



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

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Introduction

This year witnessed a milestone in the development of the International Criminal Court (ICC). In June, representatives of ICC states parties joined court officials, representatives of non-states parties, the United Nations and other intergovernmental organizations, and civil society in Kampala, Uganda for the first-ever review conference of the Rome Statute, the treaty establishing the court. A central aim of the conference was the consideration—for the first time and after seven years of court operations—of amendments to the ICC treaty. In this sense, the review conference capped the first phase of the ICC’s establishment.

In advance of the conference, Human Rights Watch also emphasized the opportunity this extraordinary gathering offered to re-engage the fight against impunity. Commitment to that fight has been tested in the 12 years since the signing of the Rome Statute by changing international priorities and direct challenges from the court’s unprincipled critics, alongside disappointment with the cost and length of ICC proceedings. Substantive discussions of the challenges facing the ICC—particularly through the conference’s stocktaking exercise—were essential, we felt, to identifying and committing to critical next steps for strengthening the ICC and the broader system of international justice.¹

Preparations within the Assembly of States Parties (ASP) and by individual delegations bore fruit in Kampala.

Two weeks of debate were marked by a sense of common resolve and purpose. Negotiation of amendments—including as to the crime of aggression—were a clear priority for states and the original purpose for convening the conference. Significantly, two amendments were adopted. But stocktaking and side events demonstrated a willingness to engage in substantive discussion of challenges facing the ICC among states representatives in order to share experiences of cooperation and to deepen their grasp of key issues. These included innovative approaches to the difficult but essential task of equipping national jurisdictions to take up their role in the fight against impunity, and the relationship between peace and justice. Victim-related issues and an assessment of the impact of the ICC on affected communities received unparalleled attention in the court’s history, while the conference’s venue in a situation under ICC investigation also brought state representatives closer to the

¹ See Human Rights Watch, *Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference*, May 2010, <http://www.hrw.org/en/reports/2010/05/10/making-kampala-count-0>, pp. 1-6.

court's work. Thirty-five states parties arrived in Kampala with pledges of concrete assistance to the court in hand.²

In the months since Kampala, the ASP Bureau, its working groups, and focal points have continued discussions on three of the stocktaking topics (cooperation, complementarity, and impact on affected communities), as well as on pledges, and time has been set aside during the upcoming ASP session for informal consultations on follow-up to the review conference and cooperation.³ Yet, a reinvigorated commitment to the ICC and the broader fight against impunity has not fully emerged in the months following Kampala. A number of factors are likely in play.

First, there were disappointing setbacks following Kampala, discussed below in part III, in the court's relationship with the African Union (AU). The AU reiterated its call for non-cooperation with the ICC on the warrants of arrest for President Omar al-Bashir of Sudan, and al-Bashir visited two ICC states parties—Chad and Kenya—without facing arrest. These developments were all the more jarring for having occurred mere weeks after the constructive and engaged role of African states parties at the review conference. A major opportunity to highlight Sudan's lack of cooperation with the ICC at a high-level United Nations meeting in September instead praised Sudan when the meeting's communiqué "welcomed commitments by the Government of Sudan to end impunity."⁴

Second, mid-2010 also saw a further delay in the trial of Thomas Lubanga, a Congolese rebel leader charged with using child soldiers, as the trial chamber stayed proceedings following the prosecutor's refusal to carry out its orders. The appeals chamber expeditiously resolved the appeal—determining that while the trial chamber could have imposed sanctions on the prosecution, a stay of proceedings was inappropriate. Progress was made in the ICC's investigation in the Kivus region of the Democratic Republic of Congo, with the October 2010 arrest by French authorities on an ICC warrant of Callixte Mbarushimana, secretary of the Democratic Forces for the Liberation of Rwanda (*Forces Démocratiques de Libération du*

² See generally Review Conference of the Rome Statute, "Pledges," RC/9, July 15, 2010, <http://www.icc-cpi.int/NR/rdonlyres/18B88265-BC63-4DFF-BE56-903F2062B797/0/RC9ENGFRASPA.pdf> (accessed November 4, 2010).

³ A chair has also been appointed for the working group on amendments of the Assembly of States Parties (ASP), established at the ASP's eighth session, see ASP, "Review Conference," ICC-ASP/8/Res.6, November 26, 2009, para. 4 in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth Session, The Hague, November 18-26, 2009*, ICC-ASP/8/20, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Part.II.pdf (accessed November 4, 2010) Part II, p. 35 ("*ASP Eighth Session Official Records*").

⁴ See UN Secretary-General, "Communiqué on Sudan High-Level Meeting," SG/2165, AFR/2043, September 24, 2010 <http://www.un.org/News/Press/docs/2010/sg2165.doc.htm> (accessed November 8, 2010).

Rwanda, FDLR),⁵ and the prosecutor has announced that he will present the results of the Kenya investigation—opened in March 2010—to the judges in December 2010.⁶ But delays in proceedings appear to be raising concerns about the court’s performance and the conduct of its principals at a time when national budgets are under continued economic pressure. As we discuss below, taken together, these seem to have generated more intense interest among a few states parties in asserting a robust role for the Assembly in oversight of the court’s administration than following through on the stocktaking recommendations from Kampala.

Sound court administration is fundamental to the court’s effectiveness, and states parties have a critical role to play in ensuring the court’s continued institutional development, including through responsible decisions about the allocation of budgetary resources, and, as we discuss below, in the election of six ICC judges and the next ICC prosecutor in the next period. An important balance needs to be struck and kept, however, between the ASP’s management oversight role and the court’s independence as a judicial institution. We discuss below our concerns as to the manner in which the ASP is approaching these issues—as well as overstated claims on the part of court principals as to the nature of that independence—in the context of discussions about the establishment of a new ASP mechanism to address court efficiency and effectiveness and making operational the Independent Oversight Mechanism (IOM). We recommend further scrutiny and examination in order to get this balance right.

