

INTERNATIONAL

CRIMINAL COURT

RECOMMENDATIONS TO THE 15TH
SESSION OF THE ASSEMBLY OF STATES
PARTIES (16 TO 24 NOVEMBER 2016)

**AMNESTY
INTERNATIONAL**



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INTRODUCTION

The 15th session of the Assembly of States Parties of the International Criminal Court (Assembly) will take place in The Hague from 16 to 24 November 2016. During the session, the Assembly is expected to:

- Hear reports from senior International Criminal Court (ICC or Court) officials, including the President, the Prosecutor and the Registrar of the ICC;
- Conduct a General Debate about the ICC and the Rome Statute system;
- Hold a plenary discussion on cooperation;
- Elect a new Vice-President of the Assembly and six members of the Committee on Budget and Finance;
- Adopt the 2017 budget for the ICC;
- Consider provisional amendments to Rule 165 of the Rules of Procedure and Evidence in relation to offences against the administration of justice;
- Consider amendments recommended by the Working Group on Amendments permitting the partial translation of key decisions of the trial chamber into a language that the accused fully understands;
- Possibly consider a proposal by South Africa to adopt new rules or regulations on the implementation of Article 97 consultations;¹ and
- Adopt resolutions on strengthening the International Criminal Court and the Assembly of States Parties, cooperation and other issues.

The 15th session takes place at a time when the ICC's activities are increasing. Since the Assembly's last session, the Court has completed the trials of Jean-Pierre Bemba and Ahmad Al Faqi Al Mahdi, as well as one trial of offences against the administration of justice. Two trials are currently in progress and another is scheduled to start in December 2016. The Trial Chamber in the Lubanga case recently approved and ordered the implementation of symbolic reparations for the victims in that case. The Office of the Prosecutor (OTP) opened an investigation into the Georgia situation and commenced new preliminary examinations in Burundi and Gabon.

However, three governments – Burundi, Gambia and South Africa – have deposited instruments with the United Nations Secretary-General to withdraw from the Rome Statute. Amnesty International has called on the governments to reconsider the decisions emphasizing that, at a time when crimes under the jurisdiction of the ICC continue to be committed with impunity in many regions of the world, the ICC remains a key avenue for justice and reparation for millions of victims. The fact that other states, including permanent members of the United Nations Security Council, have not ratified the Rome Statute further weakens the protection offered to their citizens by membership of the Rome Statute and risks perceptions of a 'double standard' in international justice.

Permanent members of the United Nations Security Council continued to ignore calls to stop using their position on the Council, including their veto powers, to block action to address the commission of war crimes, crimes against humanity and genocide. It is now more than five years since the Council referred a situation to the ICC Prosecutor, despite horrific conflicts and human rights abuses in Syria and other situations. It has failed to take any steps to support the ICC's work in Darfur and Libya or to respond to non-cooperation to both situations.

This paper sets out Amnesty International's seven priority recommendations for the 15th session which it believes are essential to ensure the effectiveness and credibility of the ICC, including its compliance with human rights, and effective oversight by the Assembly.

¹ South Africa submitted its proposal to the Bureau on 3 October 2016. At time of writing the Bureau of the Assembly has not yet decided if the proposal will be discussed as an agenda item during the 15th session.

RECOMMENDATION 1. STATES PARTIES SHOULD MAKE STRONG STATEMENTS IN SUPPORT OF THE ICC AND HIGHLIGHT KEY ISSUES DURING THE GENERAL DEBATE

The General Debate is a forum for states to discuss a range of issues concerning the Rome Statute system. It presents an important opportunity for all states parties to: affirm their support for the ICC and commitment to strengthening and maintaining the integrity of the Rome Statute system; present their views on key issues facing the ICC and international justice; and report on steps that they have taken or are planning to take to support the work of the ICC, the Trust Fund for Victims and the Rome Statute system generally.

