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**HUMAN RIGHTS WATCH MEMORANDUM FOR THE  
4<sup>th</sup> ICC ASSEMBLY OF STATES PARTIES**

**November 2005**

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## I. Introduction

The establishment of the International Criminal Court (ICC) three years ago represents a high water mark in the international community's commitment to end the impunity associated with genocide, crimes against humanity and war crimes. As a permanent court, the ICC was envisioned by its founders to be a judicial institution that would build upon the ground-breaking work of the two ad hoc tribunals. The Rome Statute's provisions were aimed at bridging the gap between international criminal proceedings and the communities most devastated by horrific crimes. The ICC was envisioned to be a mechanism for bringing justice in a broader way to victims by assisting with the re-establishment of the rule of law in war-torn societies and acting as a deterrent for future crimes. These aspirations are articulated in the statute's preamble:

*Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity. . . .*

*Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,*

*Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . .*

The Rome Statute's early entry into force and its recent 100th ratification underscore the urgent need for the ICC. As the United Nations Secretary-General aptly stated in 2004, "Undoubtedly, the most significant recent development in the international community's long struggle to advance the cause of justice and rule of law was the establishment of the International Criminal Court."<sup>1</sup> For those victimized or threatened by mass slaughter, rape as a weapon of war or forcible displacement on ethnic grounds, the court generates great hopes and expectations.

Establishing a new, permanent international criminal court is an unprecedented and enormously challenging undertaking. In the two and one half years since the inauguration of its judges and prosecutor, the ICC has made important advances. The court has moved from its establishment phase to actual operations and has reached significant milestones in the past year. Active investigations are underway in Sudan, Uganda and the Democratic Republic of the Congo. The Security Council, in a historic first, overcame strong initial opposition and referred a situation on the territory of a non-State Party to the court. The first arrest warrants were issued and served on July 8, 2005, and unsealed on October 13, 2005. The judicial organs of the court have begun to issue important case law on procedural matters of importance. Field offices have been opened and victims in the Congo have filed the first application to participate in proceedings. The Office of the Prosecutor (OTP) has developed an extensive digital database on Rome Statute crimes which it intends to make available to government ministries to promote complementarity. The court has improved its internal functioning by creating a Coordinating Council to better implement the "one court principle." Court officials have also created a number of other inter-organ working groups to improve coordination on issues of common concern. This represents real progress.

At the same time, the development of practice and policy in several key areas – including outreach, field engagement, witness and victim protection, and victims' participation – is cause for some real concern.

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<sup>1</sup> Report of the U.N. Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 23 August 2004, S/2004/616, para. 49.

The practice in these areas raises questions about the underlying vision guiding the institution and whether it is adequately focused on benefiting those most affected by the crimes.

Human Rights Watch believes that a broad view of the Rome Statute is necessary for the court to address the unique responsibilities and challenges facing an international criminal court seated hundreds, if not thousands, of miles away from where the crimes occurred. Our field experience suggests that the ICC's mandate will not be fulfilled solely by conducting efficient, effective investigations with fair trials – however crucial those tasks are. Proper implementation of the ICC's mandate requires prioritizing efforts to maximize the court's impact with those most directly affected by the crimes it is trying. A planned, deliberate effort is necessary for the trials to have a lasting impact. Unless the court makes this effort, it will fall short of the statute's scope and disappoint those it was created to serve.

The 4<sup>th</sup> ASP Session is occurring at a critical juncture for the court. The institution is in the process of shaping its strategy going forward into its second phase of operations. This paper discusses in detail some of the elements we believe are crucial to a successful strategy for guiding the work of the International Criminal Court. It also makes a number of recommendations to the ASP regarding the role it must play in assisting the ICC to realize that goal.

## **II. Maximizing the Impact of the ICC**

In order to achieve its full potential, the court's impact must not be limited solely to prosecuting a handful of perpetrators. Because the ICC will be trying only a few cases in each situation, maximizing the effect of those cases is essential to extend the reach of the court's work. We believe several components are necessary to accomplish this: broad outreach and communications, active field engagement, wide promotion of victim participation in proceedings, an independent Victim's Trust Fund, an effective victim and witness protection program, and a focus on promoting complementarity.

### **A. Effective Outreach and Communications**

Unlike a national court whose authority is implicitly accepted, the ICC has no deep-rooted legitimacy in the communities where it is working and is often viewed with suspicion, if not outright hostility, by those who fear its work. It conducts proceedings in languages not always accessible to the local population. Its legal procedures may be very unfamiliar to people in the communities affected. The fact that the ICC works in communities that are polarized and war-torn makes outreach and communications all the more important because those threatened by the court will do their utmost to tarnish it.

Although outreach (including press strategy) will not change the minds of those seeking to distort the work of the court for political reasons, it will also provide some counterweight to intentionally inaccurate information about the court. It is not intended to create a consensus about the court, rather it provides the necessary tools for local communities to have a correct understanding of the court's role. Outreach can create a sense of awareness and interest in the legal process. Human Rights Watch believes it is necessary to provide those who are looking for justice a better understanding of the court's mission. Outreach will also assist those undecided about the ICC to better understand its functions. Initiatives to inform the public about the ICC's work are critically important to making the court relevant to the very people in need of justice. This will also have the practical benefit of making people more willing to cooperate and assist the court.

Because none of the usual means for disseminating information about a national court are readily available to the ICC, the court needs to have an effective strategy for external relations, public information and outreach to popularize its work. Human Rights Watch believes effective outreach and communications require meaningful engagement, dialogue and exchange with local communities and media. An outreach and communications program must also start early to be most effective.