More fundamentally, we urge states parties not to lose sight of their broader role as stewards of the ICC and the Rome Statute system. Leaving Kampala, it seemed as if states parties had heard former UN Secretary-General Kofi Annan’s opening call to the review conference that there:

[b]e no turning back, no slowing up in our journey. Ending impunity is the solemn pledge we undertook. Let us fulfil it so that when our grandchildren look back they are not haunted by new voices from killing fields yet to be named. Let them say of us that we rose to the challenge and built an

⁵ “France: Rwanda Rebel’s Arrest Sends Strong Message,” Human Rights Watch news release, October 11, 2010, <http://www.hrw.org/en/news/2010/10/11/france-rwanda-rebel-s-arrest-sends-strong-message>.

⁶ Luis Moreno-Ocampo, Prosecutor of the ICC, Statement to the ICC 19th Diplomatic Briefing, The Hague, November 3, 2010, http://www.icc-cpi.int/NR/rdonlyres/F67584DE-F045-45E2-95038F4D16B3DEAA/282656/LMO_DiploBriefingspeech_03112010.pdf (accessed November 15, 2010), p. 6.

International Criminal Court so strong, effective and universal, that it protected the innocent by deterring even the most determined of despots.⁷

As they take decisions at the upcoming ASP session in New York, states parties should be guided by this shared sense of purpose and renew commitment to carrying forward the recommendations and outcomes of the review conference. Enhancing state cooperation practices, putting the complementarity principle into practice through increased international assistance to national jurisdictions, and investing further in the court's impact among affected communities will all be hallmarks of the court's effectiveness in the future. While budgetary pressures are real, they should not serve to justify failing to capitalize on momentum generated in Kampala. If true gains are to be made in advancing the fight against impunity, that momentum cannot afford to be lost.

Summary of Recommendations for the Ninth ASP Session

In **continuing preparations** for the ninth session of the Assembly of States Parties (ASP) of the International Criminal Court (ICC), the ASP Bureau should:

- Include cooperation as a formal item on the agenda of the ASP session, with a view toward establishing cooperation as a standing agenda item for future sessions.

In their statements during the **general debate** and in discussions on **follow-up to the review conference, cooperation, and pledging**, states parties should:

- Affirm commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Commit to taking appropriate steps at the national level, through the ASP, and within other multilateral settings, as appropriate, and to engage with court officials regarding steps to be taken by the ICC to implement the outcomes and key recommendations of the stocktaking exercise, including those contained in the resolutions on complementarity and impact on victims and affected communities, the declaration on cooperation, and the Kampala Declaration;

⁷ Kofi Annan, speech to the First Review Conference of the Assembly of States Parties to the Rome Statute of the International Criminal Court, May 31, 2010, <http://kofiannanfoundation.org/newsroom/speeches/2010/05/review-conference-assembly-states-parties-to-rome-statute-international> (accessed November 8, 2010).

- 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;
- Update the ASP 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 the **omnibus resolution** or other appropriate **stand-alone resolutions and decisions** as to **follow-up of the review conference, cooperation, and pledging**, the Assembly of States Parties should:

- Provide a basis for renewing the mandates of ASP focal points on complementarity and impact on victims and affected communities to carry forward implementation of the outcomes and recommendations of stocktaking in Kampala on these two topics and to continue dialogue on these issues within the ASP;
- Decide to establish a working group on cooperation; or, in the alternative, further 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 tenth session;
- Mandate a cooperation sub-facilitator on enhancing political and diplomatic support at the seat of the United Nations in New York;
- Commit to making pledges of increased practical and political support to the ICC a regular feature of ASP sessions; and
- Provide a basis for renewing the mandate of the pledge focal points, and mandate those focal points to develop, in consultation with states parties, proposals for follow-up in the implementation of pledges made in Kampala and for receipt of new pledges.

With regard to possible discussions on **procedures to respond to non-cooperation**, states parties should:

- Affirm clearly that obligations of ICC states parties are binding and must be upheld; and
- Stress the importance of strengthening the ASP's capacity to consider instances of non-cooperation, and make proposals for the development of specific ASP procedures to consider instances of non-cooperation.

The Assembly of States Parties should:

- Mandate the Bureau to consider in greater detail possible modes for ASP response to non-cooperation and to report the findings back to the ASP for additional action.

With regard to establishing a new **mechanism on efficiency and effectiveness** of the court, the Assembly of States Parties should:

- Proceed with caution and thought in deciding whether to establish a proposed mechanism on court efficiency and effectiveness pending further discussion within the ASP and with court officials of its aims and working methods. The ASP should consider the appropriate balance to be struck between the ASP's oversight role and the judicial independence of the court, as well as the policy expertise of its officials, and the outcomes of the mapping report of the ICC's existing internal and external oversight mechanisms. The ASP should also give consideration to the inclusion of civil society representatives in any mechanism established in order to benefit from expertise in the observation of the ICC and other international criminal tribunals.

With regard to the **investigative capacity of the independent oversight mechanism**, the Assembly of States Parties should:

- Defer adoption of the IOM's operational mandate or only provisionally adopt the mandate until the manual of procedures has been drafted and presented for adoption in order to ensure that legitimate concerns about possible impact of the IOM's operations on the court's activities are addressed.

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

- Review recommendations of the Committee on Budget and Finance and approve the allocation of resources adequate to the ICC's mission and increasing activities; and

- Allocate resources in the court’s budget for continued engagement with the African Union institutions and missions in Addis Ababa, Ethiopia.

