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INTERNATIONAL CRIMINAL COURT: AMNESTY INTERNATIONAL'S CALL FOR PLEDGES BY STATES AT THE 13TH SESSION OF THE ASSEMBLY OF STATES PARTIES

The 13th annual meeting of states parties to the Rome Statute of the International Criminal Court (ICC) will take place in New York from 8-17 December 2014. It is an important opportunity for states to affirm their commitment to fully realize the Rome Statute system of international justice and review the national mechanisms they have put in place to combat impunity for crimes under international law. In particular, states can make key pledges to strengthen their support for and cooperation with the ICC.

At its 12th session last year the Assembly welcomed pledges that had been made by 36 states and one regional organization and called on states to make additional pledges and keep the Assembly informed of their implementation.¹ In advance of the 13th session the Assembly's Secretariat has invited all delegations to submit further pledges.² Information on how to make pledges, including a form that states should complete, is available on the Assembly's website.³

Amnesty International calls on each of the current 122 states parties, unless they have already done so, to pledge to take the following steps to strengthen the Rome Statute system:

- To enact effective legislation to implement the Rome Statute;
- To ratify the Agreement on Privileges and Immunities of the International Criminal Court;
- To enter into an agreement with the ICC to relocate witnesses and victims;
- To enter into an agreement with the ICC to receive persons granted interim release;
- To enter into an agreement to receive persons released from the custody of the Court who cannot go back to their country of nationality or residence;
- To enter into an agreement with the ICC on enforcement of sentences;
- To make a voluntary contribution to the ICC Trust Fund for Victims;
- To make a voluntary contribution to the Special Fund for the purpose of funding family visits;
- To make a voluntary contribution to the Special Fund for witness relocation;
- To ratify the amendment adopted in Kampala to expand the definition of war crimes.

Amnesty International also encourages states that have previously made pledges in these or other areas to report to the Assembly at the 13th session on the status of their implementation.

1. PLEDGE TO ENACT EFFECTIVE LEGISLATION TO IMPLEMENT THE ROME STATUTE

To ensure that they can fulfil their obligations to investigate and prosecute persons suspected of crimes under international law, in accordance with the principle of complementarity, and provide full cooperation with the ICC, all states parties, regardless of their legal system, should enact effective implementing legislation. For example, states should ensure that war crimes, crimes against humanity, genocide and the modes of liability for the commission of

¹ ICC-ASP/12/Res.8, para. 66.

² ICC-ASP/13/SP/57.

³ See http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-NV-13-SP-57-ENG.pdf.

these crimes are defined in domestic criminal law in line with the highest standards of international law. In particular, states should ensure that all crimes of sexual and gender-based violence are criminalized in accordance with international law.⁴ Moreover, procedures for cooperation with the ICC should be clearly set out in national law, including executing requests from the Court for the arrest and surrender of accused persons, assisting investigations by the Prosecution and Defence, facilitating the appearance of witnesses, and responding to requests for other forms of cooperation. At present, just over half of the current 122 states parties have enacted domestic implementing legislation.⁵ Those states parties that have yet to do so should pledge to enact legislation promptly. National processes for reviewing national law and developing legislation should proceed without delay and include broad consultation with civil society. States are encouraged to consider and apply Amnesty International's: *International Criminal Court: Updated checklist for effective implementation*.⁶

2. PLEDGE TO RATIFY THE AGREEMENT ON PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL CRIMINAL COURT

To ensure the effective and independent functioning of the ICC, states parties and other states should ratify the Agreement on Privileges and Immunities of the ICC. The Agreement provides privileges and immunities to ICC officials and staff, as well as the Defence, that are essential to enable them to perform their duties and functions on the state's territory. To date 73 states, including one non-state party, have ratified the Agreement. The 50 states parties that have not done so should pledge to ratify without further delay and to take any necessary steps to promptly implement it in domestic law.

