

INTERNATIONAL CRIMINAL COURT

CONCERNS AT THE EIGHTH
SESSION OF THE ASSEMBLY OF
STATES PARTIES

**AMNESTY
INTERNATIONAL**



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CONTENTS

Introduction	1
1. States parties should reaffirm their commitment to cooperate fully with the arrest and surrender of all persons charged by the Court.....	2
2. The Assembly must take additional measures to ensure cooperation with the Court.....	5
3. The Assembly should invest more to implement the plan of action for universal ratification and full implementation of the Rome Statute.....	7
4. The Assembly must not undermine the independence of the judiciary in its resolution on family visits.....	9
5. The Assembly should consider the 2010 budget on its merits.....	9
6. The Assembly should establish an independent oversight mechanism as soon as possible	10
7. States parties are urged to make voluntary contributions to the Trust Fund for Victims ...	12
8. All States parties should nominate highly qualified candidates for the election of two replacement judges.....	12
9. The Assembly should react to declarations made by a number of states upon ratification which amount to reservations	13
Annex: Summary status of draft and enacted implementing legislation	14

CONCERNS AT THE EIGHTH SESSION OF THE ASSEMBLY OF STATES PARTIES

INTRODUCTION

The eighth session of the Assembly of States Parties of the International Criminal Court (Assembly) will take place in The Hague from 18 to 26 November 2009. In addition to its regular oversight functions, this session will also focus significantly on the preparations for the first Review Conference of the Rome Statute of the International Criminal Court (Review Conference) that will take place from 31 May 2010 to 11 June 2010 in Kampala, Uganda.

This paper addresses Amnesty International's concerns at the eighth session of the Assembly, with the exception of issues related to the Review Conference (including the crime of aggression), which will be addressed in a separate paper to be issued by Amnesty International in advance of the eighth session.

Eleven years after the adoption of the Rome Statute of the International Criminal Court (Rome Statute), over half of all states have ratified it and the eighth session of the Assembly takes place in the context of a functioning International Criminal Court (Court), which has commenced its first trial and expects to start at least two additional trials in 2010.

As the Court's oversight body, the Assembly has a vital role to play in achieving the success of the Court. Amnesty International is, therefore, seriously concerned by a series of recent developments which question how prepared and willing the Assembly and its members are to fulfil their obligations. Politicized budget decisions at the seventh session; failures by states parties to cooperate with the Court or put in place the systems to cooperate; failure to enact legislation to ensure that crimes can be prosecuted by national courts in accordance with the principle of complementarity; the failure of states parties to stop an African Union resolution refusing to cooperate with the arrest and surrender of President Omar al Bashir; and a proposal for the Assembly to adopt a resolution seeking to overturn a judicial decision by the Presidency of the Court, all threaten to undermine the effectiveness or independence of the Court. Amnesty International is calling on states parties to use the eighth session of the Assembly to address these issues and reverse this negative trend.

In this paper, Amnesty International:

- calls on all states parties in their statements to the general debate to reaffirm their commitment to the International Criminal Court and to commit to executing all arrest warrants issued by the Court;
- urges the Assembly to take additional measures to address the cooperation challenges facing the Court;
- urges the Assembly to invest more in implementing its Plan of Action for universality and full implementation of the Rome Statute;
- urges the Assembly to ensure that any resolution on family visits for detainees does

not seek to overturn the Presidency's judicial decision on the issue of family visits for Ngudjolo Chui dated 10 March 2009;

- urges the Assembly to consider the 2010 budget on its merits and to reject any attempts to make arbitrary budget cuts;
- urges the Assembly to establish an independent oversight mechanism as soon as possible;
- calls on states parties to make annual voluntary contributions to the Trust Fund for Victims;
- expresses concern about the failure of states parties to nominate more candidates for the election of judges and calls on states to take immediate steps to address the issue;
- calls on the Assembly to examine declarations made by a number of states upon ratification which amount to reservations and to call on states which made such declarations to withdraw them promptly.

Amnesty International will have a delegation present throughout the eighth session of the Assembly. Members of the delegation are available to discuss any of these issues with government delegations. Some of the issues considered by the Assembly and not discussed in this paper may be the subject of separate papers issued by Amnesty International. Amnesty International is also actively involved in most Teams organized by the Coalition for the International Criminal Court (Coalition) on a range of issues. The Coalition's Teams will also issue papers reflecting the organization's position on specific issues before or during the Assembly.

1. STATES PARTIES SHOULD REAFFIRM THEIR COMMITMENT TO COOPERATE FULLY WITH THE ARREST AND SURRENDER OF ALL PERSONS CHARGED BY THE COURT.

