



# **Human Rights Watch Memorandum for the Eighth Session of the International Criminal Court Assembly of States Parties**

**November 2009**

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## Introduction

Seven years after the Rome Statute's entry into force, the International Criminal Court (ICC) has made progress toward the realization of its founders' aspirations. This is not to say that this progress has always been even. In grappling with the enormous challenges of setting up an unprecedented judicial institution, it is not surprising that ICC officials have at times made mistakes. While additional efforts are required across the court's range of operations, there has been a marked increase in the court's activities over the past year.

The prosecution's case against Thomas Lubanga, its first in the Democratic Republic of Congo (DRC) situation, was presented in full. Pre-trial proceedings were completed in a second DRC case, that of Germain Katanga and Mathieu Ngudjolo, as well as in the Jean-Pierre Bemba Gombo case in the Central African Republic (CAR) situation. The court's first defendant to appear voluntarily, Bahr Idriss Abu Garda—who is charged with war crimes in connection with an attack on African Union (AU) peacekeepers in Darfur—made two trips to The Hague, first for an initial appearance and subsequently for a confirmation hearing that will determine whether the case is sent to trial.

Outreach—including the use of mobile screenings of audiovisual materials and local radio broadcasts—intensified around the Lubanga trial, and initiatives to develop a victim strategy and to deepen the court's field engagement moved forward. An increasing number of victims have been accepted to participate in proceedings, suggesting that some strides continue to be made in ensuring that the right of participation is realized.

As the court's activities increase, expectations are running high. In the four situations under investigation, Human Rights Watch and other civil society organizations continue to push for additional cases to address impunity.<sup>1</sup> The prosecutor has indicated that his office is monitoring several other country situations from around the globe, including Colombia, Georgia, Cote d'Ivoire, Afghanistan, and Guinea, and recently stated that he will shortly seek authorization from an ICC pre-trial chamber to open an investigation in Kenya. The Palestinian National Authority has petitioned the ICC prosecutor to accept jurisdiction over crimes committed in Gaza, and a report of the UN Fact-Finding Mission on the Gaza Conflict has urged referral of the situation in Gaza to the ICC in the absence of credible national prosecutions.

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<sup>1</sup> These include going further up to the chain of command to prosecute senior officials responsible for crimes committed during the Ituri conflict in the Democratic Republic of Congo (DRC) situation; additional cases in the Darfur and Central African Republic situations; and bringing to a resolution the possibility of investigations against government forces and personnel in the northern Uganda situation, while investigating new crimes committed by Lord's Resistance Army forces in DRC and southern Sudan.

Meeting these expectations and consolidating and expanding on the court's achievements would be no small task under any circumstances, but efforts by court officials and staff have been made more difficult by a perceptible softening of support for the ICC.

This softening support has multiple sources.

When ICC states parties gather late next spring in Kampala for the Rome Statute-mandated review conference, they will meet in a very different political climate than that out of which the statute was born. Other international priorities—including the global economic crisis and climate change—have somewhat displaced the mid-1990s' sense of responsibility for the aftermath of genocide and other mass atrocity.

Enthusiasm has also been tempered by experience. Trial of serious international crimes has proven inevitably to be slow-moving, and, at times, imperfect. It has also proven to be expensive and to require intense, sustained financial support.

In addition, limits on the reach of international justice have contributed to a perceived double standard in its application. When officials from or supported by powerful states have been able to avoid international prosecutions, the legitimacy of international justice, and, in turn, the ICC as its flagship institution, is called into question. Indeed, the double standard issue has energized impunity's proponents including, as discussed below, following the arrest warrant issued for President Omar Hassan al-Bashir of Sudan.

Changed circumstances, however, cannot be permitted to undermine what was agreed in Rome, or to allow the ICC's unprincipled critics to go unchallenged. The critical importance of the court's mission and mandate to end impunity for the crimes of most concern to the international community remains unchanged. In popular perception and through the stocktaking exercise, the review conference will take the measure of the ICC and international justice. States parties thus should make every effort made between now and then to commit to strengthening international justice and to shore up their investment in the ICC as the keystone.

Indeed, with the review conference just months away, states parties will need to take a number of steps at this Assembly of States Parties (ASP) session toward this end. These will include continued refutation of the court's unprincipled critics and efforts to interfere with its independence; increased institutional support for cooperation; ensuring adequate preparation for the review conference and careful consideration of amendment proposals;

and sound stewardship over the court's further development. We discuss these issues in detail below and make recommendations for concrete actions; recommendations specific to this ASP session are bullet-pointed throughout and summarized immediately below.

## Summary of Recommendations

In their statements during the **general debate** at the eighth session of the Assembly of States Parties (ASP) of the International Criminal Court (ICC), states parties should:

- Affirm commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Recognize the central role of the ICC as a court of last resort in the absence of genuine action by national authorities;
- Underscore the obligation of ICC states parties to cooperate fully with the court, including in arrests;
- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference;
- Acknowledge the uneven reach of international justice and commit to extending its reach including through promoting wider ratification of the Rome Statute;
- Stress that justice should not be denied for some because it is not yet possible for all;
- Confirm that justice is a crucial component of lasting peace, as well as an important objective in its own right;
- Welcome the upcoming review conference as an important opportunity to reaffirm international commitment to the ICC and international criminal justice, and commit to working towards a well-prepared conference; and
- Underscore the importance to the court's success of the election of only the most highly qualified judges.

In the **elections of ICC judges** at this Assembly session, states parties should:

- Elect only the most highly qualified judges to the ICC bench, bearing in mind the importance of a candidate's criminal law expertise and experience and commitment to active service of the ICC's mandate over a full nine-year term.

With regard to the **omnibus resolution** or other appropriate **stand-alone resolutions**, the Assembly of States Parties should:

- Act to renew a mandate for a focal point on cooperation and to establish a permanent, intersessional working group on cooperation with the focal point serving as its chairperson;
- Act to establish an independent oversight mechanism to carry out investigations and mandate a study to consider expanding the mechanism's mandate to encompass the additional functions of inspection and evaluation provided for in article 112(4) of the Rome Statute;
- Request the finalization in early 2010 of a public information strategy, in consultation with states parties and civil society, with a view toward its presentation at the ninth Assembly session. Such a strategy should include the review conference as a key opportunity to project the court's activities to a broad audience, and should seek to make full use of the court's senior officials;
- Underscore the importance to the court's success of the election of only the most highly qualified judges; and
- Provide for facilitation through one of the Assembly's Working Groups of review of the nominations procedure for election of the ICC prosecutor, with a view toward bringing any proposed changes to the Assembly's ninth session for approval and adoption.

With regard to the **budget resolution**, the Assembly of States Parties should:

- Signal prospective financial support in 2010 for a well-prepared ICC public information strategy;

- Approve funding for the establishment of an ICC liaison office in Addis Ababa;
- Ensure effective representation of the ICC in Addis Ababa by providing for a head of the liaison office at the D-1 level;
- Support the provision of resources in the court's budget for the review conference including to allow for the court's engagement in preparations;
- Adopt a policy of fully funding family visits for indigent detainees on an annual basis in the court's regular budget;
- Avoid language in any Assembly resolution that would contradict or deny the ICC presidency's decision of March 10, 2009 finding a positive obligation to fund family visits in the case of Mathieu Ngudjolo Chui; and
- Reaffirm that the Assembly looks to the Committee on Budget and Finance for recommendations as to the allocation of resources according to the court's mission and mandate.

