HUMAN RIGHTS WATCH

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

November 2012

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Summary of Recommendations for the Eleventh Session

In their statements during the **General Debate and other relevant Assembly discussions**, states parties should:

- Affirm their commitment to the mission and mandate of the International Criminal Court (ICC) to end impunity for the crimes of most concern to the international community;

- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference;

- Encourage other states parties to continue to express and implement diplomatic and political support for the court;

- Commit to continue the evolving dialogue with the United Nations Security Council to strengthen Council practices on court referrals; and

- Support meaningful victim participation, outreach, field presence, the Trust Fund for Victims and attention to the court's legacy as elements of the court's work that are particularly relevant to impact among affected communities.

With regard to the **plenary discussion on cooperation**, states parties should:

- Contribute actively by coming prepared to share lessons learned and best practices on the themes identified for debate;

- Draw on the 2007 Bureau report on cooperation and its 66 recommendations for enhancing state cooperation;

- Underscore the obligation of ICC states parties to cooperate fully with the court, including in carrying out arrests, and commit to assisting one another in providing full cooperation even under difficult circumstances;

- Evaluate whether the court has sufficient capacity to support arrest efforts; and

- Commit to adopting policies at the national level to strengthen the prevention of and response to non-cooperation and to avoid contacts with those wanted for arrest by the ICC.

With regard to the **plenary discussion oncomplementarity**, states parties should:

- Send high-level representatives, including officials of development agencies or ministries, to participate in the debate;

- Send a clear message regarding the importance of national justice for atrocity crimes and a long-term commitment to its realization;

- Commit to further mainstreaming the importance of accountability initiatives with diplomatic and development staff on the ground;

- Share experiences about initiatives taken to promote national justice for atrocity crimes in ICC countries under analysis or investigation. This could include information about what has and has not worked in terms of implementing initiatives directed at reinforcing national efforts to bring perpetrators to justice, including in the area of donor coordination; and

- Facilitate efforts to anchor complementarity in the Assembly of States Parties, including by calling on the focal points to convene meetings under the auspices of the existing working groups in The Hague and in New York on specific topics relating to complementarity.

With regard to **the election of the ICC deputy prosecutor**, states parties should:

- Put aside narrow interests and vote only for the most highly qualified candidate, giving priority to (1) demonstrated experience of professional excellence in complex criminal cases; (2) demonstrated ability to act with independence and impartiality in the exercise of professional duties; (3) a proven track-record of professional excellence in

institutional management; and (4) demonstrated experience in working with other bodies or agencies to effectively achieve a common goal.

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

- Express its political commitment through strengthened language to meaningful victim participation, outreach, the Trust Fund for Victims, field presence and attention to the court's legacy as elements of the court's work that are particularly relevant to impact among affected communities.

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

- Reflect outcomes and recommendations of the plenary discussion on cooperation, including by taking note of any moderator's summary issued, in order to provide an additional reference point for future efforts to enhance cooperation;

- Retain bracketed language in the draft resolution regarding avoiding non-essential contacts with those wanted for arrest by the ICC;

- Renew the mandate for a cooperation facilitator in order to maintain focuson measures necessary to enhance cooperation with the court, including through the organization of additional intersessional seminars;

- Request the cooperation facilitator to develop proposals in consultation with states parties for an intersessional working group on cooperation with a view toward establishing the working group at the Assembly's 12th session; and

- Make cooperation a standing agenda item for future Assembly sessions.

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

- Reflect outcomes and recommendations of the plenary discussion on complementarity, including by taking note of any moderator's summary issued, in order to provide an additional reference point for future efforts;

- Include language regarding the importance of strengthening willingness alongside capability; and

- Acknowledge the link between complementarity efforts and the court's exit strategies and long-term impact or legacy in ICC situation countries.

With regard to adoption of a 2013 **budget** for the International Criminal Court, states parties should:

- Express concern for the court's ability to have real impact in affected communities and insist that this concern provide one benchmark against which the adequacy of the resources provided to the court is measured.

With regard to any discussions on **implementation of Assembly procedures to respond to non-cooperation**, the Assembly should:

- Mandate the Bureau to provide a further report to reach a common menu of other measures available to the ASP, including securing guarantees of non-repetition and the suspension of ASP voting rights.

I. Reflections on the International Criminal Court at the Tenth Anniversary of the Rome Statute's Entry into Force

It has been ten years since the entry into force of the Rome Statute, the treaty of the International Criminal Court. In July 2002—far quicker than had been anticipated and only four years after the treaty's adoption in Rome—the ICC's 60th member country ratified the treaty, paving the way for the court to get down to work adjudicating crimes of genocide, war crimes, and crimes against humanity. A decade on, the treaty's membership has more than doubled, with 121 member countries. Its second prosecutor, Fatou Bensouda from The Gambia, took office in June 2012, inheriting a sizeable caseload of investigations in seven countries. Even as the ICC's reach remains too limited—the United States, China, and Russia have remained outside the system and have used their influence to shield allies from the court's jurisdiction—for many communities affected by mass atrocities, "The Hague" has increasingly come to represent the last, best hope for justice.

This is an achievement worth celebrating, and this anniversary year has been fittingly marked by conferences, seminars and workshops.The most fitting tribute, of course, is renewed commitment to the mission of the ICC and to seeing the effective implementation of its mandate in practice. The court's first decade has not been an easy one, and it has, at times, disappointed expectations of the world's first permanent criminal court. It is also facing challenges not present at its founding, in particular, global economic conditions that are reducing the priority and resources afforded to international justice. This will likely place new obstacles in the court's way as it seeks to improve its performance while more fully realizing its mandate.

As the court enters its second decade, therefore, each component of the Rome Statute system—including court officials and staff, states parties, and the Assembly of States Parties (ASP)—will need to heighten their efforts to ensure that the ICC can meet its founders' aspirations. At the Assembly of States Parties session scheduled for The Hague from November 14 to 22, 2012, ICC member countries will participate in a General Debate organized around the theme of "Tenth anniversary of the entry into force of the Rome Statute: the challenges ahead." Human Rights Watch notes below two challenges that should attract discussion in the General Debate and the attention of states parties well

beyond the Assembly session: (1) increasing political support for the ICC and (2) strengthening the court's impact in affected communities.

The addition of plenary discussions on cooperation and complementarity to the ASP's agenda are welcome: cooperation and complementarity are both critical areas in which increased efforts will be necessary to support the ICC and the broader fight against impunity. We address in more detail cooperation and complementarity, as well as the election of the next ICC deputy prosecutor, which will take place during the Assembly session, in the balance of this memorandum.[1]

A. Increased Political Support to the ICC

In spite of its growing membership and the commitment of many states parties, the consistent public and diplomatic support necessary for the court to carry out its judicial mandate without interference has not fully materialized. Instead, this support has tended to come and go, dragged along in the inconstant tides of global politics. States parties have not yet fully integrated execution of their obligations to the ICC alongside other important, but different, diplomatic or economic policy objectives. President Omar al-Bashir of Sudan—wanted by the ICC—and his allies within the African Union have persisted in attempts to ratchet up opposition to the court, including by trading on legitimate dissatisfaction with the still-too-limited reach of international justice. In some respects, they have taken up from where the United States—which has encouragingly warmed its relations with the court—left off during the second George W. Bush administration.

The United Nations Security Council has offered weak support to the court, referring situations for investigation only to then provide limited backing to secure cooperation and arrests in the resulting cases. There are important efforts to change this, including a first-ever debate convened under the Council presidency of the newest ICC member country, Guatemala, on the relationship between the ICC and the Council. Improving this

[1] Human Rights Watch also joins in team papers prepared by the Coalition for the International Criminal Court in advance of this Assembly session on budget and finance, communications and outreach, cooperation, elections, legal representation, and ASP oversight. The papers will be available on their release from http://iccnow.org/?mod=asp11.

relationship and securing more consistent support from the Council to the court will require intensified attention.[2]

There was perhaps no greater sign of the court's vulnerability this year than the detention by a Libyan militia of four ICC staff members in June 2012. The four—held in the western town of Zintan—were on official court business and their detention had no legal basis. Libya's central authorities publicly defended the actions of the militia, while the ICC issued a near-apology to secure their release.