Amnesty International is seriously concerned by the response of many governments to the Court's decision in March to issue an arrest warrant for Sudanese President Omar al Bashir. In addition to a strong political response by both the African Union and the League of Arab states, a number of states parties (including those from other regions) have asserted that they can avoid their obligation to cooperate with the arrest and surrender of President al Bashir by interpreting Article 98 (1) of the Rome Statute to apply head of state immunities.

On 3 July 2009, the Assembly of the African Union adopted a "Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court."¹ Amnesty International expressed dismay about a number of aspects of this political decision.² In

¹ Doc. Assembly/AU/13 (XIII), Assembly/AU/Dec.245(XIII), adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya, available at: [http://www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20\(XIII\)%20_E.PDF](http://www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20(XIII)%20_E.PDF).

² See: Amnesty International, *African Union refuses to cooperate with Bashir arrest warrant*, available at: <http://www.amnesty.org/en/news-and-updates/african-union-refuses-cooperate-bashir-arrest-warrant->

particular, the African Union (which includes 31 states parties and 13 signatories to the Rome Statute)³ decided:

“AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.”⁴

The decision is in direct conflict with Article 86 of the Rome Statute which provides that all state parties to the Rome Statute have a legal obligation to cooperate with arrest and surrender of any person charged by the Court. The obligation exists regardless of whether the accused is a head of state or not.

Article 27 (Irrelevance of official capacity) of the Rome Statute provides:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

All other international criminal court statutes have similarly rejected claimed immunities of heads of state charged with genocide, crimes against humanity and war crimes.⁵ Indeed, every single other instrument adopted since the Second World War by the international community expressly involving crimes under international law has rejected immunity from prosecution for such crimes for any government official.⁶ Those instruments articulated a

[20090706](#).

³ Sudan signed the Rome Statute, but has since repudiated its signature.

⁴ *Supra* n.1, para. 10.

⁵ Charter of the International Military Tribunal at Nuremberg, art. 7; Charter for the International Military Tribunal of the Far East, art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7; Statute of the International Criminal Tribunal for Rwanda, art. 6; Statute of the Special Court for Sierra Leone, art. 6 (2); UNTAET Regulation 2000/15 establishing the Special Panel for Serious Crimes in Dili, Timor-Leste, art. 15; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 29.

⁶ Allied Control Council Law No.10, art. II (4) (a) ('The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.');

U.N. G.A. Res. 95 (i), 11 Dec. 1946; 1948 Convention for the Prevention and Punishment of the Crime of Genocide, art. IV ('Persons committing genocide or any of the acts enumerated in Article III [conspiracy to commit, direct and public incitement to commit, attempt to commit and complicity in genocide] shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals');

1950 Nuremberg Principles, principle III ('The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility

customary international law rule and general principle of law. Every international court to consider the question since the adoption of the Rome Statute has concluded that heads of state cannot successfully assert any purported immunity from prosecution for genocide, crimes against humanity or war crimes.⁷ As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia concluded on 12 October 2009:

*“[O]ne of the fundamental aims of international criminal courts and tribunals is to end impunity and ensure that serious violations of international humanitarian law are prosecuted and punished. Individuals accused of such crimes can have no legitimate expectation of immunity from prosecution.”*⁸

Article 27 of the Rome Statute is not negated by the reference in Article 98 (1) to states' "obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State".⁹ That provision does not imply that the states participating in the Rome Conference accepted the existence of immunity of heads of state for crimes under international law after excluding it in Article 27. As two of the drafters of this provision have confirmed, this provision was inserted to address the inviolability of diplomatic premises, immunities which were not expressly addressed in Article 27.¹⁰

under international law.');

1954 Draft Code of Offences against the Peace and Security of Mankind, art. 3 ('[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.');

1973 Convention on the Prevention and Punishment of the Crime of *Apartheid*, art. III ('International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State . . .');

1991 Draft Code of Crimes against the Peace and Security of Mankind, art. 13 (Official position and responsibility) ('The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.');

1996 Draft Code of Crimes against the Peace and Security of Mankind, art. 6 (Official position and responsibility) ('The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.').

⁷ *Democratic Republic of the Congo v. Belgium (Arrest Warrant Case)*, Judgment, I.C.J., 14 Feb. 2002, para. 61; *Prosecutor v. Milosevic*, Indictment, Case No. IT-99-37, Trial Chamber, 22 May 1999; *Prosecutor v. Taylor*, Decision on immunity from jurisdiction, Case No. SCSL-2003-01-I, Appeals Chamber, 31 May 2004.

⁸ *Prosecutor v. Karadzic*, Decision on Karadzic's appeal of Trial Chamber's decision on alleged Holbrooke agreement, Case No. IT-95-/18-AR 73.4, ICTY App. Ch., 12 Oct. 2009, para. 52.