With regard to **preparation for the review conference**, the Assembly of States Parties should:

- Establish an inter-sessional task force to carry forward preparation of the review conference, including the stocktaking exercise;
- Identify the topics of the stocktaking exercise. These should include the impact of justice on victims and affected communities; state cooperation with the ICC; complementarity, universality of the Rome Statute, and the impunity gap; and the impact of international justice on peace processes and peacebuilding;
- Include language in a stand-alone review conference resolution or other appropriate resolution recognizing the importance of the ICC's full participation in the review conference and encouraging the court to prepare plans for its participation and public information efforts around the review conference. These plans should be presented to the review conference task force in early 2010; and
- Support the provision of resources in the court's budget for the review conference.

We encourage **states parties' delegates** to:

- Attend side meetings during this Assembly session organized by states, the court, and non-governmental organizations on issues including the victim strategy, the Trust Fund for Victims, and public information and outreach in order to deepen understanding of the court's activities and challenges; and
- Attend the side-event discussion on peace and justice during the Assembly session.

## I. Confronting the Court's Critics and Increasing Cooperation

As ICC officials and staff make some progress toward addressing the many remaining internal challenges to building a credible and effective institution, the court faces an increasingly challenging external environment. The arrest warrant issued by the ICC in March 2009 for President al-Bashir on charges of crimes against humanity and war crimes fuelled and intensified efforts by ICC opponents to undermine not only that specific warrant, but the court itself. The ICC finds its legitimacy in the sights of a small, but powerful minority.

As we discuss below, the campaign waged by allies of President al-Bashir demands a full-throated response by the court, its states parties, and other ICC supporters. While some key gains have been made over these past months, this response has yet to fully materialize. In addition, while diplomatic and political support is essential, the ICC requires cooperation across a wide spectrum of areas, including judicial assistance and logistical support. As we recommend below, states parties should also act at this Assembly session to put in place an intersessional working group on cooperation to carry forward the important work of the Bureau and cooperation focal point.

### A. Defending the court's mission

While backlash against the ICC arrest warrant for President al-Bashir began almost as soon as the application for the warrant was announced,<sup>2</sup> concerted efforts by allies of al-Bashir to undermine the ICC's mission culminated in a July 2009 decision at the African Union (AU) summit in Sirte, Libya. That decision—engineered by a small number of AU states opposed to the fight against impunity—called on AU member states not to cooperate in his arrest and surrender.<sup>3</sup> The decision additionally requested the AU Commission to prepare guidelines and a code of conduct for the exercise of the prosecutor's discretionary powers, particularly in relation to his *proprio motu* authority. This was to be done in advance of a late 2009

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<sup>2</sup> See, for example, African Union Peace and Security Council, "Communique of the 142nd Meeting of the Peace and Security Council," PSC/MIN/Comm (CXLII), July 21, 2008, [http://www.iccnw.org/documents/AU\\_142-communicue-eng.pdf](http://www.iccnw.org/documents/AU_142-communicue-eng.pdf) (accessed November 4, 2009) (expressing the conviction that pre-trial chamber approval of the al-Bashir warrant application would undermine peace prospects and requesting deferral of the "process initiated by the ICC" under article 16 of the Rome Statute).

<sup>3</sup> 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, [http://www.africaunion.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20\(XIII\)%20\\_E.PDF](http://www.africaunion.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20(XIII)%20_E.PDF) (accessed July 29, 2009), para. 10. The stated basis in the AU Decision for withholding cooperation is the UN Security Council's lack of response to the AU's request to suspend the ICC prosecution of President al-Bashir according to article 16 of the Rome Statute. The AU Decision is, therefore, premised on dissatisfaction with the actions of a political body, the UN Security Council, rather than with the ICC. In this context, we note that on July 31, 2008, the UN Security Council acknowledged the AU's request for the suspension of the ICC's case against President al-Bashir in resolution 1828. The request for additional or different responses by the UN Security Council is a matter that should be addressed directly with the council under its rules of procedure and has no link to cooperation with the ICC.



meeting of African ICC states parties and non-states parties to prepare for the ICC Review Conference.<sup>4</sup>

The decision's call for non-cooperation—contravening the treaty obligations of the 30 African states parties to the ICC—and suggested interference with the prosecutor's independence—a hard-won independence essential to the effective operation of a court often called on to address the role of state officials in serious crimes—are deeply troubling.

Following the decision, however, several African states—including Botswana, South Africa, and Uganda—were quick to publicly reiterate their commitment to the ICC.<sup>5</sup> Notwithstanding the Sudanese government's statement that al-Bashir was “free to travel across Africa” following the Sirte summit,<sup>6</sup> in fact, he has yet to visit an ICC state party, in or out of Africa, since the issuance of the arrest warrant. Prior to the Sirte summit, a number of statements reflecting strong support from African civil society were issued including in Cape Town, Kampala, and Addis Ababa.<sup>7</sup> And in the wake of the Sirte decision, a statement signed by more than 160 African civil society groups explicitly called on ICC African states parties to reaffirm their support for the ICC.<sup>8</sup>

Progress in resisting the efforts of a few to strip meaning from the AU's rejection of impunity for serious crimes, clearly reflected in article 4 of its Constitutive Act, has been hugely assisted by the efforts of many African ICC states parties. African ICC states parties, for example, reaffirmed their commitment to the ICC and to combating impunity during a

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<sup>4</sup> *Ibid.*, paras. 8, 11.

<sup>5</sup> See “South Africa would arrest Bashir: department,” *The Times*, July 30, 2009, <http://www.thetimes.co.za/News/Article.aspx?id=1042296> (accessed July 30, 2009); “Botswana's Position on AU Summit Decision Regarding ICC,” Botswana Ministry of Foreign Affairs and International Cooperation, July 29, 2009, [http://www.mofaic.gov.bw/index.php?option=com\\_content&task=view&id=447](http://www.mofaic.gov.bw/index.php?option=com_content&task=view&id=447) (accessed July 7, 2009); “Uganda Committed to ICC,” Office of the President, Uganda Media Center, July 10, 2009, <http://www.mediacentre.go.ug/details.php?catId=3&item=477> (accessed July 29, 2009).

<sup>6</sup> Andrew Heavens, “AU ruling means Bashir can travel in Africa: Sudan,” *Reuters*, July 4, 2009, <http://www.reuters.com/article/worldNews/idUSTRE56315820090704> (accessed July 29, 2009).

<sup>7</sup> See “African Civil Society Calls on Governments to Maintain Firm Commitment to ICC,” Coalition for the International Criminal Court news release, June 8, 2009, [http://www.iccnw.org/documents/Uganda\\_May\\_2009\\_regional\\_strategy\\_meeting\\_PR.pdf](http://www.iccnw.org/documents/Uganda_May_2009_regional_strategy_meeting_PR.pdf) (accessed October 30, 2009); “Statement by representatives of African civil society and the legal profession on the implications of the African Union's recent decisions on universal jurisdiction and the work of the International Criminal Court in Africa, Cape Town,” May 11, 2009 (copy on file with Human Rights Watch); “African Civic Leaders Statement on the situation in Sudan,” June 26, 2009 (copy on file with Human Rights Watch).

<sup>8</sup> See “Africa: Reaffirm Support for International Criminal Court,” Human Rights Watch news release, July 30, 2009 <http://www.hrw.org/en/news/2009/07/30/africa-reaffirm-support-international-criminal-court> (announcing statement). The statement was originally issued on July 30, 2009; as of August 19, 2009, the statement had 164 signatories.

meeting convened in preparation for the Sirte summit.<sup>9</sup> ICC judges and other officials have also worked to spread objective information about the court including through visits to key African capitals.<sup>10</sup> And, as indicated above, a growing coalition of African civil society organizations are working tirelessly to ensure that their voices in support of international justice are heard.

President al-Bashir's allies, however, will not be easily dissuaded. Nor do challenges to the court's legitimacy emanate exclusively from certain African states opposed to the fight against impunity. We have been disappointed at times by the muted response of ICC states parties and other international partners. It appears that two important factors may be weakening the resolve of the ICC's supporters in adequately addressing the al-Bashir arrest warrant backlash.

