



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

November 2015

The 123 states parties of the International Criminal Court (ICC) will meet in The Hague from November 18-26, 2015 at the annual session of the Assembly of States Parties (ASP). The Assembly session provides an opportunity for ICC states parties to advance serious debate regarding the range of challenges the ICC confronts in delivering on its mandate to provide justice for mass atrocities, and to take decisions that will help to equip the ICC to meet these challenges. This briefing note provides recommendations to ICC states parties with regard to (a) addressing the ICC's capacity crisis; (b) prioritizing the ICC's impact for victims and affected communities; (c) supplemental agenda items requested by the governments of Kenya and South Africa; (d) the action plan on arrest strategies; (e) avoiding non-essential contacts with individuals wanted on ICC arrest warrants; and (f) the urgent need for voluntary contributions to the Trust Fund for family visit for indigent detainees.

I. Budget and Strategic Planning

A. Addressing the ICC's capacity crisis

At the upcoming ASP session, ICC member countries will set the court's budget for 2016. The ICC has requested a budget of €153 million for next year, representing a €23 million increase, or 17 percent, over the approved program budget for 2015.¹ Many states parties appear to have been alarmed by the size of the proposed increase.

With regard to the ICC's budget negotiations, Human Rights Watch generally does not take a position as to the overall resource request submitted by the ICC each year. Rather, we consider the court's budget request from the perspective of our close observation of the court, and seek to highlight areas where our monitoring suggests inadequate resources may limit the court's effectiveness in combating impunity.

¹ Assembly of States Parties (ASP), "Proposed Programme Budget for 2016 of the International Criminal Court", ICC-ASP/14/10, September 2, 2015, https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf (accessed November 4, 2015), paras. 2-3.

From this perspective, the overall size of the request should not have come as a surprise to states parties. There is a clear capacity crisis facing the ICC. Nine situations under investigation are open before the court, stretching across eight countries. Progress in the court's work in these situations varies from country to country, but in nearly all situations there are outstanding needs for additional investigations. The Office of the Prosecutor has recently petitioned the court's judges for authorization to open an investigation in Georgia, which would be the court's tenth situation. There are an additional seven situations under preliminary examination awaiting decisions as to whether the ICC will undertake a formal investigation.

The court's overstretched resources are affecting its ability to deliver on its mandate to fight impunity and hold to account those responsible for serious international crimes, where all other avenues to justice are blocked.

The Office of the Prosecutor, which had resources to conduct only four active investigations in 2015, has cited resource constraints as a factor in delaying needed investigations in existing situations and in opening new situations where the court should be acting. It has candidly acknowledged that its recent progress in securing the confirmation of charges against three defendants—Bosco Ntaganda, Laurent Gbagbo, and Charles Blé Goudé—among other developments, has delayed progress in other cases.² The Registry, which has come under particular criticism by states parties for requesting a 26 percent increase in resources for next year, had held down its budget to zero or near-zero growth since 2013.³

The magnitude of demands on the ICC clearly were not foreseen at the time of the court's establishment; if anything, the recent proliferation of mass atrocity crimes suggests that the court's role is even more vital now than when it was created. Meanwhile, the financial pressures on states and competing priorities for resources are real. The court can and is doing more to improve the efficiency of its proceedings, while safeguarding the rights of defendants and victims, but it is far-fetched to expect this to result in cost savings as the workload of the court continues to expand.

These are the hard truths that the court and its states parties now need to confront. Human Rights Watch and other organizations have called on the court to work towards defining its optimal capacity.⁴ This would encompass an assessment of the number of

² ASP, "Office of the Prosecutor: Strategic plan 2016-2018," ICC-ASP/14/22, August 21, 2015, https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-22-ENG.pdf (accessed November 4, 2015), paras. 5, 16, 18.

³ ASP, "Proposed Programme Budget for 2016 of the International Criminal Court," para. 275.

⁴ See Elizabeth Evenson (Human Rights Watch) and Jonathan O'Donohue (Amnesty International), "Still falling short—the ICC's capacity crisis," commentary, *Open Democracy*, November 3, 2015, <https://www.hrw.org/news/2015/11/03/still-falling-short-iccs-capacity-crisis>; "The ICC at Risk," commentary, *Open Democracy*, May 6, 2015, <https://www.hrw.org/news/2015/05/06/international-criminal-court-risk>.

investigations, prosecutions, and trials, supported by the robust engagement in situation countries necessary to ensure impact in affected communities, which a high-performing and efficient ICC could carry out to play the best possible role it can in the fight against impunity. If the ICC can articulate such a vision, states parties could then support a budgetary approach that would see it scale up to this optimal capacity as soon as practicable.

