Chairperson of the African Union Commission, H.E., Dr. Nkosazana Dlamini Zuma, to President Sang-Hyun Song, ICC, September 10, 2013, [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/pr943/130910-AU-letter-to-SHS.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr943/130910-AU-letter-to-SHS.pdf) (accessed November 11, 2013).

<sup>31</sup> See *Prosecutor v. William Samoei Ruto and Joshua arap Sang*, ICC, Case No. 01/09-01/11, “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,’” October 25, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1669852.pdf> (accessed November 11, 2013). The appeals chamber held that while the presence of the defendant should be the rule as required by article 63 of the Rome Statute, in exceptional circumstances, the defendant may be excused from presence at trial. The trial chamber had erred, however, according to the appeals chamber, by granting what amounted to a nearly blanket excusal. Instead, the appeals chamber indicated that excusal should be permitted only when a relatively strict set of criteria are satisfied, including that all other alternatives should be considered first, such as altering the court’s schedule or a short adjournment. *Ibid.*, paras. 55-56, 61-63.

<sup>32</sup> The court had indicated its preliminary view that the rule proposed by the governments of Botswana, Jordan, and Liechtenstein, as initially drafted, raised concern as to whether it is consistent with article 63 of the Rome Statute. Letter of Vice-President Sanji Monageng, ICC, to H.E. Ambassador Hakan Emsgard, Embassy of Sweden, The Hague, November 4, 2013, unpublished document on file with Human Rights Watch.

## IV. Cooperation

The recent developments in the ICC’s relationship with the African Union, discussed above, demonstrate the importance of heightened attention by ICC states parties to enhancing cooperation and support to the court. Practice to date suggests an important emerging model for how the Assembly can sustain this increased focus and maximize effectiveness.

A first-ever plenary session on cooperation at the eleventh Assembly session gave the issue of cooperation the profile it deserves within the Assembly’s work. The session focused on an exchange of best practices in two key areas—(1) identification, freezing, and seizing of assets and (2) arrests.<sup>33</sup> This effectively bridged discussions that had taken place under the auspices of the Assembly’s facilitation on cooperation, led by Ambassador Anniken Ramberg Krutnes of Norway, over the course of the previous year on the first of these issues—including a one-day seminar devoted to the issue in October 2012—while setting out a marker on the second issue as an important area for follow-up.

Taking the Bureau’s seminal 2007 report on cooperation with its 66 recommendations as a framework, The Hague Working Group (HWG) then identified additional priority areas at the outset of this year including the issue of contacts with individuals subject to outstanding ICC arrest warrants, an area where the Assembly was unable to find consensus during discussions at the eleventh session in the context of the cooperation resolution; privileges and immunities; and voluntary agreements. This, in turn, led to consultations within The Hague Working Group on these topics and the convening of three intersessional seminars—one held in The Hague on contacts with ICC fugitives, arrest strategies, and privileges and immunities and two workshops held in Africa on witness protection.<sup>34</sup> We understand that the latter issue, an area continually highlighted by the court as one in which increased efforts are needed to meet real needs,<sup>35</sup> will form the basis for this year’s

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<sup>33</sup> “Concept note by the facilitator for cooperation Ambassador Anniken Krutnes (Norway),” November 2, 2012, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ASP11-PD-ConceptNote-Cooperation-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ASP11-PD-ConceptNote-Cooperation-ENG.pdf) (accessed October 28, 2013).

<sup>34</sup> ASP, “Report of the Bureau on cooperation,” ICC-ASP/12/36, October 21, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-36-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-36-ENG.pdf) (accessed October 28, 2013), paras. 3-8. Two additional seminars on fostering cooperation were also convened by the court in Nuremberg, Germany, with the financial assistance of the European Commission, Germany and the Organisation Internationale de la Francophonie. ASP, “Report of the Court on cooperation,” ICC-ASP/12/35, October 9, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-35-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-35-ENG.pdf) (accessed October 28, 2013), para. 9.

<sup>35</sup> ASP, “Report of the Court on cooperation,” paras. 30-32.

plenary session at the Assembly session. As with last year's plenary session, states parties should:

- Participate actively and use discussions at the Assembly to better understand the court's needs with regard to witness and victim protection and support, exchange best practices in the conclusion of voluntary agreements, and identify follow-up for the cooperation facilitation in 2014.

Taken together, this model provides the Assembly with a means through which to identify priorities, to generate real momentum in these areas and sustained, focused follow-up over the course of the year, and, finally, through the plenary session at the Assembly session, to bring progress and outstanding needs to the attention of all ICC states parties in order to facilitate the setting of priorities for the following year. Of critical importance, the cooperation facilitation has touched on various types of cooperation needs, ranging from technical assistance, as in witness relocation, to political and diplomatic support, as in discussions regarding setting policies on contacts with ICC fugitives. Even where in the latter area, discussed below, no clear consensus has emerged to date, consultations and dedicated opportunities to explore these issues throughout the year have moved forward understanding.

To the extent possible, Human Rights Watch recommends that the Assembly replicate this model in the coming year—including by ensuring that cooperation remains a standing agenda item for future Assembly sessions—and consider the utility of this model in advancing other core priorities within the Assembly, including complementarity. Below we discuss further four important areas for the Assembly to make further advances in the coming year: (1) arrest strategies and non-cooperation procedures; (2) pledges; (3) laying the groundwork for more fully realized intersessional work on cooperation; and (4) policies on “non-essential contacts.”