Amnesty International therefore urges all states in their statements to the General Debate at the 15th session to:

- Affirm their commitment to international justice, including their support for the ICC's work and commitment to protect the integrity of the Rome Statute;
- Highlight the importance of continued efforts to promote universality of the Rome Statute to ensure access to justice for victims - urge states that have not yet done so to ratify the Rome Statute and states parties that have recently decided to withdraw to reconsider their decisions;
- Encourage states parties that have concerns regarding the implementation of the Rome Statute system to raise those concerns with the Assembly, recognizing however that the Assembly must fully respect the prosecutorial and judicial independence of the ICC and the integrity of the Rome Statute;
- Urge all permanent members of the United Nations Security Council to refrain from using their veto power to block action to respond to the commission of war crimes, crimes against humanity and genocide, including referrals to the ICC Prosecutor;
- Support the approval of sufficient resources to ensure that the ICC can effectively conduct the preliminary examinations, investigations and cases projected for 2017;
- Commit to and urge other states to cooperate promptly and fully with the ICC, including in the execution of all arrest warrants;
- Reiterate their commitment to the fundamental principle in Article 27(2) that 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;
- Commit to and urge other states to ratify the Agreement on Privileges and Immunities and to enter into agreements with the ICC on victim relocation, interim release, enforcement of sentences and relocation of acquitted persons; and
- Pledge or announce voluntary contributions to the ICC Trust Fund for Family Visits and the Trust Fund for Victims.

RECOMMENDATION 2. THE ASSEMBLY SHOULD AMEND PROVISIONAL RULE 165 TO ENSURE THAT THE RIGHTS OF THE ACCUSED IN ARTICLE 70 PROCEEDINGS ARE FULLY RESPECTED

On 10 February 2016, the ICC judges provisionally amended Rule 165 of the Rules of Procedure and Evidence. As explained in the ICC's Report on the provisional amendments, the changes seek to simplify and expedite the prosecution and trial of offences against the administration of justice under Article 70 of the Rome Statute.² In particular, the amendments:

- Reduce the number of judges at pre-trial and trial from three to one and the number of judges conducting appeal proceedings from five to three;
- Remove the separate sentencing procedure in Article 76(2) to hear any additional evidence or submissions relevant to the sentence;
- Remove the interlocutory appeal procedure in Article 82(1)(d) on issues 'that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.'

In accordance with Article 51(3), the Assembly will consider the provisional amendments and decide whether to adopt, amend or reject them.

In September, Amnesty International issued a position paper analysing the provisional amendments.³ It recommended that the Assembly should consider reducing the number of judges in Article 70 proceedings, subject to certain safeguards to ensure the competence, independence and impartiality of the ICC. However, Amnesty International called for the Assembly to amend the provisional Rule to retain the important procedural protections of the rights of the accused in Articles 76(2) and 82(1)(d) which should apply in all ICC cases. A summary of the organization's comments on the three main elements of the provisional amendment are included below.

A. REDUCING THE NUMBER OF JUDGES IN ARTICLE 70 PROCEEDINGS

There is no requirement in international human rights law and standards for a specific number of judges to hear criminal proceedings. However, there is a requirement that criminal courts must be competent, independent and impartial.⁴ These factors should be taken into account in deciding how many judges are appointed to specific proceedings. Reducing the number of judges in ICC pre-trial and trial proceedings to one and the appeals chamber to three in Article 70 cases allows the ICC more flexibility to allocate its judicial resources to the prosecution of crimes listed in Article 5. However, the President of the Pre-Trial Division or the Presidency should also have flexibility to constitute chambers composed of more judges if necessary to safeguard the competence, independence and impartiality of the ICC and perceptions thereof, for example in highly complex or highly politicized cases.

RECOMMENDATION:

- Rule 165 and Regulation 66*bis* should be amended to establish a Pre-Trial or Trial Chamber of 'at least one judge' and a panel of 'at least three judges' to decide appeals with respect to Article 70 offences.

² Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence, 29 February 2016, paras. 1-3.

³ Amnesty International, 'Amendments to Rule 165 of the International Criminal Court's Rules of Procedure and Evidence must ensure fair trials and the rights of the accused', IOR 43/4910/2016, 28 September 2016, available at: www.amnesty.org/en/documents/ior53/4910/2016/en/

⁴ See for example: Article 14(1) of the International Covenant on Civil and Political Rights.

