



Human Rights Watch Memorandum for the Thirteenth
Session of the International Criminal Court
Assembly of States Parties
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Introduction

On September 24, 2014, Fatou Bensouda, the prosecutor of the International Criminal Court (ICC), announced that her office would open an investigation into crimes allegedly committed since 2012 within the Central African Republic, a country that has been in a state of acute crisis since March 2013. Serious abuses have been committed by all sides to the conflict, affecting hundreds of thousands of people. **The prosecutor's decision followed a referral of the situation from that country's transitional government in May 2014.**¹

Even beyond ICC states parties there are clear signs that the broader international community is increasingly looking to the ICC to address mass atrocity. In February, the government of Ukraine, although not an ICC state party, acted under Rome Statute article 12(3) to grant the court jurisdiction over events occurring within the country in late 2013 and early 2014.² In May 2014 at the UN Security Council, 13 of its 15 members, including two ICC non-states parties, voted to send the situation in Syria to the ICC prosecutor.³ A referral was blocked by the veto powers exercised by China and Russia, but the vote itself sent a powerful message about the importance of justice. And after the February 2014 report of the UN-established commission of inquiry on North Korea shed light on the **brutality of the country's prison camps**, the UN Human Rights Council and General Assembly called on the Security Council to refer the situation to the ICC.⁴

These developments testify to the ever increasing demands and expectations placed on the ICC, and the central place the court now occupies in international discussions on justice and accountability. Nonetheless there remains a significant gap between

¹ "Statement of the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, on opening a second investigation in the Central African Republic," Office of the Prosecutor (OTP) press release, ICC-OTP-20140924-PR1043, September 24, 2013, http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx (accessed November 16, 2014); "Central African Republic: ICC Investigation Needed," Human Rights Watch news release, June 26, 2014, <http://www.hrw.org/news/2014/06/26/central-african-republic-icc-investigation-needed>.

² Declaration by Ukraine lodged under Article 12(3) of the Rome Statute, April 9, 2014, [http://www.icc-cpi.int/en_menus/icc/press and media/press releases/Documents/997/declarationRecognitionJurisdiction09-04-2014.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationRecognitionJurisdiction09-04-2014.pdf) (accessed November 16, 2014).

³ "UN Security Council: Vetoes Betray Syrian Victims," Human Rights Watch news release, May 22, 2014, <http://www.hrw.org/news/2014/05/22/un-security-council-vetoes-betray-syrian-victims>.

⁴ "North Korea: UN Condemns Crimes Against Humanity," Human Rights Watch news release, November 18, 2014, <http://www.hrw.org/news/2014/11/18/north-korea-un-condemns-crimes-against-humanity>; "North Korea: Rights Body Calls for Prosecuting Leadership," Human Rights Watch news release, March 28, 2014, <http://www.hrw.org/news/2014/03/28/north-korea-rights-body-calls-prosecuting-leadership>.

these expectations and the justice the ICC can render. The ICC is increasingly looked to as a court of last resort in more and more places around the world, and yet there are significant, outstanding justice needs within the eight situations open before the ICC and the eight pending situations under preliminary examination.

The **court's ambitious mandate** and potential global reach may mean that expectations will always exceed what the court can reasonably deliver. But court officials and states **parties need to continue their efforts to heighten the court's performance and ensure it** has the political backing, cooperation, and resources necessary to narrow the gap between promise and reality.

There has been progress toward this end over the past year, both at the court and **within the ICC's Assembly of States Parties.**

At the court, the Office of the Prosecutor has shown continued commitment to improving the quality of its prosecutions and investigations, including through the implementation of its 2012-2015 Strategic Plan. This commitment remains essential. Although the year brought decisions to send three cases forward to trial, the prosecutor also conceded that she no longer has sufficient evidence to take the case against President Uhuru Kenyatta of Kenya to trial and, as discussed below, is seeking a **postponement pending the government's full cooperation** in providing potential evidence. State cooperation and pressure on witnesses are key factors in the Kenyatta case. The prosecutor should consider whether there are lessons learned for investigations, including to meet these challenges.

The registry has embarked on the ReVision project, an ambitious restructuring. Human Rights Watch welcomes the opportunity for further consultations on the changes proposed to date, and stresses the importance of ensuring key stakeholders are engaged in the process.

As discussed further below, **the court's judge-led Working Group on Lessons Learnt** has continued with the aim of seeking changes to expedite court proceedings. These efforts have been complemented by a number of other initiatives, including, in September, a Swiss-convened retreat bringing together states parties, representatives of civil society,

and practitioners to debate constructively and frankly key areas where improvements in procedure may be found.⁵

After three years of dedicated service, outgoing President Tiina Intelmann is expected to hand over leadership at the beginning of the December Assembly session with the election of Sidiki Kaba, the Senegalese minister of justice, as the next Assembly president. Minister Kaba has already outlined a robust vision for his presidency, emphasizing the importance of improving relations between Africa and the ICC, cooperation, complementarity, and universal ratification of the Rome Statute.⁶

The cooperation facilitation has continued to make real contributions to the **Assembly's efforts to heighten state support and assistance to the court. Additional** seminars on cooperation were convened this year in Argentina, Benin, and Ghana, bringing together court officials, government representatives, and experts.⁷ The **rapporteur on arrest strategies, mandated at last year's Assembly session, has** produced a detailed report on existing practice and forward-looking recommendations in this vital and challenging area of state cooperation;⁸ discussions on translating this report into an Assembly action plan on arrest strategies are ongoing at this writing.

To build on these initiatives and to chart its work for the coming year, the court needs a thirteenth Assembly session defined by a common commitment to an effective, well-supported, and independent institution. Human Rights Watch urges states parties to keep this goal at the center of their important deliberations and to reject efforts to subvert the Assembly session to other ends.

The balance of this memorandum makes recommendations in the following areas: (1) statements during the General Debate; (2) election of judges; (3) a Kenyan-proposed special agenda item; (4) consideration of amendments to the Rome Statute; (5) the **need for a review of the Assembly's non-cooperation procedures**; (6) adoption of a call

⁵ See "Retreat on Strengthening the Proceedings at the International Criminal Court", Chair's Summary, Glion, Switzerland, September 3-5, 2014 (on file with Human Rights Watch).