⁹ Paragraph 1 of Article 98 (Cooperation with respect to waiver of immunity and consent to surrender) reads:

'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'

¹⁰ Claus Kress and Kimberly Prost, 'Article 98 (Cooperation with respect to waiver of immunity and consent to surrender)', in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article, Munich: C.H. Beck, Oxford: Hart and Baden-Baden:

In addition to the legal concerns about the basis for the African Union Decision, Amnesty International is concerned that its adoption will be misinterpreted as a sign that African states parties to the Rome Statute oppose the Court's work to bring to justice those responsible for committing the worst imaginable crimes against African victims. Of course, such contentions ignore the wide support of African states in the establishment of the Court and the fact that – with the exception of Darfur – all situations under investigations were referred to the Prosecutor by the African states parties themselves. Amnesty International strongly welcomes the fact that Botswana, Chad, Kenya and South Africa in recent months have made strong statements countering this perception by clarifying that their governments will cooperate fully with the Court.

The eighth session of the Assembly is an important occasion for all states parties to the Rome Statute to affirm their support for the Court and its work. In particular, Amnesty International urges African states parties to make strong statements of support to the general debate sessions of the Assembly and to join the governments of Botswana, Chad, Kenya and South Africa in showing African support for the Court's work and committing to cooperate fully with the arrest and surrender of President Omar al Bashir and any other persons charged by the Court.

2. THE ASSEMBLY MUST TAKE ADDITIONAL MEASURES TO ENSURE COOPERATION WITH THE COURT

More than seven years into the work of the Court most states parties remain unprepared to cooperate fully with the Court:

- 69 of the 110 states parties have failed to enact legislation providing for cooperation with the Court;¹¹

Nomos, 2nd ed., 2008, 2006-2007 (footnote omitted) ('[I]t was this type of immunity [state or diplomatic immunity regarding property] that was the main driving force behind paragraph 1, the paradigm case being the customary inviolability of diplomatic premises as codified in article 22 of the Vienna Convention on Diplomatic Immunities').

¹¹ Afghanistan, Albania, Andorra, Antigua and Barbuda, Barbados, Belize, Benin, Bolivia, Botswana, Brazil, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Chile, Columbia, Congo, Cook Islands, Costa Rica, Cote d'Ivoire (although not a state party, it has made a declaration under Article 12 (3) to accept all cooperation obligations under the Rome Statute), Cyprus, Czech Republic, Democratic Republic of Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Fiji, Gabon, Gambia, Ghana, Greece, Guinea, Ghana, Guyana, Honduras, Hungary, Italy, Jordan, Kenya, Lesotho, Liberia, Luxembourg, Madagascar, Malawi, Mali, Marshall Islands, Mauritius, Mexico, Mongolia, Namibia, Nauru, Niger, Nigeria, Panama, Paraguay, Portugal, San Marino, Serbia, Sierra Leone, St Kitts and Nevis, St Vincent and the Grenadines, Suriname, Tajikistan, Timor Leste, Uganda, United Republic of Tanzania, Venezuela and Zambia.

A more detailed analysis of the status of implementing legislation is included in the Annex to this paper. Although Amnesty International recognizes that a small number of countries have enacted cooperation legislation for other international criminal courts, which they claim can be applied to the International Criminal Court, such legislation is not recognized in this list. Given the unique cooperation requirements of the International Criminal Court (for example to cooperate with reparations orders), implementation requires that legislation be reviewed and adapted to the specific requirements of the Rome Statute.

- 49 of the 110 states parties have yet to ratify or accede to the Agreement on Privileges and Immunities of the International Criminal Court;¹²
- Only two of the 110 states parties have entered into agreements with the Court to enforce sentences in their national facilities.¹³
- Although the statistical information and identity of countries is kept confidential, the Court has indicated on several occasions that only a small number of states have entered into agreements to relocate victims and witnesses.

Despite the adoption by the Assembly at its sixth session in 2007 of 66 recommendations to guide states in putting in place the national mechanisms to cooperate fully with the Court, the Assembly has failed to take effective measures to ensure that they are implemented.¹⁴ Amnesty International welcomes the efforts by the Bureau's appointed facilitator on cooperation to promote the implementation of the recommendations and cooperation generally. However, the Assembly as a whole needs to take additional collective measures for ensuring that the recommendations are implemented.

The need for such measures has become even more urgent with the emergence of situations where non-cooperation threatens to undermine the work of the Court, including the political decision by the African Union not to cooperate with the arrest and surrender of President Omar Al Bashir and objections raised by six states parties who have been requested to cooperate with the interim release of Jean-Pierre Bemba Gombo.¹⁵ The extent of problems in other areas of cooperation remains unknown as the Assembly has not requested the Court to report annually on these issues. However, the organization is aware of instances of states parties failing to respond or declining to provide requested assistance, imposing conditions incompatible with the Rome Statute on the provision of assistance and failing to implement such requests promptly.