After 10 years states parties and other international partners are still struggling and—too often—falling short in operationalizing, among the key priorities of their administrations, the support the court needs to succeed. This shortcoming may be linked to state party frustrations over the performance failures at the court, discussed further below. Whatever the causes, it undermines the institution these same states have created. The ICC still remains too new and too fragile for states parties to let up in expressing and implementing this constant commitment. It is, after all, only 20 years since the creation of the International Criminal Tribunal for the former Yugoslavia and the modern start of international justice's hugely ambitious project to end impunity for mass atrocity.

While the ICC's existence as a permanent institution, its growing membership, and its increased operationalization stand as a bulwark against a return to antipathy and license in the face of serious international crimes, neither the norm of accountability nor the court itself have advanced so far that its supporters can rest easy. For the court to be increasingly capable of taking on important but politically unpopular cases, to secure arrests, and to have its independence respected, the ICC will need increased rather than lessened expressions of political commitment—whether at the upcoming ASP session, in strategic forums such as the UN Security Council and regional organizations, or in bilateral contacts—and the implementation of that political commitment in practice.

The General Debate at the ASP remains an important forum for advancing political support to the court, particularly when statements are delivered by high-ranking officials. ICC

[2] For more information on this debate, see Letter from Human Rights Watch to Foreign Ministers of ICC States Parties, "October 17 Thematic Debate at the Security Council on the Council's Relationship with the ICC," October 16, 2012, http://www.hrw.org/news/2012/10/16/letter-october-17-thematic-debate-security-council-councils-relationship-icc.

states parties should use General Debate statements and statements during the plenary discussion on cooperation to:

- Affirm their commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;

- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference;

- Encourage other states parties to continue to express and implement diplomatic and political support for the court; and

- Commit to continue the evolving dialogue with the UN Security Council to strengthen Council practices on court referrals.

B. Strengthening the Court's Impact in Affected Communities

To say that the modern project of international justice is new and the ICC even newer is not to excuse shortcomings in the court's development over the last decade. The ICC is not yet as far along in implementing its mission and mandate in the fight against impunity as it should be.

Some of these shortcomings have attracted considerable attention.

Widely faulted for its slow pace of proceedings—only one case has yet to reach a verdict, although a verdict is expected in a second case before the end of the year, one other trial is ongoing, and three cases are teed up for trial—court officials now show more serious signs of taking steps to improve performance. Following discussions this year in the context of the Assembly's Study Group on Governance, a "Working Group on Lessons Learnt," composed of judges, will develop recommendations to states parties to amend the court's rules of procedure and evidence. The emphasis will be on expediting proceedings, while preserving fair trial and other rights within the Rome Statute.[3] It is not clear yet whether this will lead to real change but the attention to this issue is welcome.

[3] See Assembly of States Parties (ASP), "Report of the Bureau on the Study Group on Governance," ICC-ASP/11/31, October 23, 2012, http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-ENG.pdf (accessed November 4, 2012), paras. 10-

Aspects of the policy of Luis Moreno-Ocampo, the first ICC prosecutor, tended to exacerbate rather than ameliorate accusations of bias and politicization in the court's work, for example, through charging strategies that too often appeared to favor one side or the other to a conflict.[4] The newly inaugurated prosecutor, Fatou Bensouda, has emphasized her view that "justice, real justice, is not a pick-and-choose system. To be effective, to be just and to be a real deterrent, the Office of the Prosecutor's activities and decisions will continue to be based solely on the law and the evidence."[5]

But less often discussed in this tenth anniversary year is whether the ICC is living up to a key aspiration at its founding, namely, whether it is equipped to deliver justice with a real impact in affected communities.

The ICC holds out the possibility of improving the operation of international justice. It benefits from innovative provisions in the Rome Statute and from the experiences of those tribunals that had come before it, which were often criticized for remaining too far removed from the victim communities they were set up to serve. Moving international justice forward at the ICC should encompass not only the highest standards of judicial administration, respect for fair trial rights, and progress in the development of international criminal law, but also a real and operative concern to place affected communities at the heart of the court's work.

This is a vision of the court that has yet to be realized, however. In fact, if anything it appears that the ICC and its states parties over time may be settling for a much more reductive view of its mandate.

17; ASP, "Study Group on Governance: Lessons learnt:First report of the Court to the Assembly of States Parties," ("Lessons Learnt First Report"), ICC-ASP/11/31/Add.1, October 23, 2012, http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-Add1-ENG.pdf (accessed November 4, 2012), paras. 13-19.

4 Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 2011, http://www.hrw.org/reports/2011/09/15/unfinished-business.

5 Fatou Bensouda, ICC Prosecutor-Elect, "Ceremony for the solemn undertaking of the Prosecutor of the International Criminal Court," The Hague, June 15, 2012, http://www.bpi-icb.com/images/pdf/15062012fbsolemnundertaking.pdf (accessed November 4, 2012), p. 2.

Rather than develop robust field offices to support the court's activities, the court has had to shuffle staff among countries to stretch activities like outreach to new situations.[6] The court's Trust Fund for Victims is currently implementing its assistance mandate in only two of seven country situations, Uganda and Democratic Republic of Congo.[7] In addition to creating perceptions of bias, the first prosecutor's approach, referenced above, did not always prioritize the experience of affected communities, in that the cases selected have not always corresponded with underlying patterns of the most serious crimes or named those individuals widely thought to be among those most responsible for these crimes. This has left the potential for real gaps in the court's ability to deliver meaningful justice.[8]

There also have been long-standing problems in giving effect to the Rome Statute-guaranteed right of victims to participate in proceedings before the court. These problems have ranged from backlogs in processing victim applications to ensuring adequate resources for victims' counsel to provide meaningful representation of their clients,[9] and these challenges are likely to increase as a growing number of victims seek to access their rights before the court. The Working Group on Lessons Learnt has identified several aspects of victim participation as a subject for further study.[10]

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6 See, for example, ASP, "Proposed Programme Budget for 2013 of the International Criminal Court," ICC-ASP/11/10, August 16, 2012, http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-10-ENG.pdf (accessed November 4, 2012), para. 457 (noting the redeployment of two outreach staff from Democratic Republic of Congo to Côte d'Ivoire and that the same outreach officer is responsible for outreach activities for the Sudan and Libya situations).

7 Judges have recently given the go ahead for the implementation of six projects in a third situation, that of Central African Republic. *Situation in the Central African Republic*, ICC, ICC-01/05, "Decision on the 'Notification by the Board of Directors in accordance with Regulation 50 a) of the regulations of the Trust Fund for Victims to undertake activities in the Central African Republic'," October 23, 2012, http://www.icc-cpi.int/iccdocs/doc/doc1496856.pdf (accessed November 4, 2012).

8 Human Rights Watch, *Unfinished Business*.

9 See Victims' Rights Working Group (VRWG), "The Implementation of Victims' Rights before the ICC: Issues and Concerns Presented by the Victims' Rights Working Group on the occasion of the 10th Session of the Assembly of States Parties, 12 - 21 December 2011," http://www.vrwg.org/VRWG_DOC/2011_VRWG_ASP10.pdf (accessed November 4, 2012), pp. 7-10; see also CICC Legal Representation Team, "Submission and Recommendations on the 'Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011,'" http://iccnow.org/documents/CICC_Paper_on_Legal_Aid_9-03-12.pdf (accessed November 4, 2012), pp. 3-4.