⁶ Bureau of the Assembly of States Parties (ASP Bureau), "Ninth Meeting: Agenda and Decisions," September 30, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-09-30Sep2014.pdf (accessed November 16, 2014), p. 1.

⁷ Assembly of States Parties (ASP), "Report of the Bureau on cooperation," ICC-ASP/13/29, November 21, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-ENG.pdf (accessed November 23, 2014), para. 7.

⁸ *Ibid.*, annex VII ("Report on arrest strategies by the Rapporteur"), ICC-ASP/13/29/Add.1, November 21, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-Add1-ENG.pdf (accessed November 24, 2014).

to all states to avoid non-essential contacts with ICC fugitives; (7) making progress in the establishment of a coordination mechanism for national ICC focal points; and (8) strengthening follow-up to pledges made at the Kampala review conference.

Human Rights Watch also joins in position papers prepared for the Assembly by the Coalition for the ICC, and, in particular, urges states parties in their deliberations on **the court's budget** to ensure it has resources adequate to its workload. As indicated above, demands on the court continue to grow. The Office of the Prosecutor has indicated that limits in its resources have had a negative impact on its ability to carry out its mandate, forcing delays in some investigations and the deferral of others.⁹

Finally, ICC President Sang-Hyun Song will step down from the ICC bench at the conclusion of his current term in March 2015. President Song, who has served as the **court's president since March 2009, was first elected in 2003, and was therefore** among the first set of judges to take office at the ICC. The intervening years have made **clear in equal measure the court's importance** and the challenges before it. Human Rights Watch expresses its appreciation for the dedicated service of President Song.

⁹ "Proposed Programme Budget for 2015 of the International Criminal Court", ICC-ASP/13/10, September 18, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-10-ENG.pdf (accessed November 25, 2014), paras. 129, 133, 135; OTP, "Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), Mrs Fatou Bensouda, Prosecutor of the International Criminal Court," November 12, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20state%20ments/statement/Pages/otp-statement-12-11-2014.aspx (accessed November 25, 2014).

Recommendations for the Thirteenth Session

In statements to the **General Debate**, states parties to the Rome Statute should:

- Affirm commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Recognize the central role of the ICC as a court of last resort in the absence of genuine action by national authorities, and the need for efforts to expand the reach of justice, including through working toward the universality of the Rome Statute;
- Underscore the obligation of ICC states parties to cooperate fully with the court, including in carrying out arrests and in conducting investigations;
- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference;
- Commit to ensuring adequate resources for the ICC to carry out its mandate, **including to intensify the court's public information and outreach activities within situation countries, in order to promote dialogue between the court and affected communities and better understanding of the court's mandate and activities.**

With regard to the **election of judges**, states parties should:

- Give serious consideration to the report of the Advisory Committee on Nomination of Judges in deciding which candidates to support;
- **Consider candidates' substantial practical experience in criminal trials and capacity and willingness to meet the demands of adjudicating cases over a nine-year term; and**
- Put aside narrow interests and vote only for the most highly qualified candidates.

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

- Reject unequivocally any amendment to article 27 of the Rome Statute that would exempt sitting officials from prosecution before the ICC.

With regard to the **omnibus resolution**, the Assembly should:

- Resolve to **strengthen the Assembly's non-cooperation** procedures and, accordingly, mandate the Bureau to report to the fourteenth Assembly session following review of the procedures and their outcomes in light of lessons learned; and
- Mandate the Bureau to report further at the fourteenth session of the Assembly on the implementation by states and by the regional organization of the pledges undertaken at the Kampala Review Conference.

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

- Adopt in full proposed language urging states parties to avoid non-essential contacts with ICC fugitives, including the currently bracketed language inviting states parties to report essential contacts to the ICC;
- Consider whether, in addition to the ICC, reporting on essential contacts should be done **to the Assembly's Bureau**; and
- Adopt language setting up a pilot coordinating mechanism of national authorities to be convened in the margins of the fourteenth session of the Assembly, on a voluntary basis.

I. General Debate

Human Rights Watch recommends that states parties and observers make the most of **statements during the Assembly's General Debate to set** out common points of principle and affirm commitments to the ICC's mandate. The General Debate remains an important moment to set the tone of the Assembly session from the outset and lay groundwork for more specific discussions. There are a number of important benchmarks that states parties can set during the General Debate to guide those

further discussions, and Human Rights Watch will be listening carefully for states parties' commitments.

In General Debate statements, states parties should:

- Affirm commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Recognize the central role of the ICC as a court of last resort in the absence of genuine action by national authorities, and the need for efforts to expand the reach of justice, including through working toward the universality of the Rome Statute;
- Underscore the obligation of ICC states parties to cooperate fully with the court, including in carrying out arrests and in conducting investigations;
- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference;
- Commit to ensuring adequate resources for the ICC to carry out its mandate, **including to intensify the court's public information and outreach activities** within situation countries, in order to promote dialogue between the court and affected communities and **better understanding of the court's mandate and activities.**

II. Elections

At its upcoming session, the Assembly will elect six new judges—a third of the ICC's 18-member bench—for a period of nine years. **States parties' responsibility to ensure the merit-based election of the most highly qualified individuals as ICC judges** is among the most important aspects of their stewardship of the court. To carry out its mandate as a judicial institution charged with upholding the fair trial rights of individuals and bringing meaningful justice to victims of mass atrocities in an effective, credible and expeditious manner, the ICC requires judges with relevant experience and expertise who meet Rome Statute requirements and demonstrate an ethic of public service and **commitment to the ICC's mandate.**

The ICC states parties have nominated 17 candidates. Five candidates have been nominated from the Group of African States, two candidates from the Group of Asia-Pacific States, six candidates from the Group of Eastern European States, one candidate from the Group of Latin American and Caribbean States, and three candidates from the Group of Western European and Other States.

