



Human Rights Watch Briefing Note for the Fifteenth Session of the International Criminal Court Assembly of States Parties

November 2016

The states parties of the International Criminal Court (ICC) will meet in The Hague from November 16-24, 2016 at the annual session of the Assembly of States Parties (ASP).

The Assembly session each year is an opportunity for ICC states parties to advance serious debate on the range of challenges the ICC confronts in advancing its mandate to provide justice for mass atrocities, and to take decisions that will equip the ICC to meet these challenges. This year's session, however, takes place within a few weeks of the deposit of notification with the UN Secretary-General of withdrawal from the Rome Statute by the governments of South Africa and Burundi. The government of Gambia has also announced its intention to withdraw.

Without a doubt, these withdrawals – and concern that additional state party withdrawals could follow – will cast a long shadow over the essential business the Assembly needs to conduct at this session. These withdrawals pose a serious challenge to victims' access to justice and the reach of the Rome Statute. If anything, these withdrawals should spur states parties to use this Assembly session to greatest effect in reaffirming – on a stage that is likely to be watched all the more closely given these developments – the importance of the ICC, and the core principle underlying its creation: a commitment to standing on the side of victims by holding to account those most responsible for the world's worst crimes.

This briefing note first assesses the current landscape and urges states parties to be prepared to defend the ICC's fundamental principles. That is, states likely will need to guard against any temptation to use the Assembly session to offer concessions that would weaken the ICC's core mandate, in a bid to deter additional withdrawals. This note then provides recommendations to states parties in five other areas for this Assembly session: 1) the article 97 working group; 2) putting in place a stocktaking exercise at the next Assembly session to mark the twentieth anniversary of the adoption of the Rome Statute; 3) responding to non-cooperation with ICC investigations and prosecutions; 4) the role of the ICC's performance indicators in increasing the court's impact where it matters most – for victims and local

communities; and 5) the urgent need for voluntary contributions to the Trust Fund for family visit for indigent detainees.

ICC withdrawals and defending the integrity of the Rome Statute

This year's Assembly session follows closely on the heels of withdrawals by South Africa and Burundi from the Rome Statute system, as well as an announcement by Gambia of its intention to withdraw.¹

Under article 127 of the Rome Statute, notifications of withdrawal take one year to come into effect. The notifications of withdrawal, therefore, do not have any immediate effect on the work of the ICC. The prosecutor may proceed with the ongoing preliminary examination into allegations of ICC crimes committed in Burundi since April 2015. Similarly, South Africa remains obligated to cooperate with the ICC in existing cases, an obligation that will continue even once the withdrawal takes effect. The issue of South Africa's cooperation with the court regarding its failure to arrest President Omar al-Bashir of Sudan, who is wanted by the ICC on two outstanding arrest warrants for alleged crimes committed in the Darfur region, when he visited South Africa in June 2015, is pending before an ICC pre-trial chamber.²

Yet, for the fight against impunity, these withdrawals show devastating disregard for atrocity victims around the world, who look to the ICC as a court of last resort when all other avenues to justice have closed. If, as in the words of then UN Secretary-General Kofi Annan at the opening of the Rome Conference in 1998, "the eyes of the victims of past crimes, and of the potential victims of future ones, are fixed firmly upon us," these victims cannot but be let down by these developments.³

The withdrawals have also raised concerns that other states parties may follow suit, especially given South Africa's significant influence within Africa. These concerns are reinforced by the backlash against the ICC pressed by a vocal minority of African

¹ UN Secretary-General, "Withdrawal: South Africa," C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), October 25, 2016, <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf> (accessed November 9, 2016); UN Secretary-General, "Withdrawal: Burundi," C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification), October 28, 2016; <https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf> (accessed November 9, 2016); "Gambia announces withdrawal from International Criminal Court," Reuters, October 26, 2016, <http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335> (accessed November 8, 2016).