10 ASP, Annex to "Lessons Learnt First Report," p. 5. Chambers in the *Gbagbo* case and the two Kenya cases have already taken some decisions this year to, in the former case, move toward a collective application process, and, in the latter, to eliminate the application process altogether and to put in place a system of legal representation that combines external counsel with counsel drawn from the Office of Public Counsel for Victims. *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, "Second decision on issues related to the victims' application process," April 5, 2012, http://www.icc-cpi.int/iccdocs/doc/doc1392379.pdf (accessed November 4, 2012); *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC, Case No. ICC-01/09-01/11, "Decision on victims' representation and participation," October 3, 2012, http://icc-cpi.int/iccdocs/doc/doc1479374.pdf (accessed November 4, 2012); *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC, Case No.ICC-01/09-02/11, "Decision on victims' representation and participation," October 3, 2012, http://www.icc-cpi.int/iccdocs/doc/doc1479387.pdf (accessed November 4, 2012). See also REDRESS, "Q&A: ICC Decision on Victims' Representation and Participation in the Kenya Cases," October 18, 2012,

These and other gaps in the court's implementation of its mandate in a manner that gives practical emphasis to impact in affected communities have resulted, in part, from the policy decisions by court officials. But it is difficult not to see the influence of states parties at work. States parties have placed less emphasis as a general matter in their discussions on ensuring that the court's work is grounded in a concern for its impact in affected communities.

While The Hague Working Group's joint facilitation on victims, affected communities, and the Trust Fund for Victims and reparations has kept attention focused on these issues, state party discussions have tended to emphasize, although not exclusively, financial consequences for the court's budget. A palpable concern for the budgetary impact permeates the report of discussions, in particular, on implementation of the court's "Revised Strategy in Relation to Victims."[11] At last year's Assembly of States Parties session there were concerted—ultimately unsuccessful—efforts to have language that had been routinely adopted regarding the court's outreach activities dropped from the omnibus resolution. Although the appreciation of states parties for the value of outreach activities in affected communities seems to have improved over the past year (and its role has been acknowledged in the most recent report of the Assembly's Committee on Budget and Finance[12]), this has required concerted efforts by civil society to explain, once again, the necessity of ensuring that justice is not only done but seen to be done. "Exit strategies" for the ICC in its situation countries have attracted increasing attention, including from the Committee on Budget and Finance and some states parties. But a discussion of the court's legacy or long-term impact has not yet taken place in the Assembly.

This is a departure from earlier state party practice. A concern for the impact of the ICC in affected communities was certainly promoted by nongovernmental organizations, but it also became the subject of a working consensus among states parties as the ICC first

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http://www.vrwg.org/home/home/post/39-q--a---the-landmark-icc-decision-on-victims--representation-and-participation-in-the-kenya-cases (accessed November 4, 2012).

[11] ASP, "Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations," ICC-ASP/11/32, October 23, 2012, http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-32-ENG.pdf (accessed November 4, 2012), paras. 16-23.

[12] ASP, "Report of the Committee on Budget and Finance on the work of its nineteenth session," ICC-ASP/11/15, October 29, 2012, http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-15-ENG.pdf, para. 36("Public outreach, of course, was essential to raising awareness and promoting understanding of the Court's mandate and work, primarily among the affected communities.").

became operational. States parties, for example, pushed the court to improve its outreach activities when the court itself was slow to get these started.[13] At the Kampala review conference in 2010, "Impact on victims and affected communities of the Rome Statute system" headlined the stocktaking agenda.

Thisdrift away from a concern with impact may stem from state party frustration with the court's limited progress in its proceedings, dampening ambition with regard to the impact of those proceedings. Resources are also certainly an issue here. Efforts by some states parties, faced with the difficult economic conditions referenced above, to hold the court's budget down has been one factor in fraying consensus regarding the importance of impact. Additional resources would likely be needed to support the court's more robust implementation of its mandate, including resources to support additional investigations and cases in each situation.

It may be likely that the court and the Assembly will need to contend with resource constraints for some time to come. Under the circumstances, it is essential that court officials maximize the funding allocated to the court and seek to be as efficient as they can.But the Assembly has an important role to play in guiding the court in how it navigates these scarce resources without damaging its overall mandate. Regardless of how the court's budget is set in any given year, the court and its states parties cannot allow a concern for impact to be driven off the agenda. Even if the resources made available to the court are not optimal, the Assembly should insist that a concern for the court's impact in affected communities remain at the core of its work. As indicated above, these are lessons from the ad hoc tribunals that, if ignored, will cost states parties and the ICC much more in the long run in terms of lost credibility, legitimacy, and effectiveness.

As the court enters its second decade, therefore, ICC member countries and its officials should give priority to reclaiming a shared consensus regarding the importance of ensuring the court serves affected communities and has a long-term impact in situation countries. Reasserting this consensus will take time. It will need to be felt in the facilitations and discussions with court officials within the Assembly's working groups,

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[13] See Human Rights Watch *Courting History: The Landmark International Criminal Court's First Years*, July 2008, http://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf, p. 120.

many of which, including facilitations on victims, reparations, complementarity, and the court's strategic plan, could address improving this impact.

In the short-term, at the upcoming Assembly session, reclaiming a shared vision for the court could take at least two forms. First, in General Debate statements and Assembly resolutions, states parties should:

- Support meaningful victim participation, outreach, field presence, the Trust Fund for Victims and attention to the court's legacy as elements of the court's work particularly relevant to short and long-term impact among affected communities.

Second, in budget negotiations, states parties should:

- Express concern for the court's ability to have real impact in affected communities and insist that this concern should provide one benchmark against which the adequacy of the resources provided to the court is measured.

II. Election of the Deputy Prosecutor

At the upcoming ASP session, states parties will elect a new deputy prosecutor from a list of three candidates put forward by the ICC prosecutor, Fatou Bensouda. A strong deputy prosecutor is essential to support the ICC prosecutor's oversight and effective management of the Office of the Prosecutor and its staff, to assist in decision-making at the highest levels while also permitting the appropriate delegation of responsibility, and to liaise on behalf of the office with other court organs and staff.

We urge states parties to put merit first in their consideration of the nominees. In our view, this means giving priority to the same qualities that were important in last year's election of the prosecutor. These include:

- Demonstrated experience of professional excellence in complex criminal cases;
- Demonstrated ability to act with independence and impartiality in the exercise of professional duties;
- A proven track-record of professional excellence in institutional management; and
- Demonstrated experience in working with other bodies or agencies to effectively achieve a common goal.

It is likely that a deputy prosecutor will serve as an additional ambassador for the office and the court among its many constituencies, including affected communities, states parties, and the broader international community. It is therefore important that the elected individual also have demonstrated experience in communicating effectively to a wide variety of constituencies. But given that a deputy prosecutor's responsibilities will primarily concern the day-to-day running of the office, we recommend that states parties place more emphasis on the professional excellence of candidates in complex criminal cases and institutional management.

Each of the three candidates has completed a questionnaire prepared by the Coalition for the International Criminal Court (CICC). These questionnaires, available online, may assist

states parties in assessing their qualifications in light of the above benchmarks, as well as other important criteria.[14]

Finally, Human Rights Watch notes the decision by the prosecutor to seek, at this time, only the election of a deputy prosecutor for prosecutions. The court's first prosecutorinitially established two deputy prosecutor positions, one for prosecutions and one for investigations. Although the deputy position for investigations has been vacant now for several years, in our view, an experienced deputy prosecutor for investigations could offer the office a number of important benefits.

A deputy prosecutor for investigations could play a central role in conceptualizing and taking responsibility for the implementation of the office's investigative strategy in support of its prosecutions. It would also help ensure that the views, needs, and assessments of investigators are taken into account at the highest levels within the office.

In a letter to the ICC prosecutor welcoming her inauguration, we asked her to consider whether election of a deputy prosecutor for investigations with experience devising and managing complicated investigations could help better prioritize and enhance the office's investigations or whether any other steps could be taken in this regard.[15] Should the prosecutor decide to seek the election of a second deputy prosecutor, states parties should be prepared to support the resources required for this position, as well as to ensure a merit-based election.