The Rome Statute identifies several criteria to guide ICC states parties in electing judges.¹⁰ Given the current composition of the bench and consistent with the Rome Statute's requirements of "equitable geographic representation" and a "fair representation of female and male judges," this year, states parties will elect at least one male judge, two judges from the Eastern European region, and one judge from the Asia-Pacific region.¹¹ In addition, the Rome Statute requires that the court's bench consist of at least nine "List A" judges—that is, judges with established competence and experience in criminal law, procedure, and proceedings—and at least five "List B" judges—that is, judges with established competence in relevant areas of international law such as international humanitarian law and the law of human rights, as well as extensive experience in a relevant professional legal capacity.¹² At this election, states parties will elect two "List B" judges.¹³

Human Rights Watch has previously welcomed the Assembly's establishment of an Advisory Committee on Nominations of Judges (ACN), which is mandated to "prepare information and analysis, of a technical character" on the qualifications of individual judicial candidates and present its analysis to states parties for consideration.¹⁴ In our view, the ACN's analysis of each candidate's expertise and fluency in one of the ICC's working languages can greatly enhance transparency around the elections process and make it more likely that the best candidates are ultimately elected to the bench.

¹⁰ Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, arts. 35 and 36.

¹¹ ASP, "Note by the Secretariat: Fifth Election of Judges of the International Criminal Court," ICC-ASP/13/3, August 14, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-3-ENG.pdf (accessed November 15, 2014), para. 5.

¹² Rome Statute, art. 36(3)(b).

¹³ ASP, "Note by the Secretariat: Fifth Election of Judges of the International Criminal Court," para. 5.

¹⁴ ASP, "Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court," ICC-ASP/10/36, November 30, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-36-ENG.pdf (accessed November 15, 2014), p. 4.

Human Rights Watch urges states parties to:

- Give serious consideration to the ACN's report in deciding which candidates to support in the upcoming judicial election.¹⁵

In addition, states parties may benefit from reference to the responses provided to the Coalition for the ICC (CICC) questionnaire for judicial candidates.¹⁶ Audio recordings of a series of panel discussions conducted by the CICC with the candidates in September 2014 are also available.¹⁷

Even where Rome Statute criteria are satisfied, there is still considerable leeway in determining which individuals are best suited to serve as ICC judges. Human Rights Watch's close observation of the court's functioning since it began operations has highlighted the importance of electing judges who possess substantial practical experience in criminal trials.

Proceedings have intensified over the last several years, with a confirmation decision pending in one case, trial or trial preparations in seven cases, and appeals or reparations proceedings in three cases. Managing these proceedings effectively—meaning pre-trial and trial proceedings that run efficiently while respecting the rights of defendants and victims—requires judges familiar with the demands of criminal trials.

As indicated above, states parties must elect at least two “List B” judges. As a result, there remain four open slots that could be filled by either “List A” judges or “List B” judges. Human Rights Watch believes that states parties should prioritize electing “List A” candidates to fill the four open slots since judges with previous experience in criminal law and procedure will be best placed to meet the demands of ICC proceedings.

¹⁵ ASP, “Report of the Advisory Committee on Nomination of Judges on the work of its third meeting,” ICC-ASP/13/22, September 29, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-22-ENG.pdf (accessed November 15, 2014).

¹⁶ Responses are available from the Coalition for the ICC's website at <http://coalitionfortheicc.org/?mod=electionjudgeseighth2014&idudctp=21&show=all#21> (accessed November 15, 2014).

¹⁷ The audio recordings are available at <https://soundcloud.com/coalition-for-the-icc/sets/cicc-panels-on-icc-judicial> (accessed November 15, 2014).

In addition, as ICC President Sang-Hyun Song indicated in his address to the twelfth session of the Assembly, it is essential that states elect judges who are in good health. States parties should emphasize candidates who possess the capacity (including stamina) and motivation to manage the often complex and time-consuming tasks associated with pre-trial and trial proceedings over a full nine-year term of office. Moreover, as cases before the ICC proliferate, judges may be required to sit on more than one case at a time, resulting in an increased workload. States parties should therefore understand that judicial staffing resources are quite limited, and judges elected at this Assembly session will have to shoulder ever-increasing demands as the ICC's workload also increases.

Ultimately, as we have advocated in previous judicial elections, states parties should resist the practice of “vote-trading,” where states agree to support one another's candidates with minimal regard to the individual's qualifications.

Human Rights Watch urges states parties to:

- Consider candidates' substantial practical experience in criminal trials and capacity and willingness to meet the demands of adjudicating cases over a nine-year term; and
- Put aside narrow interests and vote only for the most highly qualified candidates.

III. Proposed special agenda item on the “Conduct of the Court and the Office of the Prosecutor”

In October, the government of Kenya requested a supplementary agenda item at this year's Assembly session. It clarified in a *note verbale* dated November 3, 2014 that its request is for a “special session to discuss the conduct of the Court and the Office of the Prosecutor.” The government of Kenya proposed a number of topics for discussion, all of which, it writes, are “informed by the deep concern of Kenya regarding the conduct of the Court and of the Office of the Prosecutor in relation to the situation in Kenya.”¹⁸

¹⁸ *Note verbale* from Kenya no. 514/14, dated 16 October 2014, addressed to the President of the Assembly, Ambassador Tiina Intelmann, reprinted in ASP, “List of supplementary items requested for inclusion in the agenda of the thirteenth

These topics are the prosecutor's conduct in regard to investigations in the Kenya situation, complementarity and concern that the court's standards have fallen below those of national courts, international prosecutorial standards, the alleged influence of states and civil society organizations on the court and the resulting impact on the independence of the Office of the Prosecutor, the politicization of the judicial and prosecutorial functions of the court, the judges' alleged failure to implement new Rules of Procedure and Evidence adopted at last year's Assembly regarding the excusal at trial of high-level defendants, and its existing amendment proposal regarding article 70.

At this writing, the requested agenda item is under discussion within the Assembly's Bureau. As preparations for the Assembly session continue, Human Rights Watch expects to provide more detailed recommendations for states parties.

Last year's Assembly session included at the request of the African Union a "special segment" on "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation." The Assembly can be a place for principled discussion.¹⁹ Kenya's request, however, is not in our view a call for reasonable, principled debate as to how the Assembly can improve its oversight regarding the court.