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

- Work together with civil society to create a climate in which nominations of judicial candidates who are not highly qualified and share a commitment to the ICC’s continued successful development are deemed inconsistent with states parties’ own commitment to the court; and
- In considering terms of reference for a possible ASP selection committee for the ICC prosecutor, ensure a nomination and elections process that is conducted with transparency, and which provides for dialogue between civil society and the selection committee and prioritizes the election of the most highly qualified candidate.

I. Maintaining Kampala’s Momentum

While recognizing that negotiations on the crime of aggression were the centerpiece of the conference and the priority for most states, Human Rights Watch emphasized in advance of Kampala the particular opportunities for strengthening the ICC and the Rome Statute system presented by the review conference’s stocktaking exercise.⁸ We urged states to make these discussions as substantive as possible in order to bring about a deepened grasp of these topics and permit the identification of next steps to advance the fight against impunity.

As indicated above, at Kampala, states demonstrated that they took these opportunities seriously and debate on each stocktaking topic helped identify recommendations for action at the national, regional, and international levels, as well as within the ASP and at the court

⁸ Strong frameworks for stocktaking of the impact of the Rome Statute system on affected communities, peace and justice, cooperation, and complementarity (that is, the strengthening of national jurisdictions to prosecute ICC crimes)—each a key challenge facing the ICC and its further strengthening as well as the broader Rome Statute system—had been developed through the ASP’s working groups under the leadership of focal points appointed for each topic. These focal points, in addition to the two facilitators for the review conference (Brazil and Kenya), included Costa Rica and Ireland (cooperation), Denmark and South Africa (complementarity), Chile and Finland (impact of the Rome Statute system on victims and affected communities), and Argentina, Democratic Republic of Congo, and Switzerland (peace and justice). Focal points were also appointed to encourage high-level attendance from several of the regional groupings (Netherlands, Slovenia, Uganda, and Venezuela) and pledges (Netherlands and Peru), and to steer the negotiations of a high-level declaration (Mexico) that was adopted in Kampala.

to meet key challenges. Some of these recommendations were memorialized in commitments contained in the review conference resolutions on complementarity and impact on affected communities and declaration on cooperation,⁹ while others are reflected in the summaries and reporting on each topic.¹⁰

The true benchmark of stocktaking's success, however, will depend on what happens next. Improvements in practice and policy in each of the four stocktaking areas are essential in building a more effective ICC and Rome Statute system. It is therefore essential that the ICC community—including states, court officials, and civil society—work to translate the Kampala discussions on these topics into concrete action. States parties should begin by:

- Committing to take steps at national levels and within multilateral settings, where appropriate, and to engage with court officials regarding steps to be taken by the ICC to implement the outcomes and key recommendations of the stocktaking exercise, including those contained in the resolutions on complementarity and impact on affected communities and the declaration on cooperation;
- Reflecting these commitments in statements during the General Debate and in discussions on follow-up to the review conference, cooperation, and pledges; and

⁹ See Review Conference of the Rome Statute, “Complementarity,” Resolution RC/Res.1, June 14, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf (accessed November 4, 2010) (“Complementarity Resolution”); “The Impact of Rome Statute system on victims and affected communities,” Resolution RC/Res.2, June 14, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf (accessed November 4, 2010); and “Cooperation,” Declaration RC/Decl.2, June 11, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf (accessed November 4, 2010) (“Cooperation Declaration”).

¹⁰ See generally Review Conference of the Rome Statute, “Stocktaking on International Criminal Justice: The Impact of Rome Statute system on victims and affected communities; Draft informal summary by the focal points,” RC/ST/V/1, June 10, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-V-1-ENG.pdf (accessed November 4, 2010); “Stocktaking on International Criminal Justice: Peace and justice; Moderator’s Summary,” RC/ST/PJ/1/Rev.1, June 22, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-PJ-1-Rev.1-ENG.pdf (accessed November 4, 2010) (“Peace and Justice Summary”) Review Conference of the Rome Statute, “Stocktaking on International Criminal Justice: Cooperation; Summary of the roundtable discussion,” RC/ST/CP/1/Rev.1, June 28, 2010, <http://www.icc-cpi.int/NR/rdonlyres/FB6E4F55-DCF6-4D5F-9500-6BD25E578667/o/RCSTCP1Rev1ENG.PDF> (accessed November 4, 2010) (“Cooperation Summary”); and “Taking stock of the principle of complementarity: bridging the impunity gap, [Draft] Informal summary by the focal points,” RC/ST/CM/1, June 22, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-CM-1-ENG.pdf (accessed November 4, 2010). The impact focal points have also prepared a final report summarizing discussions and recommendations advanced in side events and the plenary stocktaking session. The report provides a rich basis for future work by the ICC, states, and civil society. See The Hague Working Group of the Bureau, Secretariat of the ASP (THWG), “Stocktaking of international criminal justice: Impact of the Rome Statute system on victims and affected communities, Final report by the focal points (Chile and Finland), September 24, 2010 (on file with Human Rights Watch).

- Including language in the omnibus resolution or other appropriate stand-alone resolutions of this ASP session providing a basis for the renewal of the mandates of focal points on complementarity and impact on victims and affected communities.¹¹

Below we make additional recommendations as to how the ASP can build on the review conference when it comes to cooperation, complementarity, and pledges; in each area, the ASP has a critical role to play in translating Kampala’s momentum into a much needed enhancement of state practice.