### **A. Arrest strategies and non-cooperation procedures**

Human Rights Watch welcomes the proposed roadmap developed within The Hague Working Group for advancing discussions in the coming year regarding ICC arrest

strategies, and, ultimately, the presentation of an “action plan” on arrest strategies to the Assembly for consideration at its thirteenth session.<sup>36</sup> The Assembly should:

- Adopt the roadmap at this session.

It is axiomatic that where arrest warrants remain outstanding, there can be no justice. Last year’s focus on arrests during the plenary session on cooperation, and subsequent discussions within The Hague Working Group, served to begin to correct a lack of sustained attention to arrests within the Assembly. Implementation of the roadmap, particularly with its focus on an “experience-based analysis” of lessons learned, should take states further in an understanding of what will be necessary to bring about arrest in a number of different scenarios and translate into concrete steps toward arrest.

We have previously identified some initial lessons learned for the ICC on arrests.<sup>37</sup> In spite of continued difficulties in arrests, the past year also witnessed an important success in the surrender of Bosco Ntaganda, for whom an arrest warrant had been outstanding since 2006. As the Office of the Prosecutor stressed in its presentation to the May seminar on cooperation, his surrender was not a coincidence, but rather the product of concerted efforts by various stakeholders over several years.<sup>38</sup> These efforts included assessing barriers to arrest, including periods during which Ntaganda was protected by Congolese authorities and other periods during which the arrest of Ntaganda was more a matter of incapacity than unwillingness, and, in turn, recognition that these barriers required different strategies. These are the kinds of lessons learned that should be further mined in the implementation of the roadmap.

In addition, states parties should not overlook the importance to arrest of continued attention to two other areas of the Assembly’s work.

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<sup>36</sup> See ASP, “Report of the Bureau on cooperation,” Annex IV (“Arrest strategies: roadmap and concept paper”)

<sup>37</sup> See Human Rights Watch, “Memorandum for the Eleventh Session of the International Criminal Court Assembly of States Parties,” November 7, 2012, <http://www.hrw.org/news/2012/11/07/human-rights-watch-memorandum-eleventh-session-international-criminal-court-assembly>, pp. 23-30; see also Richard Dicker and Elizabeth Evenson, “ICC Suspects Can Hide—and That is the Problem,” *Jurist*, January 24, 2013, <http://jurist.org/hotline/2013/01/dicker-evenson-icc-suspects.php> (accessed October 28, 2013).

<sup>38</sup> ASP, “Report of the Court on cooperation,” para. 19.



First, as discussed below, policies to avoid non-essential contacts with ICC fugitives are a key element in long-term arrest strategies. Second, although the issue of non-cooperation is broader than arrest, and a failure to arrest, in some cases, may result from a lack of capacity to apprehend, rather than a lack of cooperation, the Assembly's non-cooperation procedures remain another key element in long-term arrest strategies. Demonstrating the Assembly's willingness to respond robustly to non-cooperation in arrests may help raise the cost of non-compliance, deterring authorities at the outset from refusing to cooperate. Equally, ensuring that the "early warning" practices put in place by the Assembly's non-cooperation procedures operate smoothly will provide opportunities for the Assembly president and its Bureau, states parties, court officials, and civil society to work together to deter non-cooperation.<sup>39</sup>

The past year provided an example of the importance of early notification in avoiding non-cooperation. On July 15, 2013, President Omar al-Bashir of Sudan abruptly left an African Union conference in Nigeria, an ICC state party. While Nigerian officials claimed al-Bashir was present in Nigeria at the invitation of the AU, rather than Nigeria, and cited the AU decision calling for non-cooperation in the arrest of al-Bashir,<sup>40</sup> the government subsequently affirmed its cooperation obligations to the ICC and indicated that al-Bashir's sudden departure "occurred at the time that officials of relevant bodies and agencies of ... Nigeria were considering the necessary steps to be taken in respect of his visit in line with Nigeria's international obligations."<sup>41</sup> Significant attention raised to al-Bashir's visit and the obligations of Nigeria to arrest al-Bashir by the court, the Assembly president, civil society, and other ICC states parties may have been a factor in expediting al-Bashir's departure.<sup>42</sup>

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<sup>39</sup> The procedures are outlined in ASP, "Report of the Bureau on potential Assembly procedures relating to non-cooperation," ICC-ASP/10/37, November 30, 2011, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-37-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-37-ENG.pdf) (accessed November 6, 2013).

<sup>40</sup> See Tobi Soniyi and Damilola Oyedele, "FG Insists AU Resolution as CSOs approach court to get a Bashir arrested," *This Day*, July 16, 2013, <http://www.thisdaylive.com/articles/fg-insists-on-au-resolution-as-csos-approach-court-to-get-al-bashir-arrested/153467/> (accessed October 28, 2013) (quoting text message of Nigerian foreign minister).

<sup>41</sup> *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC, Case No. 02/05, "Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court," September 5, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1640857.pdf> (accessed October 28, 2013), paras.11-12.