The importance of implementing an active outreach and communications program from the outset of operations is a key lesson the ICC needs to fully learn from the experience of the ad hoc tribunals. At the International Criminal Tribunal for the Former Yugoslavia, outreach was an afterthought and, in fact, was never included in the tribunal budget. The ICTY began its investigations in 1994. The first indictments were issued in late 1994 and early 1995. However, the outreach program was not started until the fall of 1999 when the tribunal realized how poorly it was perceived in former Yugoslavia. Regional outreach offices were finally established in 2000 and 2001 and they have had to work hard since then to correct public opinion that had already been adversely affected by a biased media.<sup>2</sup> The International Criminal Tribunal for Rwanda was established in November, 1994, and issued its first indictments a year later. However, an active outreach program was not initiated until late 1998 by which time public perception of the tribunal had been negatively influenced by government criticism.<sup>3</sup>

While the Special Court for Sierra Leone is based in the country where the crimes occurred and Sierra Leone is in a post-conflict transition, there are relevant lessons that can be drawn from its practices. The Special Court has directly engaged the local population throughout its operations, from holding “town hall” meetings across Sierra Leone when the court was first established, to continually disseminating information about its proceedings through video, radio, workshops and written material. Through direct engagement from its early stages, the Special Court has helped ensure that the local population has an accurate understanding about its work which in turn has contributed to raising people’s belief that justice can and should be done for serious crimes.<sup>4</sup>

Human Rights Watch welcomes the initiation of outreach activities by the ICC in the Democratic Republic of the Congo and Uganda and is pleased that the ICC has agreed upon an Integrated Strategy for External Relations, Public Information and Outreach. In the past few months, for example, the ICC has held an information workshop in Uganda for delegations from local councils as well as a seminar for Ugandan judicial authorities and information meetings for lawyers and journalists. The ICC has also held seminars for lawyers and non-governmental organizations (NGOs) in Kinshasa and has participated in other workshops or meetings organized by NGOs throughout the Democratic Republic of the Congo. In addition, the ICC has developed an interactive radio program in Bunia and the prosecutor has invited community leaders from Uganda to The Hague for important discussions.<sup>5</sup> The Registry also reports having prepared outreach materials for distribution in the various country situations.<sup>6</sup>

While these efforts are important, they have not been enough to provide basic knowledge to the affected communities about the ICC. Human Rights Watch researchers in northern Uganda encountered the widespread impression that the ICC is being manipulated by President Museveni. They also found that

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<sup>2</sup> Lal C. Vohrah and Jon Cina, *The Outreach Programme*, in *Essays on ICTY Procedure and Evidence*, Richard May, David Tolbert, John Hocking et al., eds., (Kluwer Law International, 2001) at 551.

<sup>3</sup> Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, *Journal of International Criminal Justice* 3 (2005), 950-961

<sup>4</sup> See Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, Vol. 17, No. 14(A), October 2005, pp. 28-33.

<sup>5</sup> “Information Meetings for Lawyers Held in Uganda”, 31 October 2005; (ICC Press Release), “ICC Holds Seminar with Ugandan Judicial Authorities”, 26 October 2005; (ICC Press Release), “ICC Representatives Participate in ICC Information Event in Kinshasa”, 15 September 2005; (ICC Press Release), “ICC Holds Workshop in Uganda on Public Outreach”, 18 August 2005 (ICC Press Release).

<sup>6</sup> *Report on the activities of the Court*, 16 September 2005, ICC-ASP/4/16, para. 77.

there is misunderstanding about the ICC's ability to prosecute crimes that occurred before July 2002 which fall outside of the court's jurisdiction.<sup>7</sup> In the Democratic Republic of the Congo, our researchers have come upon widespread confusion about why the ICC started its Uganda investigation before beginning its efforts in Ituri. Moreover, local civil society members have expressed concerns about the lack of information regarding the progress of investigations and there are signs that they are beginning to lose enthusiasm for the court's work. In Sudan, the news of the ICC referral generated a great deal of hope and high expectations among civil society groups in Darfur, but the lack of outreach since then has left many victims feeling disillusioned about the prospects for justice.

Human Rights Watch believes that the ICC must significantly enhance its outreach and communication activities in several ways in order to make the court accessible and meaningful to those most affected by the crimes. First, though the organs of the court have agreed upon an Integrated Strategy for External Relations, Public Information and Outreach, country specific strategies also must be agreed upon and implemented promptly. These strategies must include a clear division of responsibilities between the different court organs. Plans should also be tailored to respond to the particular challenges that exist for conducting outreach in each country. For example, in countries where there is limited internet access, press releases may have to be hand delivered to local newspapers, as is done in Sierra Leone. Where journalists have limited access to phones, means may have to be devised to enable reporters to call the press office collect or reach the press office in some other way. To be successful, situation specific strategies must evolve over time in response to feedback from relevant sectors of society in each country, including local journalists and civil society groups.

Second, Human Rights Watch is concerned that the ICC's outreach operations are not adequately funded at this time. This prevents outreach from being sufficiently far-reaching and maximally effective. The lack of resources demonstrates the low priority the court attaches to outreach. Similarly, the proposed budget currently allocates only 210,000 euros (or less than 0.3% of the budget) to fund all outreach efforts in the field including meetings with community leaders, printed materials, radio programs and three conferences a year with 100 participants.<sup>8</sup> Human Rights Watch believes that the small amount allocated is not nearly enough to cover the range of activities required in the three countries where investigations are ongoing. The staffing proposed for the field offices is too few and too junior. The proposed staffing does not reflect the importance of outreach to local communities as part of fulfilling the court's mandate. Even worse, the ICC's modest request for field staffing was cut further by the Committee on Budget and Finance (CBF) which recommended funding only five of the eight GS-OL posts proposed in the ICC budget. Cutting positions in the field assigned to work in outreach sends the wrong message from the ASP to court officials about the importance it attaches to outreach as a component of the court's overall strategy. The cut in local staff also probably will be seen as a lack of appreciation for the added value local staff provide to outreach efforts, a value disproportionate to their modest salaries. We urge the ASP not to cut these positions and to signal court officials that outreach should be an essential component of their operations vis-à-vis local communities.<sup>9</sup>

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<sup>7</sup> Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, September 2005, Vol. 17, No. 12(A), p. 57. A more formal survey conducted of 2585 residents in Northern Uganda between April 20 and May 2, 2005 revealed that 73% of those surveyed knew nothing about the ICC's existence or work. International Center for Transitional Justice and the Human Rights Center of the University of California, Berkeley, *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, July 2005.