A. Cooperation

Discussions in Kampala built on the ASP’s work on cooperation from the past several years, but elevated states parties’ engagement to a promising new level. For the first time, ICC states parties and other review conference participants—including representatives of the United Nations, regional intergovernmental organizations, and other international tribunals—undertook an exchange of best practices in several critical areas related to effective cooperation.¹² Until now, substantive discussion of cooperation has largely been delegated to the margins of ASP sessions and carried forward by the ASP’s facilitators within its Bureau working groups. Kampala served to focus a much-needed spotlight on the court’s needs, as well as on the developing cooperation practices of states parties. Discussions identified some common challenges and the availability of solutions through the experience and assistance, where appropriate, of other states parties and organizations.

States parties should build on the experience of Kampala by expanding the means available to the ASP to advance state cooperation with the court. Continued exchange of best practice can help to stimulate positive reinforcement and pressure toward enhanced practice, while

¹¹ When it comes to peace and justice, we see less of an immediate role for the ASP. The serious and substantive consideration given to this topic during discussions in Kampala did, we think, serve to advance understanding of the relationship between these two essential objectives of conflict resolution. Discussions indicated that “the establishment of the International Criminal Court has indeed brought about a paradigm shift; there is now a positive relationship between peace and justice. Nevertheless there were also tensions between the two that had to be acknowledged and addressed.” These tensions included, for example, a new challenge for mediators who have “to find ways to convince negotiating parties to come to the table against the backdrop of actual or possible indictments.” See Review Conference of the Rome Statute, “Peace and Justice Summary,” paras. 29, 31. It is only with additional experience that methods for managing the challenges of integrating justice efforts and peace processes are likely to become more apparent. We recommend that states parties continue to examine practice at the national level—whether as states undergoing transitional processes or as states involved in conflict mediation—while affirming in policy and practice the integral relationship between peace and justice.

¹² These included putting in place national legislation and procedures to facilitate cooperation with the ICC, including arrests and the enforcement of other court decisions, the conclusion of framework agreements to inter alia enforce ICC sentences and relocate witnesses, and mainstreaming awareness of and support for the ICC in national administrations. See generally Review Conference of the Rome Statute, “Cooperation Summary.” The review conference also adopted a declaration on cooperation emphasizing the importance of state cooperation in these areas. See Review Conference of the Rome Statute, “Cooperation Declaration,” paras. 3-6, 10.

some of the most difficult areas of cooperation—such as arrest—demand making time and resources available to carry forward innovative thinking and the development of specific strategies. We recommend below that the ASP make cooperation a standing item on the formal agenda of ASP sessions and create a working group on cooperation to carry forward initiatives over the course of the year.

The ASP will also need to increase states parties' attention to building political and diplomatic support for the court. Allies of President Omar al-Bashir continue to try to undermine the warrants issued for his arrest, and to raise new obstacles for the court. The African Union's reiteration of its decision last year to call on its members to withhold cooperation with the ICC on the arrest of al-Bashir, and the visits of al-Bashir to two ICC states parties—Chad and Kenya—without facing arrest, just weeks after the review conference, marked disturbing setbacks for international justice within Africa. We discuss these developments below in part III and make recommendations to ICC states parties and other ICC partners for meeting the challenges they pose in the long term.

The upcoming ASP session offers important immediate opportunities to recapture Kampala's reinigorated sense of collective commitment to the fight against impunity. As we recommend below, states parties should appoint a sub-facilitator on cooperation tasked with improving political and diplomatic support for the court in connection with various UN-relevant initiatives; awareness of and support for the ICC would benefit from an increased exchange of information among states parties about opportunities to weigh in on the court's behalf in important UN debates. States parties should also use their statements in the General Debate and discussions on cooperation to:

- Affirm commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Commit to the implementation of language in the Kampala Declaration and the review conference's declaration on cooperation, as well as the recommendations stemming from stocktaking on cooperation, regarding the essential importance of cooperation to the ICC's effectiveness; and
- Commit to bolstering the means available within the ASP to promote cooperation and to assisting other states parties to provide full cooperation even under difficult circumstances.

Finally, we understand the upcoming session may feature discussions on responding to non-cooperation, as recommended by consultations carried out within The Hague Working Group.¹³ These discussions are overdue, and we make recommendations below as to how states parties can begin to equip the ASP to carry out its responsibilities under articles 87 and 112 of the Rome Statute. Serious, reflective discussion at the ASP session on this matter will send a strong signal regarding the importance states parties attach to their ICC obligations. This can itself contribute to moving public and diplomatic opinion past the cooperation challenges of recent months and toward the vision projected at the Kampala review conference.

1. Cooperation as a standing agenda item for ASP sessions

The Kampala declaration on cooperation “decide[d] that the ASP should, in its consideration of the issue of cooperation, place a particular focus on sharing experiences.”¹⁴ Under the leadership of the cooperation facilitator, The Hague Working Group has begun consideration of how to put that decision into practice. The draft report produced by those consultations pointed to stocktaking as:

[a]n example of the benefits of sharing experiences. As such it could be a model which the ASP might wish to adopt at future sessions. Another approach would be for the ASP to carry out this task by other means and procedures. Any approach could focus on a positive engagement and exchange of views on the experiences.¹⁵

States parties should:

- Make cooperation a standing agenda item for ASP sessions, beginning with the upcoming ninth session.

This would effectively adopt the Kampala “model” and ensure at least one opportunity for a plenary exchange of best practices. A standing agenda item on cooperation 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. Additional opportunities throughout the year could be provided by the creation of a cooperation working group, see below.

¹³ See THWG, “Draft report on Cooperation, prepared by the facilitator, Ambassador Mary Whelan (Ireland),” October 20, 2010 (on file with Human Rights Watch), para. 19. (“Draft report on cooperation”).

¹⁴ Review Conference of the Rome Statute, “Cooperation Declaration,” para. 8.

¹⁵ THWG, “Draft report on cooperation,” para. 17.