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[14] The three candidates are Paul Rutledge, James Stewart, and Raija Toiviainen. The CICC questionnaires may be accessed at http://iccnow.org/?mod=electiondeputyprosecutors.

[15] Letter from Human Rights Watch to Fatou Bensouda, ICC Prosecutor-Elect, "Priorities for the New International Criminal Court Prosecutor," June 8, 2012, http://www.hrw.org/news/2012/06/08/icc-letter-prosecutor-elect-fatou-bensouda.

III. Cooperation

A. Positive Evolution in Assembly Practices on Cooperation

Over the 10 years since the Rome Statute's entry into force it has become clearer the extent to which the ICC must rely on state cooperation and support. This is true in terms of the diplomatic and political support necessary for the court to carry out its judicial work independently, as discussed in part I.A above, as well as the technical expertise and dedicated capacity to ensure national authorities are equipped to respond to requests for judicial assistance and logistical support.

Particularly when it comesjudicial assistance and logistical support, states parties have the opportunity through the Assembly to help one another to increase cooperation and assistance to the court, including through the exchange of best practices. But, until this year, the Assembly had made only limited progress when it came to equipping itself to facilitate more effective cooperation by states parties.

The appointment of a series of focal points or facilitators to take forward discussion on cooperation has been an important tool, particularly to promote dialogue between states parties and the court. And the Bureau's 2007 report on cooperation—with its 66 recommendations, grouped around the themes ofgeneral legal mechanisms; diplomatic and public support; cooperation in support of analysis, investigations, prosecutions, and judicial proceedings; arrest and surrender; witness protection and security; logistics and security; personnel; cooperation in the United Nations context; and cooperation with international and regional organizations[16]—remains an important, if underutilized reference.

But this work of the cooperation focal points and facilitators had not translated into a plenary agenda item on cooperation during the annual Assembly session which would have brought discussions to a wider audience. Nor had it extended, as we have recommended in the past, to an Assembly decision to constitute an intersessional "working group" or other mechanism on cooperation to augment the capacity of the cooperation facilitator to carry out work in priority areas with the participation of capital-

[16] ASP, "Report of the Bureau on Cooperation," ("2007 Report of the Bureau on Cooperation"), ICC-ASP/6/21, October 19, 2007, http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-21_English.pdf (accessed November 4, 2012).

based experts.[17] Assembly-level attention to cooperation had instead been relegated to references in General Debate statements, informal consultations, and negotiation of resolution texts. While these are important—and the General Debate, as indicated above, remains an important forum for reaffirming political commitment to the ICC—they are no substitute for focused, expert discussions addressed to enhancing state cooperation in concrete terms.

This year provides a number of important opportunities to positively evolve the Assembly's practices on cooperation. States parties should seize these opportunities in light of the need for reinforced efforts to support the court as it enters its second decade; the Assembly and individual member countries should not remain complacent in the face of the court's clear needs.

1. Intersessional Expert Seminars

In the context of The Hague Working Group facilitation on cooperation under the leadership of Ambassador AnnikenRambergKrutnes of Norway, a seminar on requests for assistance in identification, freezing, and seizing of assets and property was held in The Hague on October 1, 2012. A summary of recommendations from the seminar, which considers the role of the court, states, and other important bodies like the UN Security Council, is annexed to the Bureau report on cooperation for this session.[18]

This attention is deserved. Improved cooperation with regard to identification, freezing, and seizing of assets may benefit victims, in the form of the ultimate enforcement of forfeiture decisions against convicted individuals for the purposes of reparations and the court's legal aid system where the tracing of assets may be relevant to the determination of indigence and the court may seek reimbursement for legal fees from frozen assets. Financial information may also be of direct relevance to the Office of the Prosecutor's investigations. In addition, as the 2007 Bureau report notes, freezing of assets may help to

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[17] See our recommendations on a cooperation working group in Human Rights Watch, "Memorandum for the Tenth Session of the International Criminal Court Assembly of States Parties," November 28, 2011, http://www.hrw.org/news/2011/11/28/human-rights-watch-memorandum-tenth-session-international-criminal-court-assembly-st, pp. 28-29; "Memorandum for the Ninth Session of the International Criminal Court Assembly of States Parties," November 16, 2010, http://www.hrw.org/news/2010/11/16/human-rights-watch-memorandum-ninth-session-international-criminal-court-assembly-st, pp. 13-14.

[18] "Summary of the 1 October 2012 workshop on cooperation, including proposals and suggestions from the participants," annex II to ASP, "Report of the Bureau on cooperation" ("2012 Report of the Bureau on cooperation"), ICC-ASP/11/28, October 23, 2012, http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-28-ENG.pdf (accessed November 4, 2012).

disrupt networks of support that facilitate the ongoing commission of crimes and prevent arrest.[19]

In our view, this type of seminar goes some way toward moving the Assembly in the direction of an intersessional "working group" on cooperation by providing an opportunity for targeted discussion on priority areas with invited experts and the exchange of best practices. At the upcoming Assembly session, states parties should reflect on whether such workshops on other priority areas of cooperation, such as witness protection, should be held in the coming year and encourage the convening of additional seminars. Over time the experience of these seminars could provide additional support for the creation of an Assembly "working group" on cooperation, and states parties should consider the establishment, at last, of a cooperation working group at the 12th Assembly session next year. Key to making the most of these kinds of opportunities will be the attendance of experts and those who will respond on behalf of national authorities to the court's requests for cooperation.

2. Implementation of Non-Cooperation Procedures

This year saw the implementation of the Bureau procedures on non-cooperation adopted at the 10th Assembly session. The adoption and subsequent implementation of these procedures—as discussed below—reflects an important effort on the part of the Assembly to come to terms with its responsibilities under articles 87 and 112 of the Rome Statute to respond to findings of non-cooperation by the chambers.[20]

As states parties are aware, the procedures encompass two distinct scenarios:first, where the court has referred a specific matter of non-cooperation to the ASP, and, second, prior to a court referral of non-cooperation, where urgent action may be required to bring about cooperation for arrest and surrender of an individual subject to an ICC arrest warrant.[21] We discuss in some more detail below the critical importance of both sets of procedures to securing the execution of ICC arrest warrants.

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19 ASP, "2007 Report of the Bureau on cooperation," para. 41.

20 Article 87(5) and (7) provide that where a state party or non-state party having entered into an ad hoc arrangement or agreement with the court "fails to comply" with a cooperation request, the court "may make a finding to that effect and refer the matter" to the ASP, or, in the case of a UN Security Council referral, to the Council. For its part, the ASP shall then under article 112(2)(f) consider any question relating to non-cooperation.

21 ASP, "Report of the Bureau on potential Assembly procedures relating to non-cooperation," ICC-ASP/10/37, November 30, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-37-ENG.pdf (accessed November 4, 2012), paras.10-11.

Procedures in the first scenario were implemented over the past year in response to two December 2011 findings by the pre-trial chamber of the ICC that Chad and Malawi had failed to comply with the court's request to arrest and surrender President Omar al-Bashir of Sudan. This represents real commitment on the part of the Assembly and its president, but also illustrates the real challenges in providing an effective and meaningful response that can result in improved cooperation in the future.[22]

On the one hand, according to the Bureau report on the procedures submitted for the upcoming Assembly session, the Bureau's dialogue with Malawi appears to have contributed to positive developments. Malawi "reacted promptly to the communications by the President and engaged in a dialogue aimed at the non-repetition of the instance of noncooperation that triggered the President's actions." Following a change in government, Malawi subsequently refused to host al-Bashir a second time on its territory without arresting him, which resulted in the move of the June 2012 African Union summit from Lilongwe to Addis Ababa. This represented a significant development in reinforcing the obligations of African ICC states parties to enforce the court's arrest warrants and Malawi's commitment to the ICC, notwithstanding African Union decisions calling on African states parties not to cooperate in the arrest and surrender of al-Bashir.