¹² Afghanistan, Antigua and Barbuda, Australia, Barbados, Bosnia and Herzegovina, Brazil, Burundi, Cambodia, Chad, Chile, Comoros, Congo, Cook Islands, Costa Rica, Cote d'Ivoire (although not a state party, it has made a declaration under Article 12 (3) to accept all cooperation obligations under the Rome Statute), Czech Republic, Djibouti, Dominica, Fiji, Gabon, Gambia, Georgia, Ghana, Guinea, Japan, Jordan, Kenya, Madagascar, Malta, Marshall Islands, Mauritius, Mongolia, Nauru, Niger, Nigeria, Peru, Samoa, San Marino, Senegal, Sierra Leone, South Africa, St Kitts and Nevis, St Vincent and the Grenadines, Suriname, Switzerland, Tajikistan, Tanzania, Timor Leste, Venezuela and Zambia.

¹³ Austria and the United Kingdom.

¹⁴ Recommendations on cooperation, Annex II of the Assembly's Resolution on Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/6/Res.2, 14 December 2007: http://www.icc-cpi.int/NR/rdonlyres/9A9CD715-1651-4A5E-B0E6-9201EC07EF07/277078/ICCASP620_Voll_Part_III_English.pdf.

¹⁵ For more information on this issue see the following statement posted on the Coalition for the International Criminal Court's In Situ blog by Jonathan O'Donohue, Amnesty International's Legal Adviser on International Justice: *States object to cooperating with the conditional release of Jean-Pierre Bemba Gombo – another sign of a cooperation crisis?* <http://iccnow.org/blog/>.

Amnesty International calls on the Assembly at this eighth session to take the following positive measures to avoid a cooperation crisis:

- Request the Court to report annually to the Assembly on the status of cooperation with its requests. It is not suggested to draft the report in a way to name and shame non-cooperating states. Instead the report should provide statistical information and analysis – in particular of reasons given by states for negative responses to requests.
- Establish a Working Group on Cooperation which will meet during each session of the Assembly and inter-sessionally to:
 - review the proposed annual report prepared by the Court on the status of cooperation;
 - review the implementation of 66 recommendations on cooperation adopted at the Assembly's sixth session and consider measures that the Assembly can take to encourage more states to implement them;
 - discuss key issues of concern that arise (such as a pattern of problems with cooperation in certain areas); and
 - respond to situations of non-cooperation that are referred to the Assembly by the Court.
- Invest more in the implementation of the Assembly's Plan of Action for universal ratification and full implementation of the Rome Statute (see below).

3. THE ASSEMBLY SHOULD INVEST MORE TO IMPLEMENT THE PLAN OF ACTION FOR UNIVERSAL RATIFICATION AND FULL IMPLEMENTATION OF THE ROME STATUTE

Three years after its adoption, despite committed efforts by different facilitators, the Plan of Action is not being implemented to the extent hoped. That is not to undervalue the very important work that is being taken by some governments and inter-governmental organizations to promote the Rome Statute and implementation. Nor is it meant as a criticism of the work of the Secretariat, which continues to gather and disseminate information and offer technical assistance within the resources allocated to it. The Plan of Action is failing to live up to expectations in two respects: information sharing and impact.

Information sharing is a key element of the Plan. Recognizing that many efforts are taking place at the national level and at the inter-government level, the Plan emphasises the importance of states and other actors reporting on their activities. Regrettably, most states have failed to inform the Assembly of their activities at the national level to ratify and implement the Rome Statute and their efforts to promote the implementation of the Plan by other states. Most states have failed to take even the basis step set out in the Plan to appoint a national contact point. Responses by states parties to the Secretariat's annual questionnaire on the Plan of Action have decreased from 24 in 2007, to 13 in 2008 and

currently three in 2009.¹⁶

In terms of impact, two states have ratified the Rome Statute in this year. Without seeking to diminish these positive developments and the work by some states parties, inter-governmental organizations and non-governmental organizations to promote the ratifications, Amnesty International believes that there is the potential for even greater impact with additional input and coordination of efforts by the Assembly. A bigger problem is that most states parties have failed to enact effective legislation providing for both full and effective cooperation (see above) and to investigate and prosecute genocide, crimes against humanity and war crimes before national courts. As set out in the Annex to this paper, only 44 of the 110 states parties are known to have enacted complementarity legislation – the extent to which existing legislation in other states parties covers these crimes and to which it applies defences and principles of criminal responsibility in accordance with international law is unknown. It is also a matter of concern that much of the legislations that have been drafted and enacted fall short of what is required by the Rome Statute and other international law.¹⁷