<sup>8</sup> Proposed Programme Budget for 2006 of the International Criminal Court, 24 August 2005, ICC-ASP/4/5 (hereinafter "Draft Budget 2006"), paras. 421, 424.

<sup>9</sup> Human Rights Watch is a member of the Budget and Finance Team of the Coalition for the International Criminal Court (CICC) and fully supports the positions it has taken in its papers, *Comments on the Proposed Programme Budget for 2006 of the International Criminal Court and Commentary on the Report of the Committee on Budget and Finance on the work of its Fifth Session (10 to 14 October 2005)*.

Third, the current plans are too reliant on NGOs. The Report on activities of the Court to the ASP states that “In conducting outreach activities, the Registry relies on local actors.”<sup>10</sup> The rationale for cutting the ICC’s proposal for three additional GS-OL staff is that the work of this section “would rely to a large extent on the non-governmental organizations (NGOs) present in the field.”<sup>11</sup> Yet no mention is made of what type of assistance NGOs would be providing. As far as we know, no discussions have been conducted with local NGOs in the field on this.

Furthermore, although numerous international and local NGOs disseminate information about the court, for a variety of reasons, they cannot substitute for some amount of court-conducted outreach with ordinary citizens. In some country situations there is no civil society strong enough to conduct outreach. To the extent NGOs exist, they may not have the necessary resources to provide outreach for the court. In addition, local NGOs may be affiliated or perceived to be affiliated with a particular ethnic, political or social group. This could create the appearance of bias if the ICC is not able to work with groups of different allegiances equally. Furthermore, there are situations in which the government is hostile to the ICC and it may not be safe for an NGO to be publicly associated with the court. Moreover, some messages can only be given by the ICC itself because they would not be received in the same way if delivered by NGOs. Finally, because the ICC is a complex institution, NGOs may not be able to answer accurately all of the questions that arise about the court. Direct involvement by ICC officials in outreach will ensure that the information given to the communities is entirely consistent with the message the court seeks to deliver.

Aside from supporting the ICC’s proposed budget for outreach, Human Rights Watch encourages the ASP to request that the court report on implementation of its Integrated Strategy for External Relations, Public Information and Outreach. The ASP should further request that the court continue to submit detailed progress reports on outreach to the ASP Bureau and the Committee on Budget and Finance over the course of the year.

***Human Rights Watch recommends that, at its upcoming session, the ASP:***

- ***supports the proposed budget in its entirety in the area of outreach;***
- ***sends a strong message in its Omnibus Resolution to the ICC about the importance of conducting its own outreach to local communities and media in fulfilling its mission;***  
***and***
- ***welcomes the ICC report on outreach strategy and encourages the ICC to submit regular detailed reports on how its outreach strategy is being implemented to the ASP Bureau and the Committee on Budget and Finance.***

## **B. Adequate Field Presence and Engagement**

In addition to outreach and communication, in order to maximize impact within the communities most affected by the crimes, it is essential that the court have sufficient staff and resources in its field offices in each of the situations under investigation. Human Rights Watch welcomes the opening of ICC field offices in Kampala and Kinshasa in the past year.<sup>12</sup> Human Rights Watch also welcomes the increased ICC field presence reflected in the proposed 2006 budget. Additional resources and field-based staff are

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<sup>10</sup> Report on the activities of the Court, Fourth session of the Assembly of States Parties, 16 September 2005, ICC-ASP/4/16, para. 77.

<sup>11</sup> Report of the Committee on Budget and Finance on the work of its Fifth Session, 21 October 2005, ICC-ASP/4/27, para. 68.

<sup>12</sup> Report of the International Criminal Court, Sixtieth Session of the General Assembly of the United Nations, 1 August 2005, UN/A/60/177, para. 15.

proposed for the OTP, the Victims and Witnesses Unit (VWU), the Victim Participation and Reparations Section (VPRS), and the Public Information Unit.<sup>13</sup> In total, over thirty new field-based positions are proposed for the court's operations. In addition, the proposed budget includes requests for funding the hiring of local staff for these offices. We believe that hiring local staff is a positive development. The court will need to rely heavily on local staff for information about events and conditions in formulating its strategies in order to make sure outreach, witness protection and press relations are meaningful to the local population. The establishment of the Registry's Field Operations Section to coordinate administration, logistics and communications with respect to all field activities also reflects the ICC's increased emphasis on field activities as the number of situations under investigation grows.

Human Rights Watch further welcomes funds in the proposed 2006 budget for judges to make visits to the field. This will provide judges with a better understanding of the context in which crimes were committed. Human Rights Watch encourages the ASP to go a step further and ask the ICC to submit an option paper at the next ASP session on the possibility of conducting in situ proceedings where feasible. The beneficial effect of conducting proceedings in the country where the crimes occurred cannot be overstated. As demonstrated by the experience of the Special Court for Sierra Leone, in-country proceedings make an important contribution to making the justice process real for those most directly affected. The ASP should encourage the ICC to consider instituting at least a limited number of such proceedings where possible.

Human Rights Watch also believes the ICC must strive to establish limited but effective field presence in the areas where the victims are located and not just in the capital cities of countries where investigations are taking place. While offices in the capitals are important as a base of operations and for relations with government officials, they are no substitute for presence in the affected communities. Given the difficulty and expense of travel for victims and witnesses, locating field offices solely in the capitals has the practical effect of making the offices inaccessible to the people who may be most in need of information or interaction with the ICC. It will also be extremely difficult for the court to implement effective management of victims' participation, victim and witness protection or outreach, if ICC staff is far removed from the communities where investigations are ongoing.

Human Rights Watch recognizes the serious challenges posed by security risks in the field. In this regard, we welcome the tireless efforts of court officials to secure their presence in Bunia, Ituri. Bunia is 1700 kilometers away from Kinshasa, making it impossible for the Kinshasa office to have an effect in the areas most interested in proceedings. Even with the pressing security difficulties, we urge the ICC to examine fully any possibility for limited field presence as close as possible to, if not in, the areas it is investigating.

