



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

November 2011

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Introduction

The coming year will mark the tenth anniversary of the entry into force of the Rome Statute, the founding treaty of the International Criminal Court (ICC). In those ten years, court officials—supported by states parties, civil society, and the broader international community—have made steady progress in the difficult task of transforming, day-by-day, the aspirations of the treaty into reality. On the cusp of the election of a new prosecutor, a key milestone, the court’s workload has never been greater. Investigations in seven country situations have led to 12 pending cases against 24 individuals.

In many respects, however, the past year since the ninth Assembly of States Parties (ASP) session has thrown into stark relief the enormous challenges that lie ahead. The unanimous referral by the United Nations (UN) Security Council of the situation in Libya and the request of the new government of Côte d’Ivoire to open ICC investigations there lifted the profile of the ICC on the world stage to a new level. From Kenya to Syria, “The Hague” has increasingly come to symbolize the last best hope for justice. While this heightened profile positively marks the expanding influence and importance of the ICC, it carries with it key challenges.

First, as expectations for justice have increased, so too has the gap between these expectations and the ICC’s delivery of justice. The ICC’s mandate is far from complete in the five situations under investigation opened before this year. Yet, it continues to grow, with two new situations added, eight other situations under analysis teed up for a determination on opening an investigation, and new atrocities in a number of countries including in the Middle East and North Africa. This expansion in potential caseload responds to very real accountability needs, but limits in the ICC’s universality and capacity threaten to disappoint expectations and leave significant impunity gaps.

Second, the ICC’s heightened profile also carries with it a risk of being seen as a means to certain political goals. As governments have recognized the role of the ICC in crises and conflict situations, they may be tempted to treat the ICC as another tool to be invoked in pursuit of political goals. While political goals—like a sustainable peace—may be advanced through the operation of justice, justice delivered by the ICC is an end in its own right. The ICC should be allowed to operate independently and without interference, regardless of shifting political considerations. While this risk is not new, it appears to be increasing.

Responding to these challenges is no easy matter, and requires the increased vigilance of court officials. While the court’s first verdict is expected shortly, limited progress in the court’s existing caseload has stymied its ability to respond to new demands. The court’s

leadership should improve the ICC's delivery of justice, and ensure that justice is meaningful and credible, leaving less room for the court's detractors.

Unfortunately, ICC states parties have not sufficiently assisted the court and its leadership in grappling with these challenges. A number of factors are at issue.

When it comes to the risk of distorting the court's mandate in the service of political goals, some ICC states parties are at fault. Almost immediately following the UN Security Council referral of the Libya situation, rumors surfaced of an offer for a possible amnesty deal for former Libyan leader Muammar Gaddafi that a few ICC states parties on the Security Council had supported. In September, some members of the European Union reportedly offered the Palestinian Authority their support for upgraded status at the UN in exchange for the promise not to access the ICC, notwithstanding the European Union's renewed commitment to universality in its revised Decision on the International Criminal Court.

When it comes to assisting the court to meet increased expectations, states parties have differing views about the role of the court. While the mandate of the court to deliver justice remains clear, there is contention about just what this means in practice. How should the court balance the sustained and deep engagement necessary to carry out its mandate, as it is called upon to intervene in more and more situations where crimes within its jurisdiction have been committed?

Efforts at answering this question are, in turn, hindered by the severe financial constraints many states parties are facing due to persistent global economic woes. For some states parties, this has meant insisting that the court's requested budget shrink. Essential discussions at the 2010 ICC review conference in three areas critical to helping the ICC and Rome Statute system meet the challenges before it—cooperation, complementarity, and impact—have increasingly been drowned out and distorted by a drive toward cost-cutting. This same pressure is fraying a fragile understanding among states parties, court officials, and civil society, hammered out as the court first became operational, about the importance of key court activities—like outreach—to deliver meaningfully on the court's mandate.

These developments and debate are contributing to weakening the court's ability to meet the challenges before it. The ICC needs its states parties to recall and recommit to the highest ends to which the court aims: a check against impunity; delivery of meaningful justice to victims of the world's worst crimes; and impact among affected communities including by deterring future crimes and encouraging accountability. At the upcoming tenth Assembly session, we urge states parties to address the matters on its agenda with close attention to the consequences of their decision making for realizing these aims.

We discuss below several areas where states parties can help shore up the ICC to meet the challenges it now faces. These are: staffing the court with the most highly qualified officials in the election of the next prosecutor and six judges; ensuring the court has sufficient resources to meet its mandate of delivering meaningful justice; increasing cooperation—including diplomatic and political support to the court to affirm its independence—and responding to instances of non-cooperation; and ratcheting up efforts to assist national authorities through complementarity initiatives.

Summary of Recommendations for the Tenth Session

In their statements during the **general debate** and in any discussions or side events on **cooperation, pledging, and complementarity**, states parties should:

- Affirm their commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Underscore the obligation of ICC states parties to cooperate fully with the court, including in carrying out arrests, and commit to assisting one another in providing that full cooperation even under difficult circumstances;
- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference;
- Encourage other states parties to continue to express diplomatic and political support for the court and for cooperation with the court and affirm the importance of the court's own role in building diplomatic and political support;
- Recognize the central role of the ICC as a court of last resort in the absence of genuine action by national authorities, as well as the role of the Assembly in discussions to bring about the increased operation of the complementarity principle in practice;
- Continue discussions within the Assembly in order to optimize the role of the complementarity focal points, the ASP Secretariat, and the ICC on complementarity initiatives;

- Update the Assembly on the implementation of national pledges made in Kampala (and where progress on implementation has not been possible, share, in a constructive spirit, outstanding obstacles); and
- Make additional pledges—or where states parties were unable to make pledges in Kampala, make pledges for the first time.

With regard to **elections** of ICC judges and the ICC prosecutor, states parties should:

- Put aside narrow interests and vote only for the most highly qualified candidates; and
- Consider carefully proposals for an article 36(4) advisory committee on nominations, with a view to the establishment of the committee in advance of the next round of judicial elections.

The Assembly should:

- Mandate the Bureau to conduct “lessons learned” regarding the operation of the Bureau Search Committee for the position of the ICC prosecutor.

With regard to the **budget**, the Assembly should:

- Reject “zero nominal growth” or “zero growth” as inappropriate budgetary tools for the ICC, bearing in the mind the need for the institution’s continued, reasonable growth to meet an increasing workload;
- Consider the court’s budget request and the Committee on Budget and Finance’s recommendations on their merits, and approve a budget that is adequate to ensuring the court’s effective implementation of its mandate in 2012;
- Oppose cuts to the budget that would jeopardize the court’s meaningful delivery of justice, including in key areas like outreach and public information; and
- Ensure reasonable resources are available in the court’s travel budget to permit the essential engagement between court officials and international partners that is key to increasing cooperation.

Beyond the Assembly session, states parties should:

- Encourage the court in its strategic planning review for 2012 to use the opportunity to evaluate closely the increasing demands and workload it now faces, and determine what additional tools will be necessary to ensure it can carry out its strategic priorities and meet its objectives in this new context; and
- Pursue proposals to review the court's budget process.

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

- Express support for outreach and public information activities carried out by the court, and the need to continue to improve and adapt these activities in the context of the court's implementation of the Strategic Plan for Outreach and its public information strategy;
- Mandate the Bureau to continue its dialogue on complementarity to provide a basis for the reappointment of focal points;
- Welcome the court's report and that of the Assembly Secretariat on complementarity, encourage the court and the Secretariat to continue to identify contributions to complementarity initiatives, and invite the court and the Secretariat to provide updated reports to future Assembly sessions; and
- Renew the mandate of the Study Group on Governance, taking into account the need for greater clarity regarding its mandate and relationship with other ASP structures.

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

- Renew the mandate for a cooperation facilitator in order to maintain focus within the ASP on measures necessary to enhance cooperation with the court, and identify in consultation with court officials and through the court's report on cooperation to this ASP session, priority areas for the next facilitation that correspond with the court's most pressing needs;
- Make cooperation a standing agenda item for ASP sessions, beginning with the eleventh session;

- Establish a working group on cooperation; or, in the alternative, mandate the cooperation facilitator to develop proposals in consultation with states parties for a working group on cooperation with a view toward establishing the working group at the ASP's eleventh session;
- Decide to make pledging a regular feature of its sessions, reappoint pledge focal points, and request the focal points to develop for the future a means through which states report to the annual ASP session on the implementation of pledges; and
- Encourage the court to continue its efforts to foster cooperation with states, international and regional organizations and civil society, including through participation in regional seminars to extend its networks of cooperation and support.

In addition, on **cooperation**, states parties should:

- Meet in the margins of this Assembly session with other states parties and court officials to exchange best practices on cooperation, including domestic institutional arrangements like ICC focal points and task forces, and implementing legislation; discuss common obstacles to fulfilling specific cooperation requests; and explore the conclusion of framework agreements in areas including witness relocation, interim release, and enforcement of sentences.

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

- Adopt the procedures provided for in the Bureau report on potential Assembly procedures relating to non-cooperation; and
- Mandate the Bureau to provide a further report to reach a common menu of other measures available to the ASP, including securing guarantees of non-repetition and the suspension of ASP voting rights.

I. Elections

At the upcoming ASP session, ICC states parties will elect six new judges—one-third of the entire bench—and the next ICC prosecutor. States parties' responsibility to ensure the merit-based election of the most highly qualified individuals is among the most important aspects of their stewardship of the court. To carry out its mandate as a judicial institution charged with upholding the fair trial rights of individuals and bringing meaningful justice to victims of

mass atrocities in an effective, credible and expeditious manner, the ICC requires officials and judges with relevant experience and expertise who meet Rome Statute requirements, and who demonstrate an ethic of public service and commitment to the ICC's mandate. This is perhaps particularly true of the prosecutor, whose vision and capacity are central to the court's ability to fulfill its mission. Indeed, the public's first encounter with the institution will often come through the investigations of the prosecutor. At a time when expectations of the court and its profile are greater than ever before, and its decisions are likely to attract even more scrutiny and criticism—both justified and unjustified—states parties cannot afford to shirk their significant responsibilities to provide the court with the best leadership possible.

Perhaps reflecting increased awareness of the importance of these elections, this year has witnessed a number of innovations to assist states parties in the nomination and election of candidates to these offices. Below, we review some of these innovations with regard to judicial elections and the prosecutorial election, and make recommendations to states parties as they prepare for these two sets of elections in December. In addition to these recommendations, we join in the Coalition of the ICC (CICC) Elections Team paper prepared for the upcoming Assembly session.