Context matters here. Behind a thin veneer of cooperation aimed at staying the court's hand with regard to a formal finding of non-cooperation, since 2013, the Kenyatta administration has pursued an intense campaign to delegitimize the ICC. It has lobbied the African Union and other regional fora within the continent, the UN Security Council, and the Assembly of States Parties to end or suspend the cases against President Kenyatta and Deputy President Ruto, or to secure favorable treatment for these defendants in the amendment of the court's Rules of Procedure and Evidence.²⁰

session of the Assembly," ICC-ASP/13/34/Rev.1, November 18, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-34-Rev1-ENG.pdf (accessed November 24, 2014), annex I ("Explanatory memorandum to supplementary agenda item 1"); *Note verbale* from Kenya no. 561/14, dated 3 November 2014, addressed to the President of the Assembly, Ambassador Tiina Intelmann (Kenya agenda request), reprinted in *ibid*.

¹⁹ For further analysis of last year's Assembly session, see Elizabeth Evenson, "Breaking the Rules: Kenya, the ICC, and the Twelfth Assembly of States Parties Session," November 2014, unpublished manuscript to be published in the final publication of the ISISC meeting of experts on "Global Issues and their Impact on the Future of Human Rights and International Criminal Justice," Siracusa, September 3-7, 2014 (on file with Human Rights Watch).

²⁰ See Evenson, "Breaking the Rules," pp. 1-13; see also Human Rights Watch, "Memorandum for the Twelfth Session of the International Criminal Court Assembly of States Parties" (ASP12 Memorandum), November 12, 2013, <http://www.hrw.org/news/2013/11/12/human-rights-watch-memorandum-twelfth-session-international-criminal-court-assembly->, part II, III.

The agenda request comes at a time when there is pending litigation in the ICC case against President Kenyatta. The judges are considering competing requests either, as the defense requests, to **drop the case given the prosecution's concession that at present it does not have sufficient evidence to take the case to trial** or, as the prosecution requests, to issue a finding of non-cooperation against the government of Kenya and to postpone the trial indefinitely pending full cooperation with the **prosecution's request for records that may provide potential evidence in the case.**²¹

Within Kenya, the judges' request that President Kenyatta appear in person for a status conference on October 8²²—the first time the ICC has required President Kenyatta's personal appearance in three years, a decision cautioning the government over its leaking of confidential information in the case,²³ and the potential for a finding of non-cooperation appear to have touched off renewed criticism of the ICC. Members of parliament from the ruling coalition convened a press conference in late October calling for the termination of cases against President Kenyatta and Deputy President Ruto and vowed to raise the issue with the Assembly of States Parties.²⁴ Just a few days later, before the UN General Assembly, on the occasion of the ICC president's **presentation of the court's annual report, Kenya's permanent representative to the UN made a statement accusing a "pernicious group of countries" of hijacking the court and terming the ICC an "institutional failure of historical proportions."**²⁵

²¹ See *Prosecutor v. Uhuru Muigai Kenyatta*, ICC, Case No. 01/09-02/11, Transcript, T-31-ENG ET WT 07-10-2014 1-50 SZ T, October 7, 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1856632.pdf> (accessed November 23, 2014), p. 11, lines 16-24; "Prosecution notice regarding the provisional trial date," September 5, 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1826503.pdf> (accessed November 25, 2014); "Defence Response to 'Prosecution notice regarding the provisional trial date' (ICC-01/09-02/1-94) and Request to Terminate the Case against Mr Kenyatta," September 10, 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1830001.pdf> (accessed November 23, 2014).

²² *Prosecutor v. Uhuru Muigai Kenyatta*, ICC, Case No. 01/09-02/11, "Decision on Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014," September 30, 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1842118.pdf> (accessed November 23, 2014).

²³ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC, Case No. 01/09-02/11, "Order concerning the public disclosure of confidential information," October 21, 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1853722.pdf> (accessed November 23, 2014).

²⁴ See Alphonse Shiundu, "Now Jubilee hits back at ICC over leakage claims," *The Standard Digital*, October 23, 2014, <http://www.standardmedia.co.ke/article/2000139111/now-jubilee-hits-back-at-icc-over-leakage-claims> (accessed November 16, 2014).

²⁵ Statement by Amb. Macharia Kamau, Ambassador/Permanent Representative of the Republic of Kenya, agenda item 73, Report of the International Criminal Court, 69th Session of the UN General Assembly, October 30, 2014, <https://papersmart.unmeetings.org/media2/4654809/kenya-e-34-73.pdf> (accessed November 24, 2014); see also Kenyans for Peace with Truth and Justice, "Response to Ambassador Macharia Kamau's Statement to the 69th Session of the United Nations General Assembly (UNGA) on 30th October 2014 Regarding the Report of the International Criminal Court (ICC) to the UNGA," November 10, 2014, http://www.coalitionfortheicc.org/documents/KPTJ_Response_to_Kenya_UNGA_Statement_on_ICC.pdf (accessed November 23, 2014).

The latter developments follow long-standing efforts to discredit Kenya activists speaking up for justice and the ICC. Kenyatta, Ruto, and allied bloggers began to sharply criticize civil society organizations and activists soon after the ICC issued its summons for the two men to appear in The Hague in December 2010. After returning from an ICC status conference in The Hague in 2011, Ruto was quoted as having said, **“NGOs should stop interfering with government matters, writing letters to their donors abroad to support the ICC intervention and compiling reports about post-election violence. It is none of their business.”**²⁶

In March 2013, Dennis Itumbi, a blogger and the president’s director of digital media and the diaspora, posted on his personal website a chart of civil society leaders and opposition figures he described as the **“evil society”** for supporting the ICC.²⁷ Kenya’s authorities have failed to address hate messages on social media that preceded threats against some human rights defenders by supporters of Kenyatta and Ruto.²⁸

Since October, efforts to discredit activists supporting the ICC process have intensified. Moses Kuria, the member of parliament for Gatundu South Constituency, a seat held by Kenyatta until March 2013, had been among the bloggers criticizing the activists. On October 15, Kuria delivered his first speech in the National Assembly and denounced Kenyan activists including for their participation in a Kenya media briefing by the Coalition for the ICC at UN headquarters in New York. Kuria then called for the reintroduction of amendments to existing legislation to restrict the funds that organizations could receive from foreign sources.²⁹ A few days earlier, the Kenyan UN

²⁶ Agostine Ndungu, “Civil Society Vs the Kenyan State,” *Think Africa Press*, May 20, 2011, <http://thinkafricapress.com/kenya/civil-society-vs-kenyan-state> (accessed November 24, 2014).

