



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

March 2010

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I. Introduction

The review conference of the Rome Statute of the International Criminal Court (ICC), scheduled to take place in Kampala, Uganda from May 31 to June 11, 2010, presents an unparalleled opportunity in the fight against impunity for serious crimes in violation of international law. While the review conference will consider amendments to the Rome Statute, states parties and other stakeholders also have an opportunity to significantly influence how accountability is realized for the most serious crimes at both the national and international levels in the years to come. Realizing this potential – through the general debate, the stocktaking exercise and the adoption of resolutions and declarations – requires continued meaningful preparation and involvement in the lead-up to Kampala. In part II of this memorandum, we have outlined the general need for all states parties to consider how best to use the review conference as a platform to enhance political support for the ICC. We also underscore the importance of ensuring high-level government engagement in all deliberations surrounding the review conference.

The upcoming resumed eighth session of the Assembly of States Parties (ASP) will be a key moment to assess progress in preparations in certain areas. As part of the formal agenda, the ASP will discuss developments relating to the four topics of the stocktaking exercise it identified at its eighth session: 1) the impact of justice on victims and affected communities; 2) state cooperation; 3) complementarity; and 4) peace and justice.¹ In addition to assessing progress relating to stocktaking, the resumed session offers states parties the chance to develop a plan of action, both in relation to the stocktaking exercise and otherwise, that will be tabled in Kampala. In part III, Human Rights Watch has outlined a number of recommendations in that regard.

In part IV, we put forward several procedural-related recommendations aimed at making the most of the stocktaking exercise. Finally, in part V, we underscore the importance of the attendance of high-level and senior officials at the review conference.

¹ As agreed at the eighth session of the Assembly of States Parties (ASP) in November 2009. See ASP, “Review Conference,” Resolution ICC-ASP/8/Res.6, paras.5, 6, Annex IV, November 26, 2009, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf (accessed March 15, 2010).

II. Developing a Strategy for Interventions at the Review Conference

States parties should give serious consideration as to how to use their interventions during the review conference in Kampala to strengthen the effectiveness of national courts and the ICC in the fight against impunity. This includes statements during the high-level general debate, the stocktaking exercise, and discussions on amendment proposals. Using all of these events constructively can also make a significant contribution to bolstering political support for the court. Such political support is every bit as essential for the ICC's success as the technical discussions that will follow in the second half of the review conference.

Human Rights Watch recommends that full consultation be undertaken within national governments, including with the appropriate senior officials in the foreign affairs and justice ministries of states parties, to prepare a strategy for their interventions, and should continue to inform ongoing preparations on the four stocktaking topics. Not only do the important topics of the stocktaking exercise merit their engagement, but their participation would ensure that policy decisions taken in Kampala enjoy the full backing of the states parties involved. Such consultation would also be necessary to identify specific pledges or commitments that could be made to enhance practical support for the court (see below). One possibility to advance the consultations regarding both strategies for interventions during the review conference and the identification of pledges and commitments could be to convene, in the coming weeks, workshops or seminars within national governments on the review conference.

III. Adopting Appropriate and Meaningful Outcomes

A. Stocktaking: there is no “one size fits all” approach to outcomes

The country focal points selected by the ASP Bureau for each of the stocktaking topics have made significant progress in identifying, among other things, proposed outcomes for their respective stocktaking sessions in Kampala.² As these proposals appropriately reflect, there is no uniform approach when it comes to determining outcomes.³ Human Rights Watch urges states parties to build on the proposals of the focal points to bolster political and, where appropriate, practical support to the court. As we describe in more detail below, these

² The country focal points are as follows: 1) the impact of justice on victims and affected communities – Chile and Finland; 2) state cooperation – Ireland and Costa Rica; 3) complementarity – Denmark and South Africa; and 4) peace and justice – Switzerland, Democratic Republic of Congo and Argentina.

³ A sensitive topic such as peace and justice may not be well addressed in a resolution, for example.

include by soliciting pledges, insisting on resolutions where appropriate and, in the case of cooperation, seeking regular updates from states parties on specific issues.

B. Soliciting pledges or commitments from states parties: complementarity, cooperation and impact of justice on victims

In advance of the review conference, we encourage states parties to identify and develop specific pledges or commitments aimed at furthering the goals of the stocktaking topics on the impact of justice on victims, complementarity and cooperation. Indeed, we note that the focal points paper on the impact of justice on victims has already put forward a number of possible commitments for states parties to consider adopting.⁴ The paper by the focal points on cooperation similarly encourages states to address the steps they intend to take to give effect to the provisions of the Rome Statute relating to cooperation.⁵ Additional sample pledges for consideration by states parties may include:

- Appointing a national ICC focal point or constituting an intra-agency task force;⁶
- Implementing the Rome Statute at the domestic level;
- Ratifying the Agreement on Privileges and Immunities;
- Concluding agreements with the ICC on the enforcement of sentences, witness relocation and/or interim release of defendants;
- Making annual contributions to the soon-to-be-established special fund for witness relocation;
- Adopting national policies directed towards the mainstreaming of ICC support across ministries and within regional and international organizations, including with regard to support for the enforcement of court decisions;
- Contributing to arrest operations and the execution of outstanding ICC warrants; and