B. EXCLUDING SENTENCING HEARINGS

Amnesty International is concerned that the removal of separate sentencing hearings in accordance with Article 76(2) may preclude a convicted person from presenting mitigating evidence and submissions to a Chamber that are relevant to sentencing and undermine their rights in the trial itself, if during the trial is the only time mitigating circumstances can be presented. The ability of the defence to initiate a sentencing hearing in Article 76(2) is an important procedural protection to ensure that the right not to be compelled to testify or to confess guilt and to remain silent (Article 67(1)(g)) is fully respected and that an onus of rebuttal (Article 67(1)(i)) is not imposed on the accused during their trial. It should be applied in all ICC trials, including of offences against the administration of justice. An indication in the ICC's Report that such hearings may still be permitted at the discretion of the single judge is not sufficient to address this concern.⁵

RECOMMENDATION:

- Article 76(2) should be deleted from the list of Articles of the Rome Statute that shall not apply to Article 70 proceedings in provisional Rule 165(2).

C. EXCLUDING ARTICLE 82(1)(d) APPEALS

Article 82(1)(d) provides an important procedural protection by allowing for the defence to seek and obtain prompt remedies to violations of the rights of the accused or for the parties to seek other measures to ensure the fairness and expeditiousness of the trial. If such appeals are not permitted in Article 70 proceedings, it could lead to further violations of the rights of the accused or other parties and delay any possible resolution of important issues until post trial. In extreme circumstances, it could prevent the prompt resolution of fair trial issues that go on to undermine or affect the outcome of the whole trial. The interlocutory appeal is therefore an important safeguard against miscarriages of justice.

RECOMMENDATION:

- Article 81(1)(d) should be deleted from the list of Articles of the Rome Statute that shall not apply to Article 70 proceedings in provisional Rule 165(2).

⁵ Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence, 29 February 2016, para. 14.

RECOMMENDATION 3. THE ASSEMBLY SHOULD REJECT PROPOSALS TO PERMIT THE PARTIAL TRANSLATION OF KEY DECISIONS AND PROSECUTION WITNESS STATEMENTS

Amnesty International remains seriously concerned by proposals to amend Rule 76(3) and Rule 144(2)(b), which would allow Chambers to authorise partial translations of prosecution witness statements and key decisions of the Trial Chamber respectively into a language that the accused fully understands. Proposed Rule 101(3) would also allow Chambers to commence timelines (including for appeals) after providing the accused with only a partial translation of a decision.

When the proposed amendments were first introduced at the 13th session, Amnesty International stated that, despite some safeguards, the changes may undermine the right of the accused to translations (Article 67(1)(f)), as well as the right to adequate time and facilities to prepare a defence (Article 67(1)(b)); and to examine, or have examined, the witness against him or her (Article 67(1)(e)).⁶

Following almost two years of consideration by the Working Group on Amendments, two of the proposals – to add a new Rule 101(3) and amend Rule 144(2)(b) - have been resubmitted to the Assembly as originally drafted and the Working Group has indicated that the most controversial amendment to Rule 76(3) will remain on its agenda.

A. THE WORKING GROUP'S PROPOSAL TO ADOPT AMENDMENTS TO RULE 101(3) AND RULE 144(2)(B)

With no changes to the original proposals, Amnesty International remains concerned that if they are adopted, the Rules may undermine the ability of the accused and the defence (if it is not fluent in the working languages in which the decision is issued) to fully understand the factual and legal basis of key decisions on admissibility, jurisdiction, the criminal responsibility of the accused, sentencing and reparation. Such decisions are of fundamental importance to the interests of the accused and are likely to be appealed. Commencing timelines following only a partial translation of the decisions into the language of the accused would therefore limit the accused's ability to make informed decisions on whether and on what grounds to appeal and/or transfer the burden of such translations to the defence. Indeed, the Trial Chamber in the *Lubanga* case stated in relation to an appeal against conviction, that it would be unfair on the accused and it would constitute a breach of Article 67(1)(f) of the Rome Statute to require the accused to prepare for the appeal stage of the proceedings when he is effectively unable to read the judgment in English.⁷

RECOMMENDATION:

- The Assembly should reject the proposed amendment to Rule 144(2)(b) and amend proposed Rule 101(3) to exclude the commencement of time limits following partial translations. If it decides to adopt the proposals, significant safeguards should be incorporated into Rule 144(2)(b) to ensure that the rights of the accused are protected. At the very minimum, the Rule should require a case-by-case assessment of the nature of the decision, its impact on the accused and whether the defence may seek to appeal the decision. The scope and quality of any partial translation must also be guaranteed, in particular ensuring that the accused is effectively and fully informed of the factual and legal basis for the decision.

⁶ Amnesty International, 'International Criminal Court: Recommendations to the 13th Session of the Assembly of States Parties (8 to 17 December 2014)', IOR 53/012/2014, November 2014.