First, some may feel constrained in their defense of the ICC's mission by what is admittedly the uneven reach of international justice.

Indeed, this unevenness increasingly poses a challenge to the credibility of international justice, and, in turn, to that of the ICC. Concerns that impunity is not being tackled consistently around the world have a factual basis. Officials from or supported by powerful states have been able to avoid international prosecutions. Victims of the most serious international crimes in Afghanistan, Burma, Chechnya, Gaza, Iraq, and Sri Lanka, for example, have lacked access to justice. The failure to acknowledge this reality risks undermining efforts to secure justice for other victims who do have means of redress including through the ICC.

Second, claimed contradictions between peace and justice continue to serve as a fig-leaf for soft stances on accountability.

The relationship between peace and justice has arisen with regard to each ICC situation country. Most recently, President Joseph Kabila of the DRC has claimed that the imperative of peace prevents the arrest of Bosco Ntaganda, a former rebel commander who is wanted

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<sup>9</sup> See African Union, Report of the Meeting of African State Parties to the Rome Statute of the International Criminal Court, Addis Ababa, June 8-9, 2009, MinICC/Rpt (copy on file with Human Rights Watch).

<sup>10</sup> See, for example, "ICC First Vice-President begins her official visit to African States Parties," ICC press release, June 26, 2009, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr426> (accessed October 30, 2009); "ICC President Song starts his first official visit to African States Parties," ICC press release, June 1, 2009, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/icc%20president%20song%20starts%20his%20first%20official%20visit%20to%20african%20states%20parties> (accessed October 30, 2009).

by the ICC on charges of recruiting children to be combatants.<sup>11</sup> Rather than arrest Ntaganda, the Congolese government has rewarded him with the rank of general in the Congolese army.<sup>12</sup> References to the prioritization of peace over justice have crept into debates about accountability for crimes committed in Gaza,<sup>13</sup> compounding existing frustrations with the limited reach of international justice.

While the uneven application of international justice and the perceived contradiction between justice and other important diplomatic objectives present complex questions worthy of serious answers—some of which we attempt to provide briefly below—they should not silence or dampen the response of ICC states parties to the real dangers posed by President al-Bashir’s allies. Instead, ICC states parties, court officials, civil society, and other international partners should continue sustained efforts to answer these challenges to the court’s legitimacy head-on and to secure a broad base of support for the ICC’s mission. Efforts by states parties should take a variety of forms.

### **1. Encouraging a strong ICC public information strategy**

It is important to continue to clarify the misconceptions in which the ICC’s unprincipled critics have traded. For example, while a central charge has been that the ICC is unfairly targeting African officials, in fact, African governments voluntarily referred three out of the four situations currently before the ICC. The fourth situation, Darfur, was referred to the ICC by the UN Security Council in a resolution supported by Benin and Tanzania, both elected members of the Security Council at that time.

While states parties and civil society can assist in the dissemination of objective information about the ICC, the court needs its own strong, strategic approach to public information. Progress has been made in deepening the ICC’s approach to outreach to affected communities in recent years, including through the engaged efforts of states parties, and outreach efforts to affected communities are essential and should continue to be reinforced.

Emphasis on outreach, however, has not permitted the full development of a broader, public information strategy for the court tied to its external relations requirements. Ensuring that

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<sup>11</sup> See Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/node/84264> p. 54.

<sup>12</sup> *Ibid.*, pp. 50-54.

<sup>13</sup> See, for example, “Israel threatens to quit peace talks over UN war crimes vote,” *Daily Telegraph* (London), October 16, 2009; Yitzhak Benhorin, “Security Council might not debate Goldstone Report,” *Ynetnews.com*, October 16, 2009, <http://www.ynetnews.com/articles/0,7340,L-3791110,00.html> (accessed October 30, 2009).

information about the court reaches a wider audience requires multiple approaches and tools and will require additional resources in the court's budget for its implementation. The registry's Public Information and Documentation Section (PIDS) is in the process of developing a public information strategy and has held some consultations with civil society.

To encourage these efforts, at this Assembly session, states parties should:

- Request in the omnibus resolution the finalization in early 2010 of a public information strategy, in consultation with states parties and civil society, with a view toward its presentation at the ninth Assembly session. Such a strategy should include the review conference (discussed below) as a key opportunity to project the court's activities to a broad audience. This strategy should also seek to involve the court's senior officials;
- Signal in the budget resolution prospective financial support in 2010 for a well-prepared public information strategy; and
- Attend the annual court-organized ASP side meeting on outreach and public information and engage with PIDS in a strategic discussion on achieving broader awareness of the court's activities.

In addition, to strengthen the court's external relations, the opening of an ICC liaison office in Addis Ababa will permit court officials to engage with AU embassies and ensure ready access by embassy officials and staff to objective information about the court and its activities. The Assembly should:

- Approve funding for the establishment of an ICC liaison office in Addis Ababa; and
- Ensure effective representation of the ICC in Addis by providing for a head of the Addis Ababa ICC liaison office at the D-1 level.

## **2. Shoring up diplomatic and political support for the ICC**

States parties should continue to seek every opportunity to express vigorous support for the ICC's mission and its independence. While a show of such support is of perennial importance, it is needed now more than ever to refute any sense of waning support for the court's mandate. The general debate of the ASP provides an important platform for such

statements of support, and we urge all states to take advantage of this opportunity. In their speeches, states parties should:

- Affirm commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Recognize the central role of the ICC as a court of last resort in the absence of genuine action by national authorities;
- Underscore the obligation of ICC states parties to cooperate fully with the court, including in carrying out arrests; and
- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference.

### **3. Promoting the equal application of the law**

States parties should counter the present unevenness of international justice by promoting the equal application of the law. This can be done through efforts to secure wider ratification of the Rome Statute of the ICC and also through efforts to ensure accountability regardless of where serious crimes are committed. At this Assembly session, in general debate speeches and appropriate ASP resolutions, states parties should:

- Acknowledge the uneven reach of international justice and commit to extending its reach including through promoting wider ratification of the Rome Statute;
- Stress that justice should not be denied for some because it is not yet possible for all; and
- Identify universality, complementarity, and the impunity gap as a topic for the review conference stocktaking exercise (see discussion below).

### **4. Countering false claims about peace and justice**

States parties should seek to address claims about the relationship between peace and justice in a manner that affirms the importance of accountability to conflict resolution. Indeed, Human Rights Watch's research over the past 20 years in as many different countries—collected in our recent report, *Selling Justice Short: Why Accountability Matters*

*for Peace*—demonstrates that the path of ignoring atrocities and reinforcing a culture of impunity in peacemaking may carry a high price.

While there are undoubtedly many factors that influence the resumption of armed conflict, and we do not assert that impunity is the sole causal factor, our research shows that the impact of justice is too often undervalued when weighing objectives in resolving a conflict. Indeed, insisting on justice has not necessarily meant an end to peace talks, and the indictment of abusive leaders has at times led to their marginalization and the facilitation of peace and stability.

In general debate speeches at this Assembly session, states parties should:

- Affirm that justice is a crucial component of lasting peace, as well as an important objective in its own right.

In addition, states parties should:

- Identify the impact of international justice on peace processes and peacebuilding as a topic for the review conference stocktaking exercise; and
- Attend the side-event discussion on peace and justice during this Assembly session.

### *B. Establishing a working group on cooperation*

The above section addresses the challenges faced by the court in securing diplomatic and political support. Cooperation, of course, extends beyond this to embrace a broad spectrum of assistance, including judicial cooperation and logistical support.

Human Rights Watch has repeatedly called attention to the excellent report on cooperation endorsed by the ASP Bureau in 2007.<sup>14</sup> The report provides invaluable guidance by identifying a range of steps states parties should take to improve cooperation with and support for the ICC.