Earlier this year, the Office of the Prosecutor reported on its “basic size.” The “basic size” seeks to define the resources the prosecutor needs to “respond to the demands placed upon the Office with the required quality, effectiveness, and efficiency.”⁵ The court’s other organs are expected to report in April 2016 regarding the impact of the prosecutor’s “basic size” on their resource requirements to the Committee on Budget and Finance, the ASP’s independent body tasked with reviewing the court’s annual budget request and making recommendations to states parties.⁶

Refocusing discussion through the “basic size” concept on what the court needs to carry out its mandate could be a step in the right direction toward defining and achieving the court’s optimal capacity. But it can only be a first step; the office’s “basic size” report acknowledges that even the level of resources it seeks will be insufficient to meet existing needs for investigations.⁷

The reaction of states parties to this year’s resource request confirms, however, that the annual budget-setting process is not a path for advancing serious and urgent discussion to confront the capacity crisis. Following consultation with the Committee on Budget and Finance, the Office of the Prosecutor and the Registry have revised downwards their budget requests. Coupled with additional cuts recommended by the Committee, if approved by the Assembly, this would see the court’s budget rise by 6.3 percent to €138 million, excluding interest owed on its headquarters loan. The Office of the Prosecutor’s budget would grow by €3.9 million, instead of the €6.5 million it was seeking to put it on track to achieve a “basic size” by 2018. As discussed further below, implementation of the Registry’s *ReVision* project would be staggered to save money, which may result in significant gaps in key Registry activities needed to make court proceedings accessible to the very victims the court was set up to serve, including outreach.⁸

⁵ ASP, “Office of the Prosecutor: Strategic plan 2016-2018,” Strategic goal 5; ASP, “Report of the Court on the Basic Size of the Office of the Prosecutor,” ICC-ASP/14/21, September 17, 2015, https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-21-ENG.pdf (accessed November 4, 2015).

⁶ ASP, “Report of the Committee on Budget and Finance on the work of its Twenty-Fifth session,” ICC-ASP/14/15, October 22, 2015, https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-15-ENG.pdf (accessed November 4, 2015), para. 31.

⁷ ASP, “Report of the Court on the Basic Size of the Office of the Prosecutor,” paras. 24-25.

⁸ ASP, “Report of the Committee on Budget and Finance on the work of its Twenty-Fifth session,” paras. 2, 50, 52, 54, 61.

Court officials and states parties should work together to improve dialogue about the court's resource needs. Over the next year, court officials should work to define their optimal capacity, drawing on development of the "basic size" reports submitted to the Committee on Budget and Finance. Court officials should consider whether seeking support from independent experts could be useful in defining this optimal capacity. The Assembly should then convene a plenary session at its fifteenth session in 2016 regarding the court's optimal capacity, taking into consideration the changed realities that have seen the court's needs far outstrip expectations at its founding in 1998. This could help ground the substantive change in discourse around the court's resource requirements, without which we fear the court will simply be left to fall further and further behind, precisely at a time when it has never been more needed.

ICC states parties should:

- Consider carefully the Committee's proposed recommendations on the 2016 budget, seek information from court officials about the impact of those recommendations on the court's ability to meet its workload, and ensure approval of adequate resources for the ICC to carry out its mandate in 2016;
- Express support, in the general debate, the plenary session on the efficiency and effectiveness of court proceedings, and other statements during the Assembly session, for efforts by the court's presidency and other judges to ensure the court is a standard bearer in the administration of criminal justice, while ensuring full respect for the rights of defendants and victims;
- Welcome, in general debate and other statements during the Assembly session, the Office of the Prosecutor's "basic size" concept as an important starting point in assisting the court to achieve the capacity it needs to better meet its mandate, commit to providing sufficient resources for the Office of the Prosecutor to achieve this "basic size" as soon as possible, and call for court officials to define the court's optimal capacity; and
- Adopt language in the "Omnibus" resolution providing for a plenary debate during the fifteenth Assembly session to consider the court's optimal capacity in light of the reality that expectations for justice have exceed what was envisioned when the ICC was first established.