⁷ *Prosecutor v Thomas Lubanga Dyilo*, Decision on the translation of the Article 74 Decision and related procedural issues, ICC-01/04-01/06-2834, 15 December 2011, para. 23.

B. THE WORKING GROUP'S CONTINUED CONSIDERATION OF AMENDMENTS TO RULE 76(3)

Amnesty International is dismayed that, despite the serious fair trial concerns raised by civil society and some states parties, which have not been resolved in almost two years of consultations, the Working Group has indicated that it will continue to consider the proposal to permit partial translations of prosecution witness statements. Amnesty International reiterates its position that prosecution witness statements are key documents, which may contain important details of the allegations against the accused and other important information upon which the defence may rely. It is vital the statements are reviewed by the accused so that he or she can instruct their counsel appropriately. These statements must be provided in full in a language that the accused fully understands. For these reasons, Amnesty International continues to oppose the amendment to Rule 76(3).

RECOMMENDATION:

- The Assembly should take a decision to reject the proposed amendments to Rule 76(3) at this session.

RECOMMENDATION 4. THE ASSEMBLY SHOULD DEVELOP RULES ON THE IMPLEMENTATION OF ARTICLE 97 ENSURING THAT THE PROCESS DOES NOT INTERFERE WITH ONGOING NON-COOPERATION PROCEEDINGS

On 3 October 2016, South Africa circulated an aide memoire to states proposing new Rules of Procedure or Regulations on the implementation of Article 97 of the Rome Statute, stating that “there is no clear procedure regarding the structuring of consultations undertaken in terms of Article 97”.⁸ Article 97 provides:

Where a State Party receives a request under this Part [on international cooperation and judicial assistance] in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter...

Shortly after these proposals were circulated, it was confirmed that South Africa had deposited instruments to withdraw from the Rome Statute. A statement explaining the government’s reasons states that the experience of consulting with the ICC regarding a request to arrest and surrender Sudanese President Omar Al Bashir in 2015 “left South Africa with the sense that... its fundamental right to be heard was violated”.⁹

Amnesty International is dismayed by South Africa’s initiative to withdraw from the Rome Statute and has called on the government to reconsider its decision.¹⁰ Amnesty International also disagrees with the legal reasons provided by the government for refusing to cooperate with the ICC and considers that South Africa had a legal obligation to arrest Omar Al Bashir and surrender him to the ICC to face charges of committing genocide, crimes against humanity and war crimes in Darfur.¹¹ However, Amnesty International concurs with South Africa about the benefit of providing for clearer procedures to be applied under Article 97 and the need to establish a judicial process to rule on the legality of requests when consultations fail to resolve disputes.

As explained below, Amnesty International considers that Rules should be developed that are consistent with the Rome Statute clarifying the procedures to be followed (1) when states want to consult with the Court in accordance with Article 97; and (2) if a dispute raised during consultations cannot be resolved through dialogue and a judicial decision is required to settle the dispute in accordance with Article 119(1).¹² The organization therefore urges states parties to consider South Africa’s proposals, noting that the issue at stake is legally complicated and should not be rushed, and taking into account the following recommendations.

Recognizing that non-cooperation proceedings against South Africa are *sub judice* and the government may seek to raise concerns about the consultations in that process, states parties must focus firmly only on the merits of the proposals, ensuring that they do not interfere in the ongoing proceedings before the Pre-Trial Chamber, or be seen to be providing determinations of issues which are likely come before the Chamber in those proceedings.

⁸ Proposal submitted by South Africa on the implementation of article 97 of the Rome Statute.

⁹ Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court.

¹⁰ Amnesty International, ‘South Africa: Decision to leave International Criminal Court a deep betrayal of millions of victims worldwide’, 21 October 2016, available at: <https://www.amnesty.org/en/latest/news/2016/10/south-africa-decision-to-leave-international-criminal-court-a-deep-betrayal-of-millions-of-victims-worldwide/>

¹¹ Amnesty International, ‘South Africa: Allowing al-Bashir to evade justice shows total disregard for the law’, 15 June 2015, available at: <https://www.amnesty.org/en/latest/news/2015/06/south-africa-allowing-al-bashir-to-evade-justice-shows-total-disregard-for-the-law/>

¹² In establishing such legal procedures, consideration should also be given to whether the requested state or the requesting body may in accordance with the Rome Statute appeal decisions by the Pre-Trial Chamber or Trial Chamber settling such disputes, given the role of the Chamber settling the dispute in making the original request and the need for consistency between the decisions of the Chambers.