Implementation of the numerous recommendations contained in the Bureau's report has been a key advocacy point for us since the report's publication. We join the paper prepared by the Coalition for the International Criminal Court (CICC) cooperation team in welcoming

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<sup>14</sup> ASP, "Report of the Bureau on Cooperation," ICC-ASP/6/21, October 19, 2007, [http://www2.icc-cpi.int/iccdocs/asp\\_docs/library/asp/ICC-ASP-6-21\\_English.pdf](http://www2.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-21_English.pdf) (accessed October 30, 2009).

the efforts of the ASP-appointed focal point on cooperation, Ambassador Yves Haesendonck, to move forward implementation of the Bureau's report over the past two years of his mandate.

With the imminent expiration of Ambassador Haesendonck's mandate, Human Rights Watch fully supports the recommendation of the CICC cooperation team urging the Assembly to act at this session to renew a mandate for a focal point on cooperation. In addition, and again as recommended by the CICC cooperation team, we urge the Assembly to put in a place a permanent, intersessional working group on cooperation.

An intersessional working group would offer certain advantages over renewal of the focal point's mandate standing alone. Given the scope of the court's cooperation requirements and states parties' cooperation obligations, a working group is more appropriately suited to take this work forward than a single focal point acting on his or her own. The focal point, however, could chair the working group and take a leadership role in its oversight, particularly in the development of its first procedures and practices. A working group could also be composed of a number of states parties representatives based in key cities, including The Hague, New York, Brussels, and Addis Ababa. The geographic reach of such a working group would enable it to work closely with institutions providing cooperation to the court, including the UN, the European Union, and the African Union.

Procedurally, the working group could meet intersessionally and prepare a report for discussion and debate at the annual Assembly session, reflecting the activities of the working group over the previous year and proposing an action plan for the coming year. The working group session at the Assembly would also provide an ideal opportunity for presentation of an annual court report on cooperation. We understand the court has prepared such a report this year for presentation to the Assembly. Given the importance to enhancing cooperation of the court's clear identification of its needs, we would urge that this report be prepared and presented annually.

Substantively, the working group could take up specific, targeted initiatives each year, drawing on the recommendations detailed in the Bureau report on cooperation. These initiatives could be identified in consultation with the Bureau, and could include initiatives similar to those pursued by the current cooperation focal point such as examining the possible forms of assistance regarding witness protection, developing expertise and cooperation in the area of financial investigations and freezing of assets, and facilitating the exchange of best practices. In addition, a possible first point of business for the working

group in 2010 could be to assist in the preparation of a component on cooperation as part of the review conference stocktaking exercise (see discussion of stocktaking below).

A permanent working group on cooperation would secure this key issue a standing place on the agenda of the Assembly of States Parties, providing cooperation with the profile and attention it deserves from states parties. We urge the Assembly to:

- Act to renew a mandate for a focal point on cooperation and to establish a permanent, intersessional working group on cooperation with the focal point on cooperation serving as its chairperson.

## II. Preparing for the Review Conference

While mandated by the Rome Statute to consider any amendments to the treaty, the upcoming review conference also offers an unparalleled opportunity to enhance support for international criminal justice and the ICC as the keystone. States parties clearly recognized this in deciding at the sixth Assembly session that “in addition to a focus on amendments that may command very broad, preferably consensual support, the Review Conference should be an occasion for a ‘stocktaking’ of international criminal justice in 2010.”<sup>15</sup> The review conference has since taken on additional significance. As discussed above, the court’s needs strong support from its states parties now more than ever.

Making the most of the review conference, however, will require adequate preparation. With only months to go, key steps are required by the Assembly at this session. As a first step, in speeches during the general debate, states parties should:

- Welcome the upcoming review conference as an important opportunity to reaffirm international commitment to the ICC and international criminal justice and commit to working towards a well-prepared conference.

Additional steps include putting in place a mechanism to prepare a substantive stocktaking exercise; defining a clear role for the court at the review conference; and careful consideration of amendment proposals with a view toward putting forward only those likely to secure broad support and to preserve the integrity of the Rome Statute.

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<sup>15</sup> ASP, “Strengthening the International Criminal Court and the Assembly of States Parties,” Resolution ICC-ASP/6/Res.2, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth Session, New York, 30 November-14 December, 2007*, vol. I, p. 46, para. 54 (“ASP Sixth Session Omnibus Resolution”).



### *A. Delivering on the promise of stocktaking*

As indicated above, “stocktaking”—a critical evaluation of the performance to date of international criminal justice as it relates to the system established by the Rome Statute—will form an essential component of the review conference. It should feature prominently as a formal part of the conference’s agenda on equal footing with consideration of amendments to the statute.

Building on the work of the Assembly focal point on the review conference<sup>16</sup> and ongoing discussions within the New York Working Group under the guidance of the review conference co-facilitators, the Coalition for the International Criminal Court (CICC) review conference team has prepared a detailed set of recommendations on stocktaking. These recommendations identify four topics around which discussions could be organized:

- (1) impact of justice on victims and affected communities;
- (2) state cooperation with the ICC;
- (3) complementarity, universality of the Rome Statute, and the impunity gap;
- (4) impact of international justice on peace processes and peace building.<sup>17</sup>

Human Rights Watch agrees that these four topics reflect the issues of most importance at this point in time. Substantive discussion of these topics would provide ample basis for identifying key objectives in the coming years, as well as specific commitments required by states parties, ICC officials and staff, and civil society to meet these objectives.

Complementarity, for example, has emerged as a leading issue, particularly as the ICC’s immediate forerunners—tribunals for the former Yugoslavia, Rwanda, and Sierra Leone—wind down. Efforts to deepen the Rome Statute’s principle of complementarity and to increase capacity for serious crimes prosecutions by equipping national jurisdictions will be

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<sup>16</sup> See, for example, ASP, “Review Conference: Scenarios and Options Progress report by the focal point, Mr. Rolf Einar Fife,” ICC-ASP/6/INF.3, December 4, 2007, [http://www.icc-cpi.int/iccdocs/asp\\_docs/library/asp/ICC-ASP-6-INF-3\\_English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-INF-3_English.pdf) (accessed October 30, 2009).

<sup>17</sup> CICC Review Conference Team, “Comments and Recommendations on the Stocktaking Process at the Review Conference, July 23, 2009 (copy on file with Human Rights Watch), para. 12 (“CICC Stocktaking Recommendations”).

an essential feature of the future international justice landscape. Both the registrar and prosecutor have recently identified progressing their respective approaches to positive complementarity as a key strategic objective.<sup>18</sup>

An absence of political will, however, is surely as much of an obstacle to national trials as technical capacity. Experience from the Balkans and Rwanda suggest that a strong and effective ICC and its credible threat of action will be required to overcome any absence in political will. Delivery on the Rome Statute's commitment to end impunity for the world's worst crimes will therefore require ongoing investment in the ICC even as national efforts are also encouraged. Consideration of how these two goals can be achieved—including through an enhanced ICC approach to positive complementarity—would provide a rich basis for discussion. It could also help to identify how and where resources could be directed in the coming years.

Realizing the full value of the stocktaking exercise, however, will require adequate preparation. As further recommended by the CICC review conference team, the shape of the stocktaking exercise should be adapted to each topic and is likely to be quite distinct from an ordinary Assembly session: “[Stocktaking] may require discourse that is broad and conceptual in some cases and intimate and practical in others; it may require a platform for healing or a stage for debate; it may result in resolutions in some instances and simply the recognition of experiences in others.”<sup>19</sup> Clearly, careful, advance thinking is required in the design of stocktaking for each topic as well as a commitment to its execution. Leaving preparation of the stocktaking exercise to the last minute or to an underresourced facilitation is likely to result in little more than a glorified general debate at the review conference.