***Human Rights Watch urges the ASP to:***

- ***encourage the ICC to submit an option paper on conducting in situ proceedings where possible; and***
- ***encourage the ICC in its Omnibus Resolution to establish a field presence as much as feasible in or near the areas being investigated.***

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<sup>13</sup> Draft Budget 2006, paras. 47, 381, 408, and 444.

## C. Ensuring the ICC Adequately Prioritizes Victims and Witnesses

Adequately addressing witness and victim issues at the ICC is another crucial component to ensure that the court maximizes its impact with those most affected by the crimes being investigated and prosecuted. The ICC gives a central role to victims in the international justice process. This reflects a major advance for an international justice mechanism. The statute and the Rules of Procedure and Evidence (“the Rules”) provide victims with rights to participate in proceedings and opportunities to receive reparations, including restitution, compensation and rehabilitation.<sup>14</sup> Additionally the Rome Statute and Rules require comprehensive protection of witnesses and victim participants involved with the court at each stage in proceedings.<sup>15</sup>

The ICC has made important efforts to ensure effective participation of victims and to establish a protection program for witnesses and victim participants. However, as discussed below, Human Rights Watch believes it is crucial that the court enhances its efforts in this area. The ASP has a critical role to play in supporting a viable, but broad view of the ICC’s functions regarding victims and witnesses. The ASP should approve necessary support for activities related to witnesses and victims. Human Rights Watch also believes it should approve regulations for the Victims Trust Fund that allow the Fund to have a deep impact on the affected communities.

### 1. Victims’ Participation

At the ICC victims have a unique opportunity in the proceedings of an international criminal tribunal to serve as “participants.” In this capacity, victims are empowered to present their views and concerns beyond giving testimony as witnesses.<sup>16</sup> Victims’ participation could break down the traditional barriers between victims and the international judicial process. It could enable victims to have some input in their interaction with the ICC. Victims’ participation, if properly handled, should make justice more accessible and meaningful to those who have suffered the most.

The potentially large number of victims, the victims’ lack of understanding of ICC proceedings, and the likely difficulty of reaching victims based in rural areas create enormous challenges to successfully realizing victims’ participation. Avoiding tensions between different victims groups and the creation of unrealistic expectations for victims, along with ensuring adequate legal representation, are further challenges facing the court. Moreover, due to the groundbreaking nature of victims’ participation in international criminal proceedings, there are no previous experiences from which the ICC can benefit in addressing these challenges.

In this context, the ICC has taken a number of important steps to initiate victims’ participation. For example, the VPRS has developed application forms for victims’ participation which have been approved by the presidency. The VPRS has also started to provide some training in the field primarily to local NGOs. These NGOs may be able to serve as intermediaries between the ICC and possible victim participants by reaching out to victims, providing information about becoming a participant, and assisting in filling out applications for participation.<sup>17</sup>

The first application by victims to serve as participants in proceedings has been submitted from the eastern Democratic Republic of Congo. Progress has also been made in providing legal representation for victim participants. In September 2005, the ICC established an independent office to assist in

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<sup>14</sup> Rome Statute, arts. 68 and 75.

<sup>15</sup> Rome Statute, art. 68.

<sup>16</sup> Rome Statute, art. 68(3); ICC Rules, rule 89.

<sup>17</sup> Report on the activities of the Court, ICC-ASP/4/16, para. 70.

ensuring adequate legal representation for victim participants, the Office of Public Counsel for Victims. Hiring staff for this office is underway, along with efforts to develop its policies and working methodologies.<sup>18</sup> Additionally, the ICC has a limited budget to provide legal aid upon court order to indigent victims for legal representation of their own choosing.<sup>19</sup>

These efforts are commendable, but Human Rights Watch believes they must be significantly strengthened to make victims' participation meaningful. While the current budget proposal reflects important increases to the budget for field operations, funding remains inadequate. The proposed 2006 budget requests only seven field-based staff members from the VPRS to be allocated between the three situations currently under investigation.<sup>20</sup> Human Rights Watch is concerned that this limited staffing will not be enough to enable VPRS to contact a sufficient number of possible victim participants.

We are similarly concerned by the CBF proposed cut of 10% to support for legal representation for victims and accused. The court prepared its proposed budget based on the OTP's assumption that there will be two trials at the court in 2006.<sup>21</sup> The Registry foresees two legal representation teams for victims at trial. The effect of the 10% cut is to reduce legal representation for victims by one team. Given that four legal representation teams for victims' participation is in itself fairly limited, the ASP should reject the proposed cuts.

The current plans to ensure victims' participation also appear to reflect too much reliance on local partners.<sup>22</sup> We recognize that the ICC will not be able to reach all possible victim participants. However, there are real questions regarding the capacity, resources, willingness, and potential risks for local partners. As a result, the VPRS will need to articulate clearly how local partners will be best utilized.

The limited extent of outreach to possible victim participants to date also is cause for concern. It so far consists only of production of outreach materials and ICC participation in several seminars organized by local partners.<sup>23</sup> This level of outreach makes it extremely difficult for possible victim participants, particularly those based in rural areas, to become aware of the rights and opportunities the ICC offers.

***In short, Human Rights Watch recommends that, at its upcoming session, the ASP:***

- ***affirms in its Omnibus Resolution the important role of victims at the ICC, noting the unique policies regarding victims' participation and reparation;***
- ***requests in its Omnibus Resolution that***
  - ***the ICC report to the Bureau and the CBF on its activities in regard to victims participation; and***
  - ***the ICC develop a common focused strategy regarding victims to ensure that victims are accorded adequate prioritization by all organs of the court; and***
- ***approves all budget provisions related to field staff to assist in victims' participation and reinstates proposed cuts to legal representation.***

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<sup>18</sup> Draft Budget 2006, para. 421.

<sup>19</sup> Draft Budget 2006, para. 424.

<sup>20</sup> Draft Budget 2006, paras. 445 - 447.