² There has been significant outcry regarding South Africa's apparent circumvention of its own domestic law regarding treaty withdrawal, including the absence of first seeking parliamentary approval. The notification is the subject of a legal challenge before a South African court. Ed Stoddard, "South Africa opposition party challenges ICC withdrawal in court," Reuters, October 24, 2016, <http://af.reuters.com/article/topNews/idAFKCN12O27E> (accessed November 8, 2016). It also has been widely condemned by human rights activists across the African continent, who look to the court to play its critical role as a court of last resort. See "South Africa: Continent Wide Outcry at ICC Withdrawal," joint news release, October 22, 2016, <https://www.hrw.org/news/2016/10/22/south-africa-continent-wide-outcry-icc-withdrawal>

³ "UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must Be that of Victims and World Community as a Whole," UN press release, SG/SM/6597, June 15, 1998, <http://www.un.org/press/en/1998/19980615.sgsm6597.html> (accessed November 8, 2016).

leaders and the African Union over the past several years. In January 2016 the African Union agreed that its Open-Ended Committee of African Ministers on the ICC (Open-Ended Ministerial Committee) should explore a “comprehensive strategy including collective withdrawal.”⁴ While a number of ICC African members –Burkina Faso, Cabo Verde, Democratic Republic of Congo, Ivory Coast, Nigeria, Senegal, and Tunisia – pushed back against an African Union call for ICC withdrawal at the July African Union summit, the African Union nevertheless reaffirmed the mandate of the Open-Ended Ministerial Committee to continue to explore a strategy for withdrawal.⁵

We appreciate that against this backdrop, many ICC states parties may now want to take any action possible to avoid further withdrawals and to use the upcoming Assembly session as a framework through which to take such action.

To be sure, the Assembly can and should be a place for principled discussion rooted in commitment to the ICC, and states parties should undertake efforts to engage with one another both before and during the Assembly session.

At the same time, Human Rights Watch urges states parties to guard against initiatives that could compromise the ICC’s independence, legitimacy, and effective functioning under the guise of promoting the court’s universality.

First, while the prospect of additional withdrawals cannot be discounted, there remains strong support among African governments for the ICC. In the wake of South Africa’s withdrawal, Botswana, Ivory Coast, Malawi, Nigeria, Senegal, Sierra Leone, and Zambia have publicly signaled their opposition to withdrawal and their intention to remain with the court.⁶

Second, it is difficult to identify what principled compromises could be offered.

The discourse around the relationship between the ICC and African countries certainly raises important and legitimate questions. Critics have charged the ICC with unfairly targeting Africans for prosecution. While this charge does not bear up under scrutiny, including because of the role of African governments in referring cases to the court, it

⁴ Assembly of the African Union, Twenty-Sixth Ordinary Session, “Decision on the International Criminal Court - Doc. EX.CL/952 (XXVIII),” Assembly/AU/Dec.590 (XXVI), Addis Ababa, January 31, 2016, http://www.au.int/en/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf (accessed November 8, 2016), para. 10(iv).

⁵ Assembly of the African Union, Twenty-Seventh Ordinary Session, “Decision on the International Criminal Court – Doc. EX.CL/987 (XXIX),” Assembly/AU/Dec.616 (XXVII), Kigali, July 18, 2016, http://au.int/en/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pdf (accessed November 8, 2016), para. 5(iii)(b); Elise Keppler, “Governments Defend ICC at African Union Summit,” Human Rights Watch dispatch, July 20, 2016, <https://www.hrw.org/news/2016/07/20/dispatches-governments-defend-icc-african-union-summit>.

⁶ For more details on comments and statements by these governments, see Sarah Rayzl Lansky, “Africans Speak Out Against ICC Withdrawal,” commentary, November 2, 2016 <https://www.hrw.org/news/2016/11/02/africans-speak-out-against-icc-withdrawal>.

speaks directly to the double standards within the international political and economic order. On accountability, as with other human rights issues, officials of powerful governments or their allies are still likely to escape justice because these governments have failed to join the ICC or because they wield the veto power they hold as permanent members of the UN Security Council to protect against prosecutions. This is a problem that cannot be readily remedied by reforming the operations of the ICC. Instead, these double standards need to be addressed head-on, including through ratification campaigns to bring additional countries into the Rome Statute and efforts to ensure that the members of the UN Security Council implement a principled and consistent approach to ICC referrals.

Meanwhile, a significant part of what appears to have fueled South Africa's decision to withdraw relates to a core principle under article 27 of the Rome Statute – the irrelevance of official capacity before the ICC.