<sup>42</sup> See, for example, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC, Case No. 02/05, "Prosecution's notification of travel," July 15, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1619271.pdf> (accessed October 28, 2013); Tobi Soniyi and Damilola Oyedele, "FG Insists on AU Resolution as CSOs approach court to get al-Bashir arrested". The United Kingdom and the European Union issued statements around or just after al-Bashir's visit expressing their concerns. See "FCO Minister comments on Sudanese President's visit to Nigeria," FCO news release, July 15, 2013, <https://www.gov.uk/government/news/fco-minister-comments-on-sudanese-presidents-visit-to-nigeria> (accessed October 28, 2013); "Statement by the spokesperson of EU High Representative Catherine Ashton on the visit of Sudanese President

It is difficult to show precise causality, and two repeat visits by al-Bashir to ICC state party Chad—along with a visit also to Chad by the Sudanese defense minister who is also an ICC fugitive—were not avoided this year despite early notification and dialogue between the Bureau and the country. Nonetheless, close coordination facilitated by early notification between the Assembly president, the Bureau and its working groups, ICC states parties with relevant relationships to the country that risks engaging in non-cooperation, and civil society to raise attention to arrest obligations may deter non-cooperation in some instances.

Even where non-cooperation is not avoided in the short-term, such early warning remains an important means through which to reinforce the importance and authority of the court’s warrants. Experience has shown—including in the cases of Charles Taylor and Ratko Mladic—that while surrenders can be one of the most significant challenges for tribunals, pressure and engagement can help lay the groundwork for future cooperation. Moreover, the alternative would risk signaling that non-cooperation is not a significant issue.

Human Rights Watch urges the Assembly to:

- Adopt the proposed language in the cooperation resolution calling on the Assembly to keep its non-cooperation procedures under review with a view toward enhancing their effectiveness and placing particular emphasis on the importance of early notification of opportunities to work together to avoid non-cooperation.

In addition, we continue to recommend that the Assembly take forward its non-cooperation procedures by:

- Mandating the Bureau to begin to elaborate the actual modalities, beyond an Assembly resolution, of a “formal response” to be taken by the Assembly following dialogue with a state subject to a court finding of non-cooperation. These could include securing guarantees of non-repetition and the suspension of Assembly voting rights.

## **B. Non-essential contacts**

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Al-Bashir to Nigeria,” European External Action Service press release, July 16, 2013, [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/138092.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/138092.pdf) (accessed October 28, 2013).

As indicated above, another focus of this year’s cooperation facilitation was the issue of “non-essential contacts” with individuals subject to arrest warrants.<sup>43</sup>

Avoiding non-essential contacts by contributing to the political isolation of the suspect is a crucial way to advance ultimate surrender consistent with ICC states parties’ obligation to cooperate with the court under part 9 of the Rome Statute. It is also important to signal that “business as usual” is over for fugitives—an important step when surrender is not yet possible, such as in the case of Sudanese President Omar al-Bashir who is subject to two ICC arrest warrants for crimes in Darfur, one for genocide and the other for crimes against humanity and war crimes.

Avoiding non-essential contacts is furthermore important to show commitment to victims of alleged crimes. Non-essential contacts such as photo-ops at ceremonial occasions with those subject to arrest warrants undermine the perception of a commitment to justice for victims.

In this context, the UN, the European Union (EU) and individual states have adopted policies on avoiding non-essential contacts with those subject to ICC arrest warrants.<sup>44</sup> The HWG engaged in substantial discussions on non-essential contacts over the course of the year, including relevant language to incorporate into the cooperation resolution. This reflects a welcome effort to address this important issue.

Consensus within the HWG on an operative paragraph on non-essential contacts could not be achieved, however. Although a number of governments urged a clear call for states to avoid non-essential contacts with individuals subject to arrest warrants, others have raised concern that such language could create a new legal obligation for states or impinge on their sovereign right to determine their international relations.<sup>45</sup>

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<sup>43</sup> ASP, “Report of the Bureau on cooperation,” para. 12

<sup>44</sup> UN Secretary-General, “Guidance on Contacts with Persons Who Are the Subject of Arrest Warrants or Summonses Issued by the International Criminal Court,” A/67/828-S/2013/210, Annex, April 8, 2013, [http://www.un.org/ga/search/view\\_doc.asp?symbol=A%2F67%2F828&Submit=Search&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A%2F67%2F828&Submit=Search&Lang=E) (accessed October 28, 2013); Council of the European Union, “Action Plan to Follow-Up on the Decision on the International Criminal Court,” 12080/11 Annex, Brussels, July 12, 2011, <http://register.consilium.europa.eu/pdf/en/11/st12/st12080.en11.pdf> (accessed October 28, 2013), para. D(2)(c).

<sup>45</sup> ASP, “Report of the Bureau on cooperation,” para. 14.

The HWG ultimately decided to forward the following bracketed language to the Assembly for consideration:

[6. [*Urges*] [*Invites*] [*Encourages*] States Parties to focus on the [need] [importance] to support the effectiveness of international criminal justice when considering [the need for] specific contacts with persons subject to a warrant of arrest issued by the Court, while *recognizing* that the conduct of international relations between states falls exclusively within the competence of States Parties, subject to international law;]<sup>46</sup>

We appreciate the efforts by the cooperation facilitator and states to achieve a satisfactory compromise on this issue. However, we believe the currently bracketed language raises serious concern as it fails to clearly state the importance of states avoiding non-essential contacts with fugitives. As such, the language risks sending the signal that such contacts are not a significant concern.

In this context, we urge states to:

- Revisit this issue in consultations next year with a view to identifying language that conveys the extent to which non-essential contacts are important to advancing ultimate surrender and signaling respect for victims.