A. RULES REGARDING THE ARTICLE 97 CONSULTATION PROCESS

The consultation process in Article 97 provides for a dialogue between the state party and the Court when problems arise in relation to any request for cooperation, including arrest and surrender. The plain meaning of the verb to ‘consult with’ according to the Oxford English Dictionary is ‘to take counsel with’ or ‘to seek advice from’. State parties may therefore seek advice from the Court in order to fulfil their obligations. The process is not a diplomatic negotiation to decide any dispute on whether a state party should fulfil its obligations in the Rome Statute or to determine the legality of the request, which Article 119(1) states is a judicial function of the Court. Therefore, although Article 97 consultations are an important tool to resolve problems through dialogue, the process will not be an effective mechanism to resolve all disputes raised.

With no rules on the implementation of Article 97, a number of aspects of the process are unclear, including who a requested state should consult within the Court; the timelines for consultation; and the impact of the process on the obligation to cooperate. South Africa has proposed the following four rules or regulations governing the process which Amnesty International examines below.

1. In the case where a State Party receives a cooperation request and wishes to enter into consultations with the Court as provided for in Article 97, the requested state shall without delay approach the Presidency with a request for consultations. The President, the First Vice-President or the Second Vice-President shall conduct the consultations.
2. The Presidency may request another organ of the Court to make inputs into the consultation process.
3. The consultation process shall start within a reasonable time since the request by the State Party, as determined by the Presidency.
4. The consultation process shall be completed within one (1) day.

(i) The nature and scope of the consultations

Amnesty International is concerned that the first sentence of the proposal - which implies that consultations may be started at the discretion of the state party - is not consistent with Article 97. Article 97 requires that states ‘shall consult without delay’ when problems are identified. This legal obligation has been confirmed by the Court in a number of decisions.¹³ It applies to any problems which ‘may impede or prevent the execution of the request’, not just perceived disputes or questions regarding the legality of the request.

RECOMMENDATION:

- The first sentence of South Africa’s first proposal should be revised to reflect that states parties which identify any problems that may impede or prevent the execution of a request have an obligation to consult with the Court without delay.

(ii) Consultations with ‘the Court’

Article 97 provides that the state party shall consult with ‘the Court’ but it does not state who in the Court the state party should consult with. South Africa proposes in paragraphs 1 and 2 that states parties should consult with the Presidency, which may request input from other organs of the Court during the process. However, Amnesty International is concerned that the participation of members of the judiciary in this non-judicial consultation process may be inappropriate because they may subsequently be required to make a judicial determination on a dispute raised during the consultations. Tasking the Presidency with this function, which is neither

¹³ See for example: *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ICC-02/05-01/09-195, 9 April 2014.

administrative nor conferred upon it by the Rome Statute, would also be inconsistent with Article 38.

Amnesty International notes that Regulation 108 of the Regulations of the Court refers to the ‘requesting body’ of the Court in relation to consultations regarding cooperation requests made under Article 93 of the Rome Statute (other forms of cooperation). It also notes that Rule 176(2) of the Rules of Procedure and Evidence provides that the Registrar shall transmit requests for cooperation made by the Chambers to states and the Office of the Prosecutor shall communicate requests directly to states.

RECOMMENDATIONS:

- A requested state should consult with the ‘requesting body’ of the Court.
- In accordance with Rule 176(2), the requesting body should be the Registrar in relation to requests ordered by a Chamber or the Office of the Prosecutor in relation to its requests.

(iii) An expeditious process

As emphasized in Article 97 and above, states are under an obligation to consult with the Court ‘without delay’. Indeed, in some situations, an urgent process will be necessary especially where a suspect or evidence is temporarily on the territory of the state party or where persons or evidence may be at risk. Therefore, once the consultation process is triggered by a state party, the process should be conducted expeditiously.

In paragraphs 3 and 4 of its proposal, South Africa recommends that the process shall start ‘within a reasonable time’ and be completed within one day. However, in light of the urgency of some requests an even faster process should be available, if required.

RECOMMENDATION:

- The Rules or Regulations should provide that the process shall start and be completed as soon as possible, taking into account the urgency of the request.