In a media statement by South Africa's minister of justice and correctional services regarding the country's withdrawal, the minister cited a conflict between the government's ICC obligations to arrest and surrender individuals wanted by the ICC and its role in promoting peace, in particular within countries in Africa where the ICC may be conducting investigations and prosecutions.⁷ The government of Kenya, with African Union backing, has also called for a specific amendment to article 27 to allow immunity before the ICC for sitting leaders and other high-level officials.⁸

The irrelevance of official capacity to prosecution before the ICC is fundamental to the court's mission, as stated in the Rome Statute preamble, that "the most serious crimes of concern to the international community as a whole must not go unpunished." 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. Allowing official capacity to bar prosecution before the ICC would represent a major retreat in international criminal law and practice. Meanwhile, while tensions may exist between the imperatives of justice and those at stake in

⁷ "Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir," October 21, 2016, <http://www.dirco.gov.za/docs/speeches/2016/masu1021.htm> (accessed November 9, 2016); see also UN Secretary-General, "Withdrawal: South Africa," C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), October 25, 2016, <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>

⁸ UN Secretary-General, "Kenya: Proposal of Amendments," C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), March 14, 2014, <https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf> (accessed November 15, 2014); Assembly of the African Union, 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/decisions/9655-ext_assembly_au_dec_decl_e_o.pdf (accessed November 24, 2014), para. 10(i).

negotiating peace, the weight of experience from around the world suggests that impunity is a key factor in perpetuating cycles of violence.⁹

At a special segment of the 2013 Assembly session on the “Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation,” convened at the request of the African Union, the statements of states parties indicated that there was no consensus in favor of amending article 27.¹⁰

South Africa has signaled it may be seeking to press within the Assembly a specific exception to article 27. At last year’s Assembly session, it requested a special agenda item on the application and implementation of article 98. In its request, it set out an interpretation of the relationship between article 27 and article 98(1) that would provide immunity from arrest for sitting heads of state of states non-parties like Sudan.¹¹

The interpretation of these articles is a matter for the court’s judges, however. The judges have already addressed this issue, holding, in one set of decisions, that “customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes,” or, in a series of other decisions, including in a decision regarding South Africa’s obligations to arrest al-Bashir, that the UN Security Council, in referring the situation of Darfur to the ICC, waived the immunity of Sudanese officials.¹²

While accepting judicial decisions that governments disagree with may be a bitter pill to swallow, it is the foundation upon which a judicial institution must exist.

⁹ Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, https://www.hrw.org/sites/default/files/reports/ijo709webwcover_1.pdf

¹⁰ See Assembly of States Parties (ASP), “Special segment as requested by the African Union: ‘Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation’: Informal summary by the Moderator,” ICC-ASP/12/61, November 27, 2013, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-61-ENG.pdf (accessed November 8, 2016), para. 8.

¹¹ See ASP, “List of supplementary items requested for inclusion in the agenda of the fourteenth session of the Assembly,” ICC-ASP/14/35, October 27, 2015, annex I (“*Note verbale* from South Africa no. 57/2015, dated 5 October 2015, addressed to the Registrar of the International Criminal Court”), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-35-ENG.pdf (accessed November 8, 2016), paras. 13-14, annex II. The agenda item also covered the application of article 97, discussed further below.

¹² Compare *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC, Case No. 02/05-01/09, “Corrigendum to the 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 13, 2011, <http://www.legal-tools.org/doc/8c9d80/> (accessed November 9, 2016), para. 43 with *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC, Case No. 02/05-01/09, “Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court,” April 9, 2014, <http://www.legal-tools.org/doc/89d30d/> (accessed November 9, 2016), para. 29. The single judge of the pre-trial chamber followed the latter decision with regard to South Africa’s obligations. See *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC, Case No. 02/05-01/09, “Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir,” June 13, 2015, <http://www.legal-tools.org/doc/c2dc80/> (accessed November 8, 2016), paras. 5-9.

States parties at least year's Assembly session did not act on a request from the South African government that an "interpretation be done of the nature and scope of Article 98 and its relationship with Article 27," and subsequently also opted not to form a working group on this topic— appropriately so, given the importance of distinguishing clearly between the oversight and legislative role of the Assembly, and the independent judicial mandate of its judges.¹³

Third, recent practice at Assembly sessions has shown that dialogue on state party concerns has tended to evolve beyond discussion and into negotiations on Assembly texts that blur this essential line. Where negotiations and adopted texts, including rule changes, resolutions, and reports of proceedings, have concerned decisions recently rendered or still pending before the ICC's judges, they have risked the Assembly treading on the independence of the court's judges.

As this Assembly session approaches, therefore, Human Rights Watch recommends states parties resist any efforts toward reinterpretation and concession that would undermine the court's integrity, mission, and independence, and instead prepare to stand firmly on principle. While any withdrawal from the treaty is regrettable, the price of avoiding withdrawals cannot be an ICC hindered in carrying out its essential mandate. The court should remain, as was said many times during the Rome conference, a "court worth having."