3. PLEDGE TO ENTER INTO AN AGREEMENT WITH THE ICC TO RELOCATE WITNESSES AND VICTIMS

To ensure that they can meet their obligations to cooperate with the protection of victims and witnesses in accordance with Articles 86 and 93(1)(j) of the Rome Statute, states parties should enter into relocation agreements with the ICC. States parties that do so commit to assist the ICC fully with resettling victims and witnesses who are at such serious risk on account of their interaction with the Court that they cannot remain in their own country. Since last year, only one state has signed such an agreement with the ICC, bringing the total number to 14. More agreements are needed in all regions of the world, including, but not only, in Africa, where the ICC's investigations and prosecutions are currently focused. States parties that have not yet done so should pledge to enter into a relocation agreement as soon as possible so that they can accept and provide vital protection to victims and witnesses at serious risk when required.

4. PLEDGE TO ENTER INTO AN AGREEMENT WITH THE ICC TO RECEIVE PERSONS GRANTED INTERIM RELEASE

To ensure that the ICC can release accused persons pending their trial, states parties should enter into agreements with the ICC to accept them while on interim release. Article 60(2) RS provides that the Chamber shall grant interim release unless it is satisfied that conditions requiring their detention have been met. This practice is consistent with the right of the accused to liberty and the presumption of innocence. However, in at least one case, the ICC has not been able to find a state willing to accept an accused person.⁷ To date, only one state (Belgium) has signed such an

⁴ See Amnesty International, *Rape and sexual violence: Human rights law and standards in the International Criminal Court*, Index: IOR53/001/2011 - <http://www.amnesty.org/en/library/info/IO53/001/2011> and Amnesty International, *Combating Sexual Violence in Conflict: Recommendations to states at the Global Summit to End Sexual Violence in Conflict*, Index: IOR53/006/2014 - <http://www.amnesty.org/en/library/info/IO53/006/2014/en>.

⁵ Only 41 states have enacted implementing legislation concerning both complementarity and cooperation obligations, while 20 have enacted legislation for complementarity alone, of which two states only have incomplete legislation, and nine have enacted legislation for cooperation obligations alone. Information on states that have enacted implementing legislation can be found at <http://www.iccnw.org> and <http://www.pgaction.org/campaigns/icc-campaign.html>.

⁶ See Amnesty International, *International Criminal Court: Updated checklist for effective implementation*, Index: IOR 53/009/2010 (2010) - <http://www.amnesty.org/en/library/info/IO53/009/2010>.

⁷ See *Prosecutor v Jean-Pierre Bemba, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the interim release of Jean-Pierre Bemba and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"*, ICC-01/05-01/08, 2 December 2009. The Appeals Chamber found that the willingness of a state to accept an accused person on its territory is a pre-condition of release, paras 106-107.

agreement.⁸ The ICC has stated that “[t]he signature of such agreements would be a clear sign by States that they want a Court that is impartial and respectful of the right of the defence.”⁹ Given the existence of only one such agreement, other states parties should pledge to enter into agreements to receive persons on interim release as soon as possible.

5. PLEDGE TO ENTER INTO AN AGREEMENT WITH THE ICC TO RECEIVE PERSONS RELEASED FROM THE CUSTODY OF THE COURT WHO CANNOT GO BACK TO THEIR COUNTRY OF NATIONALITY OR RESIDENCE

To ensure that the ICC can immediately release all persons who have been acquitted or whose cases have been otherwise concluded requiring their release from the Court’s custody, states parties should enter into agreements with the Court to accept such persons who cannot go back to their country of nationality or residence. Article 81(3)(c) RS provides that “[i]n the case of acquittal, the accused shall be released immediately”, subject to the possibility that, in exceptional circumstances, an acquitted person may continue to be detained pending an appeal of the decision by the Prosecutor. However, in most cases, the accused should be released immediately. A person may be released from the custody of the Court if proceedings are terminated prior to a final judgment or appeal. In some cases, however, it may not be possible to return released persons to their country of nationality or residence, including when they are at risk of persecution or torture. Indeed, the first person acquitted by the ICC requested that the ICC prevent his return to his country, stating he would be in fear for his safety there in light of the testimony he gave in his defence during his trial.¹⁰ However, to date, no other state has agreed to accept him. The ICC has subsequently developed a framework agreement for states to accept persons released who cannot go back their country of nationality or residence in 2013, but no state has yet signed one. All states parties should pledge to enter into agreements with the ICC to receive such persons as soon as possible following their release.