Informal consultations on cooperation are unlikely to sustain elevated attention to cooperation. Stocktaking on cooperation in Kampala succeeded, in part, because of the extensive preparations undertaken both to structure the debate, and, among delegations, to bring examination of national practice to bear on discussions. Making cooperation a standing agenda item would better ensure focused attention and advance preparation among all states parties.

To promote substantive exchange on specific areas of cooperation, two or more topics could be chosen; states with relevant expertise could be encouraged to share lessons learned, while new thinking could be stimulated within the ASP in areas where there is common responsibility, including development of arrest strategies and building political and diplomatic support for the court. Discussions should span both mandatory and non-mandatory forms of cooperation.¹⁶

2. 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 current work of the cooperation facilitator, the ASP should have a working group on cooperation operating intersessionally.

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.”¹⁷ A working group would augment the capacity of the cooperation

¹⁶ As indicated in the Bureau's 2007 report on cooperation, there are two broad categories of state party cooperation with the court: (1) judicial assistance and (2) diplomatic and political support. We note that consultations on cooperation carried out in The Hague Working Group in advance of this ASP session have suggested that the ASP “continue to consider further the scope of cooperation with the Court under Part 9 of the Statute.” *Ibid.*, para. 19. The court previously reported on non-mandatory or discretionary forms of cooperation critical to its functioning, in addition to mandatory forms of cooperation. See, for example, the lists of “forms of mandatory cooperation and assistance” and “contractual forms of cooperation and assistance,” included in the appendices to ICC, “Report of the Court on international cooperation and assistance,” annex I to ASP, “Report of the Bureau on Cooperation,” ICC-ASP/8/44, November 15, 2009, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-44-ENG.pdf (accessed November 8, 2010). In Kampala, the stocktaking moderator noted the distinction between mandatory and non-mandatory forms of cooperation, but observed the distinction should not become a basis for non-cooperation. See Review Conference of the Rome Statute, “Cooperation Summary,” para. 43.

¹⁷ ASP, “Cooperation,” Resolution ICC-ASP/8/Res.2, November 26, 2009, para. 16, in *ASP Eighth Session Official Records*, pp. 18-19.

facilitator to carry out work in these priority areas on a year-round basis, and would permit more frequent exchange on cooperation.

Admittedly, a cooperation working group would represent a *sui generis* approach by the ASP, but one which is much merited, we think, given the universally recognized importance of cooperation to the court's effective functioning. We encourage states parties to think creatively about how such a working group could be structured. One possibility would be to have a working group composed of a limited 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. Members of the working group could also communicate over the course of the year in order to be in a position to take up topics as they arise. 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 toward establishing the working group at the ASP's tenth session.

Initial discussions with states parties on the creation of a cooperation working group has suggested that while there is support for a means through which the exchange of best practices, in particular, could be furthered, there is concern about the financial implications for the ASP and for states parties. Again, we encourage states parties to think about creative methods to minimize costs, including by making use of virtual exchanges of information. At the same time, enhanced cooperation practices are likely to yield significant benefits, and states parties should be encouraged to see reasonable costs associated with a cooperation working group as an appropriate investment in the credibility and effectiveness of the ICC.¹⁸

¹⁸ While the costs of inadequately developed cooperation practices are difficult to quantify, the court has indicated that there "were delays in cooperation from States Parties that could have negative implications for future programme budgets. For example, delays in responding to requests for assistance in relation to witness relocation and protection could add to the costs of the Court's protection system and might result in a prolongation of proceedings." See ASP, "Report of the Committee

3. Sub-facilitator on cooperation to build diplomatic support

At the stocktaking session in Kampala, many ICC stakeholders referenced the need for strong diplomatic support even where it was non-obligatory under the Rome Statute. In particular, ICC President Sang-Hyun Song noted that diplomatic pressure had been essential in obtaining the arrest and surrender of accused to the ad hoc tribunals and to “contribute to building a culture of respect for the Court and its decisions and requests.” He also said the ASP should “consider how to best use the political and diplomatic tools at its disposal to foster and enhance cooperation.”¹⁹ Past ICC president and cooperation stocktaking moderator, Judge Phillipe Kirsch, noted “public and diplomatic support is of considerable importance in the achievement of successful cooperation between States Parties and the Court.”²⁰

A key site of potential increased diplomatic support to the court is debate at the United Nations. Debates there often touch—directly and indirectly—on issues of concern to the ICC’s work and provide an extremely high-profile stage of particular importance to the court’s mission. To make the most of this and to avoid missed opportunities, the ASP should:

- Mandate a cooperation sub-facilitator on enhancing political and diplomatic support at the seat of the United Nations in New York.

The sub-facilitator, working under the leadership of the cooperation facilitator, would carry out agreed-upon diplomatic tasks in conjunction with activities at United Nations headquarters. Creating a sub-facilitator would increase the cooperation facilitator and the ASP’s ability to act as an intermediary between the states parties, court officials, and United Nations representatives. The sub-facilitator, for example, could monitor United Nations meetings for topics relevant to the court’s need for diplomatic support, and contact state party UN Mission officials to maximize the opportunity in statements highlighting the court’s role as appropriate. Ideally, the sub-facilitator would be a member of the ASP’s working group on cooperation, proposed above.

on Budget and Finance on the work of its twelfth session,” ICC-ASP/8/5, May 13, 2009, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-5-ENG.pdf (accessed November 4, 2010), para. 27 (“CBF 12th Session Report”).

¹⁹ Review Conference of the Rome Statute, “Cooperation Summary,” paras. 23-24.

²⁰ *Ibid.*, para. 44.