⁴ The commitments identified include contributing to the Trust Fund for Victims; adopting national implementing legislation relevant to victims and affected communities such as for the protection of victims and for the achievement of truth, justice and reparations; and concluding ad hoc agreements with the court with regard to victims and affected communities. See Focal Points for the Impact of the Rome Statute System on Victims and Affected Communities Finland and Chile, “Draft Report Submitted by the Focal Points, Chile and Finland, on the Informal Consultations Regarding the Stocktaking Exercise of the Review Conference,” unpublished document on file with Human Rights Watch, March 5, 2010, para 41(g) (“Focal Points for Victims Draft Report”).

⁵ Focal points for Cooperation Costa Rica and Ireland, “Stocktaking – Cooperation: Background Paper and Proposals for Outcome,” unpublished document on file with Human Rights Watch, March 5, 2010, para. 8.

⁶ This has also been identified as a priority by the cooperation focal points. *Ibid.*, para 13.

- Adopting or revising common positions in support of the ICC within regional organizations.

Where possible, pledges should include specific deadlines for their realization and identify the relevant officials and/or ministries that will be responsible for coordinating follow up post-Kampala. States parties could announce their pledges at key moments during the review conference such as during the general debate or at the end of certain stocktaking discussions. We urge the ASP Bureau to consult with an organization with experience in coordinating pledges such as the International Committee of the Red Cross to draw from their expertise in managing this process efficiently and in providing sample pledges for states to use in their preparations in capitals.

But more is needed beyond simply organizing the logistics of administering pledges. It would be very useful for the ASP Bureau to identify a state party that could take the lead in coordinating with the focal points to identify areas that would benefit from pledges and in turn encourage states parties to make pledges well before Kampala. This would be enormously beneficial in terms of making the most of the opportunity presented by the stocktaking topics to solicit concrete outcomes.

C. Adopting resolutions to provide the basis for further action: the Norwegian proposal, complementarity, cooperation and impact of justice on victims

We urge states to consider adopting resolutions where appropriate to provide the basis for further concrete action on specific topics. We welcome the government of Norway's draft resolution aimed at strengthening the enforcement of ICC sentences.⁷ We understand that the focal points on impact of justice on victims may be preparing a resolution or declaration for the ASP's consideration and welcome in principle the support such a resolution could give to efforts to increase the ICC's impact in affected communities. We would support a similar approach by the cooperation focal points.

The complementarity focal points have put forward for consideration by states parties a draft resolution derived from their paper's discussion on positive complementarity.⁸ Among other things, the resolution encourages measures to improve the readiness of national jurisdictions to investigate and prosecute the most serious crimes. The resolution also designates a function within the ASP Secretariat to facilitate the exchange of information

⁷ As reflected in the Norwegian draft proposal of March 12, 2010 (copy on file with Human Rights Watch).

⁸ Focal Points for Complementarity Denmark and South Africa, "Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap," unpublished document on file with Human Rights Watch, March 5, 2010.

between the court, states parties, signatory states, and other stakeholders towards the same goal.

Human Rights Watch welcomes the complementarity focal points' approach of encouraging ICC states parties to help bolster the capacity of other states where needed to prosecute perpetrators of the worst crimes. The focal points' call on all states parties to engage in positive complementarity initiatives —through better coordination of development assistance to countries that otherwise lack the capacity to try international crimes, for example —could help to close the impunity gap at the national level over the longer term. This could also advance the mainstreaming of support for the ICC across relevant ministries within national governments, bringing foreign affairs, development, and rule-of-law perspectives to bear in jointly strengthening the fight against impunity.

We fully share in the constructive comments and recommendations made in more detail in the Coalition for the ICC (CICC) review conference team paper on complementarity, including suggestions as to the importance of a specific focus on ICC situations as well as further discussion on the issue of unwillingness in addition to the inability of governments to bring perpetrators to justice.⁹ We hope that discussions at the review conference will build on the foundation laid by the focal points in their paper, and urge states parties to support the adoption of a resolution as an important step forward. Adoption of a resolution on complementarity would underscore the obligations at the national level to prosecute Rome Statute crimes and encourage much-needed efforts to bolster capacity. The resolution itself could be seen as a component of building the political support that is often a critical ingredient of seeing prosecutions of serious international crimes instituted in practice.

D. Encouraging regular updates from states parties on cooperation initiatives

We support the cooperation focal points' call for regular discussions on the progress achieved in cooperation as a standing item on the ASP's agenda. Regular discussions on achievements and practical initiatives to overcome obstacles to cooperation with the court could help move states closer towards achieving the goals outlined in the excellent report on cooperation endorsed by the Bureau in 2007. Recurring deliberations could also provide an ideal platform for expressions of political support for the ICC overall, which can help mainstream cooperation with the institution at the national level.