Given the importance of both universality and full implementation to both the success of the Court and to having a broader impact in the fight against impunity, it is disappointing that the Assembly continues to under-invest in implementing the Plan of Action. Since the Plan's adoption, Amnesty International has called for the Assembly to establish a unit within its Secretariat to provide the full time commitment needed to coordinate the implementation of the Plan; to establish regular contact with states parties and non-states parties; to promote information sharing; to develop and implement a resource database of information for states parties and non-states parties who are in the process of ratification and implementation; and to provide or coordinate technical assistance when needed. Amnesty International is, therefore, disappointed that once again this year, the facilitator reports that states parties are unwilling to invest any additional resources in the Secretariat to expand its existing work to perform these functions.¹⁸ The organization urges states parties to reconsider this issue to ensure that the Plan of Action does not become obsolete.

¹⁶ For more information see the Plan of Action page of the Court's website: <http://www.icc-cpi.int/Menus/ASP/Sessions/Plan+of+Action/>.

¹⁷ Amnesty International drew the attention of the Assembly to this issue at its third session in its paper, *International Criminal Court: The Failure of States to Enact Effective Implementing Legislation*, (AI Index: IOR 40/019/2004), available at: <http://www.amnesty.org/en/library/info/IOR40/019/2004/en>. Regrettably, many of the same flaws in legislation identified five years ago are found in subsequently enacted legislation and in draft legislation. Amnesty International continues to call on states parties to use our organization's *Checklist for effective implementation* (AI Index: IOR 40/011/2000) to ensure their national law is brought into line with the requirements of the Rome Statute and other international law, available at: <http://www.amnesty.org/en/library/info/IOR40/011/2000/en>.

¹⁸ Report of the Bureau on the Plan of Action for achieving universality and full implementation of the Rome Statute of the International Criminal Court, ICC-ASP/8/23, 9 September 2009 (available at: <http://www.icc-cpi.int/NR/rdonlyres/2D628751-C606-477D-A3D1-2319111EA46C/0/ICCASP823ENG.pdf>).

4. THE ASSEMBLY MUST NOT UNDERMINE THE INDEPENDENCE OF THE JUDICIARY IN ITS RESOLUTION ON FAMILY VISITS

On 10 March 2009, the Presidency, exercising a judicial function rather than an administrative function, issued a decision on a complaint by Mathieu Ngudjolo who is in pre-trial detention awaiting trial. The complaint sought judicial review of the Registrar's decision on the frequency of his funded family visits. In its decision, the Presidency, following a detailed examination of the facts and other practices, made a judicial determination that the Court has an obligation to fund family visits for indigent persons in detention. This resolves the issue which has been debated by the Assembly and the Court for more than two years. The Working Group had previously advocated to the Registry that there was no obligation to fund family visits, although it agreed to a discretionary amount of funds on "humanitarian" grounds.

Amnesty International is, however, concerned by reports that the Hague Working Group intends to propose that the Assembly adopt a resolution which directly contradicts the Presidency's conclusions and asserts that there is no obligation to fund the visits. If adopted the resolution would place the Registrar in an almost impossible situation - with conflicting instructions from the judiciary and the Court's funders - and more disturbingly threaten the independence of the judiciary which has been elected by the Assembly to make such determinations, including ensuring the rights of the accused are respected.¹⁹

Amnesty International calls on states parties to oppose the inclusion of any language in this resolution that would interfere with the Court's judicial work, noting that there are more appropriate options if some states parties wish to voice their disagreement with a judicial decision.

5. THE ASSEMBLY SHOULD CONSIDER THE 2010 BUDGET ON ITS MERITS

Amnesty International was dismayed about the decision of the Assembly during its seventh session to cut the 2009 budget of the Court arbitrarily by an additional €5 million through reducing the amount of states parties' assessments.²⁰ The political decision failed to take into account the detailed analysis of the Assembly's expert Committee on Budget and Finance and went well beyond its recommendations. Furthermore, it threatens the integrity of the Court's budget system which had been established over many years to ensure that budgetary decisions were based on a detailed professional assessment by an independent body of the Court's resource needs while ensuring its efficiency. Amnesty International therefore calls on the Assembly to ensure that the decisions last year do not set a precedent for future budgetary practice. In particular, the organization urges the Assembly to focus its discussions on reviewing the substance of the Committee's report and to reject proposals for additional arbitrary cuts.

¹⁹ Such interference would be contrary to the UN Basic Principles on the Independence of the Judiciary, in particular, Principles 1 to 4.

²⁰ Programme Budget for 2009, the Working Capital Fund for 2009, the scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for the year 2009 and the Contingency Fund, Resolution ICC-ASP/7/Res.4.