Recent Human Rights Watch materials

- Elizabeth Evenson (Human Rights Watch) and Jonathan O'Donohue (Amnesty International), "Still Falling Short—Addressing the ICC's Capacity Crisis," commentary, *Open Democracy*, November 3, 2015, <https://www.hrw.org/news/2015/11/03/still-falling-short-iccs-capacity-crisis>.
- Elizabeth Evenson (Human Rights Watch), "The ICC: Too important to let fail," commentary, *The Globe and Mail*, August 7, 2015, <https://www.hrw.org/news/2015/08/07/icc-too-important-let-fail>.

- Elizabeth Evenson (Human Rights Watch) and Jonathan O’Donohue (Amnesty International), “The ICC at Risk,” commentary, *Open Democracy*, May 6, 2015, <https://www.hrw.org/news/2015/05/06/international-criminal-court-risk>.

B. Prioritizing the ICC’s impact for victims and affected communities

At the core of the ICC’s mandate is the delivery of justice through fair criminal proceedings. But fair proceedings alone are insufficient to ensure that the ICC’s delivery of justice will be accessible, meaningful, and perceived as legitimate—that is, that it can have impact—in countries where it conducts investigations. When it comes to impact, the delivery of justice matters, but so does the quality of that justice and ensuring that justice is also seen to be done.

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 Trust Fund for Victims dual mandate to provide assistance to victims and 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 and increasing its 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.⁹

To be sure, the ICC’s experience to date, as well as that of the ad hoc tribunals, requires a certain realism about what local impact the ICC can achieve. Impact is not solely the product of factors within the control of court officials. The ICC will often work in highly politicized contexts where support for justice and the ICC’s role, even among victims, cannot be assumed. Achieving impact in ICC countries also becomes increasingly challenging as cases before the court have multiplied. And, yet, achieving impact should remain a central, strategic goal for court officials.

An August 2015 Human Rights Watch report, *Making Justice Count*, takes a detailed look at the experience of the ICC in Côte d’Ivoire, and explores how missteps in three areas—the prosecution’s selection of cases, outreach strategies, and engaging victims—have missed opportunities to increase the court’s impact in the country. Although the report takes Côte d’Ivoire as one case study, the lessons it draws and recommendations it makes to increase the court’s local impact are broadly applicable across the court’s work.

⁹ 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.

While the focus of the Human Rights Watch report is on strategic choices and planning by court officials, the report also highlights how resource constraints have played a role in limiting the court's potential impact in Côte d'Ivoire. This included contributing to delays in the ability of the Office of the Prosecutor to move forward with investigations of all sides to the conflict, thus reinforcing perceptions of bias in the court's work. Resource constraints were also a factor in delaying the deployment of a field-based outreach officer to Côte d'Ivoire for nearly three years after investigations were opened, restricting efforts to render the court's proceedings accessible to the broader Ivorian population.¹⁰ Court officials need to make choices that give priority to the court's local impact, but states parties will also need to be willing to provide the resources to support those choices.

Measured against the long-term goal of achieving greater local impact for the ICC, the Committee on Budget and Finance's recommendation, cited above, to stagger implementation of the Registry's new staffing structure is deeply concerning.

The Registry's *ReVision*, a restructuring of the organ that led to substantial changes in its staffing structure, put a welcome spotlight on enhancing the court's field offices in situation countries.¹¹ In spite of the importance of the court's field presence, including to maximize its local impact, it has been slow to develop.¹² The registrar's decision following the *ReVision* to put in place senior "chiefs" (at a P-5 level) in some of the court's field offices 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 chiefs of office will supervise nearly all Registry staff in a given office, with outreach and victim specialists organized in multidisciplinary teams.¹³ This should help to bring about coordination between Registry mandates, which has been lacking in the past. Equally important, through strategic guidance, based on deep knowledge of the country situation, this level of leadership might better ensure that the various mandates are pulled together into a coherent strategy specifically aimed at enhancing local impact. The chief can also serve a representational function in-country, helping to make the court less abstract and turning the court's field offices into the court's "face" on the ground.¹⁴

¹⁰ *Ibid.*, pp. 39-42, 44-59.

¹¹ 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" (*ReVision Report*), ICC-ASP/14/18, May 4, 2015, https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-18-ENG.pdf (accessed November 4, 2015), para. 26, 31.