To this end, at this session, the Assembly should:

- Identify the topics of the stocktaking exercise; and

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<sup>18</sup> Office of the Prosecutor, ICC, “Draft Prosecutorial Strategy for 2009-2012,” August 18, 2009, <http://www.icc-cpi.int/NR/rdonlyres/45BDF722-55E2-4BD3-930C-F062E9FA34B8/280702/ProsecutorialStrategyDRAFTFORDISCUSSION180809.pdf> (accessed October 30, 2009), para. 63; Silvana Arbia, Registrar of the ICC, “The Three Year Plans & Strategies of the Registry in respect of complementarity for an effective Rome statute system of international criminal justice,” Consultative Conference on International Criminal Justice, New York, September 9-11, 2009, <http://www.internationalcriminaljustice.net/papers/Session2.pdf> (accessed October 30, 2009). Positive complementarity refers to the active catalysis of domestic processes by the ICC, including by providing assistance to national judicial authorities particularly in ICC situation countries. See Geraldine Mattioli and Anneke van Woudenburg, “Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo,” in Nicolas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008), pp. 55-64.

<sup>19</sup> CICC Stocktaking Recommendations, para. 13.

- Establish an inter-sessional task force to carry forward preparation of the review conference, including the stocktaking exercise.

This taskforce could include a set of co-facilitators, one for each topic agreed as part of the stocktaking exercise. (Preparation of amendments could proceed through other co-facilitators within the task force.) Each stocktaking co-facilitator would be responsible for designing the structure of stocktaking for his or her topic.<sup>20</sup> This could include determining the amount of time required in the review conference agenda and in side events, inviting the preparation of expert papers, and recruiting the participation of speakers and participants. In so doing, the co-facilitators would be supported by consultations with other states parties, ICC officials and staff from all of its organs, representatives of affected communities, civil society, and international justice experts, in addition to the detailed recommendations already developed by the CICC.

### *B. Defining a strong role for the court at the review conference*

While the review conference is convened by the UN secretary-general and not the ICC itself, Human Rights Watch believes the court should play a strong role during the review conference and in its preparations.

ICC officials and staff—many of whom have also served in other international criminal tribunals—would bring a wealth of experience to the stocktaking exercise. This would include assessing the court’s achievements to date and identifying particular gaps in support or areas for future progress under each of the stocktaking topics proposed above.

Perhaps even more importantly, the review conference will provide an opportunity for court officials and staff to project outwards the work of the court to a broad audience. As indicated above, increased public information efforts are key to enhancing support for the ICC and countering misperceptions spread by some critics. With the attendance of the UN secretary-general and high-level delegations expected, the review conference is likely to attract substantial press coverage in Africa, including in media outlets that do not ordinarily cover the ICC’s activities. In addition, the review conference’s venue in Kampala provides a particular opportunity to reach communities affected by crimes within the court’s jurisdiction, including in Uganda as a situation country.

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<sup>20</sup> Where topics for the stocktaking exercise coincide with topics already assigned to facilitators within the ASP’s Working Groups or focal points, for example, cooperation, the facilitator or focal point for that issue could sit on the review conference task force to take up its preparation for stocktaking.

The court should be encouraged to prepare public information plans specific to the review conference in order to make the most of these opportunities. This strategy could focus on the ICC's most innovative aspects, including its progress in securing the right of victim participation and the delivery of assistance and ultimately reparations through the Trust Fund for Victims, and could feature a variety of court officials, including ICC judges and officials from the region.

To ensure adequate preparation by the court and its full participation in the review conference, the Assembly should:

- Include language in the review conference or other appropriate resolution reaffirming the importance of the ICC's full participation in the review conference and calling on the court to prepare plans for its participation and public information efforts around the review conference. These plans should be presented to the review conference task force in early 2010.

A strong role for the ICC at the review conference will of course require resources. The Assembly should additionally:

- Support the provision of requested resources in the court's budget for the review conference including to allow for the court's engagement in preparations.

### *C. Preliminary consideration of amendment proposals*

As decided at the sixth Assembly session, "proposals for amendments [to the Rome Statute] to be considered at the Review Conference should be discussed at the eighth session of the Assembly of States Parties in 2009, with a view to promoting consensus and a well prepared Review Conference."<sup>21</sup> As of the September 30 deadline set by the Bureau for the submission of proposals, Norway, Belgium, Mexico, The Netherlands, Trinidad and Tobago, and Liechtenstein (on behalf of the Special Working Group on the Crime of Aggression) have submitted proposed amendments.

Human Rights Watch considers it to be of fundamental importance that states parties are guided by preserving the integrity of the Rome Statute in their consideration or eventual action on any proposed amendments. Apart from where we feel that integrity is threatened

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<sup>21</sup> ASP Sixth Session Omnibus Resolution, para. 53.

or where an amendment concerns our organizational work or mandate, Human Rights Watch will not necessarily take a position on proposed Rome Statute amendments. We offer preliminary views here on three proposals, those of Norway, Belgium, and the Special Working Group on the Crime of Aggression, and will be closely monitoring amendment discussions at this session and beyond.

### **1. Norway**

The Norwegian proposal seeks amendment of article 103(1)(a) on the enforcement of sentences of imprisonment by adding language that would permit a state to indicate its willingness to accept sentenced persons either “in a national prison facility or in a prison facility made available to the State by an international or regional organization, arrangement or agency, as provided in the Rules of Procedure and Evidence.” According to the background statement accompanying the proposal, Norway believes that such provision would increase state participation in the enforcement of sentences by encouraging regional and international cooperation to upgrade prison facilities in those states that may wish to accept prisoners but which at this point lack the technical capacity to do so.<sup>22</sup>

Human Rights Watch has previously advocated the importance of enforcement of sentences agreements (along with other framework agreements that facilitate action by states parties on ICC cooperation requests). Regrettably, as the Norwegian proposal notes, all too few such agreements have been concluded.<sup>23</sup> In our view, the proposal helpfully introduces a certain flexibility that may be useful in making available additional facilities for the detention of persons serving out ICC sentences. Indeed, in the area of witness protection, the Assembly’s focal point on cooperation has similarly examined what assistance might be provided to states parties interested in entering into witness relocation agreements with the ICC but which lack sufficient domestic witness protection programs or other arrangements to do so.<sup>24</sup> In addition to aiding the work of the ICC, such agreements may enhance national capacity to the benefit of domestic judicial systems. The same would apply equally to upgraded prison facilities to ensure they meet international standards for the treatment of prisoners.

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<sup>22</sup> Letter of Morten Wetland, Ambassador, Permanent Mission of Norway to the United Nations to Ban Ki-Moon, Secretary General, United Nations, September 30, 2009 (transmitting Norwegian proposal) (copy on file with Human Rights Watch).

<sup>23</sup> See Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, July 2009, <http://www.hrw.org/en/reports/2008/07/10/courting-history-o>, p. 220.

<sup>24</sup> See ASP, “Report of the Bureau on Cooperation,” ICC-ASP/7/18, October 29, 2008, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP7/ICC-ASP-7-18%20English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-18%20English.pdf) (accessed October 30, 2009), para. 12.

## 2. Belgium

Belgium has submitted three proposed amendments to criminalize additional means of warfare under article 8 (or to equalize the treatment of a particular weapon in conflicts of an international and non-international nature).<sup>25</sup> Each amendment has attracted significant co-sponsors.

Human Rights Watch has led efforts to ban the use of anti-personnel mines and blinding lasers, including as a founding member of the Nobel-laureate International Campaign to Ban Landmines. We strongly support those aspects of the Belgian proposals that would criminalize their use under the Rome Statute in both international and non-international armed conflicts. Criminalization would significantly strengthen the norm established by existing bans on both weapons, as well as the stigma attached to their use.