A. Election of judges

The new Independent Panel on ICC Judicial Elections, an informal committee of five judicial and legal experts established by the CICC, carried out its first assessment of candidates for election as ICC judges. The Independent Panel's assessment of the 19 candidates rated each as either "qualified" or "not qualified" according to the criteria set out in article 36 of the Rome Statute. The panel concluded that all but four of the candidates were qualified. As to those four candidates, the assessment of "not qualified" was limited to an assessment of qualifications vis-à-vis the requirements associated with the list on which the candidate appears, that is, List A—competence either in criminal law and procedure—or List B—relevant areas of international law.¹ The Independent Panel also made a number of recommendations to the ASP regarding issues that arose over the course of its work, but

¹ See Independent Panel on International Criminal Court (ICC) Judicial Elections, "Report on International Criminal Court Judicial Nominations 2011," October 26, 2011, <http://iccindependentpanel.org/sites/default/files/Independent%20Panel%20on%20ICC%20Judicial%20Elections%20-%20Report%2026%20October%202011.pdf> (accessed November 13, 2011). The Rome Statute identifies several criteria to guide ICC states parties in selecting judges. Article 36(3) provides that "judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." Every candidate for election as an ICC judge must have established competence either in criminal law and procedure (known as "List A" candidates) or relevant areas of international law (known as "List B" candidates). In addition, states parties should take into account the requirements enumerated in article 36(8) as to gender, geography, and type of legal system represented, bearing in mind the need to include judges with specific legal expertise on issues including violence against women and children. Rome Statute of the ICC ("Rome Statute"), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 36.

were not considered in its assessment. These included the need for increased clarity from states on their nominating procedures, the relevance of the age and health of candidates to their suitability for election, and the possible adoption of a code of conduct for ICC judicial elections in order to preserve the candidate's impartiality if elected.²

State party reference to the Independent Panel's assessments can help ensure that the elections at the December session are merit-based and that candidates meet the criteria set out in article 36. As we have advocated in previous judicial elections, states parties also should resist the practice of "vote-trading," where states agree to support one another's candidates with minimal regard to the individual's qualifications. Human Rights Watch urges states parties to:

- Put aside narrow interests and vote only for the most highly qualified candidates.

We agree, however, with the Independent Panel's observation that there may be criteria in addition to those set out in article 36 that should guide states parties in their election of ICC judges. Fulfilling article 36 criteria is essential, but even when the criteria are satisfied, there is still a significant degree of latitude in determining which individuals are best placed to serve at the ICC. Our close observation of the court's functioning since it began operations has highlighted a number of practical considerations that we believe states parties should take into account so as to ensure that the best candidates are nominated and ultimately elected.

In particular, we believe ICC states parties should place a particular emphasis on:

- *Candidates who possess substantial practical experience in criminal trials.* The upcoming election comes at a critical time of the court's functioning. Pre-trial or trial proceedings are actively underway in most of the ICC's seven country situations under investigation; this pace will likely only increase. Effectively adjudicating such proceedings requires individuals familiar with the demands of criminal trials, including the need to manage oral and written submissions of the prosecution, defense, and victim participants to ensure that pre-trial and trial proceedings run smoothly and respect the rights of defendants. Individuals with prior experience working in criminal trials—"List A" candidates—are much better placed to meet these demands.³

² Independent Panel on ICC Judicial Elections, "Report on International Criminal Court Judicial Nominations 2011," pp. 16-20.

³ The Rome Statute provides for a total of 18 judges on the ICC's bench: a minimum of six in each of the pre-trial and trial divisions and five in the appeals division. Based on the minimum voting requirements under the Rome Statute, states parties must elect at least three "List A" judges to the bench in the upcoming election. The minimum voting requirement for "List B"

- *Candidates who possess the capacity and willingness to meet the demands of adjudicating cases over a nine-year term.* The ICC has lost four judges due to health reasons. States parties should carefully consider which individuals possess the capacity (including stamina) and motivation to meet the many demands on judges before the ICC over a full nine-year term of office. These demands often include extremely complex and time-consuming tasks, like assessing applications submitted by, in some cases, thousands of victims seeking to participate in proceedings and reviewing thousands of pages of material to authorize redactions. As cases before the ICC proliferate, judges should be prepared to sit on more than one trial at a time and potentially at more than one level, which means that the workload will only increase. Only limited judicial staffing resources are available. Overall, Human Rights Watch urges states parties to ensure that the candidates put forward for election by the ASP possess a firm commitment to the ICC's mission of bringing to justice perpetrators of the worst crimes known to humankind through fair trials.
- *Candidates who have demonstrated a willingness to learn through ongoing trainings.* The ICC is a unique institution, and judges serving the court will inevitably face a number of unprecedented challenges. Even judges with significant prior experience managing complex criminal trials may not automatically possess the skills and knowledge needed to manage these challenges effectively. Ongoing training—for both new judges and those already on the bench—to present "lessons learned" and strategies for managing these challenges in the future will be essential. States parties should thus elect candidates who value continuing legal education and who are willing to participate in initiatives aimed at promoting legal innovation and coordination among all judicial chambers in adjudicating complex questions relating to law and policy.⁴

We believe that candidates who possess these qualities, in addition to satisfying the Rome Statute criteria, will be best equipped to help the court meet the challenges ahead.

candidates has already been satisfied. See Assembly of States Parties (ASP) Secretariat, Note verbale, ICC-ASP/10/S/04, February 7, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2011/NV-Election-Judges-2011-ENG.pdf (accessed November 20, 2011), pp. 12-13. However of the six judges whose mandates expire on March 10, 2012, four are assigned to the trial division, one serves in both the pre-trial and trial divisions, and one is assigned to the appeals division. Judge Sylvia Steiner is assigned to the pre-trial division where she is part of pre-trial chamber I, and is also sitting on the Jean-Pierre Bemba trial bench. Therefore, to promote the efficient and effective functioning of the chambers, Human Rights Watch believes that at least five of the six judicial vacancies should be filled by individuals who have substantial practical experience in criminal trials.

⁴ These criteria are explained in more detail in: Letter to Foreign Ministers of ICC States Parties from Human Rights Watch, "Recommendations for Nominating and Electing Candidates to Serve as Judges," May 18, 2011, <http://www.hrw.org/news/2011/05/18/icc-recommendations-nominating-and-electing-candidates-serve-judges>.

Finally, the Independent Panel recommended that the ASP move forward with the establishment of its own advisory committee on nominations as provided under article 36(4) of the Rome Statute, and which could go beyond the mandate of the Independent Panel to assess not only the article 36 criteria but past performance of judicial candidates as well.⁵ Indeed, as provided in the omnibus resolution adopted during the ninth session, the Bureau appointed a facilitator to steer discussions on the establishment of an advisory committee.⁶ Human Rights Watch has previously called on the ASP to establish an advisory committee on nominations and looks forward to the Bureau's report at this Assembly session. We urge states parties to:

- Carefully consider proposals for an article 36(4) advisory committee on nominations with a view to the establishment of the committee in advance of the next round of judicial elections.

B. Election of the prosecutor

When it comes to the election of the next prosecutor, the Bureau-established Search Committee has sought to depart in significant ways from the election nine years ago of the court's first prosecutor.⁷ The Search Committee was tasked with informally receiving "expressions of interest"—meaning informal communications conveying the names of highly qualified individuals directly to the committee—from a number of sources, including individuals, civil society, and states. It was also mandated to identify candidates and informally approach those who met the criteria under the Rome Statute to be the next prosecutor.⁸ In keeping with the ASP's preference to elect the next ICC prosecutor by consensus, states parties were "encouraged" to use the Search Committee process, "ideally

⁵ Independent Panel on ICC Judicial Elections, "Report on International Criminal Court Judicial Nominations 2011," p. 20.

⁶ See ASP, "Strengthening the International Criminal Court and the Assembly of States Parties" ("Ninth Session Omnibus Resolution"), ICC-ASP/9/Res.3, December 10, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.3-ENG.pdf (accessed November 20, 2011), para. 25; Bureau of the ASP, "Second ICC-ASP Bureau Meeting: Agenda and Decisions," February 1, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2011-Bureau-2-D-01Feb2011.pdf (accessed November 15, 2011), p. 1.

⁷ The Search Committee is comprised of the following individuals from each of the five UN regional groups: Prince Zeid Ra'ad Zeid Al-Hussein, permanent representative of the Hashemite Kingdom of Jordan to the United Nations (Asian Group and Coordinator); Baso Sangqu, permanent representative of the Republic of South Africa to the United Nations (African Group); Miloš Koterec, permanent representative of the Slovak Republic to the United Nations (Eastern European Group); Joel Hernández García, legal adviser of the Ministry of Foreign Affairs of Mexico (Group of Latin American and Caribbean States); and Sir Daniel Bethlehem, Q.C., former legal adviser to the Foreign and Commonwealth Office of the United Kingdom (Western European and Others Group).

⁸ ASP, "Bureau of the ASP, Search Committee for the position of the Prosecutor of the International Criminal Court, Terms of Reference" ("Terms of Reference"), ICC-ASP/9/INF.2, December 6, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Elections/EP2011/ICC-ASP-9-INF.2-ENG.pdf (accessed November 20, 2011), para. 6.

for nomination and election” and discouraged from submitting formal nominations, and from engaging in campaign activities.⁹

In October, the Search Committee issued a report short-listing four candidates for consideration by the ASP: Fatou B. Bensouda, currently deputy prosecutor (Prosecutions), International Criminal Court; Andrew T. Cayley, currently international co-prosecutor, Extraordinary Chambers in the Courts of Cambodia; Mohamed Chande Othman, currently chief justice of Tanzania; and, Robert Petit, currently counsel, Crimes Against Humanity and War Crimes Section, Department of Justice, Canada.¹⁰ The committee did not differentiate among these four candidates.

The committee received or identified 52 expressions of interest and interviewed 8 candidates.¹¹ No other candidates have been formally nominated by states, indicating an apparent respect for the working methods of the Search Committee. Regional focal points have now been appointed in order to facilitate consensus around a single candidate for formal nomination and election at the December session. The four candidates have each been invited to briefings with ICC states parties in New York.