4. Discussions on non-cooperation

The flip side of ASP efforts to promote cooperation is ensuring an appropriate response to non-cooperation. The ASP's role in this regard is addressed in articles 87 and 112 of the Rome Statute. These articles provide that: where a state party "fails to comply" with a cooperation request from the court, the court "may make a finding to that effect and refer the matter" to the ASP (and to the Security Council where the council referred the situation to the court); and the ASP "shall ... [c]onsider ... any question relating to non-cooperation."²¹

Two developments in 2010 have made the ASP's capacity to consider issues of non-cooperation more pressing. First, the ICC recently issued its first formal finding of non-cooperation, which concerned non-cooperation by the Sudanese government in the court's cases against Ahmed Haroun and Ali Kosheib and which was sent to the Security Council.²² Second, the ICC sent notifications to the ASP and the Security Council regarding visits by ICC suspect Sudanese President Omar al-Bashir to the territory of states parties—Chad and Kenya—without arrest.²³

The draft report on cooperation prepared for the upcoming Assembly session underscores that "[p]olitical support can only be given effect if the statements, declarations and pledges made at Kampala are given concrete expression in actions to fully implement the Rome Statute"; the report concludes by recommending that the ASP "should hold a principled discussion on what procedures could be required to enable it to discharge its mandate to consider any question relating to non-cooperation."²⁴

We believe that a principled discussion on procedures will be an important step toward properly equipping the ASP to consider matters of non-cooperation, and we understand that this discussion may take place during the upcoming ASP session, although a precise format has not yet been determined. However, much more will likely be needed for the ASP to meet

²¹ Rome Statute of the ICC ("Rome Statute"), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, arts. 87(7); 112(2)(f).

²² *Prosecutor v Ahmad Muhammad Harun ("Harun") and Ali Muhammad Ali Amd-Al-Rahman ("Kushayb")*, ICC, Case No. ICC-02/05-01/07, "Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan," May 25, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc868180.pdf> (accessed November 3, 2010).

²³ *Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC, Case No. ICC-02/05-01/09, "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad," August 27, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc931075.pdf> (accessed November 3, 2010); "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya," August 27, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc930979.pdf> (accessed November 3, 2010). For a more detailed discussion of the visits, see part III, which discusses recent setbacks in Africa with regard to the ICC. In addition, we note that the ASP president sent a letter to the Kenyan government expressing concerns over the visit by President al-Bashir.

²⁴ THWG "Draft report on cooperation," paras. 13, 19.

its responsibilities under the statute. Accordingly, we recommend that states parties utilize opportunities at the upcoming ASP session to:

- Affirm clearly that obligations of ICC states parties are binding and must be upheld; and
- Stress the importance of strengthening the ASP’s capacity to consider instances of non-cooperation, and make proposals for the development of specific ASP procedures to consider instances of non-cooperation.

The ASP should:

- Mandate the Bureau to consider in greater detail possible modes for ASP response to non-cooperation and to report the findings back to the ASP for additional action.

Such an approach will help ensure that the discussion not only underscores key principles, but also provides a framework for the ASP to give further attention to developing appropriate procedures to consider non-cooperation.

B. Complementarity

Human Rights Watch attached special importance to the attention given during stocktaking to the challenges of ensuring more effective implementation of the complementarity principle—the bedrock of the Rome Statute system—in practice. In particular, we welcomed the emphasis on “positive complementarity” which we define as voluntary measures undertaken primarily by states and intergovernmental organizations and facilitated by the ICC. These measures are aimed at strengthening and enabling national capacity to conduct serious and effective investigations and trials of Rome Statute crimes and, where necessary, to exert political pressure toward that end.²⁵

Discussions, along with the consultations and reporting carried out in advance of the review conference, brought about much-needed recognition of the critical role of such measures, or as the resolution on complementarity adopted in Kampala states, for “the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community” in meeting these challenges.²⁶ The review

²⁵ See Human Rights Watch, *Making Kampala Count*, pp. 35-36.

²⁶ Review Conference of the Rome Statute, “Complementarity Resolution,” para 3.

conference “encourage[d] the Court, States Parties, and other stakeholders, including international organizations and civil society to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern as set out in the Report of the Bureau on complementarity, including its recommendations.”²⁷

The task now is to translate recognition of the need for an “enhancement of international assistance” in the prosecution of Rome Statute crimes into tangible results. As Human Rights Watch emphasized in advance of the review conference, enhancing capacity for investigating and adjudicating the most serious crimes under international criminal law—while certainly contributing to building support for the rule of law generally—is a substantively distinct subset of broader rule of law-enhancing programs. These distinct programs could include training of police investigators and prosecutors on the investigation and prosecution of ICC crimes; capacity building with regard to protection, involvement, and reparations for witnesses and victims in trials of ICC crimes; forensic expertise; training of judges on handling ICC crimes and witnesses; training of counsel in defending clients on these complex legal charges; and security for and independence of officials.

Recent practice has generated significant precedent for this “distinct-but-related” assistance approach. Programs providing technical assistance in the areas of counter-terrorism, drug trafficking, and organized crime focus on specific areas that require specialized training and enhancement. To build capacity in these areas effectively, assistance is not allocated to general rule-of-law training. To the contrary, if capacity is to be developed in these important distinct areas, it must be done with concentration on the relevant subset of rule-of-law activities. Experience has also shown that such particular programs have a positive “spillover effect,” enhancing the rule of law more broadly than the original area of focus.

To date, however, there has been relatively little emphasis with the broader rule-of-law community on a distinct subset of assistance specifically designated to ICC-type crimes.²⁸ A paradigm shift that would see the recognition of the importance of this subset of assistance is therefore required if an “enhancement in international assistance” toward the prosecution of ICC crimes is to be brought about in practice.