6. PLEDGE TO ENTER INTO AN AGREEMENT WITH THE ICC ON ENFORCEMENT OF SENTENCES

To ensure that persons convicted and sentenced to imprisonment serve their sentence in the facilities of states parties that meet international standards, states parties should enter into enforcement of sentences agreements with the ICC. Part 10 of the Rome Statute provides that convicted persons will serve their sentences in the prison facilities of states parties willing to accept such persons and emphasizes that this is a shared responsibility of all states parties. It sets out criteria for the designation of a state to enforce a sentence, including taking into account the nationality and views of the sentenced person.¹¹ Furthermore, such facilities must meet international standards.¹² To date, only eight states parties have entered into such agreements with the ICC, seven of which have entered into force. Only one African state (Mali) has signed an agreement and no new agreements have been signed in the last three years. More states parties should pledge to conclude sentence enforcement agreements with the ICC to ensure that the ICC has a broad discretion in designating where sentences can be enforced and that facilities that meet international standards are available in all regions of the world.

7. PLEDGE A VOLUNTARY CONTRIBUTION TO THE ICC TRUST FUND FOR VICTIMS

⁸ See ICC Press Release, *Belgium and ICC sign agreement on interim release of detainees*, ICC-CPI-20140410-PR993, 10 April 2014. On 23 October 2014, Belgium, the Democratic Republic of the Congo and France each accepted an individual granted interim release by the Court in the case of *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*. DR Congo and France accepted these individuals on an *ad hoc* basis in the absence of signed framework agreements on interim release with the Court.

⁹ ICC-ASP/12/35, para. 29.

¹⁰ Matthieu Ngudjolo Chui, who is the subject of a United Nations Travel Ban, requested an order for his transfer to Belgium, where he intended to apply for asylum, see: *Requête urgente de la Défense en vue de solliciter la relocalisation internationale de Mathieu Ngudjolo hors du continent africain et sa présentation devant les autorités d'un des Etats parties au Statut de la Cour pénale internationale aux fins de diligenter sa procédure d'asile*, ICC-01/04-02/12, 21 December 2012. This matter remains pending before the ICC Appeals Chamber and the travel ban remains in force until a state agrees to receive Ngudjolo Chui, see: *Registry's observations pursuant to regulation 24 bis of the Regulations of the Court on the "SECOND ADDENDUM to 'Defence request that the Appeals Chamber order the Victims and Witnesses Unit to execute and the host State to comply with the acquittal*, ICC-01/04-02/12-25, para. 4.

¹¹ See Article 103(3); Article 106 RS.

¹² For detailed guidance on the steps states should take in relation to enforcement of sentences, see Amnesty International, *International Criminal Court: Updated checklist for effective implementation*, Index: IOR 53/009/2010 (2010) - <http://www.amnesty.org/en/library/info/IO53/009/2010> at 39-42.

To ensure that victims of genocide, crimes against humanity and war crimes being investigated by the ICC are provided with assistance and that the ICC's reparation orders are fully implemented, all states parties should make voluntary contributions to the Trust Fund for Victims. The Trust Fund for Victims, through its projects of assistance and its possible role in implementing ICC reparation orders, is an essential mechanism to ensure the positive impact of the Rome Statute system on victims. However, despite generous contributions by 32 states since its establishment,¹³ it requires a significant increase in resources to expand its projects of assistance in relation to all situations under investigation by the ICC and to be prepared for the first reparation orders of the ICC. States parties, particularly states that have yet to make a contribution, should, in accordance with their financial abilities, pledge a voluntary contribution to the Trust Fund. States which are in a position to do so should consider pledging a regular annual contribution in order to help ensure the predictability of resources at the disposal of the Fund.

8. PLEDGE TO MAKE A VOLUNTARY CONTRIBUTION TO THE SPECIAL FUND FOR THE PURPOSE OF FUNDING FAMILY VISITS

To ensure that the right of indigent accused persons in detention to receive family visits are respected, states parties should make voluntary contributions to the Special Fund for the purpose of funding family visits. In 2010, the Assembly established the Special Fund despite a decision of the ICC Presidency that persons in ICC detention have a right to family visits and that the ICC has a positive obligation to fund family visits of indigent persons.¹⁴ In doing so, the Assembly decided that such visits would be funded entirely by voluntary contributions. However, only one state has made two contributions to the Special Fund in four years and the balance of the fund had fallen to approximately €10,000 by October 2014.¹⁵ Given that the expenditure on family visits in 2013 was €52,460, the Special Fund may exhaust its resources in the near future unless additional contributions are made. Having established the Special Fund, it is essential that more states parties make voluntary contributions to ensure the rights of accused persons in detention are respected. States parties can demonstrate the importance of the rights of accused persons by pledging to make a voluntary contribution to the Special Fund for the purpose of funding family visits. If insufficient voluntary contributions are made, alternative funding solutions must be adopted by the Assembly.