Human Rights Watch has engaged actively with states parties and the Bureau Search Committee over the past year to encourage a merit-based process most likely to ensure the election of the best candidate as ICC prosecutor. To that end, we—along with five other civil society organizations—issued a letter to the Search Committee identifying challenges likely to be faced by the next prosecutor and criteria to be used in evaluating potential candidates in addition to the limited criteria identified in article 42(3) of the Rome Statute.¹² Our criteria—explained in more detail in the letter—are:

- demonstrated experience of professional excellence in complex criminal cases;
- demonstrated ability to act with independence and impartiality in the exercise of professional duties;

⁹ Ibid., para. 3; “Search Committee for the position of ICC Prosecutor: Statement by the President of the Assembly, Ambassador Christian Wenaweser,” ASP news release, July 22, 2011, <http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202011/asp-20110722-pr703?lan=en-GB> (accessed November 20, 2011).

¹⁰ “Report of the Search Committee for the Position of the Prosecutor of the International Criminal Court,” October 22, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/Elections/EP2011/EP2011-PSC-Report-complete-ENG.pdf (accessed November 20, 2011), p. 1.

¹¹ Ibid., pp. 5-6.

¹² Article 42(3) of the Rome Statute provides that merit should drive the election of the prosecutor, stating that he or she must be a person of “high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases.”

- proven track-record of professional excellence in institutional management;
- demonstrated experience in working with other bodies or agencies to effectively achieve a common goal; and
- demonstrated experience in communicating effectively to a wide variety of constituencies.¹³

Human Rights Watch urges states parties to refer to these criteria in discussions leading to the election of the next ICC prosecutor. The election of the next prosecutor will profoundly shape the ICC in the coming decade and we call on states parties to continue to devote their highest attention and priority to this election.

We have been grateful for the open dialogue between the Bureau Search Committee and civil society, and, in our view, the Bureau search committee has afforded the ASP a number of advantages in this election process. To a large extent, it represents an effort to break with “business as usual” to push merit to the forefront. From a practical perspective, maintaining a level of informality in the search process has helped to preserve an important distinction between the merit of individual candidates and the states that may (or may not) support them. This distinction created space for the search process to prioritize merit above other factors, leading to an overall strong shortlist of four candidates. By limiting the familiar practices of campaigning and “vote trading” when it comes to high-level positions, use of the Search Committee may have encouraged candidates to come forward who might otherwise have been deterred by the perception such practices create that the breadth of support by states parties trumps merit.

This is not to suggest that the process has been perfect. There have been some concerns that the Search Committee process did not allow for sufficient transparency at key junctures. These concerns are perhaps inevitable, given the Search Committee’s mandate to maintain a high level of confidentiality in the process of encouraging candidates to come forward. Nonetheless, there are certainly lessons to be learned, including on how to manage public expectations for information against the need to maintain confidentiality. In addition, states parties may wish to consider making resources available to ensure that short-listed candidates are able to travel for interviews before the Search Committee and briefings with

¹³ Letter to the Search Committee for the Position of the Prosecutor of the International Criminal Court from Fédération Internationale des Ligues des Droits de l'Homme, Human Rights Watch, International Center for Transitional Justice, International Crisis Group, Institute for Security Studies, and Open Society Initiative, March 16, 2011, http://www.hrw.org/sites/default/files/related_material/ICC%20prosecutor%20criteria%2003.16.11.pdf.

states parties, in order to create an even playing field, which was not the case this year. Human Rights Watch recommends that the ASP:

- Mandate the Bureau to conduct “lessons learned” regarding the operation of the Bureau Search Committee for the position of the ICC prosecutor.

Recommendations stemming from an evaluation could inform changes in the Search Committee’s terms of reference or procedures for the next prosecutorial elections and inform the ASP’s approach to other ICC elections.

II. Budget

A number of factors discussed in the “Introduction” are fuelling contentious discussions over the court’s budget for 2012. Demands on the ICC—two new situations, Libya and Côte d’Ivoire were added to the court’s docket—are rising as global economic difficulties continue to exert pressure on many states parties. Over at least the last three years, states parties have sought to limit growth in the court’s budget, with some states parties insisting on “zero growth” or “zero nominal growth.” For the court’s largest contributors and some other states parties, this budgetary pressure emanates from the very real constraints faced by national administrations in their own budgets. But this pressure is increasingly incompatible with the court’s workload. In addition, in the face of a persistent call to cut costs, disappointment that the court has yet to deliver a judgment in its first case and inadequacies in the court’s budget process have raised questions about whether the court’s resource requests are fully justified.

The court’s budget request for 2012 amounts to €117.7 million, a 13.6% increase on the approved 2011 budget of €103.6 million.¹⁴ Over the course of 2011, in addition to the regular budget, however, the court may access approximately €5 million from the contingency fund by year’s end.¹⁵ The court’s budget request for 2012 so far excludes costs associated with the Côte d’Ivoire investigation (the authorization of which was granted after the July submission of the budget request).¹⁶

¹⁴ ASP, “Proposed Programme Budget for 2012 of the International Criminal Court” (“2012 Budget Request”), ICC-ASP/10/10, July 21, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf (accessed November 15, 2011), paras. 2, 4.

¹⁵ The court has indicated that it will likely require €3.38 million to replenish the contingency fund up to the €7 million replenishment threshold, although it has also indicated that the exact amount required for replenishment can only be calculated after the Court’s official closing of accounts. The balance of the contingency fund at the beginning of the year was €8.757 million. See ASP, “Report of the Committee on Budget and Finance on the work of its seventeenth session” (“CBF 17th Session Report”), ICC-ASP/10/15, November 18, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-15-ENG.pdf (accessed November 23, 2011), para. 50 (opening balance of contingency fund).

¹⁶ The ASP’s expert Committee on Budget and Finance (CBF) identified a number of other potential increases to the budget, including funding for the African Union Liaison Office, rent and maintenance of the interim premises, costs associated with the

In reviewing the court’s proposed budget for 2012, the ASP’s expert body, the Committee on Budget and Finance (CBF), recommended cuts in areas including general temporary assistance, consultancies, travel, training, as well as absorbing salary increases. If these recommendations—amounting to approximately €5.6 million in cuts—are adopted in full by states parties, this would reduce the court’s budget for 2012 to €112.1 million (subject to determinations on any supplementary budget requests).¹⁷ The court’s major contributors are seeking additional cuts to the budget beyond those recommended by the CBF to hold the budget down to “zero nominal growth.”

In discussions of the court’s resources and in seeking cuts, states parties seem to be looking in two directions. First, some states parties have argued that the court should prioritize between “core” and “non-core” activities, and to budget accordingly. Second, some states parties have increasingly pushed reforms or policy changes to improve the court’s efficiency.

Human Rights Watch supports an active and engaged role for the ASP that includes scrutiny and feedback on ICC operations, provided it is done in a manner that respects judicial independence. The overstretch we see in the court’s activities, discussed below, undoubtedly stems from a combination of both budgetary constraints and the need for improved policies and planning in some areas, including in the court’s preparation of the proposed budget itself. But we are concerned that discussions among states parties will be animated by an overriding concern to hold down the court’s budget without regard to the long-term consequences to the institution. As explained below, we doubt this will yield durable and constructive solutions.

While there may be areas of excessive spending that could be targeted, states parties will likely need to confront the increasing gap between the court to which ICC officials, the ASP, and civil society has over 10 years aspired—credible, fair, and effective in delivering meaningful justice in its situation countries—and the willingness of some states to pay. Indeed, the CBF—noting increasing costs in the court’s budget—indicated that “[i]t may be unrealistic for the court itself to propose large reductions in its activities and potentially stop some programme activity that had previously been mandated by the Assembly.” Calling on the ASP to provide increased guidance, it concluded that, “[s]imply put, the Court is reaching

permanent premises, replenishment of the contingency fund, the new Côte d’Ivoire situation, and the possible extension of judges (beyond extensions already budgeted by the court). *Ibid.*, p. 5, table 1. The Netherlands, the host state, has offered to fund the costs of the interim premises for 2012. See Bureau of the ASP, “Seventeenth ICC-ASP Bureau Meeting: Agenda and Decisions,” November 1, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2011-Bureau-17-D-01Nov2011.pdf (accessed November 20, 2011), p. 1. Costs associated with the Côte d’Ivoire situation are expected to be the subject of a supplemental budget request submitted to the ASP. Expenses associated with the African Union Liaison Office would only be at issue should agreement for the opening of that office be reached with the African Union this year.

¹⁷ ASP, “CBF 17th Session Report,” pp. 29-30, annexes IV-V.

the point when the expectations on the type and level of activity and on the level of resources may be diverging.”¹⁸

At this year’s ASP session, we urge states parties to take seriously the importance of ensuring the court’s continued development and its capability to meet increasing expectations. Decisions on the court’s budget should be evaluated with the consequences for the ICC’s unique character in mind. States parties should:

- Reject “zero nominal growth” or “zero growth” as inappropriate budgetary tools for the ICC, bearing in mind the need for the institution’s continued, reasonable growth to meet an increasing workload; and
- Consider the court’s budget request and the CBF’s recommendations on their merits, and approve a budget that will adequately ensure the court’s effective implementation of its mandate in 2012.

Beyond this ASP, states parties and court officials should seek out a constructive dialogue that provides increased clarity and transparency in the resources required by the court, and seeks to better equip the court to meet multiplying demands. As we recommend below, the court’s strategic planning processes and a review of the court’s budget process may provide important avenues through which this can be achieved.¹⁹ In addition to the points made here, Human Rights Watch joins in the more detailed recommendations for review of the court’s budget made in the CICC Budget and Finance Team paper prepared for the upcoming ASP session.

A. Integrated nature of the court’s activities

At the ninth ASP session, the Assembly requested the court “in addition to its normal budget for 2012 ... to draw up budget options for 2012, which costed the full range of core Court activities (investigations, prosecutions and trials) and also costed those other important

¹⁸ Ibid., paras. 13-14. The CBF identified the following as “cost drivers” meriting strategic review by the ASP: legal aid, new situations following referral by the UN Security Council; reparations; the budgetary process; outreach; and alternative finance and service delivery. Ibid., paras. 15-26.

¹⁹ The CICC Budget and Finance Team wrote to all states parties in July 2011 indicating the need for continued growth in the court’s budget, and made a submission to the seventeenth session of the Committee on Budget Finance touching on many of these issues. See Letter to ICC States Parties from the CICC Budget and Finance Team, July 6, 2011, http://www.iccnw.org/documents/CICC_Letter_on_the_2012_ICC_Budget_-_6_July_2011.pdf (accessed November 15, 2011); CICC Budget and Finance Team, “Submission to the Committee on Budget and Finance at its Seventeenth Session on 22 to 30 August 2011: Comments on the Proposed Programme Budget for 2012 of the International Criminal Court and other matters,” August 17, 2011, http://www.iccnw.org/documents/Commentary_on_2012_Budget_17_August_2011.pdf (accessed November 15, 2011).

activities, which could be achieved within the same budget allocation as 2011.”²⁰ But the court presented only its ordinary annual budget request.