The balance of the Belgian proposals concern extending to non-international armed conflicts the use of poison or poisoned weapons, gases and all analogous liquids, materials or devices, and bullets which expand or flatten easily in the human body (already criminalized under the Rome Statute in international armed conflicts under article 8(2)(b)(xvii-xix)) and criminalizing biological and chemical weapons and non-detectable fragments in international and non-international armed conflicts.

While Human Rights Watch has done less work on these weapons than on anti-personnel mines and blinding lasers, extending the court's jurisdiction over these weapons (or equalizing their treatment in conflicts of international and non-international character) is consistent with our work on weapons that pose a particular threat to civilian populations.

## 3. Special Working Group on the Crime of Aggression

Human Rights Watch's institutional mandate includes a position of strict neutrality on issues of *jus ad bellum*. We focus instead on the conduct of war, or *jus in bello*, to promote our primary goal of encouraging all parties to a conflict to respect international humanitarian law.<sup>26</sup> Consistent with this approach, we take no position on the substance of the crime of aggression.

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<sup>25</sup> Letter of Jan Grauls, Ambassador, Permanent Representation of the Royal Kingdom of Belgium to the United Nations, to Ban Ki-Moon, Secretary General, United Nations, September 29, 2009 (transmitting proposal) (copy on file with Human Rights Watch).

<sup>26</sup> The only exception that Human Rights Watch has made to this policy is to call for military interventions where massive loss of human life, on the order of genocide, can be halted through no other means, as was the case in Bosnia and Rwanda in the 1990s.

At the same time, Human Rights Watch is deeply concerned by options contained within the proposal submitted by the Special Working Group on the Crime of Aggression that would require a determination of an act of aggression or referral by the UN Security Council (alternative 1, options 1 and 2), the General Assembly (alternative 2, option 3), or the International Court of Justice (alternative 2, option 4) to “trigger” exercise of the ICC’s jurisdiction over the crime. Having the Security Council or the General Assembly act as the gatekeeper to the court’s exercise of jurisdiction would subordinate the court to the highly politicized decision-making processes of these bodies. While such politicization is less a risk where placing the trigger in the hands of the International Court of Justice is concerned, the rationale for relying on the decision-making powers of an entirely separate judicial institution rather than those of the court’s own judges is unclear. Any of these approaches would undercut the court’s independence, and also its legitimacy, authority, and credibility.<sup>27</sup>

### III. Providing Sound Stewardship

Equally important as cooperation to the court’s success is sound stewardship exercised by the Assembly in its management oversight regarding the administration of the court as provided in article 112(2)(b) of the Rome Statute. In this respect, Human Rights Watch welcomes the substantial progress made toward establishing an independent oversight mechanism. This mechanism will equip the court and the Assembly to respond more effectively to allegations of serious misconduct, increasing the institution’s transparency and accountability. We join the paper prepared on this issue by the CICC and urge the Assembly to:

- Act at this session to establish an independent oversight mechanism to carry out investigations and mandate a study to consider expanding the mechanism’s mandate to encompass the additional functions of inspection and evaluation provided for in article 112(4) of the Rome Statute.

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<sup>27</sup> The Special Working Group proposal also contains an option that would require the pre-trial chamber’s authorization before the prosecutor could proceed with an investigation in respect of a crime of aggression (alternative 2, option 2). While requiring such authorization is less problematic than requiring a determination by an institution external to the ICC, this proposal would nonetheless depart from the ordinary scheme set up by the Rome Statute, which only requires pre-trial authorization where the prosecutor seeks to open an investigation of his own motion under article 15. Such authorization is not presently required where a situation is referred to the ICC prosecutor by either the Security Council or a state. In our view, there is no reason to depart from this ordinary scheme when it comes to the crime of aggression. Only alternative 2, option 1 of the Special Working Group proposal comes close, and even then, it would introduce delay by requiring the prosecutor to provide the Security Council with a six-month notification period prior to proceeding to commence an investigation. For reasons that are unclear, the text can also be read to exempt the prosecutor from seeking the pre-trial authorization ordinarily required under article 15 where the prosecutor seeks to act of his own motion.

Human Rights Watch has also encouraged states parties to actively engage with ICC officials and staff to provide scrutiny and feedback on the court’s operations. In addition to papers on cooperation and the independent oversight mechanism already referenced above, we join in other papers prepared by the CICC, including those on budget and finance, gender, communications, and legal representation.

Each of these papers seeks the support of states parties in advancing key objectives in the coming year. In the area of legal representation, for example, the CICC papers note the proposal of The Hague Working Group to include language in the omnibus resolution recognizing the importance of funding legal aid for indigent victims in order to give effect to the right of participation and also seek reinstatement to the court’s budget of the cut in legal aid for the defense recommended by the Committee on Budget and Finance. When it comes to the court’s communications policies, the CICC paper notes substantial progress in development of the court’s outreach activities, and in addition to calling for a public information strategy as we discuss above, seeks increased coordination between states and the court, as well as within and between the court’s organs, to carry out public information efforts.

In a number of areas, dialogue between states parties and the ICC—particularly through the Assembly’s working groups—have progressed court policies and practices over the years, including in outreach activities, strategic planning, and reinforcing a “One Court” principle that gives priority to inter-organ coordination on administrative matters while respecting the independence of each organ.<sup>28</sup> We encourage states parties to:

- Attend side meetings during this Assembly session organized by states, the court, and non-governmental organizations on issues including the victim strategy, the Trust Fund for Victims, and outreach and public information to deepen understanding of the court’s activities and challenges.

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<sup>28</sup> We note that the Committee on Budget and Finance (CBF) has requested submission by the ICC presidency of a report to its fourteenth session “on the measures that the Court is taking to increase clarity on the responsibilities of the different organs.” This follows a report prepared by an external consultation on risk management. According to the CBF, this report “identified divisions among the organs and a lack of clarity of roles as the main risk that could lead to inefficiencies.” See ASP, “Report of the Committee on Budget and Finance on the work of its thirteen session,” ICC-ASP/8/15 Advance Version, September 15, 2009, <http://www.icc-cpi.int/NR/rdonlyres/93F7C5C4-6DF0-41B3-BCA5-C34B417F115A/0/ICCASP815ENGAdvance.pdf> (accessed October 30, 2009), paras. 25-26 (“CBF Thirteenth Session Report”). We encourage the court to take full advantage of this opportunity to come to a shared understanding of their respective responsibilities in a number of areas, including external relations, public information, protection of victims, witnesses and others, and administration.



Human Rights Watch is concerned, however, that every effort is made by states parties to ensure that the Assembly's oversight advances rather than detracts from the ICC's development. We address here two issues in particular: family visits for indigent detainees and the difficult task of the Committee on Budget and Finance in reviewing the court's budget proposal. In addition, we urge states parties to take seriously their responsibility in the election of ICC judges and the next ICC prosecutor. In these matters and in exercising its oversight function generally, Human Rights Watch urges states parties to be mindful of the court's independence as a judicial institution and to provide it with the human and financial resources it requires for success.