The 2010 budget process is now well advanced. Amnesty International raised initial concerns that the Court – no doubt under pressure from the 2009 budget process to reduce increases in its annual budget– may have under-budgeted in key areas where resources are foreseeable. In particular, the organization remains concerned by the Court’s decision to request funds for consecutive instead of parallel trials and to request funds for the trial of Jean-Pierre Bemba Gombo on the assumption it will start in December 2010, despite the fact that the pre-trial phase now appears to be approaching completion.²¹

Amnesty International welcomes the Committee on Budget and Finance’s review of the budget and agrees with the majority of its recommendations. The only recommendation of the Committee where the organization has serious concerns relates to legal aid. The Committee has recommended that the budget for legal aid the defence should be reduced by 7% and that the budget for legal representation of victims should be reduced by 15%. The Committee justifies its recommendation on “the current trends in expenditure.”²²

In relation to legal aid for defence, Amnesty International has been informed that the Court expects an actual overspend in its 2009 legal aid budget, which is contrary to the trend relied upon by the Committee. Amnesty International, therefore, urges the Assembly to review the Committee’s recommendation together with up to date information supplied by the Court on its 2009 expenditure to ensure that, if implemented, the cut will not undermine the ability of the Court to fund the defence in 2010. If the Assembly determines that the cut would risk underfunding the defence, it should decide either not to implement the Committee’s recommendations or to reduce the percentage to a more appropriate level.

In relation to legal aid for victims’ representation, Amnesty International is informed there has been a significant underspend in the legal aid budget for victims’ representatives in 2009. Given the amount of activity by victims’ representatives this year on situations and cases, Amnesty International is calling on the Court to conduct an urgent review to identify the reasons for the low level of implementation of the budget and to address any problems that arise. Noting that, in the proposed 2010 budget, the Court had already implemented a reduction of approximately 20% in legal aid for victims’ representatives from the 2009 level and also noting the expected increase in trial activities next year, Amnesty International urges the Assembly to review the Committee’s recommendation together with information supplied by the Court to ensure that an additional cut of 15% will not undermine the ability of the Court to fund victims representatives in 2010. If the Assembly determines that the cut would risk underfunding victims’ representation, it should decide either not to implement the Committee’s recommendations or to reduce the percentage to a more appropriate level.

6. THE ASSEMBLY SHOULD ESTABLISH AN INDEPENDENT OVERSIGHT MECHANISM AS SOON AS POSSIBLE

Amnesty International welcomes the work conducted by the Hague Working Group this year -

²¹ Art. 67 (1) (c) of the Rome Statute provides that accused persons have the right “[t]o be tried without delay”.

²² Report of the Committee on Budget and Finance on the work of its thirteenth session, ICC-ASP/8/15, paras. 95 and 96.

reflected in the Bureau's Report - to ensure progress on the establishment of an independent oversight mechanism.²³ In particular, the organization supports the recommendations of the for the Assembly to establish an *independent* oversight mechanism - located at the seat of the Court - which has the mandate to investigate allegations of misconduct against Court staff, elected officials and contractors. The organization urges the Assembly to ensure that the oversight mechanism is established as soon as possible.

As a new independent mechanism, tailored specifically to the Court, it is important that the Assembly monitor the establishment of the mechanism closely in its first years in order to identify and resolve any issues that may affect its ability to function effectively. In particular, if the Assembly decides to approve the recommendation to co-locate the mechanism with (but not to integrate or subordinate it to) the Office of Internal Audit, the arrangement should be monitored carefully to ensure that the two mechanisms can operate with the required level of independence. Given the importance of confidentiality of the mechanism's work, Amnesty International is particularly concerned that the Committee on Budget and Finance has recommended that the Court should seek to reduce the costs of the oversight mechanism "by pooling resources, such as support staff and infrastructure for securing documents and evidence" with the Office of Internal Audit and other units.²⁴ Although the Committee rightly notes the need for efficiency, the Assembly should ensure that the mechanism is not put in a position where its independence and confidentiality are compromised.

Furthermore, specific attention should be given to implementing the Bureau's proposal that, for its first year, the mechanism should be headed by a person seconded from the United Nations Office of Internal Oversight Services.²⁵ In particular, the Assembly should ensure that:

- the seconded person has the skills and experience to establish and head the office in its first year;
- the secondment is not extended for longer than one year;
- an open recruitment is conducted for the head of the mechanism at the end of the year;
- sufficient time for the seconded person to handover to the new head is provided for; and
- a review of the mechanism is conducted by the Committee on Budget and Finance and the Assembly to ensure that the procedures developed by the seconded head of the mechanism in the first year are tailored effectively to the Court and does not

²³ Report of the Bureau on the establishment of an independent oversight mechanism, ICC-ASP/8/2, plus two addendums: ICC-ASP/8/2/Add.1 and ICC-ASP/8/2/Add.2.