While it is unclear what states parties had in mind by “other important activities,” the court was right to reject a distinction between its investigations, prosecutions, and trials as “core” and other activities as “non-core.” Implementation of the ICC’s mandate depends on a range of interrelated functions.

To take some examples, ICC investigations, prosecutions, and trials are supported by the court’s field offices. Protection experts located there ensure the protection and well-being of witnesses, while logisticians support investigative missions, including those of defense counsel protecting the fair trial rights of their clients. Staff of the Victim Participation and Reparations Section, working with local partners, facilitate the application process for victims wishing to participate in proceedings. External relations activities—in situation countries, but also more globally—solicit cooperation in these investigations and prosecutions, including in the execution of arrest warrants necessary for trials to take place. They also help to secure the diplomatic and political support that the court requires to carry out its investigations and prosecutions independently.

Engagement with affected communities in situation countries through outreach plays a number of essential roles. It ensures that justice is not only done, but is seen to be done. It facilitates access to the rights of victim participation afforded under the Rome Statute. And, by increasing awareness of the court and clarifying misconceptions, it can enhance conditions necessary for cooperation with the court and the safety of victims and witnesses. This engagement, as well as the presence on the ground of court staff, is also necessary to inform ICC policy decisions and adapt these to local contexts.

These are not optional areas of court activity. As the ICC has become operational and has worked through what delivering on the Rome Statute requires in practice, it has developed an important model for the meaningful delivery of fair and credible justice. This model—which is based on the essential and integrated nature of the court’s functions—draws on lessons learned, including from the ad hoc tribunals. Dialogue between the court, states parties, and civil society—through the Bureau’s working groups, ASP sessions, and the 2010 Kampala review conference—has sought to articulate a shared vision of what is required for the court to deliver on its mandate. This vision has been ratified in the omnibus resolutions

²⁰ “External audit, programme budget for 2011 and related documents,” para. 31, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Ninth Session*, New York, December 6-10, 2010, ICC-ASP/9/20, http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/ICC-ASP-9-20-Vol.I-ENG.pdf (accessed November 20, 2011), vol. 1, part II, pp. 9-14.

adopted by states parties at each annual session, as well as resolutions adopted by the review conference, in which states parties have expressed support for the court's outreach, public information, and external relations efforts and strengthening the court's field presence, and have affirmed the central importance of victim participation.

State party support for the court's outreach, and more recently, public information efforts has been particularly strong.

The court's Strategic Plan for Outreach was initially requested by the ASP at its fourth session in December 2005.²¹ At each ASP session since, the Assembly has recognized the importance of outreach activities and encouraged the intensification of these activities, including through the implementation of the Strategic Plan.²² At the ninth ASP session, the Assembly encouraged the further development of outreach activities, "including, where appropriate, by early outreach from the outset of the Court's involvement, including during the preliminary examination stage."²³

At its eighth session, the ASP requested a court-wide public information plan, subsequently produced and adopted by the court, and welcomed by the ASP last year.²⁴ States parties requested the strategy as it became clear that the court's unprincipled critics were trading on an information vacuum among the broader public about the court, chiefly in connection with the backlash against the warrant for President Omar al-Bashir of Sudan.²⁵

The court still has considerable work to do to improve the implementation of its activities. As they have done in the past, civil society and states parties have a critical role in pushing court officials to do so, including through engaging on prosecutorial strategy and other court

²¹ ASP, "Strengthening the International Criminal Court and the Assembly of States Parties," ICC-ASP/4/Res.4, December 3, 2005, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP4-Res-04-ENG.pdf (accessed November 20, 2011), para. 22. The court's Strategic Plan for Outreach is available at http://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4Bo6-B1E3-E22618FB404C/185051/ICCASP512_English1.pdf (accessed November 22, 2011).

²² See ASP, "Strengthening the International Criminal Court and the Assembly of States Parties," ICC-ASP/5/Res.3, December 1, 2006, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP5-Res-03-ENG.pdf (accessed November 20, 2011), para. 20; "Strengthening the International Criminal Court and the Assembly of States Parties," ICC-ASP/6/Res.2, December 14, 2007, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP6-Res-02-ENG.pdf (accessed November 20, 2011), para. 20; "Strengthening the International Criminal Court and the Assembly of States Parties" ("Seventh Session Omnibus Resolution"), ICC-ASP/7/Res.3, November 21, 2008, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP7-Res-03-ENG.pdf (accessed November 20, 2011), para. 25; "Strengthening the International Criminal Court and the Assembly of States Parties" ("Eighth Session Omnibus Resolution"), ICC-ASP/8/Res.3, November 26, 2009, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.3-ENG.pdf (accessed November 20, 2011), para. 33; ASP, "Ninth Session Omnibus Resolution," para 38.

²³ ASP, "Ninth Session Omnibus Resolution," para 38.

²⁴ ASP, "Eighth Session Omnibus Resolution," para. 34; ASP, "Ninth Session Omnibus Resolution," para. 39.

²⁵ See Human Rights Watch, "Memorandum for the Eighth Session of the International Criminal Court Assembly of States Parties" ("Eighth Session Memo"), November 2009, http://www.hrw.org/sites/default/files/related_material/Memo%20of%20the%208th%20Session%20of%20the%20ASP%2011.09.09.pdf, pp. 11-12. The ICC's "Report of the Court on the public information strategy, 2011-2013" is available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-29-ENG.pdf (accessed November 22, 2011).

strategies.²⁶ But a concern to heighten the performance of the court, not strictly to lower its costs, should animate review of court practice and policy.

In budget discussions at the upcoming ASP session, states parties should:

- Oppose cuts to the budget that would jeopardize the court’s meaningful delivery of justice, including in key areas like outreach and public information; and
- Reiterate in the omnibus resolution support for outreach and public information activities carried out by the court, and the need to continue to improve and adapt these activities in the context of the court’s implementation of the Strategic Plan for Outreach and the strategy on public information.²⁷

B. Efficiency and court overstretch

Over its last several sessions, the CBF has consistently pushed the court to search for cost savings and to fund cost increases through increasing efficiency. This was endorsed by states parties at their seventh Assembly session, in requesting “the Court to make every effort to find efficiency savings over the course of 2009, and request[ing] the Registrar to make an investigation into the possibilities of such savings, implement the appropriate measures, and report to the 8th Assembly of States Parties.”²⁸ While the CBF initially seemed to refer to “inefficient bureaucratic policies” and “cutting red tape,” the court’s first report to the Assembly on efficiency measures included some administrative processes—like recruitment and human resources—but also processes directly related to its judicial mandate, like the legal aid system, the protection of witnesses, and the length of proceedings.²⁹ This dialogue on efficiency measures has continued between the court and the CBF, and most recently the CBF welcomed the court’s efforts, noting that it “had made considerable progress in its efforts to find and quantify possible efficiency savings.”³⁰

²⁶ When it comes to outreach, the court has comprehensively reported on its efforts on an annual basis since 2007. Its annual reports are available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/Outreach+Reports/> (accessed November 22, 2011). The 2010 Kampala review conference also offered an opportunity to evaluate the ICC’s outreach efforts, when the relationship between outreach, victim participation, reparations, and the court’s impact among affected communities was selected as one of the four stocktaking topics. The resolution on impact adopted at Kampala emphasized the link between outreach and victim participation, and underlined the need to continue to “optimize and adapt” outreach activities. Review Conference of the Rome Statute, “The Impact of Rome Statute system on victims and affected communities,” Resolution RC/Res.2, June 8, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf (accessed November 15, 2011), preamble, para. 3.

²⁷ Human Rights Watch also joins in the CICC Communications Team paper prepared for the upcoming ASP session.

²⁸ 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, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP7-Res-04-ENG.pdf (accessed November 20, 2011), p. 3.

²⁹ See, for example, ASP, “Status report on the Court’s investigations into efficiency measures for 2010,” ICC-ASP\8\6, May 6, 2009, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-6-ENG.pdf (accessed November 15, 2011).

³⁰ See ASP, “CBF 17th Session Report,” para. 48.

States parties have taken a direct interest in efficiency, although not explicitly tied to identifying cost savings. At last year's ASP session, states parties established a Study Group on Governance to "conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute System and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence ... with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau."³¹ The Study Group's work has been clustered around three areas: (1) the relationship between the ICC and the ASP; (2) strengthening the institutional framework within the ICC; and (3) increasing the efficiency of the criminal process.³²

The Study Group on Governance has provided a platform for exchange between states parties and court officials with the potential to increase mutual understanding in a number of key areas. In advance of the Study Group's establishment, Human Rights Watch expressed concern that it might overreach, either by infringing on judicial independence or by distorting policymaking processes that are best led by the expertise of court officials, and that it could become a vehicle to identify cost savings.³³ It seems clear that states parties have demonstrated respect for the court's independence, typically soliciting the views of court officials as a basis for discussion and relying on those views in recommending further action. The Study Group has also welcomed the participation of civil society.

It remains important that the Study Group's discussions of efficiency are not animated by a desire to find cost savings.

After eight years of operation, and as the court nears the completion of its first full cycle of trial proceedings, discussions about efficiency in proceedings and potential reform are important and necessary. But coupling these discussions too closely with a search for budget cuts would risk creating the likely false impression that there are major cost savings to be found. There may be real gaps where efficient use of existing resources could be improved and court officials have every responsibility to manage the court's resources efficiently, including through engaging in dialogue with the CBF on efficiency measures. But there are also a number of areas where the court is clearly overstretched in its budget.

³¹ ASP, "Establishment of a Study Group on Governance," ICC-ASP/9/Res.2, December 10, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.2-ENG.pdf (accessed November 20, 2011), paras. 1-2.

³² ASP, "[Draft] Report of the Bureau on Study Group on Governance," November 11, 2011, copy on file with Human Rights Watch, para. 3.

³³ See Human Rights Watch, "Memorandum for the Ninth Session of the International Criminal Court Assembly of States Parties" ("Ninth Session Memo"), November 2010, <http://www.hrw.org/news/2010/11/16/human-rights-watch-memorandum-ninth-session-international-criminal-court-assembly-st>, pp. 23-26.