To bring about this shift, efforts in fora beyond the ASP will be important. Given the intersection with rule-of-law assistance and the existing web of relationships in that context

²⁷ *Ibid.*, para 8.

²⁸ See extended discussion in Human Rights Watch, *Making Kampala Count*, pp. 37-46.

between states, UN agencies, and civil society, this is clearly not a project for the ASP to carry out alone. Rule-of-law assistance is already provided in a number of different ways—sometimes through direct support to government budgets, sometimes by supporting specific groups, and at times using implementing partners, like UN agencies or civil society. On this landscape, input and engagement from government development agencies, UN agencies like the UNDP, UNODC, and OHCHR, other intergovernmental organizations, and civil society will be necessary.

At the same time, the ASP itself remains uniquely placed to bring about this necessary shift. The ASP encompasses both those states in a position to provide assistance and those who may need that assistance, and with a number of key observers—including among non-states parties and civil society organizations—all meeting together in the context of a shared commitment to the fight against impunity. It can therefore serve as a useful place for generating practical ideas for assistance and exchanging information about assistance needs and availability. And while the ASP community may not be comprised of development experts, it brings expertise on Rome Statute crimes, precisely the perspective that has not always been present in broader rule-of-law efforts.

Therefore, while other actors will need to be brought on board, there remains a significant leadership role for the ASP in the near future. To carry out this role, we recommend that the ASP maintain focal points on complementarity supported by the ASP Secretariat in carrying out the role provided to it under 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.”²⁹ The location (New York and/or The Hague) and number of the focal points could be decided by the ASP Bureau.

It is important that the role of the ASP focal points be crafted carefully. These focal points would draw on already existing resources and institutions within the broader field of rule-of-law assistance to carry the complementarity commitment forward. Their role must be manageable in terms of human and financial resources for those countries appointed as focal points, and it should seek to best use the expertise of the legal advisors likely to carry out the function in practice. Tasks for the ASP’s complementarity focal points could fall into roughly three areas.

²⁹ Review Conference of the Rome Statute, “Complementarity Resolution,” para. 9.

First, the ASP's focal points would help to ensure dialogue between the ICC community and other rule-of-law actors and, in particular, that a focus on assistance specifically targeting prosecution of serious international crimes is increasingly included as a subset of broader rule-of-law programs. This could be done through the focal points' participation in consultations, initiatives, and policy development in other fora, including, for example, the European Union's project to develop a toolkit providing guidance to donors. The focal points could then bring information about these other initiatives back to the ASP. This would in turn facilitate the work of other legal advisors in mainstreaming this focus in their national administrations by equipping them with information and policy guidance to share with colleagues in relevant ministries.

Second, to facilitate concrete initiatives, the ASP focal points—again supported by the Secretariat—could serve as a point of contact for states—both those seeking and those in a position to provide assistance—UN agencies, civil society, the EU, donor groups in ICC situation countries, and other actors involved in rule-of-law assistance. By creating a central point for this information, over time, the focal points would become a critical resource for matching donors, recipients, and others implementing projects. To provide a focus to these efforts, the focal points could prioritize the collection of information about needs and available assistance in countries under ICC investigation or analysis where gaps in accountability are likely to be of greatest urgency.

Third, the ASP focal points could convene discussions within the ASP on specific challenges or areas of assistance. These could include strategies to address unwillingness, given that even the most robust effort at strengthening capacity can be thwarted by a state's unwillingness to implement the measures. Indeed, the Bureau report on complementarity recognizes that assistance alone will not solve all issues related to impunity, and flags unwillingness as a “special challenge.”³⁰ As the ASP's work on complementarity matures, the ASP focal points could also disseminate lessons learned as part of an annual reporting process.

In their work, ASP focal points should be supported by the ASP Secretariat in order to develop an institutional memory of work. The ASP Secretariat, for example, could set up a database of available expertise and technical assistance as a resource for states. This information would be submitted by provider states, organizations and agencies. It would be a tool for states parties in need of assistance focused on investigation and adjudication of

³⁰ ASP, “Report of the Bureau on stocktaking: Complementarity,” ICC/ASP/8/51, March 18, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf (accessed November 4, 2010), para. 11.

ICC-type crimes to access the most up-to-date information on where to find such assistance. In conjunction with the focal points, the ASP Secretariat could also maintain a log of ongoing projects dealing with the investigation and prosecution of serious international crimes in various countries, which could be consulted by donor states to enhance complementary activities being undertaken. Further steps to institutionalize the ASP's work on complementarity could be considered if additional resources—including from voluntary sources—become available to augment the Secretariat's capacity.

While the precise responsibilities of the ASP's focal points should be further developed with experience, it is essential that the ASP maintain a focus on complementarity. Accomplishing the necessary paradigm shift in assistance is unlikely to occur overnight and as discussed above, the ASP has a role to play as an engine of that change and to continue the momentum generated by discussions at the review conference. States parties should therefore:

- Include language in the omnibus resolution mandating the Bureau to continue its dialogue on complementarity in order 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 bearing in mind the essential role of the ASP in bringing about increased efforts toward international assistance in the investigation and prosecution of ICC crimes in national jurisdictions.

C. Pledges

Pledging was a new and innovative practice for the ICC at the Kampala conference. Pledging for the review conferences appears to have provided states with a helpful target. In some cases, the pledging exercise helped motivate and expedite discussions already underway at the national level, for example, on bringing forward implementing legislation or negotiating agreements with the court. 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. The ASP could also put in place a process to review progress on implementation of pledges.