### C. Intersessional work on cooperation

Human Rights Watch has previously recommended that the Assembly establish a working group on cooperation to operate intersessionally. In our view a working group would helpfully augment the capacity of the cooperation facilitation to carry out work in priority areas on a year-round basis, and would permit more frequent exchange on cooperation, including the sharing of best practices. A key feature of any such working group would be the participation of experts, including those within national administrations responsible for responding to cooperation requests of the court or the prosecutor.<sup>47</sup>

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<sup>46</sup> “Draft resolution on cooperation,” para. 6., Annex I to *ibid.*

<sup>47</sup> For more detailed recommendations on the composition, methods, and prospective agenda items for a cooperation working group, see Human Rights Watch, “Memorandum for the Tenth Session of the International Criminal Court Assembly of States Parties,” November 2011, [http://www.hrw.org/sites/default/files/related\\_material/2011\\_Memo\\_tenth\\_%20session\\_ASP.pdf](http://www.hrw.org/sites/default/files/related_material/2011_Memo_tenth_%20session_ASP.pdf), pp. 28-29; Human

As indicated above, the intersessional seminars and consultations convened this year through the cooperation facilitation have continued to advance the Assembly toward a model of sustained attention to identified priorities on a year-round basis. An important and welcome new initiative holds out the possibility of taking this further. According to language put forward in the cooperation resolution for consideration and adoption at this session the Bureau would be mandated to present a “report on the establishment of a permanent coordinating mechanism constituting a network of national central authorities/national focal point points for cooperation with the Court, for sharing knowledge and know-how on a voluntary basis.”<sup>48</sup>

Such a coordinating mechanism to increase the exchange of best practices between ICC states parties is likely to translate into more effective responses to cooperation requests. A standing network could facilitate exchange on a more frequent basis, on topics of specific interest to those making use of the network, than intersessional expert seminars standing alone. Through the inclusion of national central authorities or focal points, it could overcome a key gap in the Assembly’s cooperation work, which to date has insufficiently included such experts in consultations on cooperation. It could also facilitate bilateral contacts between national authorities on specific issues of mutual interest.

This is not to say that such a network would replace the need for an Assembly facilitation on cooperation or, ultimately, an Assembly working group. Indeed, exchange within the network could yield suggestions for areas where further, in-depth study is needed. Moreover, state representatives within the Bureau and its working groups are likely to remain best placed to advance discussions of the court’s cooperation needs in the area of diplomatic and political support and to address non-cooperation. A permanent coordinating mechanism is thus likely to add in important ways to the tools available to the Assembly to enhance cooperation, rather than duplicating or making redundant existing measures.

Human Rights Watch endorses language in the cooperation resolution to:

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Rights Watch, “Memorandum for the Ninth Session of the International Criminal Court Assembly of States Parties,” November 2010, [http://www.hrw.org/news/2010/11/16/human-rights-watch-memorandum-ninth-session-international-criminal-court-assembly-st#\\_Toc277604879](http://www.hrw.org/news/2010/11/16/human-rights-watch-memorandum-ninth-session-international-criminal-court-assembly-st#_Toc277604879).

<sup>48</sup> “Draft resolution on cooperation,” para. 17.

- Explore the creation of a permanent coordinating mechanism of national central authorities or focal points.

Preparation of a Bureau report on this should also be an opportunity to:

- Consider how, in addition to the possibility of creating such a network, its emerging good practice could ripen into the establishment of an intersessional working group.

## **D. Pledges**

Although pledges made at the Kampala review conference in 2010 marked out a new and innovative practice for the Assembly, there has been limited follow-up to ensure the implementation of those pledges and to provide clear guidance on opportunities for the making of new pledges. We therefore welcome language proposed in the cooperation resolution mandating the Bureau to provide a report to next year's Assembly session on the implementation of the Kampala pledges.<sup>49</sup> Such a report would be an important next step in revitalizing the Assembly's pledging practices.

Human Rights Watch therefore recommends states parties:

- Mandate the preparation of a report assessing implementation of the Kampala pledges.

In drafting the proposed report, the Bureau should not only assess the status of existing pledges, but also:

- Identify a more durable framework for states to report on implementation and to make new pledges, for consideration and adoption at the Assembly's thirteenth session.

## **V. Complementarity**

Discussions on complementarity have evolved considerably since the Kampala review conference. By now, states parties, the court and other stakeholders recognize that efforts by governments, through development assistance in rule of law programming aimed at building domestic capacity to address war crimes, crimes against humanity and genocide,

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<sup>49</sup> Ibid., para. 28.

contribute to the fight against impunity and the functioning of the Rome Statute system.<sup>50</sup> Indeed, last year's Assembly plenary session on complementarity helped refine states parties' awareness about the value of bolstering domestic capacity while outlining some of the challenges in doing so. Other developments since the eleventh Assembly session include participation by Assembly President Tiina Intelmann in an NGO-hosted seminar on complementarity held in Addis Ababa, as well as the two high-level witness protection seminars held in Dakar and Arusha, discussed above, organized by the cooperation facilitator in conjunction with the Assembly Secretariat. The witness protection seminars included discussion of the complementary role of national systems of protection.<sup>51</sup>

Outside of the Assembly, other notable events include the EU adoption of a complementary "toolkit"—essentially a roadmap for how the EU can strengthen its provision of development assistance through its rule-of-law programming to increase domestic capacity to handle ICC crimes.<sup>52</sup> The adoption of the toolkit is especially significant since the EU is the world's largest provider of official development assistance and a considerable amount of its development funding is allocated to strengthening the rule of law in developing countries. Further, the nongovernmental International Center for Transitional Justice (ICTJ), together with the United Nations Development Program (UNDP), convened the first-ever meeting under the "Greentree" umbrella in an ICC situation country. Held in Abidjan, Cote d'Ivoire, the meeting included key stakeholders to discuss progress and obstacles in realizing independent and impartial justice for post-election crimes.<sup>53</sup>

In light of the ongoing evolution of discussions, it is unfortunate that complementarity was not included as an agenda item for this year's Assembly session especially since the

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<sup>50</sup> ASP, "Report of the Bureau on complementarity," ICC-ASP/12/31, October 15, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-31-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-31-ENG.pdf) (accessed October 28, 2013).