On the other hand, again according to the Bureau report, dialogue with Chad resulted only in the government reaffirming its position that it was in full compliance with international law, citing the same African Union decisions effectively rejected by Malawi.

This mixed record demonstrates both the positive results that can be achieved through the Assembly's non-cooperation procedures—alongside other advocacy efforts, including by states and civil society[23]—and the need for the Assembly to go further in developing these procedures. The Bureau recommends that the non-cooperation of Chad be considered at the upcoming Assembly session. This could take place within the larger framework of a

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[22] The United Nations Security Council, meanwhile, took no steps toward the implementation of its mandate to respond to ICC findings of non-cooperation with respect to Security Council referrals. The Security Council referred the situation in Darfur, Sudan in March 2005 and the situation in Libya in February 2011.

[23] See, for example, "AU Summit: Malawi Stands With Darfur Victims," joint news release of an informal network of African civil society organizations and international organizations with a presence in Africa who work on the ICC and Africa, June 8, 2012, http://www.hrw.org/news/2012/06/08/au-summit-malawi-stands-darfur-victims.

discussion on continuing to enhance and upgrade the Assembly's non-cooperation procedures.

Three areas may be of particular interest.

First, the Bureau report notes that the president of the Assembly "called upon States Parties to raise the decision of the Pre-Trial Chamber I in their bilateral contacts with the authorities of Chad," but does not reflect the extent to which this may or may not have taken place.[24] In our view, making the Assembly procedures on non-cooperation as effective as possible demands that these procedures reverberate far beyond the Bureau itself. States parties found to be in non-compliance with their obligations under the Rome Statute should be made to hear this directly from other states parties and at the highest levels of diplomacy. In discussions at this Assembly, states parties could consider sharing in broad terms their experience with attempts to engage with other states parties on issues of non-cooperation.

Second, apart from suggesting the adoption of an Assembly resolution, the procedures adopted on non-cooperation do not address the actual modalities of a "formal response" to be taken by the ASP following dialogue with the concerned state in the event a matter is referred by the court. The prospect of public censure before the ASP is likely among the most powerful tools available to the Assembly for ensuring cooperation. At the same time, states parties should continue discussions and:

- Mandate the Bureau to provide a further report to reach a common menu of other measures available to the ASP, including securing guarantees of non-repetition and the suspension of ASP voting rights.

Finally, it is clear that there will need to be continued engagement among the ICC, its states parties, and the African Union. African Union decisions on non-cooperation have put pressure on African ICC states parties. In this regard, Human Rights Watch welcomes the organization in October 2012 of a second AU-ICC joint seminar in Addis Ababa with the

[24] ASP, "Report of the Bureau on non-cooperation" ICC-ASP/11/29, November 1, 2012, http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-29-ENG.pdf (accessed November 4, 2012), para. 8.

support of the International Organisation of the Francophonie, as well as the visit of the Assembly president, Ambassador Tiina Intelmann of Estonia, to Addis in October 2012.[25]

3. Plenary Cooperation Discussion

The upcoming Assembly session features, for the first time, a plenary discussion on cooperation.This is a significant development that will serve to give cooperation the platform within Assembly discussions that the topic deserves. It is also a return to the example set by stocktaking on cooperation during the Kampala review conference in 2010 and will give more full effect to the Kampala declaration on cooperation, which "decide[d] that the ASP should, in its consideration of the issue of cooperation, place a particular focus on sharing experiences."[26] Human Rights Watch has recommended for several years that the Assembly establish a standing agenda item on cooperation during its annual sessions.

Human Rights Watch understands that the themes under consideration during the cooperation plenary are (1) identification, freezing, and seizing of assets; and (2) arrests. Any themes identified for discussion are likely to represent a small subset of pressing cooperation issues, and should not diminish concern for other areas, including, for example, the urgent needs identified by the court to conclude additional agreements for the relocation (on a temporary or more permanent basis) of witnesses, victims, and others

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[25] "President of the Assembly visit to Addis Ababa," ASP news release, October 26, 2012, http://www.icc-cpi.int/NR/exeres/FE60FBF4-49A0-4F80-B706-EAE130EF30E0.htm (accessed November 4, 2012); Second Joint African Union-International Criminal Court Seminar Concludes in Ethiopia, ICC news release, October 18, 2012, http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/pr843?lan=en-GB (accessed November 4, 2012).

[26] Review Conference of the Rome Statute, "Cooperation," Declaration RC/Decl.2, June 11, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf (accessed November 15, 2011), para. 8. It also gives effect to Assembly resolutions from the last two sessions. The ninth session omnibus resolution recalled the Kampala declaration and "request[ed] the [cooperation] facilitator to explore proposals to facilitate the sharing of experience and other initiatives to enhance cooperation, such as a standing item on cooperation within the Assembly's agenda," while the cooperation resolution from the tenth session provided for a cooperation agenda item for the upcoming 2012 session. ASP, "Strengthening the International Criminal Court and the Assembly of States Parties," ICC-ASP/9/Res.3, December 10, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf (accessed November 4, 2012), para.11; ASP, "Cooperation," ICC-ASP/10/Res.2, December 20, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.2-ENG.pdf (accessed November 4, 2012), para. 14.The draft resolution on cooperation for this Assembly session also includes reference to an agenda item for the 12th session that may helpfully cement cooperation as a standing agenda item. "Draft Resolution on Cooperation," annex I to ASP, "2012 Report of the Bureau on cooperation," para. 23.

at risk.[27] But focused discussions on a select number of areas are likely to produce more concrete results.

In order to make the most of this opportunity, it will be important that states parties come prepared to make substantive contributions on themes identified by discussion. A plenary cooperation discussion, while a significant evolution in the practice of the Assembly, will only be as productive as the time and investment made by states parties in preparation and active engagement during the session. To help inform state party preparations and contributions, we offer below some reflections on arrests. A discussion of arrests engages a number of difficult and sensitive issues, including non-cooperation in arrests by ICC members and the decisions by the African Union regarding the immunity of heads of state, referenced above. These issues deserve reflection, but, in our view, an emphasis should be placed in the plenary discussion on state party experiences to date in keeping with the spirit of "exchange of best practices."

B. Arrests

Focused Assembly attention on arrests is overdue. Of course, the Assembly session is not a forum where states parties should discuss any specifics for particular arrest efforts. That discussion, unsurprisingly, would best take place in other settings. Nonetheless, the "value added" of discussing arrests in the Assembly, drawing on broad lessons learned, lies in creating greater clarity of what is needed and increasing a sense of real support for actually executing and assisting with arrest warrants.

While there has been positive practice on arrests, with the surrender of six suspects to the ICC by authorities in Democratic Republic of Congo, France, Belgium, and Côte d'Ivoire, arrest warrants against 12 other individuals remain outstanding.[28]

The failure to arrest Joseph Kony and other senior commanders of the Lord's Resistance Army (LRA) has left the LRA free to export atrocities across the borders of central Africa, creating new generations of LRA victims in Democratic Republic of Congo, South Sudan,

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[27] ASP, "Report of the Court on cooperation," ICC-ASP/10/40, November 18, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-40-ENG.pdf (accessed November 4, 2012), paras.39-46, 95.

[28] Of these 12 individuals, one—Vincent Otti, wanted in the Uganda situation—is presumed dead, while an ICC pre-trial chamber decided that Libya may postpone surrender of Saif al-Islam Gaddafi pending the outcome of Libya's admissibility challenge to the case against him.

and Central African Republic.[29] It has stalled the court's progress in Uganda, threatening to undermine investments in outreach and the facilitation of victim participation among affected communities and requiring the court to maintain operations even in the absence of judicial proceedings.