¹² See Human Rights Watch, *Making Justice Count*, pp. 22-30.

¹³ ASP, "Revision Report," para. 31.

¹⁴ See Human Rights Watch, Letter to the Assembly of States Parties Committee on Budget and Finance, September 15, 2015, <https://www.hrw.org/news/2015/09/15/letter-assembly-states-parties-committee-budget-and-finance>.

If staggered implementation of the new *ReVision* structure delays putting in place these chiefs of field offices, it may set back efforts to remedy the already significant gaps in the court's field presence, and, in turn, to improve the court's ability to have a greater impact locally. In addition, a limited number of positions covering outreach functions in the field were abolished through the *ReVision*, but were intended to be replaced by new positions, for example, at a higher grade, either through the *ReVision* process or through requests for additional positions in 2016 (see below). Staggered implementation—if an existing position has been abolished and a new position is not yet recruited—could lead to significant gaps in essential activities.

The Committee has also recommended against establishing certain field-based posts that the Registry did not include in the basic *ReVision* structure, but is seeking to establish in 2016 on the basis of its anticipated workload in the coming year. These include field officers or assistants covering outreach or victim-specialist functions in Uganda, Central African Republic, and Côte d'Ivoire, as well as the chief of field office for the Central African Republic.¹⁵ There are active investigations in all three of these situations, as well as pre-trial or trial proceedings planned for 2016 in both Uganda and Côte d'Ivoire. For the court to have impact, affected communities need to have access to information about the court's proceedings and victims need to access and effectively exercise their rights to standing before the court. The Committee's recommendation regarding these posts, on top of a staggered implementation of the *ReVision* structure, and other existing staffing gaps in the court's Outreach Unit, may contribute to disastrous under-resourcing.

States parties should appreciate that their decisions on the 2016 budget request could have profound consequences for advancing toward a vision of the court that counts where it matters most—for victims and in communities affected by the crimes tried before it.

ICC states parties should:

- Seek, on an urgent basis, information from the ICC regarding the effect of the Committee on Budget and Finance's recommendation to stagger implementation of the *ReVision*; and
- Ensure adequate resources in the 2016 budget to support the court's robust presence in situation countries, including to conduct outreach and engage victims in the court's proceedings.

¹⁵ ASP, "Report of the Committee on Budget and Finance on the work of its Twenty-Fifth session," paras. 64-67.

Recent Human Rights Watch materials

- Human Rights Watch, Letter to the Assembly of States Parties Committee on Budget and Finance, September 15, 2015, <https://www.hrw.org/news/2015/09/15/letter-assembly-states-parties-committee-budget-and-finance>.
- Elizabeth Evenson (Human Rights Watch), “ICC success depends on its impact locally,” commentary, *Open Democracy*, August 26, 2015, <https://www.hrw.org/news/2015/08/26/icc-success-depends-its-impact-locally>.
- Human Rights Watch, *Making Justice Count: Lessons from the ICC’s Work in Côte d’Ivoire*, August 2015, <https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire>.

II. Supplemental agenda item requests

The governments of Kenya and South Africa have requested the addition of supplemental agenda items for the upcoming Assembly session.¹⁶

A. Amendments to the Rules of Procedure and Evidence

Kenya is seeking the inclusion of an agenda item on “Review of the Application and implementation of amendments to the Rules of Procedure and Evidence introduced at the 12th Assembly.”

With regard to this request, the Kenyan government recalls its “recollection, that ... the Assembly when adopting [a resolution amending certain Rules of Procedure and Evidence at its twelfth session in 2013], agreed, by consensus, that the amendments to Rule 68 shall not be applied retroactively and further with the understanding that the amended rules were without prejudice to Article 67 of the Rome Statute related to the rights of the accused.” The government then explains that its proposed agenda item seeks “to afford [the Assembly’s] members ... an opportunity to reaffirm and clarify their understanding of the agreement(s) and aforementioned Resolution.” The government is seeking, as an outcome of this discussion, the establishment of “a monitoring/review mechanism to review and report to the 15th Assembly the practical impact on enhancing the efficiency and effectiveness of the Court and the fair trial guarantees of an accused on the application of the rule by the Court and recommend/propose remedial measures.”¹⁷

There is currently an appeal pending in the ICC prosecutor’s case against Kenya’s deputy president, William Ruto, and a co-defendant, Joshua arap Sang, related to

¹⁶ 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, https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-35-ENG.pdf (accessed November 4, 2015).