²⁷ A copy of the chart is posted to <http://nipate.com/infographic-inside-the-kenyan-civil-evil-society-s-operation-web-t25643.html> (accessed November 24, 2014). Itumbi has claimed responsibility for the chart. See Dennis Itumbi, “Yes I did a Civil Society infographic and their Financial linkages, I have never denied. It was Factual. I stand by it @bettymurungi,” Twitter post, August 4, 2014, 1:37 a.m., <https://twitter.com/Oleltumbi> (accessed November 24, 2014).

²⁸ See Human Rights Watch, “Kenya,” in *World Report 2014*, <http://www.hrw.org/world-report/2014/country-chapters/kenya>; “Kenya: Rights Defenders Under Attack,” Human Rights Watch news release, October 4, 2013, <http://www.hrw.org/news/2013/10/04/kenya-rights-defenders-under-attack>.

²⁹ “Hon Moses Kuria Maiden Speech On Kenyan Ngo,” *Your Listen*, audio clip, [n.d.], http://yourlisten.com/JFJustice_tw/hon-moses-kuria- maiden-speech-on-kenyan-ngos-in-parliament (accessed November 16, 2014). For more commentary and background on these developments, see L. Muthoni Wanyeki, “Enemies of the state, lackeys of foreign power? Yeah, right,” *The East African*, October 25, 2014, <http://www.theeastafrican.co.ke/OpEd/comment/Enemies-of-the-state--lackeys-of-foreign-power--Yeah-right-/434750/2498918/-/m828rfz/-/index.html> (accessed November 16, 2014) (commenting on Kuria’s speech and situating it within a broader context of efforts to repress civil society); Ariel Zirulnick, “Backlash to ICC trial? How Kenyan bill could clamp down on ‘foreign influences,’” *Christian Science Monitor*, November 7, 2014, <http://www.csmonitor.com/World/Africa/2014/1107/Backlash-to-ICC-trial-How-Kenyan-bill-could-clamp-down-on-foreign-influences> (accessed November 16, 2014).

permanent representative had complained to all UN missions in a *note verbale* about this same media briefing.³⁰

The ICC is not above criticism. We have called and continue to call on ICC officials to heighten the court's performance, and note that there are a number of reviews underway, **including those referenced above (see “Introduction”)**. But ICC states parties should resist any effort to use the Assembly to further politicize and derail the cases arising out of the Kenya situation. These cases need to be allowed to take their **judicial course, and the court’s independence and mandate should be protected.**

The stakes here are too high for any other course of action. For the defendants, their fair trial rights need to be **scrupulously protected by the ICC’s judges**. For victims of post-election violence, for whom in the absence of national prosecutions, the ICC cases represent the only genuine efforts to determine responsibility for the atrocities that rocked the country in 2007-2008, their rights to justice, truth, and reparation are on the line. States parties should work together to avoid the capture of this Assembly session by an agenda so transparently aimed at undermining justice.

IV. Amendments

There are several **amendment proposals pending before the Assembly’s Working Group on Amendments.**

Two sets of proposals for amendments **to the court’s Rules of Procedure and Evidence (Rules)** have been forwarded by the Study Group on Governance for consideration by the Working Group on Amendments, pursuant to an agreed **“Roadmap on reviewing the criminal procedures of the International Criminal Court.”**³¹ Human Rights Watch has not taken a position regarding these Rules amendments.

³⁰ *Note verbale* of the Permanent Mission of the Republic of Kenya to the UN to permanent missions and permanent observer missions to the UN, October 10, 2014, <http://www.scribd.com/doc/242803872/The-Permanent-mission-of-the-Republic-of-Kenya-to-the-United-Nations-Note-to-All-Missions-on-CSOs-Media-briefing-on-ICC> (accessed November 23, 2014).

³¹ These are proposed amendments to Rule 76(3), Rule 101(3) and Rule 144(2)(b), and the introduction of a new Rule 140 *bis*. The amendments to Rule 76(3), Rule 101(3), and Rule 144(2)(b) would authorize partial translations of prosecution witness statements or court decisions, and allow the court to delay the commencement of time limits of certain decisions until their translations are notified. New Rule 140 *bis* would permit, under certain circumstances, a trial chamber to continue hearing a case in order to complete a specific matter, where one judge is absent for illness or other unforeseen and urgent reasons. See “[Draft] Report of the Study Group on Governance,” October 28, 2014, annex I (“Report of the Study Group on Governance Cluster I in relation to amendment proposals to the Rules of Procedure and Evidence put forward by the Court”) (on file with Human Rights Watch). The roadmap, adopted in 2011 and revised in

Without commenting on the merits of these specific proposals, however, we wish to acknowledge **the considerable efforts undertaken by the court's Working Group on Lessons Learnt (WGLL)** with the ultimate aim of expediting proceedings before the court. In addition to the amendment proposals under consideration in the Working Group on Amendments, the WGLL also provided several status updates over the course of the year and a report on its consideration of **"Pre-trial and trial relationship and common issues," and is reviewing** issues related to applications for victim participation before the court.³²

The remaining proposals concern amendments to the Rome Statute, and include a proposed amendment by Kenya to article 27 (irrelevance of official capacity).³³ At this writing, it appears that within the Working Group on Amendments states parties have agreed to defer further discussion on Rome Statute amendments until after this Assembly session.

Nonetheless, Human Rights Watch reiterates its opposition to any amendment to Rome Statute article 27 aimed at exempting sitting heads of state or other senior officials from prosecution. The irrelevance of official capacity under article 27 of the Rome Statute is part and parcel of the court's mission that **"the most serious crimes of concern to the international community as a whole must not go unpunished."**³⁴ The

2013, is available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-ENG.pdf (accessed November 15, 2014).

³² "[Draft] Report of the Study Group on Governance," paras 18-22, 28 and annex II ("Report of the Working Group on Lessons Learnt to the Study Group on Governance Cluster I: Expediting the Criminal Process Progress Report on Cluster B: 'Pre-Trial and Trial Relationship and Common Issues'").