(iv) The state party’s continuing obligation to cooperate

There is nothing in Article 97 that indicates the commencement of the consultation process has any effect, suspensive or otherwise, on the request for cooperation or the ability of the ICC to call for compliance with the original request. South Africa’s proposal is currently silent on the ongoing obligation of the requested state party to cooperate during the consultations.

RECOMMENDATION:

- The Rules or Regulations should state clearly that the state party’s obligations to cooperate continue and are not suspended at any stage of the consultation process.

B. RULES REGARDING THE LEGALITY OF A REQUEST FOR SURRENDER

Amnesty International considers that in the event that a dispute raised during the consultations regarding the legality of any request for cooperation cannot be resolved through dialogue, the Court should settle the dispute promptly in accordance with Article 119(1) by a judicial decision. Currently, however, procedures for challenging the legality of requests are limited to requests of ‘other forms of cooperation’ made under Article 93. Regulation 108 of the Regulations of the Court provides that a requested state may apply for a ruling from a competent Chamber once consultations have been exhausted. That Regulation however does not extend to requests for arrest and surrender under Article 89.

According to some academic commentaries, the omission of such a legal challenge was a deliberate decision by the drafters of the Rome Statute and the Rules, who were of the view that

states parties must strictly comply with requests for the arrest and surrender of suspects. In particular, they point to the strict language of Article 89 and to the text of Article 98 which requires that the Court shall make *a priori* determination that the request for surrender is consistent with the Article.¹⁴ They also state that the drafters of the Rome Statute considered that the risk of the Court erring by proceeding with a request for surrender contrary to Article 98 was tolerable.¹⁵ Amnesty International agrees that the Rome Statute imposes a strict obligation on states to cooperate with requests for arrest and surrender which must be strictly enforced. However, the lack of a judicial mechanism to address disputes regarding the application of Article 98 are problematic and should be revisited. Indeed, the current practice, which requires a state party to wait until non-cooperation proceedings have been commenced against it before it can present legal arguments to the relevant Chamber, are ineffective for ensuring cooperation and threaten to damage the relationship between the ICC and the state party. The organization is of the view that rules can be introduced that are consistent with the Rome Statute to establish such procedures.

South Africa has proposed two rules providing for a judicial ruling to settle a dispute which are examined below:

5. If the Presidency declares that consultations have been exhausted without the dispute having been resolved, the requested State may apply for a ruling from the competent Chamber, which application must be done within five working days.
6. An application under sub-rule/regulation 5 shall not in itself have suspensive effect, unless the Chamber so orders.

(i) The scope of the process

Recognizing that Regulation 108 already exists providing for a challenge to the legality of requests under Article 93, any new rules or regulations adopted should not duplicate that procedure. Furthermore, specific rules should be established to address requests for arrest and surrender which is a rigid, *stricto sensu* obligation that is not qualified by any grounds for refusal including the absence of procedures in national law.¹⁶ Indeed, the only limitations on the Court's ability to request the surrender of suspects is set out in Article 98.

RECOMMENDATIONS:

- Procedures should be established so that the relevant Chamber will rule on the legality of a request for surrender if a dispute exists following the exhaustion of consultations.
- The scope of any judicial determination should focus on whether the Court should have proceeded with the request in accordance with Article 98.

(ii) Rulings should be provided in all cases of disputes of the legality of a request for surrender

The Court's ability to settle such disputes, which are not resolved during consultations, should not be conditional on an application by the requested state as currently provided in South Africa's proposal. Indeed, a state party acting in bad faith that does not want to cooperate may decide not to seek a ruling on the legality of the request because it may weaken its position in subsequent non-cooperation proceedings. A decision is required in all cases to address the question of legality and to clarify state parties' obligations to cooperate.

¹⁴ Claus Kreß and Kimberley Prost, 'Article 98' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed), CH Beck, Hart and Nomos 2008, 1603.

¹⁵ *ibid.*

¹⁶ *ibid* 1534.

RECOMMENDATION:

- The Rules or Regulation should provide for either the requested state or requesting body to make an application or for the Chamber to make a decision on its own motion.

(iii) Rulings should be provided expeditiously and urgently when required

Given the urgent need to clarify states parties' obligations in some cases, the timelines for making an application for such a ruling should be significantly less than the five days proposed by South Africa and the Court should be able to reach an urgent decision if required.