<sup>51</sup> ASP, "Report of the Secretariat on complementarity," ICC-ASP/12/33, October 15, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-33-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-33-ENG.pdf) (accessed November 7, 2013), para. 3. For more information on the NGO seminar, see <http://www.issafrica.org/events/icc-complementarity-in-practice-challenges-progress-and-prospects-in-africa>.

<sup>52</sup> The European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, "Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap between International and National Justice," January 31, 2013, [http://eeas.europa.eu/human\\_rights/icc/docs/joint\\_staff\\_en.pdf](http://eeas.europa.eu/human_rights/icc/docs/joint_staff_en.pdf) (accessed November 6, 2013), p. 4. See also letter from Human Rights Watch to EU High Representative Catherine Ashton and Commissioner for Development Andris Piebalgs regarding the EU Complementarity Toolkit, September 23, 2013, <http://www.hrw.org/news/2013/09/23/letter-eu-high-representative-catherine-ashton-and-commissioner-development-andris-p> (setting out recommendations in five areas to push forward implementation of the toolkit).

<sup>53</sup> See ICTJ, "Supporting National Prosecutions in Cote d'Ivoire," June 11, 2013, <http://ictj.org/news/supporting-national-prosecutions-cote-divoire> (accessed November 6, 2013). Human Rights Watch participated in the meeting.

Assembly, as a body encompassing donor and recipient states, non-states parties and civil society united by a shared commitment to fight impunity for Rome Statute crimes, is ideally placed to act as a guarantor of the complementarity principle.<sup>54</sup> We share the view expressed by the Bureau in its report on complementarity that the Assembly should consider making complementarity an agenda item to be discussed at future sessions.<sup>55</sup> In addition, in order not to lose further momentum within the Assembly, it will be important for a strong work plan to be developed on complementarity by the country focal points, with the input and engagement of all states parties.

In the absence of a plenary session on complementarity, therefore, states parties should use statements during the General Debate and at relevant side events to:

- Express support for the inclusion of complementarity as an agenda item at next year's Assembly session;
- Call for the development of a strong Assembly work plan on complementarity for 2014;
- Share experiences about initiatives taken to promote national justice for atrocity crimes in ICC countries under analysis or investigation. This could include information about what has and has not worked in terms of implementing initiatives directed at reinforcing national efforts to bring perpetrators to justice, including in the area of donor coordination; and
- Commit to further mainstreaming the importance of accountability initiatives with diplomatic and development staff on the ground. This could include developing national guidelines on how complementarity projects could be better mainstreamed in their development assistance, as the EU has done in its complementarity toolkit.

In addition, states parties should:

- Give priority to attendance at side events on complementarity.

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<sup>54</sup> Similarly, the Bureau underlined in its paper that the ASP “is a key forum for matters of international criminal justice.” ASP, “Report of the Bureau on complementarity,” para. 7.

<sup>55</sup> *Ibid.*, para. 10.



To ensure the flow of information from the General Debate and side events feeds into the ongoing evolution on complementarity within the Assembly, we urge the Assembly Secretariat to:

- Appoint a rapporteur to attend all side events on complementarity in order to prepare a written summation that can be distributed to all ICC states parties. The report should also include relevant excerpts from General Debate statements.

Below we explore further the benefit of enhancing attention to the overlap between the ICC's completion strategies and complementarity initiatives, which, we recommend, should remain a focus of the Assembly's work on complementarity in the next year.

### **A. ICC completion strategies: a role for complementarity**

Increased attention to the overlap between complementarity efforts and the ICC's prospective completion strategies in its situation countries could provide an important focus for the Assembly's efforts in the coming year. This shift, set into motion by last year's Assembly resolution on complementarity and followed through in the Bureau and court reports on complementarity for the upcoming session, would be a welcome and necessary development.<sup>56</sup>

The term "completion strategy" was coined in the context of the ad hoc and special tribunals to guide the winding down of their activities. These strategies address not only the immediate issue of completing case work and trials, but also how so-called "residual issues" will be addressed—that is, how any ongoing obligations such as the protection of witnesses or the revision of sentences will be handled. Importantly, they also address how the legacy of the tribunals will be consolidated in the communities affected by the crimes within their jurisdiction.<sup>57</sup>

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<sup>56</sup> See "Complementarity," Resolution ICC-ASP/11/Res.6, November 21, 2012, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP11/ICC-ASP-11-Res6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res6-ENG.pdf) (accessed October 28, 2013), preambular para. 5, para. 7; ASP, "Report of the Bureau on complementarity," paras. 13-14; ASP, "Report of the Court on complementarity: Completion of ICC activities in a situation country," ICC-ASP/12/32, October 15, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-32-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-32-ENG.pdf) (accessed October 28, 2013).