The court's budget request reflects apparent shortfalls in funding for a number of units and activities and conservative assumptions about pre-trial and trial activity in 2012.³⁴ The strain on the institution of moving from four (2009) to five (2010) to seven (2011) situations in a relatively short period of time is evident. To cope simultaneously with two cases against three defendants each in the Kenya situation, the pre-trial chamber required additional resources from the contingency fund.³⁵ Citing resource constraints, the Victim Participation and Reparations Section was unable to process victim applications received in the *Callixte Mburashimana* case in advance of the confirmation of charges hearing in that case, leaving hundreds of individual applicants without access to their participation rights.³⁶ The contracts of a large number of temporary ICC staff have not been renewed for 2012.³⁷ The ICC prosecutor, Luis Moreno-Ocampo, recently warned:

The Office [of the Prosecutor] is faced, for the first time, with the possibility that investigations cannot proceed due to resource constraints. The CBF proposal [of recommended cuts] would entail a change to the previously agreed structures, and will transform the decision making. Some cases will not be investigated because [sic] budgetary constraints. Changing the model of the Court from a case driven to a resource driven one, is more than a budget issue, it is a legal and strategic question.³⁸

While there may be both better and more cost-efficient means of doing the court's work, in light of these significant gaps between demand and required funding, we are skeptical that the overall resources needed to support the court's work can be substantially decreased.

³⁴ For further discussion, see CICC, "Submission to the 17th CBF Session," pp. 3-6. These units include the Victim Participation and Reparations Section, Office of the Public Counsel for Defense, Public Information and Documentation Section, Victim and Witnesses Unit, the Office of Internal Audit, as well as redeployments between field offices. The court's budget request acknowledges that future judicial developments in four cases—*Mburashimana*, *Banda and Jerbo*, and the two Kenya cases—or in the new situations are not budgeted for in its request. ASP, "2012 Budget Request," para. 72. In the *Mburashimana* and Kenya cases, decisions on the confirmation of charges are expected by early 2012.

³⁵ ASP, "2012 Budget Request," para. 57.

³⁶ "Hundreds of victims prevented from participating in crucial court hearings due to lack of resources at the International Criminal Court," REDRESS news release, July 15, 2011, <http://www.iccnw.org/documents/StatementVictimParticipation15July2011.pdf> (accessed November 15, 2011). During discussions on the review of the ICC's "Strategy on Victims" in The Hague Working Group convened by the facilitator for victims and affected communities and the Trust Fund for Victims, court officials indicated that resource constraints are limiting the strategy's implementation across the board. See ASP, "[Draft] Report of the Bureau on victims and affected communities and Trust Fund for Victims," ICC-ASP/10/31, November 11, 2011, copy on file with Human Rights Watch, para. 8. States parties appear to have responded that the strategy appeared "too ambitious and unrealistic, including because it would not be sustainable within available resources." *Ibid.*, para. 11.

³⁷ Silvana Arbia, ICC Registrar, "Remarks to the diplomatic corps at the 21st diplomatic briefing," The Hague, November 8, 2011, <http://www.icc-cpi.int/NR/rdonlyres/6E215717-3219-4C7E-A924-A9D18BF8CDC8/283963/RegistrarDiplomaticBriefing81111Fra.pdf> (accessed November 15, 2011), pp. 4-5 (informal translation).

³⁸ Luis Moreno-Ocampo, ICC prosecutor, "Remarks to the 21st Diplomatic Briefing," The Hague, November 8, 2011, <http://www.icc-cpi.int/NR/rdonlyres/6E215717-3219-4C7E-A924-A9D18BF8CDC8/283954/111108ProsecutorspeechDiplomaticBriefing.pdf> (accessed November 15, 2011), p. 4.

Indeed, we are concerned that calls for increased efficiency may distort important planning and reform processes. For example, the Office of the Prosecutor has touted the limited number of cases in ICC situations as a measure of the Office's commitment to efficiency, and signaled that an "expansive prosecution policy" would exponentially increase the court's budget.³⁹ But Human Rights Watch's research suggests that the ICC has been far too limited in the cases brought in each situation, risking the court's mandate in these situations. If anything, the Office of the Prosecutor needs to do more in ICC situations to deliver credible and meaningful justice. While this will require policy changes in the Office of the Prosecutor, it will also inevitably imply more resources.⁴⁰

Discussions of possible efficiencies and more effective means to carry out the court's work are important, and we endorse states parties' continued attention to these issues. Although increased clarity with regard to the Study Group's mandate and its relationship to other ASP structures will be important as it takes up a recurrent role, states parties should extend the Study Group's mandate, and Human Rights Watch joins in the more extensive recommendations regarding the Study Group in the CICC's ASP Oversight Team paper prepared for the upcoming ASP session.

We find particular merit in the proposal to discuss a range of issues that might lead to the streamlining of proceedings before the court.⁴¹ Issues identified by Japan, the cluster three focal point, include the "number of judges in divisions and chambers, absence of a judge, evidential issues (written evidence and witness proofing), case management, pre-trial proceedings, victim participation, [and] the establishment of an internal working group at the court to review judicial processes."⁴² While Human Rights Watch has not made a study of these issues, several appear relevant to improving the pace of proceedings before the ICC, a critical component of fair trial rights and the court's delivery of meaningful justice to affected communities. Japan's proposal to solicit the views of the judges on these issues will provide a sound starting point for discussion.

But given increased demands on the court, these discussions are unlikely to remove the need for reasonable growth in the court's budget. We urge states parties to ensure that important strategic discussions in the Study Group or Bureau working groups are not driven primarily by concerns to reduce the budget.

³⁹ *Ibid.*, pp. 3-4; Office of the Prosecutor, "Discussion Document—Increasing the Efficiency of Judicial Proceedings," June 14, 2011, copy on file with Human Rights Watch, p. 2.

⁴⁰ See generally Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 2011, <http://www.hrw.org/reports/2011/09/15/unfinished-business>.

⁴¹ See ASP, "[Draft] Report of the Bureau on Study Group on Governance," para. 25.

⁴² *Ibid.*, para. 24.

C. Steps forward

Below we recommend two steps for the court and states parties to pursue in the coming year. While these recommendations are unlikely to solve the immediate challenge facing states parties in setting the budget for 2012, addressing these issues could provide a stronger basis for future budget discussions and decision making. We also discuss the drawbacks of proposals to move some court activities to voluntary funding.

1. Strategic planning

In dialogue with states parties, the court will revise its overall strategic plan in 2012. The court should consider using this opportunity to evaluate closely the increasing demands and workload it now faces, and determine what additional tools will be necessary to ensure it can carry out its strategic priorities and meet its objectives in this new context.

This is no easy task, as even predicting the court's workload for a given year is difficult. It may depend on a number of factors not entirely within its control, including state and UN Security Council referrals and cooperation in arrests, or subject to the independent decisions of its judges.

To the extent possible, however, the court should seek to anticipate with increased clarity what a more mature ICC, with multiple country situations and simultaneous trials, looks like. Predicting the evolution of each existing situation over the next six years (the remaining period of the current strategic plan) and the court-wide implications of the opening of new situations within that period could then help identify where growth, contraction, or other adjustments will be necessary to permit the court to remain responsive, and case-driven rather than resource-driven. In carrying out this mapping, the court should revisit its "court capacity model," which in earlier years allowed the court to predict what could be achieved with available resources.⁴³

This should be done separately from the budget process itself, but it could provide states parties with an enhanced context for annual budget requests and a coherent vision that better justifies those requests with reference to a multi-year perspective. This could help bring about the ASP's desired "coherence between the strategic planning process and the budgetary process, which is crucial for the credibility and sustainability of the longer-term strategic approach."⁴⁴

⁴³ See ASP, "Report on the Court Capacity Model," ICC-ASP/5/10, August 21, 2006, http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-10_English_Reissued.pdf (accessed November 15, 2011).

⁴⁴ ASP, "Ninth Session Omnibus Resolution," para. 36.

In a sense, the CBF has already anticipated this need for an increased multi-year perspective. It has requested that the court “produce a medium term (up to 2015) expenditure forecast as an annex to the 2012 proposed programme budget and for each annual budget thereafter. The Committee also encouraged the Assembly to consider [sic] mechanisms to address such costs.”⁴⁵ While the CBF cites costs like capital replacements, premises, and staff costs, in some sense investigations that result in trials and require the range of court activities set out above to support them, might also be considered “multi-year cost-drivers.” The above process could help formulate planning tools to better anticipate and communicate the multi-year consequences in court activities.

It is already clear that new management tools required in the coming period include exit strategies for completing the court’s work in a given situation. The work of the court is far from finished in any of its situations, but planning is nonetheless essential in order to ensure that the eventual scaling back or closing down of court activity consolidates the court’s legacy. This could include, for example, by planning from the outset to contribute to the development of national capacity to carry out prosecutions of serious international crimes after the ICC has completed its work. It is also essential that the court’s exit from a situation does not detract from its legacy. The court does not want to leave witnesses exposed or contribute to any sense that the ICC has abandoned the situation country. This is particularly so where, as is currently the case in Uganda, the court may need to put in place maintenance strategies when its judicial processes stall due to non-cooperation in arrests. As the CBF has indicated, “[e]xit strategies will help provide information to the Assembly on how existing resources can be redeployed, as well as providing guidance on how a situation country can be assisted to carry on national proceedings when the Court will have finished its activities in a given situation.”⁴⁶

2. Review of the ICC budget process

It is clear that the court’s budget process should be revisited. The ICC’s proposed budget is based on assumptions derived nearly a year before the budget is approved. While the CBF has noted continued improvements in the court’s presentation of the budget, the proposed budget can still lack transparency about the use of resources or the justifications for additional resources. The proposed budget also lacks the multi-year perspective referenced above. Perhaps most fundamentally, early underspending by the court has contributed to a lack of trust between states parties and the court that it is able to accurately identify its resource needs. Court officials have not always helped, sending mixed signals in previous

⁴⁵ ASP, “CBF 17th Session Report,” para 22.

⁴⁶ *Ibid.*, para. 19. The court and the ASP’s activities on complementarity are discussed below in part V.

budget discussions about the ability to cope with resource cuts or to absorb new costs, suggesting excess funds in the budget.

Under cluster two, and in connection with an examination of the relationship between the presidency and the registry with regard to the administration of the court, the Study Group began discussion this year on the court’s budget process. The Study Group has now proposed that these discussions be continued in the coming year as a separate cluster on budget process.