RECOMMENDATION:

- If, upon making a declaration that consultations have been exhausted, the requesting body considers that a dispute exists regarding the legality of the request for arrest and surrender in accordance with Article 98, the requesting body shall inform the requested state and the relevant Chamber of the dispute immediately. The Chamber will inform the requested state and the requesting body of the timelines for making an application for a ruling or, in urgent cases, call for their submissions, in order to make a determination on its own motion.

(iv) Obligations of the state party to cooperate during the dispute settlement process

Amnesty International agrees with South Africa's proposal in paragraph 6 to clarify that an application shall not in itself have suspensive effect, unless the Chamber so orders.

RECOMMENDATION 5. THE ASSEMBLY SHOULD NOT TAKE ANY POSITION ON 'MITIGATING CIRCUMSTANCES' OF CRIMINAL RESPONSIBILITY

On 8 November 2016, Colombia submitted the following revised proposal for the draft omnibus resolution to the New York Working Group of the Bureau:

Recalling further the full range of justice and reconciliation mechanisms with restorative measures that are complementary to criminal justice processes, including truth and reconciliation commissions, national reparation programmes and institutional and legal reforms, including guarantees of non-recurrence **and, in this regard, convinced that genuine and concrete individual acknowledging that contributions to the promotion of peace and reconciliation, in a given case, may constitute a mitigating circumstance of criminal responsibility on a case by case basis...**

Amnesty International is concerned that Colombia's proposal seeks the Assembly's endorsement of the government's position on a legal matter that has no place in the resolution on Strengthening the International Criminal Court and the Assembly of States Parties.

On the substance of the proposal, Amnesty International notes that there is no provision in the Rome Statute or elsewhere in international criminal law for mitigating criminal responsibility. If the proposal relates to mitigation of sentencing, it is inappropriate as Articles 76 and 78 of the Rome Statute provide that it is the role of the Trial Chamber to consider and determine the appropriate sentence in the event of a conviction. Rule 145 of the Rules of Procedure and Evidence already sets out a non-exhaustive list of mitigating circumstances that the Chamber shall take into account in the determination of sentence. Whether a person's promotion of 'peace and reconciliation' should be taken into account is a matter for the Chamber to consider on a case by case basis taking into account the facts of a particular case. The Assembly should not seek or appear to interfere in such decisions.

Furthermore, Amnesty International is concerned that, if adopted, the proposal may interfere with the on-going preliminary examination of the situation in Colombia by the Office of the Prosecutor. The June 2016 peace agreement provided for the establishment of a Special Jurisdiction for Peace in Colombia which includes an overarching and standard reduction in punishment for those who admit responsibility for crimes against humanity or war crimes. Those who contribute to 'peace and reconciliation' would be symbolically sentenced to five to eight years of 'restriction of freedoms' but not prison sentences. Those who admitted responsibility but did not do so immediately, would serve five to eight years in prison. The OTP's Report on Preliminary Examination Activities (2016) states that the Office "has not formed a specific or final position regarding the Special Jurisdiction for Peace, which is yet to be established."¹⁷ Therefore, the Assembly should under no circumstances be seen as taking a position on these issues.¹⁸

¹⁷ Report on Preliminary Examination Activities 2016, 14 November 2016.

¹⁸ Amnesty International understands that a new peace agreement has been entered into between the parties to the conflict and will be studying and commenting on this in due course, especially as it affects accountability for Rome Statute crimes. We believe that the issues raised by the Office of the Prosecutor for consideration are likely to also arise in relation to the new peace agreement.

RECOMMENDATION 6. THE ASSEMBLY SHOULD TAKE URGENT MEASURES TO ENSURE SUFFICIENT FUNDING FOR FAMILY VISITS OF INDIGENT PERSONS IN ICC DETENTION

Further to concerns raised last year regarding the lack of resources of the Trust Fund for Family Visits (TFFV), Amnesty International remains concerned that the level of the fund remains critically low and threatens the ability of the ICC to ensure that the rights of indigent detainees to family visits are respected.

As the Presidency has previously decided, persons in detention have a right to family visits and there is an implied positive obligation on the ICC to fund family visits for indigent detained persons in order to give effect to a right which would otherwise be ineffective.¹⁹

The current balance of the TFFV is €9,372.55.²⁰ This figure does not appear to have changed significantly since October 2015, indicating that funded visits may not have taken place in the last year.