Similarly, a failure to arrest Bosco Ntaganda, who until recently was protected by Congolese authorities and promoted within the Congolese army, has left an unbroken record of new abuses. Since the ICC issued a first arrest warrant for Ntaganda in August 2006 (a second arrest warrant on a new set of charges was issued in July 2012), Human Rights Watch's research has documented his repeated involvement in human rights abuses, violations of the laws of war, and mass atrocities.[30]

Compelling arrest and surrender by a recalcitrant government poses the "hard case" of cooperation. By pitting the writ of the court against the prerogatives of national sovereignty, arrest is the "Achilles' heel" of enforcement that highlights the broader limitations of a still fledgling system of international justice. Despite the difficulties, experience from two decades of international criminal tribunal practice shows that efforts by states to wield their combined political, diplomatic, and economic clout can be decisive for arrest and surrender.

As the Rome Statute observes the tenth anniversary of its entry into force, the broader international justice community marks two milestones—the verdict in the trial of the former Liberian president, Charles Taylor, before the Special Court for Sierra Leone (SCSL), the first ever international prosecution of a former head-of-state since Nuremburg, and the start of trials by the International Criminal Tribunal for the former Yugoslavia (ICTY) of its last remaining fugitives, including former Bosnian Serb commander Ratko Mladic.

These developments were made possible by concerted, collective efforts on arrests. Serbia's surrender of indicted persons to the ICTY was directly related to diplomatic

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[29] See, for example, Human Rights Watch, Trail of Death: LRA Atrocities in Northeastern Congo, March 2010, http://www.hrw.org/sites/default/files/reports/drc0310webwcover_0.pdf; *The Christmas Massacres: LRA attacks on Civilians in Northern Congo*, February 2009, http://www.hrw.org/sites/default/files/reports/drc0209webwcover_1.pdf.

[30] See, for example, "DR Congo: Bosco Ntaganda Recruits Children by Force," Human Rights Watch news release, May 16, 2012, http://www.hrw.org/news/2012/05/15/dr-congo-bosco-ntaganda-recruits-children-force; Human Rights Watch, *Bosco Ntaganda—Wanted for War Crimes*, video, April 13, 2012, http://www.hrw.org/video/2012/04/13/bosco-ntaganda-wanted-war-crimes.

pressure around negotiations over its accession to the European Union. In the Taylor case, increasing diplomatic pressure in 2006 by states, including the United Kingdom and the United States, helped lead to his surrender. Despite his indictment on war crimes and crimes against humanity, Taylor had been enjoying safe haven in Nigeria.

Experience to date offers at least four lessons for arrests before the ICC. States parties could reflect on these or other lessons drawn from state practice in their interventions during the plenary discussion on cooperation.

1. Need for Tailored Arrest Efforts

No two arrest scenarios are likely to be the same or susceptible to the same strategies. In some cases, the arrest of a suspect may be blocked by the unwillingness of national authorities to apprehend an individual on their territory. In other cases, national authorities may lack the capacity to carry out law enforcement operations.

Both present difficult challenges requiring different responses. In the former, the creative use of diplomacy, as discussed below, may be the most important ingredient, catalyzing the will on the part of national authorities to carry out arrests including by raising the costs of a failure to do so. In the latter, augmenting national arrest capacity—perhaps even a taller order—may require addressing simultaneously the political will necessary among several countries or intergovernmental organizations to sustain an international arrest operation and the expertise to carry out such operations, as well as ensuring a legal basis is in place. This may be relevant in the negotiation of mandates of United Nations and regional peacekeeping missions.

In both scenarios the means to achieve these ends will also differ on the underlying circumstances. Large, public campaigns may at times be effective in catalyzing public pressure to arrest; at other times, such public campaigns may disrupt careful negotiations. The choice of advocacy tools matters and may shift as arrest efforts develop in a given case.

Given the need for tailored approaches, and the court's existing caseload, states parties should consider enhancing the court's capacity and resources to analyze and address—

including by mobilizing the support of states parties and other international actors— the factors leading to non-arrest.

2. Creative Use of Diplomacy

Although tailored approaches are needed, the value of principled and active use of diplomacy is likely to be an important ingredient in successful arrest efforts, particularly where national authorities are acting to shield individuals from justice. The ICTY and Taylor examples cited above amply illustrate this. To this end, states parties should regularly raise arrest and surrender in bilateral contacts with non-cooperative states, in interactions with influential third-party states, in meetings at regional and international intergovernmental organizations, and at ASP sessions.States parties should also be creative in identifying and utilizing relevant political and economic leverage as appropriate, such as sanctions.

The Assembly's adoption of procedures on non-cooperation is an example of harnessing creative diplomacy. This is especially so if, as recommended above, states parties undertake bilateral contacts to ensure that the Bureau's implementation of the procedures reverberates in capitals and if the Assembly continues to elaborate a menu of responses to ICC findings of non-cooperation. Human Rights Watch also welcomes the ongoing work by the European Union to develop guidance for its institutions and member states to deploy the diplomatic tools at its disposal in a consistent manner to respond to non-cooperation. This work can serve as a model for other regional organizations or states parties to develop procedures to guide their own responses.

3. Long-Term Strategies

Recalcitrant governments are able to create real obstacles, and, therefore, arrest can take a long time. While doing everything possible to hasten arrest and surrender so that court proceedings can go forward efficiently, states parties also need to be able to take, in tough cases, a long view. That was certainly the experience of all the ad hoc and special tribunals. There was a 16year delay in bringing Mladic to the ICTY, and it took Serbian authorities in Belgrade 15 years to apprehend Bosnian Serb leader Radovan Karadzic. Charles Taylor's arrest took nearly three years once the indictment was unsealed. Felicien Kabuga along with other indictees of the International Criminal Tribunal for Rwanda are still at large.

The need to take a long view, however, is not an excuse for lapsing into inaction. States parties have an important role to play to reaffirm the validity and importance of the ICC's arrest warrants as part of long-term strategies where immediate arrest and surrender are unlikely.Strong and consistent responses to ICC findings of non-cooperation in the execution of arrest warrants are a key part of hastening progress. As noted above, efforts by the Assembly and the European Union in this regard are welcomed. Equally important is the attention in both the Assembly procedures and in what we understand to be discussions of the European Union on anticipating and preventing non-cooperation in the execution of arrest warrants (that is, "early warning" procedures).

We repeat here the observations we made in advance of the last Assembly session of the importance of these kinds of responses to a successful long-term arrest strategy. Al-Bashir's planned visits to some states parties and even some non-states parties have been avoided through concerted efforts among diplomats and international and local civil society to bring pressure to bear on national authorities to either bar or arrest al-Bashir. These include visits to Kenya, Central African Republic, Libya, Zambia, and Malaysia. Moreover, at times, even where visits have taken place, for example to Malawi, similar efforts have succeeded in securing extensive media coverage of the obligations of ICC states parties to execute ICC arrest warrants and the opposition of civil society and ICC states parties to such visits without arrest.

Such successes fall short, of course, of actual arrest. But they ensure that al-Bashir is known internationally as a fugitive, signal that there should be no "business as usual" with those seeking to evade justice, and affirm the integrity of the ICC's arrest warrants and the importance of cooperation with the ICC. Over time, this helps maintain the validity of the arrest warrants and may contribute to the marginalization that is, at times, a prerequisite to eventual arrest.

Finally, an important component of signaling that "there is no more business as usual" with those wanted on an ICC arrest warrant is the avoidance of contacts between these individuals and officials of ICC states parties or other states. Particularly where contacts attract publicity they can reverberate internationally and promote a sense that the ICC arrest warrant is being pushed to the side and does not have international backing. The Office of the Prosecutor has emphasized the importance of avoiding non-essential

contacts, as have the United Nations and the European Union.[31] Additional states parties should consider adopting domestic policies of avoiding contacts with ICC fugitives.