In some respect, this could duplicate the effort of the CBF, which has requested that the court “reconsider its process for establishing the proposed programme budget and report to the Committee on this matter at its eighteenth session.”⁴⁷ We are conscious of not duplicating oversight and reporting mechanisms within the Assembly. In addition, the Study Group and states parties may want to consider the extensive agenda proposed for the Group, and consider what limits should be placed on the issues before the Group. But at the same time, direct discussions with states parties on the court’s budget process—such as has been possible in the Study Group on other issues over the past year—could facilitate increased understanding between the court and states parties, and a more constructive dialogue on these issues in the future.

We recommend that states parties:

- Consider what appropriate fora exist or should be created by the Assembly to conduct a review of the court’s budget process.

This could include adopting the Study Group’s recommendation, but also inviting the participation and expertise of the CBF. Any review should identify in advance clear items for discussion and possible outcomes. As with the issues on the Study Group’s agenda this year, the first step in discussions should be to invite the court to present its views. The review process might consider whether the already-requested court report to the CBF could serve as the starting point for the cluster’s work. This review might also provide an ideal opportunity to examine the role of the CBF, its relationship to the ASP, and to strengthen its working methods.⁴⁸

⁴⁷ *Ibid.*, para 23.

⁴⁸ We have previously raised concerns about the at times limited information available to the CBF, and a tendency for it to take on policy issues beyond its mandate. See Human Rights Watch, “Eighth Session Memo,” pp. 27-30, “Ninth Session Memo,” p. 25; see also CICC, “Non-Paper: Recommendations to the Study Group on Governance,” March 1, 2011, copy on file with Human Rights Watch, p.2.

3. Voluntary funding

Finally, the CBF has suggested that the ASP consider “alternative resources and service delivery” for some court activities. Human Rights Watch recommends against any move to place certain court activities outside of the annual budget, subjecting them to voluntary funding or even a “mixed financing system of assessed and voluntary contributions.” Voluntary funding is unlikely to provide a secure basis for the court’s activities, and would tax the court’s existing resources to pursue fundraising efforts.

The CBF made special mention of the possibility of funding outreach and public information activities through this “mixed financing system.” The court’s outreach and public information activities do make use of networks of partners, such as international and local media, and civil society organizations. These networks increase the impact of the court’s activities, beyond what would be possible given the resources available in the court’s budget. But this does not eliminate the ICC’s responsibility to provide accurate, impartial information about court proceedings on which these networks rely and the need for court staff to carry out strategic activities and directly convey appropriate messages. In addition, in affected communities, there is little substitute for direct exposure to the court’s own staff and officials to ensure the two-way dialogue at the core of effective outreach.

III. Cooperation

To meet the challenges ahead, increased cooperation by states parties is essential. Meeting expectations for justice and resisting manipulation of the court’s mandate in service of political goals will require strong public backing for the court’s independent, judicial mandate, allowing the ICC to get its work done free of political interference. This is no less important than judicial assistance and logistical support to ensure progress in arrests, investigations, and fair trials.

While supporting the ICC is the responsibility of individual states, the ASP has an essential role to play in assisting states parties to enhance their cooperation. The ASP has made some progress over the past year to continue its work on cooperation. Consultations on cooperation under the leadership of the ASP’s cooperation facilitator in The Hague Working Group provided an important opportunity for exchange between states parties and court officials on a number of areas. These included framework agreements, implementing legislation, diplomatic support to the court, witness relocation, and other types of assistance and new evidence. We urge states parties at the upcoming ASP session to:

- Renew a mandate for a cooperation facilitator in order to maintain focus within the ASP on measures necessary to enhance cooperation with the court; and

- Identify, in consultation with court officials and through the court’s report to this ASP session on cooperation, priority areas for the next facilitation that correspond with the court’s most pressing needs.⁴⁹

But apart from these consultations and with the notable exception of the development of procedures to address non-cooperation (discussed below), the ASP has not made much progress when it comes to equipping itself to facilitate more effective cooperation. We reiterate below three steps the ASP could take to strengthen its institutional framework: (1) a standing agenda item on cooperation during ASP sessions; (2) an intersessional working group on cooperation; and (3) revitalizing the practice of pledging.⁵⁰ We urge states parties to return to these recommendations during this session to ensure that the ASP’s commitment to fostering cooperation is strengthened, rather than pushed aside. In addition, states parties should make use of the ASP session itself to bolster cooperation and reaffirm the key role of the ICC in building diplomatic and political support for its mission.

A. Strengthening the ASP’s institutional framework on cooperation: next steps

1. Making use of the annual ASP session

ASP sessions are in and of themselves an important opportunity to bolster cooperation. Even in the absence of a formal agenda item on cooperation, we recommend that states parties:

- Meet with other states parties and court officials in the margins of the ASP session, to exchange best practices on cooperation, including domestic institutional arrangements like ICC focal points and task forces, and implementing legislation; discuss common obstacles to fulfilling specific cooperation requests; and explore the conclusion of framework agreements in areas including witness relocation, interim release, and enforcement of sentences.

⁴⁹ For example, the cooperation resolution adopted at the eighth ASP session identified 11 priority areas for the cooperation facilitator. These included “exploring ways to continue enhancing public and diplomatic support to the Court,” “exploring ways to continue enhancing the enforcement of Court decisions,” promoting or exploring the possibility of agreements with the court on witness relocation and protection, enforcement of sentences, provisional release, and “exploring ways to facilitate the use of new types of evidence, including financial information.” ASP, “Cooperation,” Resolution ICC-ASP/8/Res.2, November 26, 2009, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.2-ENG.pdf (accessed November 20, 2011), para. 16.

⁵⁰ We also recommended that states parties appoint a sub-facilitator on cooperation to build diplomatic support before the United Nations, a key site of debates often touching on issues of concern to the ICC’s work and providing an extremely high-profile platform of particular importance to the court’s mission. Although the ASP did not appoint a sub-facilitator, a focal point was appointed in the New York-based Group of the Friends of the ICC to take this forward.

ASP sessions can also contribute to building political support. We recommend that during the general debate and other relevant opportunities, states parties express their own political support through statements that:

- Affirm commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Underscore the obligation of ICC states parties to cooperate fully with the court, including in carrying out arrests, and commit to assisting one another in providing that full cooperation even under difficult circumstances;
- Emphasize the independence of the ICC and its prosecutor and commit to protecting the court from political interference.

The proposed resolution on cooperation should:

- Encourage states parties to continue to express diplomatic and political support for the court and for cooperation with the court.

2. Cooperation as a standing agenda item for ASP sessions

At the ninth ASP session, informal consultations on cooperation featured a useful exchange of best practices among states parties, aimed at sharing experiences that could lead to improved cooperation with the court. Several states took the floor to provide information on various aspects of their cooperation arrangements. In addition, it was out of these consultations that apparently a clear consensus first emerged to take action—as recommended in the 2010 Bureau report on cooperation⁵¹—on ASP procedures for non-cooperation. This moved the ASP forward on an important cooperation-related issue, discussed below.

While participation in these consultations was limited—perhaps due to the relatively late addition of this item to the agenda, and to their characterization as “informal” rather than a plenary meeting of states parties—it represented an important continuation of the substantive discussions that were a hallmark of stocktaking on cooperation during the Kampala review conference. It also gave some effect to the Kampala declaration on cooperation, which “decide[d] that the ASP should, in its consideration of the issue of

⁵¹ ASP, “Report of the Bureau on cooperation,” ICC-ASP/9/24, November 17, 2010 http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-24-ENG.pdf (accessed November 15, 2011), para. 19.

cooperation, place a particular focus on sharing experiences.”⁵² Indeed, the omnibus resolution adopted at the ninth session recalled this language from the Kampala declaration and “request[ed] the [cooperation] facilitator to explore proposals to facilitate the sharing of experience and other initiatives to enhance cooperation, such as a standing item on cooperation within the Assembly’s agenda.”⁵³

Unfortunately, in spite of this positive example, we are not aware of plans for a formal agenda item on cooperation at the upcoming ASP session.

As we recommended last year, and as experiences at Kampala and during the last ASP session bear out, a well-prepared standing agenda item on cooperation would ensure at least one opportunity for a plenary exchange of best practices. This standing agenda item could also encompass exchange on other outstanding challenges for enhancing cooperation that may not be amenable to solutions through sharing experience, for example, where challenges—such as arrests—require new approaches. We urge states parties through language adopted in the cooperation resolution to:

- Make cooperation a standing agenda item for ASP sessions, beginning with the eleventh session; and
- Request the cooperation facilitator to promote substantive exchange during this agenda item, including by identifying in advance specific topics—spanning both mandatory and non-mandatory forms of cooperation—for discussion.

3. Working group on cooperation

While placing cooperation on the agenda of annual ASP sessions would move forward the ASP’s collective work on cooperation, to best ensure enhanced state practice in the long-term and build on the work of past cooperation focal points and facilitators, the ASP should have a working group on cooperation operating intersessionally. A working group would augment the capacity of the cooperation facilitator to carry out work in priority areas on a year-round basis, and would permit more frequent exchange on cooperation.

We encourage states parties to think creatively about how such a working group could be structured, both to ensure effective exercise of its mandate and to limit resource implications. One possibility would be to have a working group composed of a limited

⁵² Review Conference of the Rome Statute, “Cooperation,” Declaration RC/Decl.2, June 11, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf (accessed November 15, 2011), para. 8.

⁵³ ASP, “Ninth Session Omnibus Resolution,” para. 11.

number of representatives on a self-selected basis, while bearing in mind the need for diversity on the basis of experience, need, and regional representation. Under the leadership of the cooperation facilitator, members of the group could be tasked to take on particular initiatives. The working group could summarize its activities in an annual report for the ASP, making recommendations for discussion topics during the ASP agenda item on cooperation, and identifying possible priority work areas for the following year.

States parties should:

- Adopt a decision at the upcoming session establishing a working group on cooperation; or, in the alternative,
- Mandate the cooperation facilitator to develop proposals in consultation with states parties for a working group on cooperation, with a view towards establishing the working group at the ASP's eleventh session.