¹⁷ *Ibid.*, annex II.I (“*Note verbale* from the Permanent Mission of Kenya to the United Nations no. 384/15, dated 13 October, 2015, addressed to the President of the Assembly, H.E. Mr. Sidiki Kaba,”), paras. 2, 4, 7.

amended Rule of Procedure and Evidence 68. In August 2015, the Ruto and Sang trial chamber, in a majority decision, applied Rule 68 to accept into evidence what it deemed to be the prior recorded testimony of certain witnesses, whom the prosecution established were subject to interference. The decision noted an “element of systematicity of the interference of several witnesses in this case which gives rise to the impression of an attempt to methodically target witnesses of this case in order to hamper the proceedings.”¹⁸

The defense has been granted leave to appeal a number of issues arising out of the trial chamber’s decision.¹⁹ The ICC appeals chamber granted leave to the African Union to submit an amicus brief for the express purpose of “placing before the Court all relevant material arising out of the negotiations of [r]ule 68 of the [Rules of Procedure and Evidence] during the Twelfth Session of the [ASP] [...] in November 2013.” The appeals chamber indicated that this may be relevant to its consideration of the first issue on appeal, namely, whether amended Rule 68 can be applied to the Ruto and Sang case in a manner consistent with ICC treaty provisions regarding the retroactivity of changes in the law and rules.²⁰

It would seem, then, that the issue Kenya seeks to discuss during the upcoming Assembly overlaps to a significant degree with issues currently pending before the court’s appeals chamber. The effect of Kenya’s request is to exert pressure on ongoing judicial deliberations.

B. Other items for discussion proposed by Kenya

The government of Kenya has also asked the Assembly to discuss a number of issues raised in a petition endorsed by 190 parliamentarians. These include a request to the Assembly president to “appoint an independent mechanism to audit the Prosecutors’ witness identification and recruitment processes” in the Ruto and Sang case and for the ICC to suspend the case against Ruto and Sang until the outcome of this independent audit.²¹

¹⁸ *Prosecutor v. William Samoei Ruto and Joshua arap Sang*, ICC, Case No. 01/09-01/11, “Decision on Prosecution Request for Admission of Prior Recorded Testimony,” August 19, 2015, <http://www.legal-tools.org/doc/d7bbo1/> (accessed November 4, 2015), para. 60.

¹⁹ *Prosecutor v. William Samoei Ruto and Joshua arap Sang*, ICC, Case No. 01/09-01/11, “Decision on the Defence’s Applications for Leave to Appeal the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony,’” September 10, 2015, <http://www.legal-tools.org/doc/44d1do/> (accessed November 4, 2015).

²⁰ *Prosecutor v. William Samoei Ruto and Joshua arap Sang*, ICC, Case No. 01/09-01/11, “Decision on applications for leave to submit amicus curiae observations pursuant to rule 103 of the Rules of Procedure and Evidence,” October 12, 2015, <http://www.legal-tools.org/en/doc/1b248b/> (accessed November 4, 2015), paras. 9, 16; *Prosecutor v. William Samoei Ruto and Joshua arap Sang*, ICC, Case No. 01/09-01/11, “The African Union’s Amicus Curiae Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties,” October 19, 2015, <http://www.legal-tools.org/doc/168e50/> (accessed November 4, 2015).

²¹ ASP, “List of supplementary items requested for inclusion in the agenda of the fourteenth session of the Assembly,” annex II.II (“*Note verbale* from the Permanent Mission of Kenya to the United Nations no. 398/15, dated 16 October 2015, addressed to the President of the Assembly, H.E. Mr. Sidiki Kaba, conveying a petition from the National Assembly

The Kenyan parliament's petition appears to relate to competing allegations, widely circulated in the Kenyan media, regarding schemes to recruit false witnesses before the national commissions of inquiry into Kenya's post-election violence that preceded the ICC's investigations. It is up to the ICC's judges to weigh the evidence presented before them in court. Discussion of these allegations within the Assembly would only serve to politicize the court's proceedings. The Assembly's Independent Oversight Mechanism established under Rome Statute article 112(4) has a mandate to investigate allegations of misconduct by court officials and staff.