4. Domestic Procedures and Implementing Legislation

While mobilizing arrest efforts often has a significant political element, states parties should not overlook the importance of having domestic procedures in place to deal appropriately with requests for arrest and surrender from the court. This helps ensure states are able in practice to meet their obligations to cooperate with the court and is an important component of the requirement in Rome Statute article 88 that "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part IX of the Statute]." The 2007 Bureau report on cooperation notes, however, that "a number of issues may constitute barriers to an expeditious transfer." It recommends that "it may be useful for States Parties to consider establishing in advance of a request, relevant national guidelines for providing logistical assistance with regard to transfers. Such guidelines may also address issues relating to suspects in transit through the territory of States Parties. The Court may be able to provide a checklist of issues related to transfers."[32] An exchange of best practices regarding such domestic procedures is likely to be particularly useful during the Assembly plenary discussion on cooperation.

Recent experience in Kenya and South Africa also points to an important interplay between Rome Statute implementing legislation and arrest efforts. Kenya implemented the Rome Statute in 2009, while the South African Implementation of the Rome Statute of the International Criminal Court Act entered into force in 2002. In both countries, such laws reinforced the obligation to arrest al-Bashir irrespective of the July 2009 African Union decision calling on its member countries not to cooperate in the arrest and surrender of al-Bashir.[33]

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[31] See Office of the Prosecutor of the ICC, "Prosecutorial Strategy, 2009-2012," February 1, 2012, http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf (accessed November 4, 2012), para. 48; David Hutchinson and Marcus Pallek, "Introductory Remarks to Legal Opinions of the Office of Legal Affairs of the United Nations," *International Organizations Law Review*, vol. 3 (2006), p. 397; "Action Plan to follow-up on the Decision on the International Criminal Court", annex to Political and Security Committee memorandum to COREPER, Council of the European Union, "I" Item Note, July 12, 2011, http://www.iccnow.org/documents/EU_Action_Plan_st12080_en11.pdf (accessed November 4, 2012), p. 14.

[32] ASP, "2007 Report of the Bureau on cooperation," para. 43.

[33] Assembly of the African Union, "Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)," Assembly/AU/Dec. 245 (XIII) Rev. 1, July 3, 2009,

In South Africa, the authorities concluded that, notwithstanding the July 2009 AU decision, ratification of the Rome Statute and its domestic implementing legislation would compel the arrest of al-Bashir should he enter South Africa.[34] In Kenya, the visit of al-Bashir in August 2010 without facing arrest prompted the Kenyan Section of the International Commission of Jurists (ICJ-Kenya) to petition the high court for a provisional arrest warrant. The court ruled in favor of ICJ-Kenya and issued the warrant for al-Bashir, finding that ICJ-Kenya had standing to seek a warrant under the International Crimes Act following the failure of the responsible minister to comply with his obligations under the act to do so.[35] An appeal in the case remains pending but the warrant has been left in force.[36] These situations reflect that the availability of domestic procedures, including through implementing legislation, may reduce the latitude for politicized decision-making regarding meeting cooperation obligations.

In light of the above, in statements during the plenary discussion on cooperation, states parties should:

- Contribute actively in the plenary discussion on cooperation by coming prepared to share lessons learned and best practices on the themes identified for debate, that is, identification, freezing, and seizure of financial assets, and arrests;

- Draw on the 2007 Bureau report on cooperation and its 66 recommendations for enhancing state cooperation;

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http://www.africaunion.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20(XIII)%20_E.PDF (accessed November 4, 2012), para. 10.

34 South African Government Information "Notes following the briefing of Department of International Relations and Co-operation's Director-General, Ayanda Ntsaluba," July 31, 2009, http://www.info.gov.za/speeches/2009/09073110451001.htm (accessed November 4, 2012).

35 "High Court Decision on Al Bashir Arrest Warrant," The Kenyan Section of the International Commission of Jurists news release, December 2, 2011, http://www.icj-kenya.org/index.php/more-news/435-pressstatement-al-bashir (accessed November 5, 2012).

36 Humphrey Malalo, "Kenya court refuses to shelve ruling on Sudan's Bashir," Reuters, December 20, 2011, http://af.reuters.com/article/topNews/idAFJOE7BJ02X20111220?pageNumber=2&virtualBrandChannel=0 (accessed November 4, 2012).

- Underscore the obligation of ICC states parties to cooperate fully with the court, including in carrying out arrests, and commit to assisting one another in providing that full cooperation even under difficult circumstances;

- Evaluate whether the court has sufficient capacity to support arrest efforts; and

- Commit to adopting policies at the national level to strengthen the prevention and response to non-cooperation and to avoid contacts with those wanted for arrest by the ICC as a key element of long-term arrest strategies.

In the stand-alone resolution on cooperation, states parties should:

- Reflect outcomes and recommendations of the plenary discussion on cooperation, including by taking note of any summary issued, in order to provide an additional reference point for future efforts to enhance cooperation;

- Retain bracketed language in the draft resolution regarding avoiding non-essential contacts with those wanted for arrest by the ICC;

- Renew the mandate for a cooperation facilitator in order to maintain focus within the ASP on measures necessary to enhance cooperation with the court, including through the organization of additional intersessional seminars, and request the cooperation facilitator to develop proposals in consultation with states parties for a working group on cooperation with a view toward establishing the working group at the ASP's 12th session; and

- Make cooperation a standing agenda item for future ASP sessions.

IV. Complementarity

The complementarity principle in the Rome Statute makes it clear that primary responsibility for pursuing accountability for atrocity crimes rests squarely on the shoulders of states.[37] It was not until Kampala, however, that states began to consider how to address the very real challenges facing states emerging from conflict or intense violence to fulfill this obligation in practice. The Kampala complementarity resolution, which highlighted "the need for additional measures at the national level as required and for the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community" helped to kick-start discussions on how to better integrate development actors in the fight against impunity.[38]

The awareness-raising that began in Kampala has continued to deepen in the more technical discussions between international justice practitioners and development actors under the umbrella of the "Greentree" process convened jointly by the nongovernmental International Center for Transitional Justice and the United Nations Development Program (UNDP). In just a few short years, diplomatic discussions on the ICC and the future of international justice have focused increasingly on what states can do—including through their allocation of development assistance—to improve national capacity to handle atrocity crimes.

Against this backdrop, we very much welcome the plenary debate on complementarity at this year's ASP. As we have stated before, the ASP, as a body encompassing donor and recipient states, non-states parties and civil society united by a shared commitment to fight impunity for Rome Statute crimes, is ideally placed to act as a guarantor of the complementarity principle. The fact that the head of the UNDP, the central development pillar within the UN system, will be giving the keynote address is a testament to the potential for headway in mainstreaming accountability for atrocity crimes among development actors.

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[37] Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, preamble, art. 17.

[38] Review Conference of the Rome Statute, "Complementarity," Resolution RC/Res.1, June 8, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf (accessed November 4, 2012), para. 3.

Positive movement in diplomatic circles on the principle of complementarity, while important, needs to be matched by concrete advances on the ground where such atrocities have been committed. In this regard, the enthusiasm around complementarity should not obscure the fact that the obstacles to realizing national justice for atrocity crimes can be significant.

An obvious challenge confronting many national justice systems is capability: effectively investigating, prosecuting, and trying atrocity cases fairly require specialized expertise. In many situations, donors can help strengthen capacity by channeling funds already earmarked for rule of law reform projects more specifically towards strengthening capacity to realize national justice for international crimes (such as through strategic and rigorous training programs to help build necessary skills sets, establishing witness protection mechanisms, and training defense staff). Designating funds specifically for Rome Statute crimes as a "related but distinct" subset of rule of law assistance—not unlike what is already done by states for piracy, terrorism and organized crime—can encourage cooperation with the recipient government in question when it comes to identifying benchmarks of success. In this way, more engaged participation between the donor and recipient government increases the former's leverage when it comes to seeing results at the national level.

This of course presumes the ongoing "buy-in" and support of development actors who determine funding priorities on the ground—a key factor which cannot be taken for granted. Our recent research in Guinea, for instance, revealed that while international partners, including the European Union, France, Germany, and the UNDP, provide significant rule of law assistance, none of these funds have as of yet been directed specifically towards investigating and prosecuting crimes emanating from the September 28, 2009 massacre.[39] We hope that the adoption of the European Union's long-awaited complementarity "toolkit," essentially a handbook to provide guidance in its development of projects aimed at bolstering national capacity to address serious international crimes, will further mainstream complementarity in diplomatic missions on the ground.