Although the resources currently available may be sufficient to fund some visits, the Presidency, in a recent decision, has stated that in considering requests, the Registry must take into consideration other pending or anticipated requests from other indigent detainees to ensure the equal treatment of detainees.²¹ As the principle of the equal treatment of detainees exists to ensure that the rights of all detainees are respected, it cannot be applied by the Registrar to limit the implementation of the rights of indigent detainees collectively. Therefore, sufficient funding to ensure a reasonable number of family visits for all indigent detainees must be found.

Importantly this same decision by the Presidency emphasizes the need to actively seek donations for the TFFV from states parties, other States, non-governmental organizations, civil society, individuals and other entities.²² Amnesty International has been informed that in response the Registrar has approached a number of states parties seeking donations, so far without results. Amnesty International calls on all states parties to make immediate donations to the TFFV to ensure that the ICC can comply with the rights of indigent persons in detention and to establish effective mechanisms to promote the Fund, including through a call for voluntary contributions in the omnibus resolution.

At the same time, the organization calls on the Assembly to consider the effectiveness of the TFFV which, despite efforts of the ICC and civil society to promote donations, has only received voluntary contributions from two states in more than five years. Even if voluntary contributions are provided to address the immediate lack of resources, our organization is concerned that the issue will inevitably recur when those funds are spent.

To safeguard for the implementation of the right to family visits, when the resources of the TFFV are insufficient to fund a reasonable number of family visits for indigent detainees on an equal basis, Amnesty International calls on the Court to continue to approve reasonable requests by first exhausting all the resources of the TFFV and then through resorting to the contingency fund, unless or until the TFFV is replenished.

¹⁹ Decision on 'Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008', ICC-RoR-217-02/08, 10 March 2009, para 37.

²⁰ Public redacted version of 'Decision on the "Application to review the Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit" dated [REDACTED] 2016', ICC-RoR221-02/16, 11 Aug. 2016, para. 14

²¹ Public redacted version of 'Decision on the "Application to review the Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit" dated [REDACTED] 2016', ICC-RoR221-02/16, 11 Aug. 2016, para. 40

²² Public redacted version of 'Decision on the "Application to review the Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit" dated [REDACTED] 2016', ICC-RoR221-02/16, 11 Aug. 2016, para. 42.

RECOMMENDATION 7. THE ASSEMBLY SHOULD ESTABLISH A STANDING AGENDA ITEM TO CONSIDER AND ADDRESS NON-COOPERATION

Article 86 of the Rome Statute provides that ‘States Parties shall, in accordance with the provisions of the Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’. Despite this, since the Assembly’s last session, the Court has referred three findings of non-cooperation to the Assembly pursuant to Article 87(7) of the Rome Statute. According to Article 112(2)(f), the Assembly has an obligation to consider any question relating to non-cooperation, which must include such referrals by the Court. Amnesty International therefore strongly supports the recommendation of the focal points on non-cooperation that ‘future sessions of Assembly include an agenda item to consider non-cooperation issues arising throughout the inter-sessional periods.’²³

A standing agenda item on non-cooperation would strengthen, standardize and formalize the Assembly’s response to non-cooperation ensuring that it fully meets its obligations under Article 112(2)(f). It would be an important mechanism to discuss and develop best practices and measures to prevent or to address instances of non-cooperation, taking into account the views and experiences of states parties that have not complied with requests or that have identified challenges.

²³ Assembly of States Parties, ‘Report of the Bureau on non-cooperation’ (8 November 2016) [44] <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-31-ENG.pdf>.

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INTERNATIONAL CRIMINAL COURT

RECOMMENDATIONS TO THE 15TH SESSION OF THE ASSEMBLY OF STATES PARTIES (16 TO 24 NOVEMBER 2016)

The 15th session of the Assembly of States Parties of the International Criminal Court will take place in The Hague from 16 to 24 November 2016 at a time when the Court's activities are increasing. However, three states parties have deposited instruments with the United Nations Secretary-General to withdraw from the Rome Statute.

This paper sets out Amnesty International's seven priority recommendations for the session which include urging states parties to: affirm their support for the Court; calling on states parties that are withdrawing from the Statute to reconsider their decisions; supporting additional resources for the Court to expand its work in 2017; ensuring that Rule amendments ensure the rights of the accused and the effectiveness of the Court; and strengthening measures to ensure state cooperation with the Court.