<sup>57</sup> ASP, "Report of the Court on complementarity: Completion of ICC activities in a situation country," para. 17

While the ICC is a permanent institution, its activities in a given situation will nonetheless decrease over time as existing judicial proceedings are completed and additional cases are not pursued by the prosecutor. As explored in the court’s report on complementarity in more detail, building domestic capacity to try Rome Statute crimes better positions the ICC to more effectively complete its activities in a situation country. This is true with regard to easing the burden on the ICC by being able to transition some responsibilities to national authorities. Indeed, as the court notes, “a fully functioning national system would assist the Court’s efforts in dealing with residual functions and thus may impact positively, amongst others, on the Court’s costs related to its exit strategy.”<sup>58</sup> An operational domestic witness protection and support program, a viable means to implement ICC-ordered reparations, and the ability to enforce sentences are only a few examples. It is equally true, however, with regard to cementing the rule of law in situation countries, which in turn contributes to strengthening the court’s legacy and its lasting impact.<sup>59</sup>

More work will need to be done by the ICC to develop planning for completion strategies tailored to specific situations and to provide states parties with guidance as to how they can best assist the implementation of those strategies. But given the benefits to the effective and responsible completion of the ICC’s activities and its legacy, situation countries and their international partners, including among states parties, should give increased attention to whether specific complementarity initiatives could be launched, or where programming already exists in situation countries revisited, with an eye on building those capacities likely to be most relevant to ICC completion strategies.

Although it is clear that the court itself is limited in actual capacity-building for investigating, prosecuting and trying Rome Statute crimes in the field, court officials nonetheless remain a key resource when it comes to identifying capacity gaps that would benefit from assistance by donor states and intergovernmental agencies and should be included in discussions to identify such initiatives. In the longer term, maintaining a robust field presence with adequate staff is especially important in this regard, and would strengthen the ICC’s ability to forge relationships with the host government and the diplomatic community to ensure ongoing political support for the court and efforts to end impunity for ICC crimes more broadly. Further, the ICC’s field offices can play a valuable

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<sup>58</sup> *Ibid.*, para. 35.

<sup>59</sup> See *ibid.*, paras. 27-31.

role in effectively implementing the court’s completion strategies on the ground and therefore positively contribute.

As the court and the Bureau have both emphasized in their respective reports on complementarity, it is essential to provide assistance to the national justice system as early as possible to address the cases that the ICC will not prosecute.<sup>60</sup> It may take years of dedicated assistance to develop the necessary capacity to investigate, prosecute and fairly try Rome Statute crimes. Such assistance should be provided based on a needs assessment of the gaps in not only capacity—again, the ICC’s insight in this regard will be essential—but also the government’s willingness to allow judicial authorities working on Rome Statute crimes the space to act independently and impartially.

To encourage further attention to the overlap between the development of ICC completion strategies and complementarity initiatives, states parties should in statements in the General Debate and during interventions at relevant side events:

- Recognize the overlap between the ICC’s completion strategies in situation countries and complementarity, and that the court is a key resource when it comes to identifying capacity gaps that would benefit from assistance by donor states and intergovernmental agencies;
- Stress the importance of supporting national justice for ICC crimes in the fight against impunity, and underscore that it is essential to provide assistance in situation countries as early as possible to address the cases that the ICC will not prosecute;
- Acknowledge the important role of field offices when it comes to developing completion strategies and implementing them in a way that maximizes the court’s legacy and impact; and
- Call on the ICC to continue to move forward in the development of completion strategies in order to provide clear indication to states parties, including situation countries, of what kinds of strengthened capacity for the national investigation and prosecution of ICC crimes would be most relevant.

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<sup>60</sup> Ibid., para. 49; ASP, “Report of the Bureau on complementarity,” para. 13.

Going forward, states parties should:

- Consider inviting outside organizations such as ICTJ and UNDP to brief states parties on the “Greentree” meetings in situation countries, in order to facilitate the identification of specific initiatives that could make the most of the overlap between complementarity and court completion strategies; and
- Consider convening a specific seminar, under the auspices of the Assembly and in cooperation with the national authorities of a situation country, on an aspect of providing support for national capacity to handle ICC crimes, such as outreach, witness and victim protection and support, or implementation of reparations, with particular relevance to ICC completion strategies.

## **B. Political will**

Political will to permit independent and impartial investigation of ICC crimes should not be presumed, and is often in short supply in countries affected by conflict or an intense period of violence, at least initially. Based on Human Rights Watch’s research in countries affected by conflict, including Côte d’Ivoire, Democratic Republic of Congo, and Guinea, judicial independence often exists on paper but in reality there is a longstanding history of political interference by the executive or general corruption, or both. This means that pursuing sensitive ICC cases, which may implicate governmental policies or actors, may be impossible, at least initially, as judges and prosecutors lack the institutional culture and support needed to try allegations without fear of professional or personal retribution. Without judicial and prosecutorial independence, all other national capacity building initiatives will likely produce limited results when it comes to closing the impunity gap for Rome Statute crimes. While being a general problem across all complementarity initiatives, it is an important stumbling block that should be taken into account in any discussions of implementing ICC completion strategies.