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39 On September 28, 2009, several hundred members of Guinea's security forces burst into a stadium in Guinea's capital, Conakry, and opened fire on tens of thousands of opposition supporters peacefully gathered there. By late afternoon, at least 150 Guineans lay dead or dying, and dozens of women had suffered brutal sexual violence, including individual and gang rape. Human Rights Watch, *Bloody Monday: The September 28 Massacre and Rapes by Security Forces in Guinea*, December 2009, http://www.hrw.org/sites/default/files/reports/guinea1209web_0.pdf.

To this end, without turning the court into a development agency, ICC staff have a valuable role to play in flagging gaps in capacity to ensure that donor assistance is used to best effect. Indeed, the court's report to the ASP highlights a number of specific areas where capacity-building efforts are especially needed, and where court expertise could be particularly helpful in designing and planning the provision of such assistance.[40] As also acknowledged in the report, where these efforts are undertaken in ICC situations under investigation and make use of ICC expertise they can strengthen the court's legacy or long-term impact and facilitate the court's eventual exit.[41]

But development assistance, even when allocated with court input, is not by itself enough to see forward movement on the ground when it comes to accountability for atrocity crimes. The success of capacity-building projects aimed at bolstering national justice efforts hinge on the willingness of the recipient government to let them thrive. Unsurprisingly, such will may be in short supply. Atrocity crimes—as the most serious crimes known to humankind—are by their nature very sensitive and difficult to pursue, particularly when committed in response to longstanding ethnic or political tensions.

The sensitivity of these crimes is only heightened if those responsible for them occupy positions of power in the government. If there is some will, it may be uneven, with the result that there is only an appetite to pursue the perceived "losers" of the conflict, who may also be the sitting government's political enemies. While realizing some justice may benefit a constituency of victims, the pursuit of lopsided accountability risks exacerbating rather than easing the underlying tensions that resulted in the outbreak of violence and the commission of mass crimes in the first place.

Efforts to realize national justice must also confront the reality of weak institutions in countries recovering from conflict or an episode of intense violence. The commission of mass atrocities is usually the result of the breakdown of key institutions central to supporting the rule of law. Based on our research in Côte d'Ivoire, the Democratic Republic of Congo, and Guinea, more often than not, this manifests itself in the justice sector through the lack of judicial independence and impartiality, either because of a history—

[40] ASP, "Report of the Court on complementarity," ICC-ASP/11/39, October 16, 2012, http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-39-ENG.pdf (accessed November 4, 2012).

[41] Ibid., paras. 18-20.

sometimes decades long—of political interference by the executive, or general corruption, or both. Pursuing sensitive atrocity cases, which may implicate governmental policies or actors, can be difficult where judges and prosecutors lack the institutional culture and support needed to try allegations without fear of professional or personal retribution.

Of course, the challenges discussed above are nothing new. Indeed, they offer a salient reminder as to why the ICC was created in the first place. But the deeply rooted nature of these obstacles should not be used as excuse to shy away from efforts aimed at tackling them. If anything, the complexity of the obstacles confronting effective national justice for atrocity crimes only further underscores the central role development actors have to play in designing programs aimed at building capacity, including those aimed at strengthening local civil society. It remains essential for development officials to work closely with political actors in their governments to use their collective leverage to erode unwillingness over time.

In recent years, the link between justice and development has become more prominent. In its 2011 World Development Report, the World Bank has acknowledged that "a major episode of violence [...] can wipe out an entire generation of economic progress."[42] Impunity undercuts public confidence, which leaves the state vulnerable to episodic violence. Breaking cycles of violence requires strengthening legitimate institutions, including those that deliver justice.[43] This is crucial to reinforce public confidence and create the conditions necessary to realize sustainable development.

Indeed, in a number of the situations under investigation or analysis by the ICC, including Côte d'Ivoire, Democratic Republic of Congo, Uganda, and Guinea, there is a degree of recognition by the respective governments of the value of pursuing a measure of national justice for the atrocities committed on their soil. The pursuit of justice in each of these countries is not without flaws. Nonetheless, development and political actors of ICC states parties that are active in these countries can use their combined leverage—the former

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42 The World Bank, *Conflict, Security, and Development: World Development Report 2011* (Washington, D.C.: The International Bank for Reconstruction and Development/The World Bank, 2011), p. 6.

43 Ibid., p. 2. Our research in many of the ICC situations under investigation and analysis—including Kenya, Côte d'Ivoire, Democratic Republic of Congo, and Guinea—support the conclusion that widespread impunity fosters cyclical violence. Targeting perpetrators of mass crimes through independent and impartial trials, by helping to dismantle criminal structures that resulted in their commission, delivering truth to victims, and deterring others from committing similar crimes, can help break devastating patterns of violence.

through programs aimed at building capacity, the latter through public and private diplomacy—to push these governments closer towards realizing an independent and impartial justice process.

One thing is clear: overcoming obstacles to national capacity and willingness requires a firm recognition among diplomatic and development actors in the ICC's 121 states parties that fighting impunity for atrocity crimes requires long-term attention, support, and investment. The success of this long-term engagement is enhanced by coordination among donors acting in a particular country. Working together can help improve effectiveness by avoiding duplication of efforts and bolster states parties' collective political influence to push for meaningful national efforts to pursue serious international crimes.

In light of the above, we make the following recommendations to states parties as they prepare for the upcoming Assembly session and debate on complementarity.

First and foremost, we urge states to match the UNDP's high level of engagement by:

- Sending high-level representatives to participate in the ASP debate on complementarity. Doing so would only further reinforce the priority states place on pursuing national accountability for serious international crimes. Moreover, to the extent it is feasible, we urge states to seize the opportunity offered by the debate to further mainstream the pursuit of justice for atrocity crimes by including development actors in their delegations and encouraging them to participate in the debate.

Second, states parties can through their contributions in the General Debate and complementarity discussion:

- Persist in sending a clear message regarding the importance of national justice for atrocity crimes, and a long-term commitment to its realization. This can be part of laying the necessary groundwork of support among governments—both prosecuting authorities and international donors providing assistance.

Third, this message should also resonate within diplomatic missions and with development officials in the countries where atrocity crimes have been committed. This is

the only way to match diplomatic enthusiasm with results on the ground. In their statements states parties should:

- Commit to further mainstreaming the importance of accountability initiatives with diplomatic and development staff on the ground.

Fourth, states parties should in their statements in the General Debate and the plenary session on complementarity:

- Underscore the importance of strengthening both capability and willingness, where willingness is defined as creating and maintaining a climate conducive to realizing independent and impartial justice. States parties should also insist on the inclusion of similar language in the draft resolution on complementarity.

Fifth, the discussion on complementarity can provide an opportunity for states parties to:

- Share experiences about initiatives taken to promote national justice for atrocity crimes in ICC countries under analysis or investigation. This could include information about what has and has not worked in terms of implementing initiatives directed at reinforcing national efforts to bring perpetrators to justice, including in the area of donor coordination; and

- Facilitate efforts to anchor complementarity in the ASP, including by calling on the focal points to convene meetings under the auspices of the existing working groups in The Hague and in New York on specific topics relating to complementarity.

These topics could include, for instance, ongoing efforts by UN actors to implement specific projects on the ground (in New York) or those aimed at coordinating approaches to complementarity in various capitals (and inviting a few European-based development officials to The Hague). In this way, delegations could maintain a dynamic discussion about possible strategies to overcome the challenges around pursuing national justice for atrocity crimes. This could ultimately lead to a working group on complementarity if justified by need in the future.

Finally, in the resolution on complementarity, states parties should:

- Acknowledge the link between complementarity efforts and the court's exit strategies and long-term impact or legacy in ICC situation countries.