³³ All but one of these proposals were submitted in advance of the ICC's first review conference, held in Kampala, Uganda, in June 2010. These are two proposed amendments to extend the jurisdiction of the ICC over certain crimes committed during non-international armed conflict over which it already has jurisdiction in situations of international armed conflicts (Belgium); a proposed amendment to criminalize the use of nuclear weapons (Mexico); a proposed amendment to extend the jurisdiction of the ICC to terrorism (The Netherlands); a proposed amendment to extend the jurisdiction of the ICC to drug trafficking (Trinidad and Tobago and Belize); and a proposed amendment to article 16, described below (African Union States Parties to the Rome Statute). See ASP, "Report of the Working Group on Amendments," ICC-ASP/10/32, December 9, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-32-ENG.pdf (accessed November 15, 2014). In addition, following an African Union Extraordinary Summit in October 2013, Kenya submitted a package of amendments. These proposed amendments—circulated by the UN Secretary-General via depository notification on March 14, 2014—relate to the Rome Statute's preamble (to include a reference to the ICC as complementary to regional, as well as national criminal jurisdictions), article 27 (irrelevance of official capacity), article 63 (trial in the presence of the accused), article 70 (offenses against the administration of justice), and article 112(4) (Independent Oversight Mechanism). UN Secretary-General, "Kenya: Proposal of Amendments," C.N.1026.2013.TREATIES-XVIII.10 (Depository Notification), March 14, 2014, <https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf> (accessed November 15, 2014).

³⁴ Rome Statute, preamble.

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.

At the domestic level, immunity of sitting heads of state and government and of foreign ministers before foreign domestic courts has been a traditional principle of international law. Many states also allow immunity of sitting high-level officials before their own courts. At the same time, a growing number of states reject immunity based on official capacity when it comes to serious crimes. The Kenyan constitution, adopted in 2010 in the shadow of the country's horrific 2007-08 electoral violence, specifically prohibits the president's immunity from criminal prosecution for "crime[s] for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."³⁵

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.³⁶ Allowing official capacity to bar prosecution before the ICC would represent a major retreat in international criminal law and practice.

Kenya's proposed amendment to article 27 stems from an October 2013 decision of the AU, at its extraordinary summit on the ICC, that "no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their

³⁵ "The Constitution of Kenya," Revised Edition 2010, <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> (accessed November 25, 2013), para. 143(4).

³⁶ See *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC, Case No. 02/05, "Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir," December 12, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf> (accessed November 24, 2014), paras. 22-43; UN Economic and Social Council, "Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity," E/CN.4/2005/102/Add.1, February 8, 2005, <http://www1.umn.edu/humanrts/instate/HR-protection2005.html> (accessed November 24, 2014), principle 27. See also, for example, "President Milosevic and Four other Senior FR Yugoslavia Officials Indicted for Murder, Persecution and Deportation in Kosovo," International Criminal Tribunal for the Former Yugoslavia press release, May 27, 1999, <http://www.icty.org/sid/7765> (accessed November 24, 2014); "Charles Taylor is subject to criminal proceedings before the Special Court," Special Court for Sierra Leone press release, May 31, 2004, <http://www.rscsl.org/Documents/Press/2004/pressrelease-053104.pdf> (accessed November 23, 2014); Beth Van Schaack, "Immunity Before the African Court of Justice & Human & Peoples Rights—The Potential Outlier," *Just Security*, July 10, 2014, <http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/> (accessed November 23, 2014).

term of office.”³⁷ In June 2014, the AU summit adopted a protocol expanding the African Court on Justice and Human Rights to include criminal jurisdiction over crimes including genocide, war crimes, and crimes against humanity. The protocol includes a provision on the immunity of sitting heads of state and government and other senior officials based on function. This provision has been widely criticized, however, including a declaration signed by more than 140 African civil society organizations and international civil society organizations with a presence in Africa.³⁸

In Kenya, as in countries as diverse as Afghanistan and the Democratic Republic of Congo, an impunity crisis has led to cycles of violence.³⁹ Those responsible for political assassinations under President Jomo Kenyatta’s post-independence government and the use of torture against political opponents and excessive use of force by the security services under President Daniel arap Moi were not prosecuted. The 2007-2008 election violence was preceded by similar episodes around the 1992 and 1997 elections. Government commissions named names, including prominent politicians, but no one was prosecuted. It is widely thought that this entrenched impunity encouraged politicians to believe in 2007 that they could get away with virtually anything in order to achieve their political ends.

Human Rights Watch urges states parties to:

- Reject unequivocally any amendment to article 27 of the Rome Statute that would exempt sitting officials from prosecution before the ICC.

³⁷ 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.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf (accessed November 24, 2014), para. 10(i).

³⁸ See “Call for African States to Reject Immunity for Serious Crimes by African Civil Society Organisations and International Organisations with a Presence in Africa,” August 24, 2014, <http://www.hrw.org/news/2014/08/24/call-african-states-reject-immunity-serious-crimes-african-civil-society-organisatio>.

³⁹ See Human Rights Watch, “Selling Justice Short: Why Accountability Matters for Peace,” July 2009, http://www.hrw.org/sites/default/files/reports/ij0709webwcover_1.pdf, pp. 35-54 (Afghanistan, Democratic Republic of Congo), pp. 77-81 (Kenya).

V. Non-cooperation procedures

Since 2011 the Assembly has had in place an agreed set of procedures to prevent non-cooperation in the arrest and surrender of ICC suspects and to respond to findings of non-cooperation issued by the court's judges pursuant to Rome Statute article 87(5) or (7). As we have noted previously, the Assembly's procedures have had some impact, particularly with regard to the use of the Assembly president's good offices to limit visits of Sudanese President Omar al-Bashir to the territories of ICC states parties without facing arrest.⁴⁰

We also note, however, that this year al-Bashir visited the Democratic Republic of Congo and Chad. The visit to Congo resulted in an ICC finding of non-cooperation against that country; the finding was forwarded to the Assembly and the UN Security Council.⁴¹ The publicly available "agenda and decisions" of the Bureau indicate that this finding was discussed within the Bureau in April, and that the Assembly president had raised the finding with ICC states parties sitting on the Security Council, but there is no indication of further follow-up.⁴²

It is clear that securing effective cooperation in its cases remains a central challenge for the ICC. For example, there are currently requests for findings of non-cooperation pending with regard to the court's cases arising out of the Kenya and Libya situations.⁴³

⁴⁰ Human Rights Watch, "ASP12 Memorandum," pp. 25-26.