9. PLEDGE TO MAKE A VOLUNTARY CONTRIBUTION TO THE SPECIAL FUND FOR WITNESS RELOCATION

To support other states parties in relocating victims and witnesses, states parties should make voluntary contributions to the Special Fund for witness relocation. The Special Fund seeks to complement the process of states entering into agreements to relocate witnesses and victims. It assists states parties that are willing to accept witnesses and victims who are at serious risk but which are not in a position to bear the full cost of such relocation. The initiative also aims to foster regional solutions for the relocation of those at risk, thereby minimising the personal impact of relocation. Only seven states have made contributions to this Special Fund to date. In addition to entering into agreements on relocation, states parties are encouraged to also make voluntary contributions to the Special Fund to support other states that wish to provide this vital form of cooperation to the ICC.

10. PLEDGE TO RATIFY THE AMENDMENT ADOPTED IN KAMPALA TO EXPAND THE DEFINITION OF WAR CRIMES

At the Review Conference on the Rome Statute of the ICC, held in Kampala in 2010, states parties adopted two amendments to the Rome Statute which are open for ratification to all states parties. An amendment to Article 8 RS makes employing certain prohibited weapons war crimes in non-international conflict, including poison and poisoned weapons, asphyxiating and poisonous gases and bullets which expand or flatten easily in the human body.¹⁶ To date, it

¹³ These are: Andorra, Australia, Austria, Belgium, Colombia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Japan, Jordan, Latvia, Liechtenstein, Luxembourg, Mexico, the Netherlands, Norway, Poland, Republic of Korea, Senegal, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago and the United Kingdom.

¹⁴ *Decision 'Mr Mathieu Ngudjolo's Complaint under Regulation 221(1) of the Regulations of the Registry against the Registrar's Decision of 19 November 2008'*, ICC-RoR-217-02/08, 10 March 2009.

¹⁵ Germany has made two contributions of €85,000 each.

¹⁶ See RC/Res.5* Amendments to article 8 of the Rome Statute.

has been ratified by 21 states. States parties should pledge to ratify the amendment to Article 8 RS without delay in order to ensure that the ICC can exercise jurisdiction over the use of prohibited weapons in both international and non-international armed conflicts.

Amendments were also adopted at Kampala that seek to activate the ICC's jurisdiction over the crime of aggression. To date, 18 states have ratified them.¹⁷ Although it is not within Amnesty International's mandate to promote ratification of the crime of aggression,¹⁸ the organization notes that states parties that wish to do so may also make pledges to ratify these amendments.

¹⁷ See ICC Website, available here: http://www.icc-cpi.int/en_menus/asp/RomeStatute/Pages/default.aspx/. The crime of aggression is defined in Article 8*bis* RS. It can come into force pursuant to a decision of the Assembly after 1 January 2017 when 30 ratifications have been achieved (see Article 15*ter* RS: Exercise of jurisdiction over the crime of aggression (Security Council referral)). See also: RC/Res.6* The crime of aggression.

¹⁸ Amnesty International is an organization that works to ensure that people everywhere enjoy all rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. Although the organization recognizes that an act of aggression by one state against another can lead to serious human rights abuses in international armed conflicts, it does not take a position on whether conflicts themselves should be determined to be just or legal or whether leaders suspected of committing the specific crime of aggression – a crime by one state against another state - should be prosecuted. Instead, during international armed conflicts, Amnesty International focuses on protecting civilians; exposing violations of human rights and humanitarian law; and campaigning against impunity for human rights abuses committed during conflict. This includes calling for the investigation and prosecution of persons suspected of genocide, crimes against humanity and war crimes.