²⁴ Report of the Committee on Budget and Finance on the work of its thirteenth session, ICC-ASP/8/15, para. 121.

²⁵ Contained in Addendum ICC-ASP/8/2/Add.2.

adopt unsatisfactory UN systems and procedures.

Amnesty International notes that the investigative role of the mechanism represents only part of the mandate envisaged by the drafters of Article 112 (4). This is also recognized in the Bureau's Report, which states that additional tasks of inspection and evaluation should be added "in due course."²⁶ To ensure that the development of its mandate remains on the agenda of the Assembly, Amnesty International urges the Assembly, as a first step, to schedule a study to consider the additional tasks that the mechanism could perform.

7. STATES PARTIES ARE URGED TO MAKE VOLUNTARY CONTRIBUTIONS TO THE TRUST FUND FOR VICTIMS

Recognizing that the Court's first trial began in 2009 and that at least two other trials are expected to start in 2010, it is likely that the Court may issue its first reparations order in the next years. To ensure that the Trust Fund has adequate resources to fulfil the Court's orders to provide reparations through the Fund and to conduct other projects of providing assistance to victims, Amnesty International once again urges each states party to make annual voluntary contributions to the Trust Fund and to announce their contribution in their statements to the general debate.

8. ALL STATES PARTIES SHOULD NOMINATE HIGHLY QUALIFIED CANDIDATES FOR THE ELECTION OF TWO REPLACEMENT JUDGES

Since the first elections of judges in 2003, Amnesty International has called for all states parties to undertake transparent national nomination processes in consultation with civil society in order to identify the most highly qualified candidates from their countries to be put forward to the election of judges, members of the Committee on Budget and Finance and other elections.²⁷ The organization considers that, to ensure the election of the highest qualified candidates, the Assembly must have the broadest choice of the strongest candidates from all states parties.

Amnesty International is once again concerned that states parties are failing to meet their responsibility to ensure the nomination of highly qualified candidates. With respect to the election of two replacement judges at the eighth session, at the time of issuing this paper, only five of the 110 states parties have nominated candidates and the deadline for nominations has had to be extended three times because Asian and Eastern European states parties have failed to meet their regional minimum nomination requirements. No candidates have been nominated by African, Eastern European and Western European and other

²⁶ ICC-ASP/8/2, para. 43 (a).

²⁷ In particular, see: Amnesty International's *Checklist to ensure the nomination of the highest qualified candidates for judges* (AI Index: IOR 40/026/2005), available at: <http://www.amnesty.org/en/library/info/IOR40/026/2005/en>.

governments.

The small number of nominations not only limits the opportunity to identify the highest qualified candidates from the 110 states parties, but it may also have an impact on the overall expertise and geographical balance of the 18 Court judges. So far in the current election, only one of the five nominated judges has “established competence in criminal law and procedure, and the necessary experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings,” as opposed to experience in international law. Furthermore, if not addressed, the failure of states in Asia and Eastern Europe to nominate enough candidates to meet the regional minimum nomination requirements would mean that the Assembly would not be bound to vote for any of those candidates who have been nominated from their regions.

Amnesty International urges all states parties that have not done so, regardless of their region and whether other states in the region have nominated, to take immediate steps to nominate the highest qualified candidates for judges from their countries or other states parties in a transparent process in close consultation with civil society at every stage. In addition, it urges each state party that puts forward a nominee to provide detailed information to the Assembly about the procedures that they used to obtain the best possible pool of candidates and to evaluate and select its nominee.

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

As in previous years, Amnesty International is seriously concerned that declarations made upon ratification by some states amount to disguised reservations. Article 120 of the Rome Statute provides that no reservations may be made to the Statute (unilateral declarations which specify or clarify the meaning of certain provisions and not amounting to reservations are not expressly prohibited). In its report: *International Criminal Court: Declarations amounting to prohibited reservations to the Rome Statute* the organization examines declarations made by states parties to date and concludes that a number of them amount to reservations, including unilateral declarations made by Australia, Colombia, France, Malta, United Kingdom and Uruguay.²⁸ The legal analysis also calls on all states parties not to make any declaration that may amount to a reservation. The organization welcomed the decision by Uruguay on 26 February 2008 to withdraw its declaration and urges the other listed states to do the same.

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

²⁸ AI Index: IOR 40/32/2005, November 2005, (also available in French and Spanish), available at: <http://web.amnesty.org/library/index/engior400322005>.