⁴¹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, Case No. ICC-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.icc-cpi.int/iccdocs/doc/doc1759849.pdf> (accessed November 23, 2014). ICC judges had previously issued two findings of non-cooperation against the government of Chad. *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, Case No. ICC-02/05-01/09, "Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir," March 26, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1573530.pdf> (accessed November 23, 2014); "Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad 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.icc-cpi.int/iccdocs/doc/doc1287888.pdf> (accessed November 23, 2014).

⁴² ASP Bureau, "Third meeting," April 16, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-03-16-04-2014.pdf (accessed November 15, 2014), p. 2.

⁴³ These include the prosecutor's request for a finding of non-cooperation against the government of Kenya with regard to outstanding requests for assistance in investigations related to the case against President Kenyatta, described above. In addition there are a number of requests pressed by the ICC-appointed defense team for Saif al-Islam Gaddafi with regard to the failure of Libya to surrender Gaddafi to the court. See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC, Case No. ICC-01/11-01/11, "Request for Finding of Non-Compliance," June 7, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1601671.pdf> (accessed November 23, 2014); "Request for Finding of Non-Compliance and Referral to United Nations Security Council," July 23, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1622634.pdf> (accessed November 23, 2014); "Urgent Request for Ruling on Requests for Finding of Non-compliance", December 9, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1696178.pdf> (accessed November 23, 2014). An ICC pre-trial chamber

Given the central importance of cooperation to the court's effective exercise of its mandate, the Assembly needs to be better prepared to take a robust approach to preventing non-cooperation and to carrying out its enforcement responsibilities when cooperation is not forthcoming.

Human Rights Watch recommends that states parties:

- **Adopt language in this year's omnibus resolution resolving to strengthen the Assembly's non-cooperation procedures** and, accordingly, mandating the Bureau to report to the fourteenth Assembly session following review of the procedures and their outcomes in light of lessons learned.

A review could take place through a specific facilitation **in one of the Bureau's working groups** and could include an evaluation of lessons learned to date in the implementation of the procedures, the identification of existing gaps, and consideration as to what enhancements are needed in future practice. The review may, but need not, lead to the revision of the Assembly's **written procedures on non-cooperation**. Rather, 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.

In our view, three areas merit particular attention.

First, the **"informal response procedure"** in the Assembly's non-cooperation procedures is limited to addressing and ultimately deterring impending non-cooperation in the request for arrest or surrender. **"Informal responses" come into play** where there is not yet a finding of non-cooperation by the court's judges. The failure of a state to fully assist with requests for assistance pertaining to investigations, among other possible areas of cooperation, may **constitute serious impediments to the court's mandate**. In these other areas, too, action by states parties to secure the full

indicated in July that the court may take further action to ensure Libya's cooperation, including making a formal finding of non-cooperation and transmitting it to the Security Council to take appropriate measures. See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC, Case No. ICC-01/11-01/11, "Decision on matters related to Libya's duties to cooperate with the Court," July 11, 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1801733.pdf>, para. 13 (accessed November 23, 2014).

cooperation of another state party may be even more effective before a formal finding of non-cooperation. We note that discussions of the **EU's Working Party on Public International Law-ICC Subgroup (COJUR-ICC)** with regard to the **EU's response to non-cooperation with the ICC by third states** also **"reflect upon how the EU and its Member States can respond to impending instances of non-cooperation,"** and therefore do not appear to be limited to responses to court findings of non-cooperation or to situations of arrest and surrender.⁴⁴

States parties should consider how best to fill this gap in the current procedures in order to be better equipped to work together in an informal manner to prevent a broader range of non-cooperation.

Second, the Assembly's **"formal response"** procedures are triggered where there are findings of non-cooperation. These procedures foresee an extended process of dialogue with the state concerned by a finding of non-cooperation, culminating in possible Assembly action. **When it comes to these "formal responses,"** we recommend that the review pay particular attention to developing a menu of actions that could be taken in the event dialogue is insufficient to address the situation, including to bring about cooperation or guarantees of non-repetition. This menu—to be applied only **where there is a need to enforce the court's judicial findings of non-cooperation**—could include actions to be taken within the Assembly, for example the suspension of voting or other rights, as well as recommended measures that individual states parties (or indeed other states) may take in their bilateral or multilateral relationships with a state concerned by a finding of non-cooperation. They should lead up to and include recommendations for specific sanctions that the Assembly can draw to the attention of the UN Security Council, as appropriate.

Third, the review might also consider how to engage with the UN Security Council regarding its enforcement responsibilities under Rome Statute article 87.

⁴⁴ Information note from International Criminal Court Sub-area of the Public International Law Working Group (COJUR-ICC) to Delegations, **"The EU's response to non-cooperation with the International Criminal Court by third states,"** 16993/13, November 27, 2013, http://eeas.europa.eu/human_rights/icc/docs/st_16993_2013_init_en.pdf (accessed November 15, 2014), para. 9.

VI. Non-essential contacts

Human Rights Watch has previously outlined the importance it attaches to states adopting policies of avoiding non-essential contacts with ICC fugitives.⁴⁵ Such policies, provided they are implemented consistently in practice, are important to long-term **arrest strategies, in that they reaffirm the authority of the court's arrest warrants and** can contribute to the political isolation of suspects and, ultimately, surrender. In addition, such policies signal solidarity with victims of alleged crimes and reaffirm **states' commitments to justice for victims.**

This year, states parties through the cooperation facilitation in The Hague Working Group once again engaged in substantial discussions on non-essential contacts over the course of the year, discussions that have been ongoing since 2012. States parties have forwarded the following partially bracketed language to the Bureau for consideration by the Assembly:

Urges 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, welcomes the efforts of States and international and regional organizations in this regard, [and invites States Parties to advise the ICC on a voluntary basis of contacts with persons subject to a warrant of arrest made as a result of such an assessment;]⁴⁶

Through this language the Assembly would, for the first time, clearly call on states parties to avoid non-essential contacts with ICC fugitives. We note that this call is not bracketed in the current draft resolution, meaning that it has met with the consensus of states parties.