4. Pledges

Pledging was a new and innovative practice for the ICC at the Kampala conference, and appears to have provided states with a helpful target for achieving cooperation goals. Providing an annual opportunity for the making of new pledges could have a helpful ongoing effect and ensure that the court receives concrete commitments of increased assistance on a regular basis. At last year's ASP, however, proposals to develop a framework to ensure follow-up on pledges did not meet with the support of states parties. Although the pledge focal points were reappointed, the ASP ultimately only called on states and regional organizations to "submit additional pledges and to inform, as appropriate, on the implementation thereof at future Assembly sessions."

We urge states parties to follow through on the practice of pledging at this ASP. While any follow-up mechanism should largely depend on self-reporting, providing a specific framework for states to report on implementation is likely to be an important spur to the continued practice of pledging.⁵⁴ In addition to state (and organizational) announcements

⁵⁴ The updated Action Plan adopted by the European Union (EU) in July 2011, the revision of which was one of the EU's pledges to the Kampala review conference, provides that the "[t]he EU and its Member States should exchange information on the fulfilment of the pledges made in particular at the Review Conference, the Assembly of States Parties or in any other international fora such as the ICRC [International Committee of the Red Cross] conference." See "Action Plan to follow-up on the Decision on the International Criminal Court" ("EU Action Plan"), annex to Political and Security Committee memorandum to COREPER, Council of the European Union, "I" Item Note, July 12, 2011, http://www.iccnw.org/documents/EU_Action_Plan_st12080_en11.pdf (accessed November 15, 2011), p. 13. A follow-up mechanism on pledges within the ASP could possibly operate through the establishment of other regional exchanges of information, with annual reporting by regional groupings to the Assembly.

regarding pledges and their implementation, as recommended above, we encourage the Assembly through either its omnibus or cooperation resolutions to:

- Decide to make pledging a regular feature of its sessions; and
- Reappoint pledge focal points and request the focal points to develop for the future a means through which states can report to the annual ASP session on the implementation of pledges.

B. Role of the ICC in ensuring diplomatic and political support

As indicated above, the ICC depends on vigorous political and diplomatic support from its states parties and others in the international community, and we have previously set out a number of more specific recommendations to states parties.⁵⁵ Recommendations to states parties and the court regarding political and diplomatic support featured prominently in the recommendations of the first Bureau report on cooperation.⁵⁶

While the essential role of states parties cannot be overstated, the court also has a clear part to play. The ICC president's annual address to the General Assembly, the prosecutor's briefings to the Security Council on Darfur and Libya, and high-level visits of court officials to the United Nations, regional organizations, and situation countries, among others, generate important opportunities to foster increased understanding among national officials and officials of intergovernmental organizations. This can in turn lead to enhanced cooperation.⁵⁷

Indeed, the ASP's decision at its eighth session to open an ICC liaison office at the African Union was aimed at increasing opportunities for ICC officials to engage directly with African Union embassies and officials. This followed a negative turn in the relationship between the ICC and the African Union (AU) in the wake of the AU decision calling on its members to withhold the cooperation of its member states in the arrest and surrender of President Omar al-Bashir of Sudan as well as recognition that there was limited, accurate information available to diplomats in Addis about the ICC. Although opening of the ICC liaison office at the African Union remains blocked, the court has nonetheless made important progress in

⁵⁵ See Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, July 2008, <http://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf>, pp. 223-30.

⁵⁶ ASP, "Report of the bureau on cooperation," ICC-ASP/6/21, October 19, 2007, http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-21_English.pdf (accessed November 15, 2011), paras. 23-28 (recommendations 7-11).

⁵⁷ While aimed at external relations goals, these high-level visits can also provide related public information opportunities to the court. By publicizing these visits or other similar initiatives in a manner consistent with the court's public information strategy welcomed by the ninth ASP session, the court can raise awareness of the court among the broader public and contribute to increased popular support for the court. This could, in turn, also have an impact on political and diplomatic support.

intensifying its engagement with African Union members, consistent with the ASP's commitment "to the Court's further regular engagement in Addis Ababa with the African Union and diplomatic missions in anticipation of establishing its liaison office."⁵⁸ For example, in July 2011, the court and the AU jointly held a technical seminar in Addis Ababa. Participants included AU commission officials and staff, as well as representatives of African ICC states parties. According to the court, the AU has already indicated its intention to hold a follow-up seminar in 2012.⁵⁹

The court has engaged in similar initiatives elsewhere. Regional seminars sponsored by the League of Arab States (Qatar) and the Francophonie (Senegal, Cameroon, Tunisia) have brought court officials into contact with staff and officials from national ministries through these regions. As the court has indicated in its cooperation report, these seminars as well as other engagement between court officials and international partners are creating important new networks of support for the ICC.⁶⁰ Indeed, in our experience, cooperation with the court is often facilitated through networks of influence among the staff and officials of national administrations. The increased awareness of a given ministry or embassy staff member to the ICC's needs and concerns, can translate concretely into improved public positions of his or her administration. While the seminars are often funded through states parties and intergovernmental institutions, the participation of ICC officials is essential. In the cooperation or omnibus resolution, states parties should:

- Encourage the court to continue its efforts to foster cooperation with states, international and regional organizations and civil society, including through participation in regional seminars to extend its networks of cooperation and support.

In discussions on the budget, states parties should:

- Ensure reasonable resources are available in the court's travel budget to permit essential engagement between its staff and officials and international partners key to increasing cooperation.

⁵⁸ ASP, "Ninth Session Omnibus Resolution," para. 31. The ASP also instructed the court to "make available in 2011 appropriate human resources and travel funds not less than that expended in 2010 (€38,300) to maintain diplomatic engagement with the African Union pending revision of the decision by the African Union to reject, for now, the request by the Court to open a Liaison Office in Addis Ababa, Ethiopia". See ASP, "Programme budget for 2011, the Working Capital Fund for 2011, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2011 and the Contingency Fund," ICC-ASP/9/Res.4, December 10, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf (accessed November 20, 2011), p. 33.

⁵⁹ ASP, "Report of the Court on cooperation," ICC-ASP/10/40, November 18, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-40-ENG.pdf (accessed November 20, 2011), para. 71.

⁶⁰ *Ibid.*, paras. 70-86.

IV. Non-cooperation

Alongside its efforts to facilitate enhanced cooperation, the ASP is mandated to ensure appropriate responses to non-cooperation. This responsibility is addressed in articles 87 and 112 of the Rome Statute. Article 87(5) and (7) provide that where a state party or non-state party having entered into an ad hoc arrangement or agreement with the court “fails to comply” with a cooperation request, the court “may make a finding to that effect and refer the matter” to the ASP, or, in the case of a UN Security Council referral, to the Council. For its part, the ASP shall then under article 112(2)(f) consider any question relating to non-cooperation. At the ninth session, the ASP tasked its Bureau “to prepare a report on which Assembly procedures could be required to enable it to discharge its mandate to consider any question relating to non-cooperation and to submit that report to the Assembly for consideration at its tenth session.”⁶¹

The now-prepared Bureau report contemplates two distinct scenarios: first, where the court has referred a specific matter of non-cooperation to the ASP, and, second, prior to a court referral of non-cooperation, where urgent action may be required to bring about cooperation for arrest and surrender of an individual subject to an ICC arrest warrant. As provided for in the report, the former would require a “formal response, including some public elements” by the ASP (although an informal and urgent response could be pursued as a first step), while the latter would require an “entirely informal response at the diplomatic and political levels.”⁶²

The report goes on to suggest procedures attached to each scenario. Formal responses to court referrals of non-cooperation would amount essentially to providing various opportunities for the concerned state to respond through the Bureau, followed by the possibility of an open dialogue between that state, states parties, observer states, and civil society representatives during an ASP session. After the open dialogue, the Bureau could prepare a report including recommendations for ASP action to be discussed and implemented—possibly through an ASP resolution.⁶³ Informal responses to imminent situations of non-cooperation would institutionalize the current practice of the ASP president’s use of good offices to raise the matter with the concerned state and others in a position to bring about cooperation, with the added assistance of four regional focal points selected by the Bureau. Following a report of the president to the Bureau regarding any such

⁶¹ ASP, “Ninth Session Omnibus Resolution,” para. 12.

⁶² Bureau of the ASP, “Report on potential Assembly procedures relating to non-cooperation,” September 8, 2011, copy on file with Human Rights Watch, paras. 10-11.

⁶³ *Ibid.*, paras. 13-14.

use of good offices, the Bureau would decide how and whether the president should continue to engage on the matter.⁶⁴

These proposals reflect a sound starting point in addressing the ASP's responsibilities on non-cooperation. The existence of these procedures would better equip the ASP to meet these responsibilities and send a welcome signal of the importance the ASP attaches to upholding state obligations to the ICC. At the upcoming ASP session, we recommend states parties:

- Adopt the procedures provided for in the Bureau report on potential Assembly procedures relating to non-cooperation.

To be sure, when it comes to formal responses, the real test will lie in the implementation of these procedures. Apart from suggesting the adoption of a resolution, the report does not address the actual modalities of a "formal response" to be taken by the ASP following dialogue with the concerned state in the event a matter is referred by the court. The prospect of public censure before the ASP is likely among the most powerful tools available to the Assembly for ensuring cooperation. At the same time, states parties should continue discussions and:

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

In addition, states parties should ensure that the necessary framework is in place to facilitate the Bureau's work on non-cooperation. For example, the Bureau report refers to discussions in "plenary session of the Assembly under the agenda item on cooperation." This underscores the importance, as we recommend above, of establishing a standing ASP agenda item on cooperation. Should a working group on cooperation be established, consideration could also be given to whether some tasks allocated in the proposed procedures to the Bureau could be more appropriately carried out in that forum.

Human Rights Watch welcomes in particular the report's inclusion of proposed informal responses by the ASP to anticipated non-cooperation in the arrest and surrender of ICC fugitives. We have seen the importance to date of these kinds of responses to a successful long-term arrest strategy. President Omar al-Bashir, wanted on two ICC arrest warrants for charges of genocide, crimes against humanity, and war crimes, has traveled to a number of

⁶⁴ Ibid., paras. 15-20.

ICC states parties without facing arrest (and indeed, such visits have been, in large measure, the impetus behind the ASP's attention to non-cooperation). But other visits to states parties—and therefore additional instances of non-cooperation—and even some non-states parties have been avoided through concerted efforts among diplomats, including the ASP president, and international and local civil society to bring pressure to bear on national authorities to either bar or arrest Bashir. These include visits to Kenya, Central African Republic, Libya, Zambia, and Malaysia. Moreover, at times, even where visits have taken place, for example to Malawi, similar efforts have succeeded in securing extensive media coverage of the obligations of ICC states parties to execute ICC arrest warrants and the opposition of civil society and ICC states parties to such visits without arrest.