C. Articles 97 and 98

South Africa has submitted a request to include the supplementary agenda item, "Application and Implementation of Article 97 and Article 98 of the Rome Statute."²² As with Kenya's proposed item on the amendment of Rules of Procedure and Evidence, this agenda item would pose significant risks to compromising the independent function of the ICC's judges.

The requirements of article 97 and the interpretation of article 98 are encompassed by litigation currently pending before the ICC on the visit by Sudanese President Omar al-Bashir to South Africa without arrest in June 2015.²³

On June 12, 2015, South Africa initiated consultations with the court under article 97 regarding al-Bashir's attendance at an African Union summit, which was taking place in South Africa from June 7 to 15.²⁴ On June 13, the ICC judges issued an order in response to an urgent request from the prosecutor on South Africa's obligation to arrest al-Bashir.²⁵ The June 13 order indicated that the article 97 consultations had concluded

of Kenya, dated 13 October 2015"), paras. 2-3; *ibid.*, appendix ("Petition, dated 13 October 2015, from Hon. David Pkosing Losiakou, MP, Member of the National Assembly of the Republic of Kenya, on behalf of 190 Parliamentarians, addressed to the President of the Assembly, the International Criminal Court and the United Nations Security Council, respectively"), paras. B.1-2.

²² ASP, "List of supplementary items requested for inclusion in the agenda of the fourteenth session of the Assembly," annex I ("Note verbale from South Africa no. 57/2015, dated 5 October 2015, addressed to the Registrar of the International Criminal Court").

²³ Al-Bashir is subject to two ICC warrants, one issued in 2009 and one issued in 2010. The warrants include charges of war crimes, crimes against humanity, and genocide committed in Darfur.

²⁴ *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" ("Decision following the Prosecutor's request"), June 13, 2015, <https://www.icc-cpi.int/iccdocs/doc/doc1995566.pdf> (accessed November 4, 2015), para. 4. Article 97 provides for consultations between a government and the court when a government identifies difficulties in implementing cooperation with the ICC.

²⁵ *Ibid.* The government of South Africa has subsequently characterized the prosecution's urgent request as related to obtaining "clarity regarding the Article 97 consultations." *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, Case No. 02/05-01/09, "Submission from the Republic of South Africa in response to the Order requesting a submission dated 4 September 2015 for the purposes of proceedings under article 87(7) of the Rome Statute" ("Submission from the Republic of South Africa"), October 2, 2015, <https://www.icc-cpi.int/iccdocs/doc/doc2080188.pdf> (accessed November 4, 2015), paras. 1.4. The prosecutor's request was made confidentially; the prosecutor has requested that it be

and that South Africa was obligated to arrest al-Bashir, including because article 98 did not negate the obligation to arrest him.²⁶

Al-Bashir arrived in South Africa on June 13 and departed without arrest on June 15. On September 4, 2015, the ICC judges requested submissions from South Africa to determine whether to issue a finding of non-cooperation with respect to the al-Bashir visit.²⁷ The proceedings on a finding of non-cooperation are ongoing. South Africa requested and was granted an extension to file its submission while litigation in South Africa's domestic courts on the visit is pending.²⁸

In its request, South Africa notably argued that the June 13 order by the ICC judges violated South Africa's "right to fair procedure" because South Africa's article 97 consultations had not concluded when the order was issued and South Africa's domestic courts were seized with the issue.²⁹ The prosecutor has subsequently made a written request to the judges in which she disputes the way in which South Africa has characterized the state of the article 97 consultations at the time the June 13 order was issued.³⁰

In its proposal for the supplementary agenda item, the government of South Africa indicates that it is seeking further clarity on the procedures for consultation under article 97 and the scope of article 98 based on its experience with al-Bashir's visit to South Africa.³¹ However, these matters clearly relate to the consideration by the ICC judges on non-cooperation by the government of South Africa regarding the al-Bashir visit. This agenda item can thus be expected to risk interfering with, or being perceived to interfere with, that independent judicial consideration and is not appropriate for the ASP to consider at this time.

reclassified as a public filing, but this had yet to occur at writing. See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, Case No. 02/05-01/09, "Prosecution request for it to be heard should the domestic legal proceedings in the Republic of South Africa not be finalised by 31 December 2015, and for confirmation of South Africa's continuing obligations to arrest and surrender Omar Al Bashir and for reclassification of filings" ("Prosecution request for it to be heard"), October 26, 2015, <http://www.legal-tools.org/doc/16d6f7/> (accessed November 4, 2015), para. 10.