ICC states parties should:

- Use general debate and other statements strategically to reaffirm the critical role of the ICC as a court of last resort, the essential importance of ensuring that no one is above the law, and the irrelevance of official capacity as reflected in article 27, and to reject politicized attacks on the court's independence;
- Ensure high-level representation within delegations to signal the importance governments attach to the ICC and the fight against impunity; and
- Prepare to work together across regions within the Assembly to resist outcomes in Assembly texts that could undermine the ICC's independence, legitimacy, and effective functioning.

¹³ The initial request was included in South Africa's supplementary agenda item. See *Note verbale* from South Africa no. 57/2015, dated 5 October 2015, addressed to the Registrar of the International Criminal Court, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-35-ENG.pdf, paras. 13-14. In the report of the Assembly's proceedings, the Assembly noted that "some States Parties raised concerns [regarding the relationship between article 27 and 98]," and that, therefore "interested States Parties could refer the matter to the Bureau for further consideration and attention." The South African government subsequently requested the establishment of a working group on articles 97 and 98. States parties decided not to set up the working group on article 98, but did agree to set one up on article 97, as discussed below. See Bureau of the ASP, "Agenda and Decisions," June 3, 2016, https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2016-Bureau-03-03Jun2016.pdf (accessed November 8, 2016), p. 2.

Recent Human Rights Watch and joint materials

- Joint Statement, “South Africa: Continent Wide Outcry at ICC Withdrawal,” Human Rights Watch press release, October 22, 2016, <https://www.hrw.org/news/2016/10/22/south-africa-continent-wide-outcry-icc-withdrawal>
- “South Africa: ICC Move Betrays Victims,” Human Rights Watch press release, October 24, 2016, <https://www.hrw.org/news/2016/10/24/south-africa-icc-move-betrays-victims>
- “Burundi: ICC Withdrawal Major Loss to Victims,” Human Rights Watch press release, October 27, 2016, <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>
- Sarah Rayzl Lansky, “Africans Speak Out Against ICC Withdrawal,” commentary, Human Rights Watch, November 2, 2016, <https://www.hrw.org/news/2016/11/02/africans-speak-out-against-icc-withdrawal>

Article 97 working group

As noted above, at last year’s Assembly session, the South African government requested a special agenda item on the application and implementation of article 97, in addition to article 98. Article 97 provides for consultations between a government and the court when a government identifies difficulties in implementing the ICC’s cooperation requests.

At the conclusion of the last Assembly session, states parties “expressed their willingness to consider, within the framework of the appropriate subsidiary body of the Assembly, proposals to develop procedures for the implementation of article 97.”¹⁴ At the request of the South African government, states parties established a working group on article 97 in June 2016.¹⁵

It is unclear at this writing whether the article 97 working group will report to this year’s Assembly session on its progress, including consideration of a proposal presented by South Africa for rule or regulation amendments. The proper functioning of article 97 may be important to ensuring cooperation with the court, and, in Human Rights Watch’s view, could legitimately be the subject of Assembly discussions in close consultation with court officials. But, as indicated before the last Assembly session, Human Rights Watch considers that further discussion and, in particular, any outcome should be deferred until the litigation on South Africa’s cooperation in the al-Bashir

¹⁴ ASP, “Proceedings,” in *Official Records, Fourteenth Session, The Hague, November 18-26, 2015*, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/OR/ICC-ASP-14-20-OR-vol-I-ENG.pdf, para. 59.

¹⁵ Bureau of the ASP, “Agenda and Decisions,” June 3, 2016, https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2016-Bureau-03-03Jun2016.pdf, p. 2.

case is resolved. The litigation would appear to encompass the government's concerns regarding article 97 in addition to the relationship between article 27 and 98.¹⁶

ICC states parties should:

- Defer further discussion within the article 97 working group until after a final determination by the ICC with regard to South Africa's cooperation in the *Prosecutor v. Omar Hassan Ahmad Al Bashir* case.

Rome Statute at Twenty: Stocktaking of progress and challenges ahead

July 2018 will be the twentieth anniversary of the adoption of the Rome Statute. To mark the beginning of the anniversary year, and to set in a place a framework for anniversary celebrations and concrete actions by ICC officials and states parties to bolster support to the court in 2018 and beyond, the Assembly should mandate the Bureau to prepare a stocktaking exercise of progress to date and challenges ahead, to be held during a plenary session at the sixteenth Assembly of States Parties session. This exercise could provide constructive, positive attention to the work of the ICC, a focus needed more than ever now in light of the recent withdrawals.