<sup>21</sup> Draft Budget 2006, para. 10.

<sup>22</sup> Draft Budget 2006, para. 441.

<sup>23</sup> Report on the activities of the Court, ICC-ASP/4/16, para. 70.

## 2. Maximizing the Impact of the Trust Fund for Victims

In keeping with our view that the vision of the court should include an effort to have a broad impact on affected communities, Human Rights Watch believes the Trust Fund for Victims should be not be limited to the implementation of reparation orders. It should be used in a way to benefit more than just the narrow class of victims affected by crimes that resulted in a successful prosecution. Therefore, Human Rights Watch supports draft regulations for the Trust Fund that would allow its board of directors both to implement court orders for reparations and to allocate voluntary contributions more broadly to benefit victims of crimes under investigation by the ICC.<sup>24</sup>

Human Rights Watch is a member of the Victims' Rights Working Group and supports its positions on the Trust Fund.<sup>25</sup> In particular, Human Rights Watch agrees that the drafters of the Rome Statute did not intend to limit the Trust Fund exclusively to implementing reparation orders by the court. Because the court will only prosecute a limited number of people, a large number of victims would be left uncompensated by a narrow interpretation of the Trust Fund's scope. This may lead to tension and resentment. The Trust Fund for Victims should be allowed to use other resources it has raised to implement programs flexibly for the benefit of victims once investigations have begun.

Furthermore, Human Rights Watch believes that the Trust Fund should be able to start projects for the benefit of victims once the prosecutor has formally opened an investigation. This standard limits the situations for which funds will be disbursed yet allows the board the ability to fund projects closer to the time of the atrocities when the funds are most needed. Waiting until post-conviction before distributing funds could mean that victims have to wait many years before receiving assistance. By this time the impact of the assistance may not be as great.

Finally, preserving the board's discretion and independence to use its expertise to direct the allocation of funds that are not used for reparation orders without requiring a court order is important. This will help to ensure the board is able to fulfill its mandate and maintain its independence from the court. The court may feel uncomfortable making judgments about victims' compensation before there is a conviction. Although Human Rights Watch recognizes that decisions to allocate funds will always entail difficult choices, allowing the board the flexibility to apply funds where most needed allows the board to maximize the Trust Fund's potential.

The other issue of continuing contention is the earmarking of voluntary contributions collected by the Trust Fund for Victims. Human Rights Watch believes that permitting partial earmarking in a limited way will maximize the ability of the Trust Fund to attract donations. The proposed regulations include provisions ensuring that allocations from earmarking are made consistently with Rule 85 and do not result in an inequitable distribution of funds and property among groups of victims.<sup>26</sup> Furthermore, the board itself can adopt additional measures to guarantee that funds are collected and distributed in a way that does not compromise the objectives of the Trust Fund for Victims. For example, the Victims' Rights Working Group proposed that the board itself establish categories from which donors can choose to earmark funds and set a cap on the amount of a donation which may be earmarked.

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<sup>24</sup> Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims, 26 August 2004, ICC-ASP/3/14/Rev. 1. Draft Regulations start at p. 3.

<sup>25</sup> See Victims' Rights Working Group, *Comments on the Proposals Submitted by Australia, Canada, Croatia, Japan, The Netherlands, New Zealand, Norway, and the United Kingdom*, September 2005; *Submission to the Second Meeting of the Bureau's Working Group on Regulations of the Trust Fund for Victims*, July 2005; *Comments on the Draft Regulations of the ICC Trust Fund for Victims*, February 2005.

<sup>26</sup> Draft Regulations of the Trust Fund for Victims, ICC-ASP/3/14/Rev. 1, paras 30-33.

In short, it is important that the regulations for the Trust Fund for Victims create a reasonable, but generous mandate allowing it to perform its functions in a meaningful manner. Human Rights Watch believes it is crucial that the ASP reach a consensus on the regulations at this ASP session to enable the Trust Fund for Victims to begin its important work.

***Human Rights Watch urges the ASP to finalize ongoing discussions and adopt Regulations for the International Criminal Court Trust Fund for Victims.***

### **3. Victim and Witness Protection**

No one disputes that protection and support for victim participants, witnesses and others at risk are “paramount concerns” for the International Criminal Court.<sup>27</sup> The experience of the ad hoc tribunals and the Sierra Leone Special Court suggests that protecting those willing to come forward and testify--whether for prosecution or defense--will be key to the effectiveness of the ICC. The capacity of the ICC to ensure adequate protection will likely determine the extent to which victims and witnesses will be willing to participate in court proceedings. It will also affect their perception of the institution’s sensitivity to their needs and circumstances. An effective protection program is therefore essential to the operations of the ICC.

Effective protection creates many challenges. National authorities in the countries where international tribunals operate are often incapable or unwilling to assist with meaningful protection. The ICC is currently investigating situations where conflict is ongoing and where civilians, human rights activists and staff of international organizations face serious security risks daily. Logistics for operating in these situations are extremely difficult. The ICC’s financial and capacity constraints make meeting protection obligations all the more difficult.

Despite the challenges, the annual Report on the activities of the court submitted to the Assembly of States Parties<sup>28</sup> indicates that the ICC has made important strides over the past year in developing a functional protection scheme. The court has made efforts to coordinate action by the OTP and the Registry’s VWU during the investigation phase. For example, the VWU and the OTP have jointly developed security protocols for each of the situations under investigation to guide the work of the investigators who contact potential victims and witnesses. VWU staff members have in some instances accompanied investigators in order to monitor the situation of victims and witnesses. The OTP has taken precautions to limit the number of individuals contacted and to conduct interviews in a discrete manner. This includes using intermediaries or means and locations that limit their exposure. The Gender and Children Unit of the OTP has created a roster of external psychologists to assist with the assessment of the psychological condition of witnesses prior to interviews and to provide specialized support for traumatized individuals. The VWU has developed emergency response systems that allow victims and witnesses to seek assistance at any time should their security be threatened. Recent decisions by both Pre-Trial chambers have also demonstrated the chambers’ commitment to understanding security challenges faced by victims and witnesses in the field and to ensuring that the court takes all necessary measures to protect them.<sup>29</sup>

With the issuance of the Uganda arrest warrants and the assumption that there will be arrest warrants in one other situation in the coming months, the ICC is entering a new phase of its operations which will pose new and more acute challenges for the protection of victims and witnesses in contact with the

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<sup>27</sup> President Philippe Kirsch, Address to the United Nations General Assembly, November 8, 2005, at p. 3.