ANNEX: SUMMARY STATUS OF DRAFT AND ENACTED IMPLEMENTING LEGISLATION

The information below summarises the status of implementing legislation in states parties as of October 2009. This information is correct to the best of Amnesty International's knowledge. To report corrections or clarifications, please email ijp@amnesty.org.

GENERAL IMPLEMENTING LEGISLATION STATUS

STATES PARTIES THAT HAVE SOME FORM OF ENACTED IMPLEMENTING LEGISLATION (54)

Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, Colombia, Comoros, Costa Rica, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Iceland, Ireland, Japan, Kenya, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Macedonia (FYR), Mali, Malta, Montenegro, the Netherlands, New Zealand, Niger, Norway, Panama, Peru, Poland, Portugal, Romania, Samoa, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Timor-Leste, Trinidad and Tobago, United Kingdom, Uruguay.

STATES PARTIES THAT HAVE SOME FORM OF DRAFT IMPLEMENTING LEGISLATION (33)

Afghanistan, Benin, Bolivia, Brazil, Burkina Faso, Central African Republic, Comoros, Congo (Republic of the), Cook Islands, Costa Rica, Czech Republic, Democratic Republic of the Congo, Dominica, Dominican Republic, Ecuador, Fiji, France, Gabon, Ghana, Greece, Hungary, Italy, Kenya, Lesotho, Luxembourg, Mexico, Mongolia, Nigeria, Paraguay, Peru, Serbia, Sierra-Leone, Uganda.

STATES PARTIES THAT HAVE NEITHER DRAFT NOR ENACTED IMPLEMENTING LEGISLATION (28)

Albania, Andorra, Antigua and Barbuda, Barbados, Belize, Botswana, Cambodia, Chad, Djibouti, Gambia, Guinea, Guyana, Honduras, Liberia, Madagascar, Malawi, Marshall Islands, Mauritius, Namibia, Nauru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, San Marino, Suriname, Tajikistan, Tanzania, Venezuela, Zambia.

ENACTED IMPLEMENTING LEGISLATION STATUS

STATES PARTIES THAT HAVE ENACTED LEGISLATION IMPLEMENTING BOTH COMPLEMENTARITY AND COOPERATION OBLIGATIONS (31)

Argentina, Australia, Belgium, Canada, Croatia, Denmark, Estonia, Finland, Georgia, Germany, Iceland, Ireland, Korea (Republic of), Latvia, Lithuania, Macedonia (FYR), Malta, Montenegro, the Netherlands, New Zealand, Norway, Poland, Samoa, Senegal, Slovakia, Slovenia, South Africa, Spain, Trinidad and Tobago, United Kingdom, Uruguay.

STATES PARTIES THAT HAVE ENACTED LEGISLATION IMPLEMENTING ONLY COMPLEMENTARITY OBLIGATIONS (13)

Bosnia and Herzegovina, Burundi, Chile, Colombia, Costa Rica, Cyprus, Kenya, Mali, Niger, Panama, Portugal, Serbia, Timor-Leste.

STATES PARTIES THAT HAVE ENACTED LEGISLATION IMPLEMENTING ONLY COOPERATION OBLIGATIONS (10)

Austria, Bulgaria, Comoros, France, Japan, Liechtenstein, Peru, Romania, Sweden, Switzerland.

ENACTED AND, OR, DRAFT LEGISLATION STATUS

STATES PARTIES THAT HAVE ENACTED LEGISLATION IMPLEMENTING COMPLEMENTARITY OBLIGATIONS AND DRAFT LEGISLATION IMPLEMENTING COOPERATION OBLIGATIONS (3)

Costa Rica, Kenya, Serbia.

STATES PARTIES THAT HAVE ENACTED LEGISLATION IMPLEMENTING COOPERATION OBLIGATIONS AND DRAFT LEGISLATION IMPLEMENTING COMPLEMENTARITY OBLIGATIONS (4)

Comoros, France, Peru, Switzerland.

STATES PARTIES THAT HAVE DRAFT LEGISLATION IMPLEMENTING BOTH COMPLEMENTARITY AND COOPERATION OBLIGATIONS (21)

Benin, Bolivia, Brazil, Burkina Faso, Central African Republic, Comoros, Costa Rica, Democratic Republic of the Congo, Dominica, Fiji, Ghana, Greece, Italy, Lesotho, Luxembourg, Mexico, Mongolia, Nigeria, Paraguay, Sierra Leone, Uganda.

STATES PARTIES THAT HAVE DRAFT LEGISLATION IMPLEMENTING ONLY COMPLEMENTARITY OBLIGATIONS (7)

Afghanistan, Cook Islands, Czech Republic, Dominican Republic, Ecuador, Gabon, Hungary.

STATES PARTIES THAT HAVE DRAFT LEGISLATION IMPLEMENTING ONLY COOPERATION OBLIGATIONS (0)

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