As this twentieth anniversary approaches, the ICC is growing into maturity. The court has issued five verdicts, and they have become increasingly significant. The recent conviction of Jean-Pierre Bemba, a former Congolese vice-president, for murders and rapes by rebel fighters under his command is of particular importance. Investigations have taken place or are ongoing in 10 situations, widening victims' access to justice. To be sure, there have also been setbacks, including the collapse of the court's cases related to Kenya's 2007-08 post-election violence. Improving the pace of court proceedings while deepening the ICC's impact with victims and affected communities also should remain key strategic goals for ICC officials. But the court shows signs of emerging as the critical court of last resort its founders envisioned in 1998.

And yet, 2018 looks set to be a vastly different time than 1998. The landscape on which the ICC works has never been more challenging. Two ICC states parties have now taken the unprecedented step of seeking to remove themselves from the Rome Statute community of states, and the court's cases have also attracted political backlash. Multiplying human rights crises around the globe have meant that demand for justice is far exceeding expectations envisioned by the statute's drafters. Budgetary challenges faced by the ICC's member countries have limited the resources available to the ICC to address these demands; the court's capacity continues to far fall behind the need for accountability. With crucial international institutions such as the UN Security Council gripped by paralysis, gone is the post-Cold War optimism that animated projects to

¹⁶ See Human Rights Watch Briefing Note for the Fourteenth Session of the International Criminal Court Assembly of States Parties, November 2015, https://www.hrw.org/sites/default/files/supporting_resources/hrw_asp14_briefing_note.pdf, pp. 10-12.

consolidate international cooperation and the rule of law when the ICC was first set up.

A plenary session on the Rome Statute's twentieth anniversary will provide an opportunity to take stock of achievements to date, while, critically, also grappling with this changed landscape. It will represent a natural continuation, in a more consolidated format, of the broader stocktaking exercise at the 2010 Kampala review conference.

ICC states parties should:

- Include language in the Omnibus resolution deciding to include a specific item on the twentieth anniversary of the Rome Statute in the agenda of the sixteenth Assembly of States Parties and mandate the Bureau to undertake necessary preparations.

Responding to non-cooperation in ICC investigations and prosecutions

This year, ICC judges issued three findings of non-cooperation against ICC states parties. Two of these findings relate to the failure of the governments of Uganda and Djibouti to arrest President Omar Al-Bashir during visits by al-Bashir to those countries.¹⁷ The third relates to the failure of the government of Kenya to comply fully with the prosecution's request for tax, bank, company, land transfer, and telephone records in the now-withdrawn case against Uhuru Kenyatta, the president of Kenya.¹⁸

In 2011, the Assembly adopted a set of procedures related to non-cooperation. One dimension of these procedures relates to efforts by the Assembly to deter non-cooperation, and following consultations, the Assembly's focal points on non-cooperation have prepared a "toolkit" to be used by states parties to that end.¹⁹

The other dimension of the procedures relate to a "formal response" to judicial findings of non-cooperation. These procedures provide for a number of possible steps: meetings of the Assembly's Bureau with the state concerned by a finding of non-cooperation; a public meeting with the Bureau's New York Working Group; appointment of a facilitator to discuss the issue; discussion of a draft Assembly

¹⁷ *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC, Case No. 02/05-01/09, "Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute," July 11, 2016, <http://www.legal-tools.org/doc/a09363/> (accessed November 8, 2016); "Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute," July 11, 2016, <http://www.legal-tools.org/doc/51c322-1/> (accessed November 8, 2016).

¹⁸ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC, Case No. 01/09-02/11, "Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute," September 19, 2016, <http://www.legal-tools.org/doc/2f2e43/> (accessed November 8, 2016).

¹⁹ ASP, "Report of the Bureau on non-cooperation," ICC-ASP/15/31, November 8, 2016, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-31-ENG.pdf (accessed November 9, 2016), annex II.

resolution containing concrete recommendations; and then possible adoption of such a resolution regarding an instance of non-cooperation.²⁰

While some of these steps have been taken with regard to past findings of non-cooperation, the Assembly has yet to discuss a specific instance of non-cooperation or to take action on such an instance during its annual sessions.

It is essential that these non-cooperation procedures be put fully into practice. Securing effective cooperation in its cases remains a central challenge for the ICC.