²⁶ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, Case No. 02/05-01/09, "Decision following the Prosecutor's request," paras. 5-10. Article 98 relates to pre-existing obligations that may impede cooperation.

²⁷ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, Case No. 02/05-01/09, "Order requesting submissions from the Republic of South Africa for the purposes of proceedings under article 87(7) of the Rome Statute," September 4, 2015, <http://www.legal-tools.org/doc/8a12a8/> (accessed November 4, 2015).

²⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, Case No. 02/05-01/09, "Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87(7) of the Rome Statute," October 15, 2015, <https://www.icc-cpi.int/iccdocs/doc/doc2086145.pdf> (accessed November 4, 2015). The domestic litigation pertains to South Africa's compliance with a domestic court order barring al-Bashir's departure from South Africa.

²⁹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, Case No. 02/05-01/09, "Submission from the Republic of South Africa," October 2, 2015, paras. 1.4-5.

³⁰ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, Case No. 02/05-01/09, "Prosecution request for it to be heard," October 26, 2015, paras. 9-10.

³¹ "Note verbale from South Africa no. 57/2015, dated 5 October 2015, addressed to the Registrar of the International Criminal Court" paras. 5-17.

ICC states parties should:

- Avoid discussions during the ASP session that are aimed or could be perceived as aiming at undermining the independence of the court’s judges with regard to pending decisions; and
- Emphasize in general debate and other appropriate statements during the Assembly session, including in response to any effort to politicize pending cases, the independence of the ICC and its prosecutor and commit to protecting the court from political interference.

III. Cooperation

A. Arrest strategies action plan

In spite of positive developments this year, including the transfer of Dominic Ongwen, a commander of the rebel Lord’s Resistance Army (LRA), to the ICC to face charges of war crimes and crimes against humanity committed in northern Uganda, and the arrest and surrender of Ahmad Al Faqi Al Mahdi in the first case emerging out of the Mali situation, arrest and surrender of suspects remains a persistent challenge across the ICC’s cases. At its upcoming session, the Assembly will consider an “Action Plan on arrest strategies.” This action plan is the product of two years of work by the rapporteur on arrest strategies and consultations within the Bureau’s cooperation facilitation in The Hague Working Group.

Although discussions between states parties have modified the original draft action plan submitted by the rapporteur, the action plan remains a first-ever effort to provide a coherent and comprehensive vision regarding strategies for arrest within the ICC context. The action plan provides that the Assembly and the ICC may develop specific arrest strategies on “region, situation, and cases” bases and lists a broad range of measures that could be included in these strategies. These include the use of conditionality policies with regard to states obligated to enforce the court’s warrants; incentives to individual suspects to induce voluntary surrender; the political isolation of fugitives; enhancing political and diplomatic support to the court; and operational support to arrest operations.³² These measures are rooted in lessons learned with regard to arrest from national to internationalized jurisdictions, as detailed in an extensive report submitted by the rapporteur last year to the Assembly.³³

Any action plan, however, is only as good as its implementation.

³² “[Draft] Action plan on arrest strategies,” October 15, 2015, on file with Human Rights Watch.

³³ ASP, “Report on arrest strategies by the Rapporteur,” ICC-ASP/13/29/Add.1, November 21, 2014, https://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-Add1-ENG.pdf (accessed November 4, 2015).

The draft action plan's implementation is now permissive, rather than mandatory (e.g., "The Assembly ... may develop ... specific strategies," para. 14.). The Assembly only "might" keep the implementation of the Action Plan under review (para. 45), and "may" establish various mechanisms, including a "focal point and special rapporteur" on arrest strategies, to support its implementation (paras. 47-58). States parties have also left for further debate at the Assembly whether to "take note" or "approve" of the rapporteur's report on the draft action plan in the session's resolution on "Cooperation"; the agreed draft text presently also only "takes note" of the action plan itself.³⁴

To be sure, a large degree of flexibility in the design and implementation of arrest strategies is essential; not every measure, nor every mechanism envisioned in the action plan may be feasible or even necessary to bring about arrest in a specific case. Case-specific strategies, in particular, may be highly sensitive, requiring the strictest security and confidentiality and resulting in inherent limitations in the use of Assembly mechanisms for their development. And, yet, the action plan would appear to fully permit this flexibility.