### *A. Family visits*

At the seventh Assembly session, Human Rights Watch urged states parties to approve a policy of funding family visits for indigent ICC detainees and provide for the necessary resources in the court's budget. We noted that while the right of all detained persons to family visits is well-recognized in international law, several unique characteristics of the ICC system—including the distance between The Hague and ICC situation countries and the length of pre-trial and trial proceedings during which detainees enjoy a presumption of innocence—made the realization of this right for indigent detainees unlikely without financial and other assistance.<sup>29</sup> States parties chose to defer a policy decision until the eighth Assembly session, inviting further discussion between the court and states parties,<sup>30</sup> but approved funding for visits during 2009 in the court's ordinary budget.<sup>31</sup>

At the time of the Assembly's session and in the preceding year while family visits were the subject of ongoing discussions in The Hague Working Group, there was no existing ICC case law on the matter. In March 2009, however, the ICC presidency—reviewing an appeal from an ICC detainee, Mathieu Ngudjolo Chui, as to the registrar's use of the funds allocated by the Assembly for family visits—held that:

It is accepted that there is no express recognition of a general right to funded family visits in the texts of the Court or in international human rights instruments. However, notwithstanding the lack of recognition, the

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<sup>29</sup> See Human Rights Watch, *Memorandum for the Seventh Session of the International Criminal Court Assembly of States Parties*, November 2008, <http://www.hrw.org/en/reports/2008/11/07/human-rights-watch-memorandum-seventh-session-international-criminal-court-assembly>, pp. 21-22.

<sup>30</sup> ASP, "Strengthening the International Court and the Assembly of States Parties," Resolution ICC-ASP/7/Res.3, November 21, 2008, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh Session, The Hague, 14-22 November 2008, ICC-ASP/7/20* ("ASP Seventh Session Official Records"), vol. I, p. 31, paras. 17-18.

<sup>31</sup> ASP, "External audit, internal audit, programme budget for 2009 and related documents," pp. 12-13, paras. 15-16.

Presidency finds that, in the instant case, a positive obligation to fund family visits must be applied in order to give effect to a right which would otherwise be ineffective in the particular circumstances of the detainee.<sup>32</sup>

In so finding, the ICC presidency was careful to note that this “positive obligation” was not unlimited, but rather “the extent of the obligation to fund family visits will inevitably be restricted by the resource constraints faced by the Court .... Such restrictions are legitimate to the extent that the right to family visits is still rendered effective.”<sup>33</sup> The presidency determined that the registrar, who “bear[s] overall responsibility for the management of the detention center, ... is best positioned to determine the precise visiting conditions necessary to render the detainee’s right to family visits effective, in particular his ability to maintain family links, in light of resource capacity.”<sup>34</sup>

Any policy decision now taken by the Assembly on family visits must be consistent with the decision of the ICC presidency on Mathieu Ngudjolo Chui’s petition. Under the court’s regulations, a detained person is accorded a right to address the presidency regarding administrative decisions concerning his or her detention.<sup>35</sup> The presidency thus routinely provides judicial review of decisions regarding detention conditions, of which the funding of family visits is but one aspect. Standards for this judicial review have been elaborated by the presidency in a series of decisions.<sup>36</sup>

Human Rights Watch appreciates the efforts made within The Hague Working Group and particularly by the facilitator on family visits to advance what have been difficult discussions on the topic. We welcome what we understand to be the substantial progress made toward recommending adoption of a policy decision at this Assembly session to fund family visits for indigent detainees out of the court’s regular budget on an ongoing basis. A decision to

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<sup>32</sup> Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC, Case No. ICC-01/04-01/07, Decision on “Mr. Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008,” March 10, 2009, <http://www.icc-cpi.int/iccdocs/doc/ICC-ROR217-02-08-8-ENG.pdf> (accessed October 30, 2009), para. 37.

<sup>33</sup> *Ibid.*, para. 42.

<sup>34</sup> *Ibid.*, para. 53.

<sup>35</sup> Regulations of the Court, ICC, ICC-BD/01-02-07, amended June 14 and November 14, 2007, <http://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/o/ICCBDo10207ENG.pdf> (accessed October 30, 2009), reg. 106; see also Regulations of the Registry, ICC, ICC-BD/03-01-06, revised September 25, 2006, [http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/140149/ICCBDo30106\\_English1.pdf](http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/140149/ICCBDo30106_English1.pdf) (accessed October 30, 2009), reg. 221 (elaborating complaints procedure).

<sup>36</sup> The ICC presidency has elaborated its standard of judicial review of decisions of the Registrar in several decisions. See Prosecutor v. Katanga and Ngudjolo, “Decision on funding family visits,” p. 10, note 71.

fund family visits would be consistent with the ICC presidency's decision on Mathieu Ngudjolo Chui's petition.

We are concerned, however, by what we understand to be efforts to adopt language in the course of taking this policy decision that would contradict the ICC presidency's finding of a positive obligation to fund family visits in the case of Mathieu Ndudjolo Chui. Adoption of such language would undercut the court's independence as a judicial institution. In a climate where the ICC's opponents have sought its politicization, the court's best defense is the integrity and independence of its judges. The Assembly should avoid setting the potentially dangerous precedent of interference.

At this session, Human Rights Watch urges the Assembly to:

- Adopt a policy of funding family visits for indigent detainees on an annual basis in the court's regular budget; and
- Avoid language in any Assembly resolution that would contradict the ICC presidency's decision of March 10, 2009 finding a positive obligation to fund family visits in the case of Mathieu Ngudjolo Chui.

#### *B. Committee on Budget and Finance*

Ensuring adequate resources for the ICC is a key responsibility of its states parties and an important measure of sound stewardship. As was made clear at the time,<sup>37</sup> Human Rights Watch and other CICC member organizations were disappointed by the Assembly's action last year of imposing an arbitrary reduction on assessed contributions, in effect reducing the court's approved budget by €5 million. This represented a distortion of the court's financial regulations, including by providing for resort to the Working Capital Fund in the event of a budgetary shortfall.

In our view, this was driven primarily by the insistence of a few states parties that growth in the ICC's budget be held down insofar as possible, rather than careful consideration of the resources required by the court's workload. As the budget resolution itself reflects, states

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<sup>37</sup> See CICC, "Statement by the CICC Team on Budget and Finance to the Seventh Session of the Assembly of States Parties," November 17, 2008 (copy on file with Human Rights Watch).

parties themselves viewed this as “exceptional.”<sup>38</sup> Notwithstanding the global economic crisis that continues to put pressure on state budgets, we have every expectation that at this Assembly session states will reject last year’s approach and afford the court’s proposed budget careful and responsible scrutiny on its own terms.

As indicated above, Human Rights Watch joins in the CICC budget and finance team paper and the specific recommendations advanced therein. We write separately to underscore concerns that the Committee on Budget and Finance (CBF) may not always have sufficient information available to assess the impact of some of its recommendations on the court’s work.

Time allocated to the CBF to review the court’s extensive budget request is limited. As noted in the CICC paper, we especially appreciated the efforts by CBF members to consult with civil society at their sessions notwithstanding these time pressures. We understand that the CBF has adopted a practice of limiting presentations given by court staff and makes use of written reports and informal consultations with staff. While this approach may aim at maximizing the very limited time the CBF has to conduct its review, it may also mean that the CBF may not have sufficient interaction with court staff during its sessions to gain additional necessary information to evaluate the court’s requests.

The CBF recommended, for example, that instead of approving a new P-2 associate field officer for the Victims Participation and Reparations Section (VPRS) to handle applications for participation from the Central African Republic situation, the VPRS’s field officer in Kampala should be redeployed.<sup>39</sup> The Kampala-based VPRS position, however, is responsible for fielding applications in the northern Uganda and Darfur situations; redeployment would consolidate responsibility for three of the four ICC situation countries in a single position. It is unclear from the CBF’s report whether it was provided with information about the workload of the existing P-2 position in Kampala.

The CBF also recommended against the conversion from General Temporary Assistance to established posts of the P-3 psychologist/psychological trauma expert in the Victims and Witnesses Unit (VWU) and the P-2 audiovisual producer in the Public Information and Documentation Section (PIDS).<sup>40</sup> The CBF did not provide an explanation as to its

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<sup>38</sup> See ASP, “Programme budget for 2009, the Working Capital Fund for 2009, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for the year 2009 and the Contingency Fund,” ICC-ASP/7/Res.4, November 21, 2008, ASP Seventh Session Official Records, p. 39.