This is a significant step forward. We note with concern, however, that the definition of what is deemed an essential contact is left to the discretion of each state party. This tends to weaken the overall impact of the language as the subjective determinations of

⁴⁵ Human Rights Watch, "ASP12 Memorandum," pp.26-28; Human Rights Watch, "Memorandum for the Eleventh Session of the International Criminal Court Assembly of States Parties", November 7, 2012, <http://www.hrw.org/news/2012/11/07/human-rights-watch-memorandum-eleventh-session-international-criminal-court-assembly>, pp. 27-28.

⁴⁶ ASP, "Report of the Bureau on cooperation," annex I ("Draft resolution on cooperation"), para. 6.

state parties with regard to their contacts could vary widely, leading to an inconsistent approach that does not ultimately serve the aims articulated above.

It would be preferable for the resolution to avoid reference to the discretion of each state party and for discussions to continue in the future to arrive at common guidelines regarding what is and is not an essential contact. States parties may at the very least **wish to give consideration to the draft resolution’s preambular paragraph noting that “contacts should be avoided when such contacts undermine the objectives of the Rome Statute”**—reflecting agreed language from previous resolutions—in giving some objective content to their determinations.

In this context, the currently bracketed language—inviting states parties to report to the ICC any contacts with fugitives they deem essential—becomes particularly important. **This reporting “invitation” could over time lead to the development of a record of** contacts deemed essential by states parties, contributing to a sort of working consensus around what is and is not essential. It could also serve to create some sense of accountability among states parties with regard to their contacts, again ultimately contributing to a consistent approach.

Human Rights Watch recommends that state parties:

- Adopt in the cooperation resolution the proposed language urging states parties to avoid non-essential contacts with ICC fugitives in full, including the currently bracketed language inviting states parties to report essential contacts to the ICC.

In addition, the Assembly may wish to consider whether reporting to the Bureau, instead of or in addition to the ICC, might be more appropriate. Reporting to the Bureau, perhaps to the cooperation facilitation within The Hague Working Group, could increase transparency around these contacts, providing a basis for taking discussions forward regarding a common understanding of what constitutes an essential contact.

VII. Coordinating mechanism of national focal points

Last year, the Assembly mandated **the Bureau to “report to the thirteenth session of the Assembly on the feasibility of establishing a coordinating mechanism of national authorities dealing with cooperation with the court, for sharing knowledge and know-how on a voluntary basis.”**⁴⁷ Pursuant to this mandate, consultations on the feasibility of such a coordinating mechanism were carried out in the cooperation facilitation within The Hague Working Group.⁴⁸

Human Rights Watch has previously supported the creation of such a coordinating mechanism to increase the exchange of best practices between ICC states parties.⁴⁹ A coordinating mechanism is likely to translate into more effective responses to cooperation requests, particularly where that mechanism includes national central authorities or focal points. The Assembly has made important strides to advance state cooperation through its focal points and facilitations on cooperation, but discussions have not benefited on a regular basis from the expertise of these national authorities. Indeed, we have seen the value of the engagement of national experts in such networks in other, similar contexts, including the European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.⁵⁰ In our view, such a coordinating mechanism would add unique value to the **Assembly’s current architecture and would not duplicate other existing mechanisms.**

Following the discussions this year within The Hague Working Group, Human Rights Watch recommends states parties ensure that this initiative is moved forward next year and adopt language, currently bracketed in the draft cooperation resolution, to:

- Set up a pilot coordinating mechanism of national authorities to be convened in the margins of the fourteenth session of the Assembly, on a voluntary basis.

⁴⁷ ASP, “Cooperation,” Resolution ICC-ASP/12/Res.3, November 27, 2013, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res3-ENG.pdf (accessed November 15, 2014), para. 18.

⁴⁸ ASP, “Report of the Bureau on Cooperation,” annex II (“Report of the feasibility study on the establishment of a coordinating mechanism of national authorities dealing with cooperation”).

⁴⁹ Human Rights Watch, “ASP12 Memorandum,” pp. 28-30.

⁵⁰ Information about the network is available from <http://www.eurojust.europa.eu/Practitioners/networks-and-fora/Pages/genocide-network.aspx> (accessed November 15, 2014).

VIII. Pledges

Pledges made at the Kampala review conference in 2010 marked out a new and innovative practice for the Assembly, but there has been limited follow-up to ensure the implementation of those pledges and to provide clear guidance on opportunities **for the making of new pledges. We welcomed therefore the Assembly’s mandate last year to its Bureau to “report to the Assembly at its thirteenth session on the progress made by States Parties on the implementation of pledges made at the Review Conference in Kampala.”**⁵¹

Pursuant to this mandate, the Assembly secretariat circulated a letter to all states parties in August 2014 inviting states to report on progress in the implementation of Kampala pledges, as well as circulating a registration form for new pledges.⁵² As of October 28, 2014, however, only three replies had been received.⁵³ Pledges were made in Kampala by a total of 35 states parties, one non-state party, and one regional organization.⁵⁴ At this writing it is unclear whether any new pledges have been made this year.

In our view—and in light of the limited replies received—there is a need for the Assembly to continue its follow-up to these pledges to ensure that they translate into concrete support to the court and, further, to revitalize the pledging practice within the Assembly.

Human Rights Watch recommends that states parties:

- **Adopt language in this year’s Omnibus resolution mandating the Bureau to report further at the fourteenth session of the Assembly on the implementation by States and by the regional organizations of the pledges undertaken in Kampala.**

⁵¹ ASP, “Cooperation,” Resolution ICC-ASP/12/Res.3, para. 29.

⁵² *Note verbale* of the ASP, “Pledge registration Form”, ICC-ASP/13/SP/57, August 12, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-NV-13-SP-57-ENG.pdf (accessed November 23, 2014).

⁵³ ASP, “Report of the Bureau on cooperation,” para. 28.

⁵⁴ Review Conference of the Rome Statute, “Pledges,” RC/9, July 15, 2010, <http://www.icc-cpi.int/NR/rdonlyres/18B88265-BC63-4DFF-BE56-903F2062B797/0/RC9ENGFRASPA.pdf> (accessed November 15, 2014).

The Bureau should give early consideration next year as to what steps can be taken to ensure full reporting and to work toward putting in place a clear framework for making new pledges, publicizing these pledges during Assembly sessions, and ensuring follow-up on their implementation. A clear framework, in our view, is likely to provide increased incentives to states parties to make and implement pledges.