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

There is often substantial time and effort required to activate state and regional representatives, ICC officials, international and local civil society, and journalists. Achieving successes in deterring non-cooperation thus often depends on “early warning” and on the efficient sharing of information among these networks. By institutionalizing and expanding on the work of the ASP president to date through the procedures proposed in the Bureau report, the ASP can take on an increased role in helping relevant stakeholders to work together to promote full cooperation and assist states in meeting their obligations.

V. Complementarity, the Assembly, and the ICC

As important as achieving a more fully realized and well-supported ICC may be, addressing existing and emerging accountability needs also requires extending the reach of international justice through national prosecutions of mass atrocities. It is for this reason that Human Rights Watch welcomed attention given during the review conference stocktaking exercise to the challenges of ensuring more effective implementation of the complementarity principle—the bedrock of the Rome Statute system. Translating increased attention to complementarity into tangible results on the ground, however, remains elusive.

Human Rights Watch is carrying out research and advocacy projects in Bosnia, Democratic Republic of Congo, Guinea, Kenya, and Uganda either to push for national prosecutions of mass crimes or to analyze existing, stalled, or failed investigations and prosecutions of

these crimes. Our findings will examine the persistent obstacles that confront such national efforts, ranging from inconstant political commitment to the absence of legislative frameworks and capacity. They will also highlight some possible if still imperfect solutions, like the mixed presence of national and international staff in the Sarajevo War Crimes chamber. But with the exception of Bosnia, in each of these countries, there is limited progress in the prosecution of mass crimes, particularly when it comes to individuals in positions of power or leadership.

This is no surprise, and reaffirms importance of recourse to the ICC as a last resort. Increasing the actual operation of the complementarity principle is clearly a long-term project, and the ASP remains an essential actor.

Over the course of the past year, discussions in Kampala have continued to pay dividends and multiply across a number of fora. While discussions in Kampala raised awareness within the ASP and ICC community about the critical role of “the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community,”⁶⁵ this has been increasingly internalized by other important stakeholders. Chief among these have been a number of development actors.

The European Commission has continued its efforts to develop a “toolkit” to provide guidance in its development of projects addressed to bolster national capacity for the prosecution of serious international crimes. In addition, the updated version of the European Union Action Plan on the ICC—a Kampala pledge—now contains a section on “complementarity,” which provides that the EU and its member states will give priority to the fight against impunity in development cooperation.⁶⁶ Following the commitment announced by the Assistant Secretary-General for Legal Affairs of the United Nations at last year’s ASP session that the UN would pay increased attention to the issue of complementarity, the United Nations Development Programme (UNDP) announced a specific interest in mainstreaming Rome Statute issues in its activities.⁶⁷ Indeed, just in advance of the upcoming ASP session, the International Centre for Transitional Justice and the UNDP will host a conference on complementarity largely aimed at rule of law and development actors.

⁶⁵ Review Conference of the Rome Statute, “Complementarity” (“Complementarity Resolution”), Resolution RC/Res.1, June 8, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf (accessed November 15, 2011), para 3.

⁶⁶ See EU Action Plan, pp. 15-16. The “toolkit,” once finalized, may provide an important reference point for EU member states in implementing this commitment, as well as for other states and development agencies.

⁶⁷ See ASP, “Report of the Court on complementarity,” ICC-ASP/10/23, November 11, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-23-ENG.pdf (accessed November 15, 2011), para.18; “ICC President discusses strengthening of national jurisdictions with UN Development Chief,” ICC news release, March 18, 2011, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr643> (accessed November 15, 2011); see also United Nations Security Council, “The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary General,” S/2011/634, October 12, 2011, http://www.unrol.org/files/S_2011_634EN.pdf (accessed November 16, 2011), para. 32.

The World Bank has also directed increased attention to the connection between justice and development, inviting president of the court Judge Sang-Hyun Song to address the opening of its “Law, Justice, and Development Week” this fall.⁶⁸

As we have noted previously, prior to Kampala there had been little emphasis in the broader rule-of-law community on a distinct subset of assistance specifically designated to ICC-type crimes.⁶⁹ A paradigm shift that would see recognition and prioritization of the importance of this subset of assistance is absolutely essential if an “enhancement in international assistance” toward the prosecution of ICC crimes is to be brought about in practice. The ASP should therefore count increased interest in complementarity among development actors as a significant achievement.

But given the gap in understanding that existed prior to Kampala, and the still-divided perspectives between rule-of-law actors and the ICC community, it is too soon to say whether this increased interest will translate into the necessary paradigm shift. A real risk remains that development actors could seek to return to the status quo, subordinating or assimilating specific objectives in the fight against impunity for international crimes to broader rule-of-law assistance.

Complementarity efforts require the continued participation of the ASP. The ASP encompasses both those states in a position to provide assistance and those who may need that assistance and a number of key observers—including among non-states parties and civil society organizations—and has access to ICC staff, a key complementarity resource. These actors are all united by a shared commitment to that fight against impunity. The ASP is thus uniquely positioned to serve as a guarantor of the concept of complementarity, maintaining focus even as new actors come onboard.

The ASP should step up its attention to complementarity to ensure that it does not relinquish its unique added value to these efforts. Progress has been made in realizing the role designated to the ASP Secretariat in the Kampala resolution on complementarity to “facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions.”⁷⁰ The ASP Secretariat has developed plans for a complementarity “extranet” or web portal to facilitate virtual exchanges of information about complementarity

⁶⁸ “ICC President calls for more synergies between international justice and development,” ICC news release, November 15, 2011, <http://www.icc-cpi.int/NR/exeres/EE06C7EB-C193-44A3-BED6-9418548A8C72.htm> (accessed November 15, 2011).

⁶⁹ See discussion in Human Rights Watch, *Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference*, May 2010, <http://www.hrw.org/sites/default/files/reports/ij0510webwcover.pdf>, pp. 37-46.

⁷⁰ Review Conference of the Rome Statute, “Complementarity Resolution,” para. 10.

resources, offers and requests for assistances, and lessons learned. The “extranet” could be a useful tool, and once launched, we encourage the ASP Secretariat to make substantial efforts to ensure its publicity to relevant stakeholders and to encourage frequent use and updating of the site. This will be key to ensuring that the “extranet” becomes a dynamic, go-to source of information.

But more is needed, consistent with plans described in this year’s Bureau report on complementarity. We have previously defined a catalytic role for the ASP—carried out through focal points or facilitators on complementarity and the ASP Secretariat—with three core functions: (1) ensuring dialogue between the ICC community and other rule-of-law actors through participation in consultations, initiatives, and policy development in other fora, and bringing information about these initiatives back to the ASP community; (2) facilitating concrete initiatives by serving as a point of contact for those seeking and those in a position to provide assistance, with an initial focus on a selected ICC situation country; and (3) convening discussions within the ASP on specific challenges—like building political will—or areas of assistance.⁷¹ The “extranet” could make significant contributions toward these ends, but ultimately they will require sustained, engaged, networking and diplomacy of ASP focal points and Secretariat staff. Toward this end, the Bureau report on complementarity indicates that the Secretariat is also pursuing relationship-building contacts with other stakeholders.

In our discussions with states parties in the margins of last year’s ASP session, several expressed concerns about the financial implications of an augmented role for the ASP, as well as the workload placed on ASP focal points and Secretariat staff. While we believe that the functions set out above represent modest objectives, we agree that the role of the ASP and its Secretariat may need to be scaled up over time and developed with experience. Ideally, the availability of additional resources in the future might allow the Secretariat to augment its capacity to further institutionalize the ASP’s work on complementarity.

It is essential that the ASP maintain and reinforce its efforts on complementarity. States parties should therefore:

- Recognize in general debate statements the central role of the ICC as a court of last resort in the absence of genuine action by national authorities, and the role of the ASP in discussions to bring about the increased operation of the complementarity principle in practice;

⁷¹ We discuss these recommendations in more detail in Human Rights Watch, “Ninth Session Memo,” pp. 17-21.

- Include language in the omnibus resolution mandating the Bureau to continue its dialogue on complementarity to provide a basis for the re-appointment of focal points; and
- Continue discussions within the ASP in order to optimize the role of those focal points and that of the ASP Secretariat, and set specific goals for the ASP to achieve before the eleventh ASP session.

In addition, states parties should continue to support and encourage the court's engagement in complementarity. Human Rights Watch welcomes the court's report on complementarity for the upcoming ASP session, a report requested by the Review Conference.⁷² The report helps to clarify the nature of the court's engagement in complementarity activities; it is evident that in the court's day-to-day work, it is often well-positioned to catalyze complementarity initiatives and to support these initiatives with its expertise.⁷³ While the court report indicates that these activities are carried out within existing resources or with externally provided resources,⁷⁴ Human Rights Watch considers that even modest costs of pursuing and enhancing these initiatives should be supported by states parties when weighed against their significant potential to yield dividends in building national capacity to address ICC crimes.

In omnibus language during the upcoming ASP session, states parties should:

- Welcome the court's report on complementarity;
- Encourage the court to continue to identify areas where it can contribute through its work and expertise to complementarity initiatives, as well as to the work of the ASP secretariat. The court should put a particular emphasis on the one hand, on the further exploration of the connection, discussed above, between the development of exit strategies and the court's legacy in situation countries, and on the other hand, on engagement in complementarity initiatives that contribute to strengthening national capacity to prosecute international crimes in those situation countries; and

⁷² See ASP, "Report of the Court on complementarity."

⁷³ The Office of the Prosecutor notes that the publicity of its preliminary examinations can contribute to national accountability efforts. *Ibid.*, para. 33. Human Rights Watch welcomes the Office of the Prosecutor's commitment to using the time it takes to decide whether to open an investigation-to engage with national authorities. The prospect of ICC action can provide an incentive to national authorities to step up efforts to pursue their own investigations, while signaling to would-be violators that the international community is watching. But while the prosecutor's office has in recent years increased the public profile of its "situations under analysis" and its engagement at the national level, this engagement has not always been consistent. We make a number of recommendations to the Office of the Prosecutor to strengthen its approach in Human Rights Watch, "Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to 'Situations under Analysis,'" June 2011, http://www.hrw.org/sites/default/files/related_material/HRW%20Course%20Correction_o.pdf.

⁷⁴ ASP, "Report of the Court on complementarity," para. 5.

- Invite the court to provide an updated report on complementarity to a future ASP session.