Indeed, in referring the government of Kenya's non-cooperation to the Assembly, the ICC trial chamber noted that it did so because even though the case against President Kenyatta was withdrawn, the material requested by the prosecution could be relevant for current or future cases arising out of the situation. The chamber also sent a message more broadly regarding the significance of non-cooperation:

[T]he Chamber finds that, in general, the lack of bona fide cooperation by the Government of a situation country, as shown by the Kenyan Government in this instance, may have a serious impact on the functioning of the Court in future proceedings. Therefore, notwithstanding the passage of time, and having regard to the nature of the non-cooperation at issue, the Chamber finds it appropriate for the lack of cooperation in this case to be further addressed.²¹

Human Rights Watch urges the Assembly to ensure that it acts to take up its responsibilities under article 87(7) to enforce the court's judicial findings of non-cooperation. A clear response from the Assembly is key to give meaning to these findings, to bring about future cooperation, and to deter other states from non-cooperation.

As a first step, Human Rights Watch urges states parties to ensure that the issue of the three recent findings of non-cooperation is placed on the agenda of the next Bureau meeting. The Bureau should also convene meetings with the governments concerned as soon as possible after the conclusion of the Assembly session. Consideration could then be given to follow-up steps, including the appointment of a facilitator and the development of recommendations for Assembly-wide action.

²⁰ ASP, "Strengthening the International Criminal Court and the Assembly of States Parties," Resolution ICC-ASP/10/Res.5, December 21, 2011, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.5-ENG.pdf (accessed November 9, 2016), annex ("Assembly procedures relating to non-cooperation").

²¹ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC, Case No. 01/09-02/11, "Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute," <http://www.legal-tools.org/doc/2f2e43/>, para. 35. Three men are wanted on ICC charges for witness tampering in the now-vacated case against William Ruto, the deputy president of Kenya, and a co-defendant, the former broadcaster, Joshua arap Sang. A legal challenge to the surrender of at least one of these individuals, Walter Barasa, is currently pending before the Kenyan Court of Appeals.

States parties may wish to consider whether, as they implement the procedures next year with regard to the three recent findings of non-cooperation, they should, in parallel, review the “formal response” procedures. The Assembly’s current procedures outline a clear, if only permissive process for responding to formal findings of non-cooperation, but stop short of prescribing specific steps the Assembly can take collectively to respond to non-cooperation findings. Human Rights Watch has previously urged the Assembly to go further in articulating its “formal response” to findings of non-cooperation. Consultations held by the non-cooperation focal points in 2015 touched on this dimension, resulting in a preliminary set of recommendations.²²

Such review could include an evaluation of lessons learned to date, the identification of existing gaps, and consideration as to what enhancements are needed in future practice in the implementation of the procedures. The aim of the review should be to stimulate reflection and to secure consensus around recommended actions going forward in order to ensure that a commitment to prevent and respond to non-cooperation can be more easily translated into concrete action on the part of the Assembly and states parties.

ICC states parties should:

- Express regret, in general debate, plenary cooperation session, and other statements during the Assembly session as well as in language in the Omnibus resolution, with regard to the increase in findings of non-cooperation over the past year and at the detrimental impact non-cooperation has on the court’s investigations and prosecutions;
- Call on the Bureau to include these non-cooperation findings within its agenda and, express the expectation in general debate, plenary cooperation session, and other statements at the Assembly session, that the Bureau and Assembly will put the non-cooperation procedures into practice with regard to current findings of non-cooperation as soon as possible after the conclusion of the Assembly session;
- Include language in the Omnibus resolution mandating the Bureau to ensure the effective implementation of the Assembly’s non-cooperation procedures and the development of recommendations in light of lessons learned.

²² See Human Rights Watch Human Rights Watch Memorandum for the Thirteenth Session of the International Criminal Court Assembly of States Parties, November 25, 2014, <https://www.hrw.org/news/2014/11/25/human-rights-watch-memorandum-thirteenth-session-international-criminal-court>; ASP, “Report of the Bureau on non-cooperation,” ICC-ASP/14/38, November 18, 2015, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-38-ENG.pdf (accessed November 8, 2016), annex III.

Performance indicators and the court's impact in affected communities

The court is developing a set of court-wide performance indicators, following a request to the court by the Assembly at its thirteenth session in 2014 that it “intensify its efforts to develop qualitative and quantitative indicators that would allow the [c]ourt to demonstrate better its achievements and needs, as well as allowing States Parties to assess the Court’s performance in a more strategic manner.”²³ It has prepared a report to the Assembly on its progress in this regard, which, Human Rights Watch understands, includes an initial, preliminary set of data for several indicators.

Through participation in consultations regarding the performance indicators over the past year, Human Rights Watch has urged the court to include indicators that are relevant to the court’s impact for victims and in affected communities. By impact, we mean a concern to ensure that court proceedings are meaningful, accessible, and perceived as fair within these local communities.