<sup>28</sup> Report on the activities of the Court, ICC-ASP/4/16.

<sup>29</sup> ICC Rules 87 and 88.

court. In many ways, the efficacy of the protection scheme and the recent activities of the court will be put to the test. In this context, it is vitally important that protection activities receive the full attention and resources required to be effective.

While the details of the court's witness protection programs must remain opaque for reasons of security, Human Rights Watch is concerned about items in the budget that create questions about the operational capacity of the protection unit. Human Rights Watch believes it is crucial that the VWU steps up its field presence in this new phase of the court's operations. The proposed hiring of two P-3 protection officers and two P-2 support officers, as well as a number of GS-OL local staff to manage the VWU protection and support activities in the field are welcome steps. Adequate field presence is key to ensure that the court is able to monitor regularly the security of victims and witnesses and be able to intervene immediately when necessary. We have questions, however, as to whether the proposed level of staffing (and the location of staff in Kinshasa or Kampala which is remote from where victims and witnesses are located) is sufficient to ensure effective protection and support.

The limited staffing is linked to the court's intent to rely on local networks and individuals to provide for witness protection in remote and insecure areas. Indeed, in the Report on the activities of the Court to the ASP, the ICC acknowledges that it will have to rely on partners to implement its protection plan.<sup>30</sup> Although a witness protection program will certainly need to rely on local actors to some extent, the apparent reliance on local partners—in substitution for court personnel—raises some concerns about both conceptual and practical requirements of witness protection. Important issues with respect to confidentiality may be compromised by providing information about the identity of witnesses to local actors. Furthermore, to the extent local partners are involved, they by and large do not have witness protection experience and may be extremely limited by resource constraints and capacity. Moreover, involvement in witness protection activities is likely to expose them to serious risks. It will therefore be important for the court to clarify the extent to which it will rely on local partners and the modalities this reliance will take.

In accordance with obligations under Article 93 of the Rome Statute, States Parties should assist the court in providing witness and victim protection, including through relocation agreements. States Parties may also need to use their influence to ensure that cooperation agreements are undertaken with peacekeeping operations that may play an important role in providing witness and victim protection. Finally, States Parties must also be willing financially to support effective protection measures. Protection is not cheap, but it is necessary and it is well worth the costs.

***Human Rights Watch urges the ASP to approve all budget provisions related to victim and witness protection and reject the CBF's recommendation to cut two P-2 field positions proposed by the VWU.***

***Human Rights Watch further urges States Parties to assist the court with protection by signing relocation agreements and influencing other UN agencies and states to sign cooperation agreements.***

#### **D. Complementarity**

To maximize the ICC's impact, Human Rights Watch believes it is essential for the court to assist and, where necessary, press states to conduct national investigations and trials. This is inherent in the Rome

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<sup>30</sup> See Report on the activities of the Court, ICC-ASP/4/16, para. 77.

Statute's fundamental principle of complementarity. There is a role for the prosecutor, the Registry and the States Parties in this endeavor as the ICC should view complementarity as a crucial part of its overall strategy for achieving justice. In this regard, Human Rights Watch welcomes the efforts of the prosecutor to develop a digital library on the crimes in the Rome Statute that will be accessible to states. We urge the prosecutor to speak publicly on the importance of national prosecutions conducted in a way consistent with internationally accepted fair trial standards. In addition, where appropriate the Prosecutor should assist national prosecutions of ICC crimes.

***Human Rights Watch urges the ASP in its Omnibus Resolution to encourage all organs of the ICC to include activities promoting complementarity as part of their overall strategy.***

## **E. Strategic Plan**

One important means to ensure that the ICC develops an appropriate institutional approach for maximizing impact is for the organs of the court to agree on and apply a set of guiding principles to its operations. Human Rights Watch welcomes the 2004 recommendation of the CBF to the court that it articulate a set of global long-term objectives for inclusion in the draft 2006 budget. This proposal was intended to address "fragmentation" and duplication of work in the various organs of the court.<sup>31</sup> In December 2004, in response to the CBF recommendation, the court created an inter-organ working group to develop a five-year Strategic Plan.<sup>32</sup> Human Rights Watch appreciates the commitment of the court to developing this plan as a means to identify and implement an appropriate vision for its operations.

In April 2005 the court informed the CBF that the Strategic Plan would be ready in July. However, the court has now reported that it will need more time to complete its plan.<sup>33</sup> Given that the Strategic Plan is the instrument by which the court will express the content of its vision, a delay of another year is problematic. Key decisions regarding the development of the institution are already being taken. What is at stake is a strategic direction that can and should have impact on ICC practice and policies.

Moreover, as discussed earlier in this paper, Human Rights Watch has made recommendations about which guiding principles should be identified and operationalized by the court to achieve a proper institutional approach. This requires a conception of the court's mandate that recognizes the purposes underlying the creation of the ICC. These principles extend beyond fair and effective trials for serious crimes and include maximizing impact in local communities to limit impunity for serious crimes and build respect for the rule of law. As such, we believe the Strategic Plan must include the following key elements:

- credible and impartial investigations with adequate explanation to local populations by the Office of the Prosecutor concerning its policies and decisions not to prosecute where appropriate;
- effective outreach, field engagement and promotion of complementarity in the communities most affected by the crimes;
- effective victims' participation and reparations as well as protection and support for testifying witnesses and victim participants; and

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<sup>31</sup> See Report of the Committee on Budget and Finance to the Third Assembly of States Parties, 02-04 August 2004, ICC-ASP/3/18, paras. 11-12, 46; Report of the Committee on Budget and Finance to the Third Assembly of States Parties, 29-31 March 2004, ICC-ASP/3/22, para. 25.