The Assembly has invested significant time in advancing work forward on arrests, as part of its broader efforts to improve cooperation with the court. Without further progress in realizing arrests in a number of ICC cases, there can be no justice for victims. States parties should use this Assembly session to clearly signal the importance of effective arrest strategies, strongly support the action plan as one tool toward that end, and commit to implementation of the action plan.

ICC states parties should:

- Agree to language in the "Cooperation" resolution adopting the action plan, rather than "taking note" or "approving" the plan; and
- Commit to implementation of the action plan and express the expectation that a follow-up mechanism will be put in place by the Bureau as soon as practicable in 2016 in statements during the general debate, the plenary discussion on cooperation, and at other appropriate opportunities during the Assembly session.

B. Avoiding non-essential contacts with ICC fugitives

The 2014 Assembly resolution on "Cooperation" "[u]rges States Parties to avoid contact with persons subject to a warrant of arrest issued by the Court, unless such contact is deemed essential by the State Party, ... and acknowledges that States Parties may, on a voluntary basis, advise the ICC of their own contacts with persons subject to

³⁴ "Draft resolution on cooperation," October 16, 2015, on file with Human Rights Watch, para. 3b.

a warrant of arrest made as a result of such an assessment.”³⁵ Although the resolution language leaves it up to each state party to determine whether contacts are essential, rather than establishing consistent guidance for all states parties, the adoption of language clearly calling on states parties to avoid non-essential contacts marked a substantial step forward.

Avoiding non-essential contacts contributes to the political isolation of the suspect. It signals that “business as usual” is over for fugitives—an important step when surrender is not yet possible. In addition, avoiding non-essential contacts shows commitment and respect to victims of alleged crimes.

Human Rights Watch was concerned by information that senior officials of ICC states parties appeared in the presence of Sudanese President Omar al-Bashir at two recent ceremonial events and were photographed along with al-Bashir at these events. These were the opening of the New Suez Canal in Egypt on August 6, 2015 and a commemoration in China of the end of World War II on September 3, 2015. Photographs of al-Bashir, who is wanted on two outstanding ICC arrest warrants, in the presence of world leaders, undermine the message that he is a fugitive from justice who should be surrendered. Contact for occasions that are ceremonial are inconsistent with the concept of essential contacts.

ICC states parties should:

- Recommit, in general debate, plenary cooperation session, and other statements during the Assembly session, to avoiding non-essential contacts with individuals wanted on outstanding ICC arrest warrants; and
- Report essential contacts to the court, as provided for in the 2014 resolution on “Cooperation”, and consider whether reporting these contacts additionally to the Bureau could further increase the transparent application and effectiveness of the call to avoid non-essential contacts.

IV. Family Visits

The right of all detained persons to family visits is well recognized.³⁶ The ICC presidency, in a March 2009 judicial decision, held that the ICC has a positive

³⁵ ASP, “Resolution on cooperation,” ICC-ASP/13/Res.3, December 17, 2014, https://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP13/ICC-ASP-13-Res3-ENG.pdf (accessed November 4, 2015), para. 6.

³⁶ See, for example, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted December 9, 1988, G.A. Res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988), 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 that “[a] detained person shall be entitled to receive visits,” and Regulation of the Registry 179 provide that the “Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links.”

obligation to fund family visits of indigent persons in order to give effect to their right to family visits.³⁷ 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."³⁸ 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.³⁹

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. While this has been sufficient to meet the court's obligations since 2011, less than €10,000 now remain. There is a substantial and real risk that, in the near future, the ICC will not be able to meet its positive obligations with regard to 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, risking its legitimacy.

ICC states parties should:

- Use the 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.

³⁷ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC, Case No. ICC-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, <http://www.icc-cpi.int/iccdocs/doc/ICC-ROR217-02-08-8-ENG.pdf> (accessed November 4, 2015).

³⁸ "Family visits for indigent detainees," ICC-ASP/8/Res.4, November 26, 2009, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.4-ENG.pdf (accessed November 4, 2015), preambular para. 2.

³⁹ See ASP, "Financial statements for the period 1 January to 31 December 2010," ICC-ASP/10/12, July 26, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-12-ENG.pdf (accessed November 4, 2015), p. 52.