Court officials have a number of different responsibilities relevant to maximizing the ICC’s local impact. These include the prosecution’s selection of cases; outreach to affected communities; assisting victims to participate in court proceedings; engaging victims and civil society in consultations; and the possibility of in situ proceedings. They also include implementation of the dual mandate of the Trust Fund for Victims to provide assistance to victims and to carry out court-ordered reparations. And they include “positive complementarity” initiatives to encourage additional national investigations and prosecutions, amplifying the effect of the cases pursued by the ICC, as well as other efforts aimed at increasing the court’s long-term legacy. Most of these responsibilities are best supported by a robust presence of ICC staff in situations under investigation and the establishment of court field offices.²⁴

Indicators that can reflect progress toward achieving this impact – and through the collection of data over time, highlight areas where continued progress is needed – are an essential part of assessing the court’s performance.

Human Rights Watch therefore welcomes what we understand to be the report’s acknowledgment of civil society’s concern that performance indicators be developed that are relevant to assessing the court’s impact for victims and affected communities. While there is further work to be done in future phases of the project to develop performance indicators, we understand that the report already includes some initial indicators relevant to a number of the above areas.

²³ ASP, “Strengthening the International Criminal Court and the Assembly of States Parties,” Resolution ICC-ASP/13/Res.5, December 17, 2014, http://www.legal-tools.org/uploads/tx_ltpdb/ICC-ASP-13-Res5-ENG.pdf (accessed November 8, 2016).

²⁴ See discussion in Human Rights Watch, *Making Justice Count: Lessons from the Work of the ICC in Côte d’Ivoire*, August 2015, <https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire>, pp. 14-21.

The inclusion of performance indicators relevant to the court's local impact will help to reinforce important progress at the court.

For example, the registry is implementing its new structure in the field, following the ReVision, including the recruitment of senior chiefs of office in the court's field offices.²⁵ The latter is a critical and overdue step that has significant potential to better root the work of the court locally and strengthen the ICC's connection with affected communities. These heads of office could play a critical reporting function in assessing performance on increasing impact, including through ensuring regular consultations are held in situation countries between ICC staff and affected communities. The Committee on Budget and Finance has recommended that the Assembly approve funding for the recruitment of a chief of office for a Georgia field office.²⁶ We urge that this position be recruited as soon as possible; having a chief of office in place from a relatively early point in the court's investigations in Georgia should help ensure more impact-sensitive approaches in key areas, including outreach and victim participation.

The prosecutor has also highlighted the importance of the court's impact for victims and affected communities in her office's new case selection and prioritization policy, issued in September 2016. The policy emphasizes that the office of the prosecutor seeks out direct interaction with victims and victims' associations at all stages of its activities and includes as assessment of the impact of investigations and prosecutions on victims and affected communities, as well as the impact of investigations and prosecutions on ongoing criminality and deterring new crimes, as two of the criteria guiding its prioritization between cases selected for investigation.²⁷ Critically, the policy reaffirms the prosecutor's overall commitment to "represent as much as possible the true extent of criminality which occurred within a situation, in an effort to ensure ... that the most serious crimes committed in each situation do not go unpunished."²⁸ Our observation of ICC practice to date suggests that reflecting in the office's cases underlying patterns of serious crimes – what crimes, committed where, and by which groups – following impartial and independent investigations of

²⁵ See ASP, "Report on the review of the organizational structure of the Registry: Outcomes of Phase 4 of the ReVision Project - Decisions on the structure of the Registry," ICC-ASP/14/18, May 4, 2015, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-18-ENG.pdf (accessed November 10, 2016), para. 26, 31.

²⁶ ASP, "Report of the Committee on Budget and Finance on the work of its twenty-seventh session," ICC-ASP/15/15, October 28, 2016, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-15-ENG.pdf (accessed November 8, 2016), paras. 75-76.

²⁷ Office of the Prosecutor, "Policy Paper on Case Selection and Prioritisation," September 15, 2016, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (accessed November 8, 2016), paras. 9, criterion C and D.

²⁸ *Ibid.*, para. 8

allegations against all parties is key to the court's legitimacy within affected communities, a prerequisite for impact.²⁹

States parties should encourage the court to continue with its development of performance indicators and to continue to increase, in future phases of the project, its focus on evaluating performance through the lens of impact for victims and affected communities.