<sup>32</sup> Report on the activities of the Court, ICC-ASP/4/16, para. 15.

<sup>33</sup> See Report of the Committee on Budget and Finance on the Work of Its 5th Session, ICC-ASP/4/27, 21 October 2005, paras. 24-25, 112.

- fair and efficient trials of all accused.

The enumeration of even the most appropriate guiding principles, however, is only the first step. The more daunting task will be ensuring that these are translated into action. In order to help ensure that this can be accomplished, clear plans to implement the principles must be identified. Reliable indicators to evaluate their implementation will also need to be developed. To further assist in accomplishing this objective and ensure that appropriate principles are in place, feedback from relevant stakeholders on the Strategic Plan should also be obtained in a manner consistent with the independence of the court.

*Human Rights Watch recommends that the ASP in its Omnibus Resolution:*

- *welcomes the preparation of the Strategic Plan and urges the ICC to finalize it as a matter of priority and develop plans for implementation as soon as feasible; and*
- *urges the ICC to emphasize in its Strategic Plan key elements such as outreach and victim participation that have been addressed in this paper.*

*Human Rights Watch also recommends that upon finalization of the Strategic Plan, the ASP Bureau initiate an ASP working group to discuss the Plan.*

### **III. The Role of States Parties in International Justice: Cooperation, Support and Strengthening National Prosecutions**

At this juncture, with three active investigations and the issuance of the first arrest warrants, the need for robust support by States Parties and ASP engagement is vital. This is for two reasons: first, to secure cooperation from states, various agencies of the United Nations and other inter-governmental organizations; and second, to fulfill the ASP's breadth of responsibilities to the court. There can be no question that active support by States Parties will shape the ICC's future and determine whether it ultimately reaches the goals for which it was established. In addition, beyond the framework of the ASP, there is another important way in which States Parties can promote justice for serious crimes: ICC investigations create an opening to strengthen national capacity to prosecute the most serious crimes and States Parties should approach this opportunity strategically.

#### **A. Ensuring Effective Cooperation with the ICC**

##### **Cooperation by States**

Cooperation by states is crucial to the success of the ICC. Because it has no police force and no enforcement mechanisms, it is unable to perform its most basic functions without state cooperation. In this regard, we note the obligation of States Parties under Article 93 of the Rome Statute to cooperate with the court in its functions. This includes collection of evidence, arrest of indictees, and witness protection. We welcome the first specific cooperation agreements concluded between the ICC and States Parties. However, due to the nature of its mandate, the ICC may face resistance in the states in which it is conducting investigations. Pressure by States Parties will be critical to ensuring necessary cooperation.

The importance of state pressure is well-illustrated by the recent wave of surrenders to the ICTY. Security Council resolutions, without more, were not enough to secure state cooperation. If it were not for the pressure of European Union and the United States on the countries of the former Yugoslavia,

the ICTY would not have had nearly the success it has had in the last year in obtaining the voluntary surrender of nearly twenty indictees. Undoubtedly, the ICC will require similar involvement from States Parties in order to effectuate arrests and receive cooperation from governments that might otherwise be hostile.

### **United Nations and Inter-governmental Organization Cooperation**

Ensuring cooperation by various United Nations and other inter-governmental bodies is crucial. For example, in some situations peacekeeping missions have an important role to play in assisting the ICC with witness protection, evidence gathering and arrests. U.N., African Union and European Union agencies in the field can provide invaluable logistical assistance in gaining access to hard-to-reach areas as well as security in dangerous situations. It is therefore important that the ICC receive the support and assistance it needs from the United Nations and other inter-governmental organizations. States Parties have a key role in bringing this cooperation about.

It is important to note that over the past thirteen months, the ICC's relationship with the United Nations has been substantially strengthened in part due to the role of States Parties. The conclusion and implementation of the Relationship Agreement between the United Nations and the ICC in October 2004 was an important achievement. As a result, President Kirsch made his first report to the U.N. General Assembly on November 8, 2005. This provided the occasion for positive and informative interventions by many States Parties at the General Assembly. The Security Council referral of Darfur to the ICC on March 31, 2005, was another very significant accomplishment. It should enhance direct communication between the ICC and the Security Council by requiring periodic reports from the ICC to the Security Council.

Further bi-lateral agreements with specific United Nations agencies will be needed and efforts should be made to conclude these agreements swiftly. Strong support from ASP members at the UN is necessary to ensure that states opposing the court are not able to derail ICC efforts and block cooperation agreements. A solid show of support from the states that support the ICC is necessary to make certain that the ICC is not crippled by the efforts of a determined minority.

### **The Key Role of the United Nations Liaison Office**

An important issue to be resolved during this ASP session is the establishment of an ICC U.N. Liaison Office in New York. In making its decision, States Parties will consider an Option Paper by the Bureau together with the favorable recommendations contained in the Report by the Committee on Budget and Finance.<sup>34</sup> Human Rights Watch believes it is important to establish an ICC New York U.N. Liaison Office for a number of reasons. First, there are operational advantages to having a New York office. For example, there will be moments when ICC personnel will be at risk and need urgent assistance from U.N. peacekeeping forces. Having a Liaison Office in New York to facilitate communications with the Department of Peacekeeping Operations is important to security for court personnel.

Second, although the ICC is seated in The Hague, it is essential to root the court in the United Nations system because the two institutional mandates are so complementary. As discussed above, cooperation from the United Nations is essential to the ICC's success. Having an office in New York will assist in managing relations at U.N. headquarters and help ensure that the ICC receives the consideration it should have in U.N. activities. For example, when developing the mandate of a peacekeeping operation, even if there is no ICC investigation at the time, it could be useful to anticipate the need for cooperation with the ICC. Keeping track of these issues and maintaining focus at the United Nations on ICC issues

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<sup>34</sup> Option Paper by the Bureau on the Establishment of a New York Liaison Office, 24 August 2005, ICC-ASP/4/6; Report of the Committee on Budget and Finance on the Work of its Fifth Session, ICC-ASP/4/27, para. 104.

would be an important part of this office's work in addition to facilitating visits from ICC staff based in The Hague. The value of developing direct contacts in various agencies of the United Nations is another important intangible benefit.