But political willingness is not static. The fact that willingness can change over time reinforces the importance of initiating capacity building efforts—including those aimed at bolstering judicial and prosecutorial independence—as early as possible to help cultivate the national ownership needed for such efforts to thrive. Such measures could include

efforts to help national authorities strengthen laws aimed at protecting judicial independence, developing guidelines to insulate prosecutors from inappropriate executive interference (and which may include developing a system of random case allocation), helping domestic efforts to map crimes committed, assisting prosecutors in developing a case selection strategy, and strengthening national civil society actors to magnify grassroots support for accountability for ICC crimes. The success, or lack thereof, of such capacity building efforts can help inform assessments of not only ability but also overall political willingness to close the impunity gap for ICC crimes domestically. Attention to political will continues to lag behind attention given in the Assembly’s work to capacity building, as reflected in the limited reference to the issue of willingness in this year’s draft resolution on complementarity. As discussions deepen among states parties, the court and the Assembly about the relationship between complementarity and the court’s completion strategies, we look forward to increased attention to the inextricable relationship between willingness and ability.

In statements during the General Debate or at relevant side events, states parties should:

- Highlight the importance of engaging in capacity-building projects that could support and measure both ability and willingness, where willingness is defined as creating and maintaining a climate conducive to realizing independent and impartial justice.

## **VI. Office of the Prosecutor’s Strategic Plan, 2012-2015**

Human Rights Watch welcomes the efforts by the Office of the Prosecutor under the leadership of its new prosecutor and deputy prosecutor to take stock of shortcomings in its performance to date and to identify needed changes. In particular, we appreciate the attention given by the office to examine whether its operational model is sufficient to meet its mandate, a model which, when it comes to investigations, has increasingly been called into question by the office’s record before the judges.<sup>61</sup>

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<sup>61</sup> While a number of the office’s cases have yet to proceed beyond the arrest warrant stage given the court’s persistent difficulties in securing arrest, in cases that have gone forward to a confirmation hearing, judges have declined to confirm charges against 4 out of 14 defendants, and adjourned the hearing for an additional defendant to permit the office to bring forward additional evidence. The office—citing challenges in securing cooperation and reliable witness testimony—also dropped all charges this year against Francis Muthaura. In the two cases that have proceeded to a verdict, one has resulted in a conviction and one in an acquittal, although appeals are pending as to both judgments.

This determination is reflected in the office’s new Strategic Plan for 2012-2015, issued in October 2013. The Strategic Plan projects a number of important changes in the office, as to both policies and structure, and contains detailed reflections on the current challenges facing the office. While a full assessment of the Strategic Plan is beyond the scope of this memorandum, three elements may be particularly relevant to improving the efficacy of the office’s investigations.

First, the office plans to shift away from focused investigations, the policy pursued under the previous ICC prosecutor, to more open-ended investigations that will consider multiple case hypotheses.<sup>62</sup> This shift could address concerns that by settling on a case hypothesis too early in its investigations, and pursuing only this case hypothesis in investigations, the office has sometimes overlooked evidence, impairing what it is ultimately able to prove at confirmation or at trial. In addition, by being more explicitly open-ended in its investigations, the office may be able to more effectively demonstrate its independence and impartiality, and respond to perceptions that its selection of cases is driven by politics, rather than evidence.

Second, the office will only seek arrest warrants or summonses where cases are as trial ready as possible, or where there are prospects of being trial ready within a reasonable time period.<sup>63</sup> This marks a move away from the office’s previously phased approach in some investigations, that is, first collecting enough evidence for an arrest warrant, then returning to the investigation to secure evidence to get across the threshold for confirmation of charges, and then seeking out evidence to secure a conviction. While an advantage of this approach was that it allowed for rotating the office’s scarce resources between cases—investigations could be completed up to a certain point and then moved on to another case or situation—it created a risk of misjudging just how much evidence would be required for each of these thresholds, and therefore missing the mark in court. There are also clearly good policy reasons to do investigations as early as possible in the life of a case.<sup>64</sup> Most fundamentally, it becomes more difficult with the passage of time to

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<sup>62</sup> OTP, “Strategic Plan, June 2012-2015,” paras. 4, 23.

<sup>63</sup> *Ibid.*

<sup>64</sup> See some additional discussion in Elizabeth Evenson, “Kenyatta decision turns spotlight on ICC investigation,” Victim Rights Working Group *Bulletin*, Spring 2013, Issue 22, <http://www.vrwg.org/ACCESS/ENG-22-Evenson.pdf> (accessed October 28, 2013), p. 2.

reconstruct complicated international crimes; often there will already be a time lag between when crimes are committed and when the office has the mandate to act in a given situation. Early collection of evidence could facilitate early disclosure to the defense and fewer delays in trials. In addition, investigations that secure evidence early may be good practice when it comes to cooperation strategies. While each situation is different, in the period before arrest warrants are announced it may be easier to secure cooperation on the ground because while there may be knowledge that an ICC investigation is open, it is unclear just who may ultimately be subject to charges before the ICC. This can mean that there is wider latitude to conduct investigations, before those who do ultimately find themselves subject to ICC charges seek to shut down the office's access to evidence or potential witnesses.