⁹ CICC Review Conference Team, "Comments and Recommendations on Complementarity in the Context of the Stocktaking Exercise at the Review Conference: Resumed Eighth Session of the Assembly of States Parties, 22-25 March 2010," March 11, 2010 (copy on file with Human Rights Watch).

At the same time, we believe that such discussions should take place more frequently than the biennial schedule proposed by the focal points. We have previously called on the Assembly to put in place a permanent, intersessional working group on cooperation.¹⁰ Procedurally, the working group could prepare a report for debate at the annual Assembly, reflecting that year's activities of the working group and prescribing an action plan for the following year. Substantively, the working group could take up specific targeted initiatives each year, drawing on the recommendations detailed in the Bureau report on cooperation. We urge states parties to take a decision at the review conference (through a resolution or other appropriate means) to, at a minimum, create a standing agenda item on cooperation during ASP sessions, and to consider going forward with the creation of a cooperation working group to complement these annual discussions.

E. Adopting a high-level declaration

We welcome the ASP Bureau's recent decision to appoint a facilitator to take the lead in putting forward a high-level declaration to be tabled in Kampala.¹¹ In addition to preparing for events that are reflected in the formal agenda, we urge ICC states parties to constructively engage with the facilitator to develop a resolution which, at a minimum, expresses support for the ICC and its mandate in broad terms (referencing but not focusing on the stocktaking topics). Such a declaration could be adopted at the conclusion of the general debate in Kampala.

States parties' engagement in the preparation of such a declaration – which should include officials at the ministerial level – brings many advantages. The requisite advance negotiations of the text could encourage the engagement of high-level capital officials in review conference preparations. Further, adopting the high-level declaration early on in the review conference could set a positive tone for further interventions in the stocktaking exercise and in subsequent negotiations on amendments and the crime of aggression. The successful negotiation and adoption of a high-level declaration would also guarantee a positive outcome for the review conference from the outset.

¹⁰ Human Rights Watch, *Memorandum for the Eighth Session of the International Criminal Court Assembly of States Parties*, November 2009, <http://www.hrw.org/en/news/2009/11/09/human-rights-watch-memorandum-eighth-session-international-criminal-court-assembly-s>, p. 15.

¹¹ The ASP Bureau has designated the government of Mexico as the facilitator for the high-level declaration.

IV. Continued Preparations for Kampala: Ensuring Robust Stocktaking Panels

As referenced earlier, the country focal points selected by the ASP Bureau for each of the stocktaking topics have made significant progress in identifying, among other things, proposed modalities, substance, and outcomes for their respective stocktaking sessions in Kampala. We would like to express appreciation for the efforts made by the focal points to consult with civil society representatives as they drafted their respective papers for presentation before the ASP. We look forward to ongoing consultations as needed with the focal points as preparations continue for Kampala.

We understand that each of the focal points is considering holding high-level panel discussions as a format to encourage further deliberations for each of the respective stocktaking topics. Where this format is adopted, we urge the focal points to consider how the panelists can be encouraged to robustly debate tough or pressing questions about their respective topics instead of simply delivering prepared presentations. Selecting effective moderators to pose these questions, insisting on serious responses and directing the flow of interventions will be absolutely essential to the success of the panels.

Ensuring that the ICC's perspective, including its policies and practice, is incorporated in panel discussions will be very important. Further, in structuring the panels we strongly urge the focal points to seriously consider preserving a role for victims and civil society participants—for instance, in addition to any civil society representatives sitting on the panels, by setting aside time for them to present questions to the panelists—in each of the stocktaking sessions. We also urge focal points to consider in their selection of panelists the importance of drawing on lessons learned from other international criminal tribunals. Indeed, panelists either representing these institutions or from civil society where these institutions have been active could provide useful contributions to enrich discussions across the stocktaking topics.

In addition, we recommend appointing a “rapporteur” who could report on relevant discussions that take place including in a number of side events likely to be planned as complements to the formal agenda. The rapporteur would ensure side event discussions are reflected in a final report resulting from each of the topics. The practical result would be to “extend” the time devoted to each of the topics, and could provide yet another avenue to include the views of victims and civil society in the discussions. In fact, this proposal has

been put forward in the paper prepared by the focal points for impact of justice on victims and affected communities.¹²

V. The Importance of Securing High-Level Attendance in Kampala

The scope and substance of the discussions in Kampala make essential the presence at the general debate and throughout the stocktaking exercise of senior-level officials of the ICC's 110 states parties, including heads of state or government and ministers. The political stature of such officials would help confirm policy decisions made in the preparations phase and lend prominence to their formal adoption in Kampala. More broadly, high-level attendance would be instrumental in sending the message, including to perpetrators and would-be perpetrators, that the international community prioritizes justice for the victims of the worst crimes known to humankind.

¹² Focal Points for Victims Draft Report, para 41(f).