ICC states parties should:

- Welcome, in statements in the general debate and at other appropriate moments during the Assembly session, the court's progress in developing performance indicators in areas relevant to increasing its impact for victims and affected communities in an assessment of its performance;
- Encourage, in statements at the Assembly session, the court in its next phase of indicator development to develop additional performance indicators relevant to the court's impact for victims and affected communities; and
- Ensure, in negotiations on the budget, adequate resources to permit the office of the prosecutor to increase the number of investigations and prosecution in order to fully implement its policy on case selection and prioritization, and to support the registry's new structure in the field.

Recent Human Rights Watch materials

- "Human Rights Watch Comments on the ICC Office of the Prosecutor Draft Policy Paper on Case Selection and Prioritisation," May 3, 2016, <https://www.hrw.org/news/2016/05/03/human-rights-watch-comments-icc-office-prosecutor-draft-policy-paper-case-selection>

Family visits

The right of all detained persons to family visits is well recognized.³⁰ The ICC presidency, in a March 2009 judicial decision, held that the ICC has a positive

²⁹ See Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 2011, <https://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf>; Human Rights Watch, *Making Justice Count*, August 2015, <https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire>.

³⁰ See, for example, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/RES/70/175, January 8, 2016, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/175 (accessed November 9, 2016), rule 58 ("Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals: (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and (b) By receiving visits."); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, December 9, 1998, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988), <http://www.un.org/documents/ga/res/43/a43r173.htm> (accessed November 8, 2016), principle 19 ("A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."). Regulation of the Court 100 states

obligation to fund family visits of indigent persons in order to give effect to their right to family visits.³¹ In November 2009, however, the Assembly passed a resolution reaffirming many states parties' position "that according to existing law and standards, the right to family visits does not comprise a co-relative legal right to have such visits paid for by the detaining authority or any authority."³² In 2010, the Assembly established a Trust Fund for family visit for indigent detainees in order to ensure that family visits are now funded entirely through voluntary contributions.³³

Unfortunately, over the last six years, states parties have not followed through on the creation of the Trust Fund. To date, only two states parties have made voluntary contributions, totaling €180,000. A recent decision of the ICC presidency, reaffirming the right of indigent detainees to funded family visits, emphasized the critically low level of resources of the Trust Fund, and the need to actively seek donations from states parties, other states, nongovernmental organizations, civil society, individuals, and other entities.³⁴ Indeed, the level of funding within the Trust Fund – less than €10,000 – appears to be identical to the amount of funding available one year ago.³⁵

There is a substantial and real risk that, in the near future, the ICC will not be able to provide for family visits for indigent detainees. This would place the registry, with its responsibilities to oversee such visits, and the ICC as a whole, in an untenable position. Indeed, in its recent decision, the presidency has indicated that in considering requests for family visits, the registry should take into consideration pending or anticipated requests from other indigent detainees to ensure the equal treatment of detainees. In the absence of sufficient funding to ensure a reasonable number of family visits for all indigent detainees, however, this concern for equal treatment could lead to the perverse result of limiting the rights of all detainees.

Urgent donations to the Trust Fund are needed. In addition, Human Rights Watch believes that the ICC and the Assembly may need to consider alternatives to the Trust

that "[a] detained person shall be entitled to receive visits," and Regulation of the Registry 179 provides that the "Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links."

³¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC, Case No. 01/04-01/07, "Decision on Mr. Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008," March 10, 2009, https://www.icc-cpi.int/CourtRecords/CR2009_02787.PDF (accessed November 10, 2016).

³² ASP, "Family visits for indigent detainees," Resolution ICC-ASP/8/Res.4, November 26, 2009, https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.4-ENG.pdf (accessed November 9, 2016), preambular para. 2.

³³ See ASP, "Financial statements for the period 1 January to 31 December 2010," ICC-ASP/10/12, July 26, 2011, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/OR/ICC-ASP-10-20-Vol.II-ENG-C.pdf (accessed November 9, 2016), p. 52.

³⁴ Public redacted version of "Decision on the 'Application to review the 'Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit' dated [REDACTED] 2016," ICC Presidency, August 11, 2016, https://www.icc-cpi.int/CourtRecords/CR2016_05804.PDF (accessed November 8, 2016), para. 42.

³⁵ *Ibid.*, para. 14.

Fund, including the court's use of the contingency fund to ensure respect for the rights of indigent detainees to family visits.

ICC states parties should:

- Use the Assembly session to announce, on an urgent basis, voluntary contributions to the Assembly's Trust Fund for family visit for indigent detainees; and
- Consider, going forward, whether a more effective funding mechanism is needed to ensure the effective protection of the rights of indigent ICC detainees to family visits.