Third, the office will look to increase its field presence and country knowledge. Human Rights Watch has previously recommended more attention to the field presence of the ICC as a whole in order to ensure that the court's activities are more deeply rooted in and informed by the specific contexts in which it is working, and ultimately can have more impact in affected communities. For the Office of the Prosecutor, having investigators based in situation countries for a longer period of time, rather than conducting shorter missions from The Hague should permit these investigators to develop stronger networks for cooperation, as well as contacts with potential witnesses, react more flexibly to changing circumstances on the ground without requiring additional missions from The Hague, which can mean delay or missed opportunity, and, overall, increase the office's appreciation of context, informing prosecutorial strategies.<sup>65</sup>

Given the importance of these and other changes outlined in the Strategic Plan, including to the structure of the office, the plan deserves further consideration by states parties. Between the lines of the Strategic Plan lies a potentially substantively different approach in the future by the Office of the Prosecutor. To cite just one example, more effective investigations are likely to mean longer timelines in bringing cases after the opening of new situations. Lengthier investigations, in turn, may exacerbate existing challenges in prioritizing between the many competing demands on the office, raising an additional set of strategic choices requiring further attention.

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<sup>65</sup> Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Year*, July 2008, <http://www.hrw.org/sites/default/files/reports/icco708webwcover.pdf>, pp. 54-57.

With the record of the Office of the Prosecutor to date, a different future would be a positive development. But there will be a corresponding need to midwife expectations through what is likely to be a period of transition, as implementation of the changes envisioned in the Strategic Plan will take time and may not improve the office's record in the short-term. Consultations on the Strategic Plan with civil society, in The Hague Working Group and in the context of the budget negotiations have provided a start, but further efforts are required to evaluate and understand proposed changes, and, critically, to evaluate their implementation. States parties and court observers, therefore, should continue to engage with the office to understand the changes it seeks to make.

Most immediately, the new Strategic Plan bears on the court's budget request to be considered by states parties at the upcoming Assembly session.

The Office of the Prosecutor has requested a nearly 27 percent increase in its budget for 2014. The office's budget request focuses, in particular, on additional resources to grow the size of its investigation teams to avoid the need to rotate resources between its several situations and to invest in technologies to yield new kinds of evidence in addition to the witness testimonies on which it has largely relied to date, both additional important elements of the new Strategic Plan. The request is the first of four years of anticipated growth in the office, which if approved by states parties, will result in a €20 million increase in the office's budget by 2017.<sup>66</sup> By way of comparison, in 2013, the total approved budget of the office was just over €28 million.

The Committee on Budget and Finance, in its review of the court's proposed budget, expressed concern that the office had not fully supported its request. This may have been due, in part, to the fact that its recommendations were issued prior to the finalization of the new Strategic Plan. The Committee recommends that states parties approve a more limited increase in the office's budget, bringing the total approved increase to €5,3 million, or an 18.7% percent increase from its 2013 approved budget.<sup>67</sup>

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<sup>66</sup> ASP, "Draft report of the Committee on Budget and Finance on the work of its 21<sup>st</sup> session," Advance version, ICC/ASP/12/15, October 3, 2013, para. 54.

<sup>67</sup> *Ibid.*, para. 60.



The shifts in policy and practice outlined in the office's new Strategic Plan make clear that more than just additional resources will be needed to improve the efficacy of its investigations; effective management of any new resources and continued further evaluation of the office's operational model will also be important. But since at least 2008, Human Rights Watch has expressed concern publicly that the office needed more, and more experienced, investigators to meet the demands of its investigations.<sup>68</sup> The office's workload has only grown in the intervening period, while the number of investigators has remained stagnant, or, even contracted.<sup>69</sup> It is clear that more resources are needed. At the same time, the Office of the Prosecutor is not the only area in which further investment is required. It is concerning that perhaps due to pressure in recent years from states parties to hold down growth in the court's budget, the court has apparently sought to accommodate the office's substantial request for additional resources by adopting a highly restricted approach to growth in other key areas. These include areas where court activities are currently overstretched, including to support legal representation and participation of victims, the court's field presence and outreach, training for the court's intermediaries, the Trust Fund for Victims, and the Office of the Public Counsel for Defense.<sup>70</sup>

In discussions on the budget, therefore, states parties should:

- Give particular consideration to ensuring that the Office of the Prosecutor has the additional resources it needs to bolster its investigative capacity, while signalling support in future years to protect the equality of arms and to invest in other areas where the court continues to have inadequate resources to carry out its mandate.

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<sup>68</sup> Human Rights Watch, "Courting History," pp. 47-49.

<sup>69</sup> According to figures compiled by the War Crimes Research Office at American University Washington College of Law, in 2007, the office requested 52 full-time investigators, while in 2013, it requested 46. See War Crimes Research Office, American University Washington College of Law, "Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor," October 2012, <http://www.wcl.american.edu/warcrimes/icc/documents/ICCReport16.pdf> (accessed October 28, 2013), p. 31. In this year's budget request, the office has indicated that it requires 65 full-time investigators to meet its current caseload. ASP, "Proposed Program Budget for 2014 of the International Criminal Court," ICC/ASP/12/10, July 29, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-10-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-10-ENG.pdf) (accessed November 7, 2013), para. 230.

<sup>70</sup> CICC Budget and Finance Team, "Submission to the Committee on Budget and Finance at its Twenty-First Session, 9-19 September 2013," September 5, 2013, [http://www.iccnw.org/documents/Comments\\_and\\_Recommendations\\_to\\_the\\_CBF\\_at\\_its\\_21st\\_Session.pdf](http://www.iccnw.org/documents/Comments_and_Recommendations_to_the_CBF_at_its_21st_Session.pdf) (accessed October 28, 2013), pp. 3-5.