<sup>39</sup> CBF Thirteenth Session Report, para. 96.

<sup>40</sup> *Ibid.*, paras. 92-93.

recommendation regarding the VWU post. It is unclear whether it had information available to it about the requirement in article 43(6) of the Rome Statute that the VWU “include staff with expertise in trauma” or the increasing frequency with which the trial chamber has required the presence of a psychologist during witness familiarization and testimony. As to the PIDS post, “the Committee questioned the need to create permanent in-house capacity at this point.”<sup>41</sup> Again, it is unclear whether the CBF had sufficient information about the central role of audiovisual materials in the court’s outreach activities. Outreach activities in 2009, for example, have relied heavily on the production of radio and television programs to reach affected communities.<sup>42</sup>

In reviewing budget requests attached to the court’s strategic review of its field operations, the CBF approved requests for enhancing strategic policy and planning and coordination capacity for those operations through additional or upgraded Field Operations Section positions based in The Hague. It recommended against approving the reclassification from P-3 to P-4 of the four field office managers to “heads of registry.”<sup>43</sup> We welcome the CBF’s recommendations regarding additional resources at headquarters, and note that they intend to revisit the court’s strategic review of field operations at their next session. In the interim, key risks identified by the strategic review—including the current absence of persons in the field with sufficient responsibility to coordinate registry staff to ensure efficient management of registry resources as well as to respond to threats to the safety of personnel or allegations of staff misconduct<sup>44</sup>—will remain unaddressed in the absence of the requested “heads of registry.” In addition, the close coordination between the Field Operations Section in The Hague and these “heads of registry,” a key part of the plans for enhancement of the court’s field operations, will not be possible.<sup>45</sup>

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<sup>41</sup> *Ibid.*, para. 93.

<sup>42</sup> See, for example, ICC, “Outreach Report 2009—Executive Summary,” October 7, 2009 (copy on file with Human Rights Watch).

<sup>43</sup> CBF Thirteenth Session Report, para. 82.

<sup>44</sup> See ASP, “Report of the Court on the enhancement of the Registry’s field operations for 2010,” ICC-ASP/8/CBF.2/10, July 30, 2009 [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-33-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-33-ENG.pdf) (accessed November 5, 2009), paras. 3, 20-21, 26 (“Court report on field operations”).

<sup>45</sup> Court report on field operations, para. 31. We recognize that there may have been additional factors at work guiding the CBF’s recommendations on this issue, including disagreement between the court’s organs as to the desirability of these requested changes in the staffing of field offices. As noted above, the CBF has indicated that it will review this issue at its fourteenth session following the completion of the court’s strategic planning. Human Rights Watch continues to advocate for the establishment of “heads” of the court’s field offices to provide for increased coordination of the court’s field activities as well as a consistent point of contact in the field for the court’s key local interlocutors, see Human Rights Watch, *Courting History*, pp. 109-11, and looks forward to further discussion on this issue with the CBF and states parties.

To ensure that the CBF has sufficient information to fully review the court’s proposed budget, the Assembly should consider—in consultation with the CBF itself—whether adjustments are necessary to the CBF’s procedures including in particular whether more time should be allocated to the CBF for its review.

At this session, the states parties and the Assembly should:

- Reaffirm in the budget resolution that the Assembly looks to the Committee on Budget and Finance for recommendations as to the allocation of resources based on the court’s mission and mandate.

### *C. Election of judges*

At this Assembly session, ICC states parties will vote to elect two new judges to the court. With only 18 judges, the nomination and election of only the most highly qualified candidates is essential at each and every election. In this regard, it is disappointing that just five nominees have been put forward for these elections.<sup>46</sup>

As was the case during the elections earlier this year, the election of “List A” candidates, that is, those candidates with criminal law expertise and prior experience in criminal proceedings as judges, prosecutors or defense lawyers, continues to be particularly important at this point in the court’s development. Given the requirements of the ICC’s work—including long trial days and an ever increasing docket that must be dealt with efficiently and in a manner consistent with fair trial rights— judges must come to the court prepared for a strenuous and demanding workload for the duration of their nine-year term.

The decision of the ICC judges at their fifteenth plenary to organize themselves into divisions in a manner that will require frequent recusal of two judges from the Appeals Division did not reflect a priority on the welfare of the institution. States parties should also elect candidates who demonstrate an ethic of public service and commitment to the ICC’s mandate and institutional development.

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<sup>46</sup> This is notwithstanding the fact that only three regions were eligible to nominate candidates for these elections. The Eastern Europe grouping understandably waived its right to nomination given the late date at which it became eligible to put forward candidates following ratification by the Czech Republic, see ASP, “Twelfth ICC-ASP Bureau Meeting, 9 September 2009, Agenda and Decisions,” <http://www.icc-cpi.int/NR/rdonlyres/F2685BCE-3EEC-4153-802A-F55666960431/0/ICCASP2009Bureau12Do9September2009ENG.pdf>, (accessed October 30, 2009), para. c, but four candidates from the GRULAC and one candidate from the Asian states do not reflect sufficiently robust efforts by states parties.

In addition, as we have advocated in previous judicial elections, states parties should resist the practice of “vote-trading,” where states agree to support one another’s candidates with minimal regard to the individual’s qualifications. Vote-trading over ICC positions could lead to the election of poorly qualified judges, and hence to a bench that will not be the most skilled and representative. Human Rights Watch urges states parties to put aside narrow interests and vote only for the most highly qualified judges.

The growing visibility of the work of the pre-trial, trial, and appeals divisions underscore how critical the election of the most highly qualified candidates to the ICC bench is to the continued progress of the court. The performance of its judges in the courtroom and their decision-making will increasingly provide a key test of the court’s effectiveness and credibility. Ultimately, as the nominators and electors of judges, states parties have the greatest opportunity to influence the court’s positive development by providing it with the best possible bench. States parties should not shirk this profound responsibility.

At this session, states parties should thus:

- Elect only the most highly qualified judges to the ICC bench, bearing in mind the importance of a candidate’s criminal law expertise and experience and commitment to active service of the ICC’s mandate over a full nine-year term; and
- Include language in the omnibus resolution of this session and in general debate speeches underscoring the importance to the court’s success of the election of only the most highly qualified judges.

#### *D. Election of the next ICC prosecutor*

States parties also exercise an important oversight role in the nomination and election of the ICC prosecutor. Ensuring sound prosecutorial strategy through the election of an individual who exemplifies the qualifications provided for in article 42 of the Rome Statute—a highly competent person of high moral character with extensive practical experience in the prosecution or trial of criminal cases—is essential to continuing to build the effectiveness and credibility of the ICC. Indeed, while the public face of the ICC should increasingly be rounded out to reflect the diversity of the court’s activities, including those of its judges, the registry, and counsel representing defendants and victim participations, the public’s first encounter with the ICC and its greater familiarity with the institution often will come through the investigations of its prosecutor.

Elections for the court's second prosecutor will take place in 2012. The present nominations process provides that "the procedures for the nomination of candidates for judges apply mutatis mutandis to the nomination of the Prosecutor" and "[n]ominations for the post of the Prosecutor should preferably be made with the support of multiple States Parties."<sup>47</sup> We encourage states parties to prepare for the 2012 elections by examining whether any revisions are required to the nominations procedure to ensure that the most highly qualified candidates are brought to its attention. At this session, the Assembly should:

- Provide in the omnibus resolution for facilitation through one of the Assembly's Working Groups of review of the nominations procedure for election of the ICC prosecutor, with a view toward bringing any proposal changes to the Assembly's ninth session for approval and adoption.

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<sup>47</sup> ASP, "Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court," Resolution ICC-ASP/1/Res.2, September 9, 2002, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP1-Res-02-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-02-ENG.pdf) (accessed October 30, 2009), paras. 24-25.