Now that the court has entered its operational phase, a close working relationship with the United Nations is increasingly important. It is essential that the ASP take the decision to establish a liaison office during this ASP session.

***Human Rights Watch therefore recommends that States Parties:***

- ***renew their commitment to cooperate with the ICC in full accordance with their obligations under the Rome Statute; and***
- ***use their influence to encourage other states and U.N. and inter-governmental agencies to enter cooperation agreements with the ICC.***

***Human Rights Watch further recommends that the ASP:***

- ***establishes a working group responsible for monitoring cooperation and addressing failures to cooperate; and***
- ***supports the establishment of a U. N. Liaison Office in New York.***

## **B. Support**

Human Rights Watch views the long-term success of the ICC as contingent on the willingness of the ASP to act as an engaged and supportive body. The Assembly has an important role to play in ensuring that the court is efficient and operates as intended: complementing national courts and making a meaningful contribution to the cause of justice. As a new and unique institution facing enormous challenges, the court needs assistance in developing “best practices.” It will benefit from close engagement by the ASP particularly in this early operational phase. Where there are shortcomings in practice, States Parties need to point them out. Thus, aside from being essential to securing cooperation, the active involvement of the ASP with the court is necessary to help the ICC become the most effective institution possible. The stakes are too high for States Parties to do otherwise.

Human Rights Watch believes the ASP can better serve its court if it makes several changes to the annual ASP meeting. In this regard, we welcome the “lessons learned” exercise conducted by the Bureau after the third ASP session and we urge the ASP to implement some of the recommendations that were identified including:

**General Segment:** There should be a short general segment at the beginning of the meeting. This is necessary to bring life to important substantive issues that otherwise may be discussed only technically or not at all. A general segment will also provide meaning to later discussions. For example, in deciding different budgetary issues, it would be helpful to understand the context in which the request for funds is brought. As the General Assembly Session of November 8, 2005 demonstrated, these segments can be very informative and rich.

**Longer Session:** It is crucial for the kind of substantive dialogue between the court and the ASP envisioned in Resolution 8 of 2004 that the duration of the meeting be extended.<sup>35</sup> Six days is not sufficient to consider all of the important issues that require ASP attention. For example, the complicated issue of the crime of aggression was originally slated for a full day, but had to be cut in the preliminary schedule to a half-day because of time constraints. A shorter meeting may also make it difficult to bring issues to resolution, as was seen last year with the Code of Conduct and the Trust Fund for Victims Regulations. The limited time frame makes it more difficult to have meaningful dialogue on the strategic or substantive issues court officials might like to raise. Finally, the approach of the 2009 Review Conference will make a lengthier session in 2006 all the more important to consider substantive issues that may arise as proposed amendments.

**Working Groups:** The experience of the past year has demonstrated the important value of working groups. When a working group is inclusive and actively consults the members of the ICC, experts, and NGOs when developing an approach to an issue, it can be very useful. The establishment of a working group is an efficient way for States Parties to address substantive issues and may make the general ASP meetings more productive. To assist in their operations, it is important that the working groups receive support from the ASP Secretariat.

**Active Bureau:** The ASP needs its Bureau to be active in the exercise of its responsibilities. A Bureau that takes a hands-on approach and is appropriately involved in issues related to effective operations of the ICC could be very beneficial. An active Bureau requires commitment and time on the part of Bureau members. Those elected must be willing to devote the necessary time to do the work. The Bureau should make efforts to communicate its work to States Parties. The Bureau should also receive adequate support from the ASP Secretariat.

**Alternate Meeting Locations:** The ASP should alternate its annual meetings between New York and The Hague. States parties with fewer resources have indicated that costs make it difficult to attend the meeting in The Hague. They have expressed the desire to have meetings in New York where they are represented at the United Nations.<sup>36</sup> Fuller participation in the ASP meetings would greatly benefit the ICC.

*In short, Human Rights Watch recommends that the ASP:*

- *supports the addition of a general segment at the beginning of the annual meeting in order to create a context for the technical discussions that follow;*
- *supports a longer annual meeting in order to allow time for discussions of strategic importance to the operation of the court;*
- *uses working groups to address particularly important issues;*
- *assists the Bureau in actively fulfilling its responsibilities; and*
- *alternates its annual meetings between The Hague and New York to allow broader participation by its members.*

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<sup>35</sup> Intensifying the Dialogue between the Assembly of States Parties and the International Criminal Court, 10 September 2004, Resolution ICC-ASP/3/Res.8.

<sup>36</sup> See 8 November 2005 statements of Mr. Thomas B. Amolo, Ministry of Foreign Affairs of the Republic of Kenya and H.E. Mr. Aminu Bashir Wali, Permanent Representative of Nigeria to the United Nations in response to Report of the International Criminal Court to the 60<sup>th</sup> Session of the United Nations General Assembly, both of which express a desire to have meetings alternate between The Hague and New York in order to facilitate wider participation of developing countries.

### **C. Strengthening National Prosecutions**

In addition to supporting the work of the court directly, States Parties can strengthen prosecutions for serious crimes in other ways. Human Rights Watch believes States Parties should see the ICC's efforts as a start, but not an end, to ensuring that justice is achieved for atrocities. The ICC opens the door to enhancing national justice systems and provides states a unique opportunity to assist domestic courts to promote the prosecution of war crimes, crimes against humanity and genocide. States need to approach complementarity in a strategic and focused manner. In particular, states must tailor their own aid programs to rebuild national justice systems to ensure that states are meeting their responsibilities to prosecute serious crimes.

*Human Rights Watch urges States Parties to approach the issue of complementarity in a strategic manner and to tailor any efforts to assist with the rebuilding of national justice systems in such a way as to enhance domestic capacity to prosecute war crimes, genocide and crimes against humanity.*