We note that time has been made on the agenda of the ASP session to review those commitments made in Kampala. To maximize the utility of these pledges to the court and to make pledging an ongoing aspect of ASP practice, we urge states parties and non-states

parties to use constructively both the General Debate and a specific segment on pledges. Specifically, we encourage:

- States parties and non-states parties that did not have the time to prepare pledges that could be announced in Kampala to make pledges at the upcoming ASP session;
- Those that have made progress in implementing those pledges to report that progress at the ASP session;
- Those that have not been able to make progress on pledges, to share—in a constructive spirit—what some of the outstanding obstacles are to implementation;
- The ASP to develop for the future a means through which states report to the annual ASP session on the implementation of pledges—this could best be facilitated by maintaining a set of pledging focal points; and
- The ASP to make pledging a regular feature of its sessions.

II. Providing Oversight and Sound Stewardship

Taking steps to translate discussions and pledges in Kampala into concrete action will materially advance the ICC and the fight against impunity, and we urge states parties to seize this ASP session as an opportunity to recapture and build on the momentum of the review conference. At the same time, the ASP also has important responsibilities when it comes to its oversight and stewardship of the ICC, and which also require action at the upcoming ASP session and over the course of the next year. We discuss below three of these issues: a possible mechanism to facilitate dialogue with court officials on efficiency and effectiveness, operationalizing the investigative capacity of the newly established independent oversight mechanism (IOM), and preparing for elections of the next ICC prosecutor and six ICC judges.

A. Dialogue on enhancing the ICC's efficiency and effectiveness

At the upcoming ASP session, states parties will consider a proposal to establish a new mechanism addressed to “enhancing the efficiency and effectiveness of the Court.”³¹ According to a draft resolution that would establish the mechanism, issues that may be addressed—in dialogue with court officials and with a view toward reporting back to the

³¹ THWG, “Draft resolution on governance,” November 9, 2010 (on file with Human Rights Watch), para. 1.

Bureau and the ASP at its tenth session any recommendations including possible amendments to the Rome Statute—include, but are not limited to “the relationship between the Court and the Assembly, questions related to the responsibilities of the different organs of the Court, and the legal framework, in particular the Rules of Procedure and Evidence, pertaining to the day-to-day operation of the judicial programme of the Court.”³² The mechanism, as proposed at this writing, would apparently take the form of either a set of co-facilitators or a study group within The Hague Working Group.³³ This proposal stems from a decision at last year’s ASP session to “as part of the follow up to the Review Conference, keep under constant review the question of enhancing the efficiency and effectiveness of the Court, including by considering the possibility of establishing mechanisms within its New York and The Hague working groups.”³⁴

We have previously advocated an active and engaged role for the ASP that includes providing scrutiny and feedback on ICC operations, although only in a manner that respects judicial independence. In a number of areas, dialogue between states parties and the ICC—particularly through the ASP’s working groups—have progressed court policies and practices, including in strategic planning, outreach activities, and reinforcing a “One Court” principle that gives priority to inter-organ coordination on administrative matters while respecting the independence of the different organs.

At the same time, we are concerned by the potential for this mechanism to overreach, either by infringing on judicial independence or by distorting policymaking processes that are best led by the expertise of court officials. A number of factors fuel our concern.

First, states parties continue to place the court under extreme pressure when it comes to the annual budget; demand for zero-nominal growth seems only to have heightened in the last three years. The ASP’s rigorous scrutiny of the court’s budget is essential, as is the careful management of allocated resources by court officials. But global economic distress is increasingly invoked as a justification by states parties to limit their own commitments—for example, in following up on cooperation and complementarity³⁵—and those of the court—for example, in insisting that strategic planning in a number of areas be carried out “within

³² *Ibid.*, paras. 1-4.

³³ *Ibid.*, para. 3.

³⁴ ASP, “Review Conference,” para. 9 in *ASP Eighth Session Official Records*, p. 35.

³⁵ As we discuss above, states parties have expressed concern about the additional resources that might be required to enhance the ASP’s capacity to address cooperation, and the Kampala resolution on complementarity provides that the exchange of information function provided to the ASP secretariat be carried out “within existing resources,” see Review Conference of the Rome Statute, “Complementarity Resolution,” para. 9.

existing resources.”³⁶ In our view, this has already led to a deterioration of genuine dialogue between states parties and court officials on the resources adequate to meet the court’s workload. If budgetary concerns throttle strategic planning, this could lead away from the realization over time of a robust institution. We are concerned that a mechanism on “efficiency” may only serve as a tool to identify further cuts, when what is required instead is a transparent and open dialogue about resources necessary to meet long-term strategic goals and the identification of real gaps where efficient use of existing resources could be improved.

Second, some states parties are frustrated by the court’s performance, including delays in judicial proceedings and a continued lack of coordination between its organs.³⁷ (The latter appears to be part of the rationale for the new mechanism; the draft resolution recalls the court’s report on measures to increase clarity on the responsibilities of the different organs and the decision at the last ASP session to continue a dialogue between court officials and states parties on governance.³⁸) Court officials have added to these frustrations, when, for example, judges sought to cite judicial independence as a justification to refuse an accounting for their time spent in The Hague to the Committee on Budget and Finance,³⁹ and when the prosecutor invokes an overstated notion of his office’s independence and own

³⁶ For example, a public information strategy to be presented at the ASP’s ninth session has been prepared to be implemented within existing resources. Some states parties have also voiced similar concerns—that is, that no new resource needs be incurred—in the court’s implementation of review conference recommendations for increasing its impact on affected communities. Those recommendations address core activities in need of enhancement like outreach and field presence.

³⁷ At the request of the Committee on Budget and Finance (CBF) and after a report prepared by an external consultant on risk management identified “divisions among the organs and a lack of clarity of roles as the main risk that could lead to inefficiencies,” see ASP, “CBF 12th Session Report,” para. 25, the presidency of the court produced a report on the responsibilities of the different organs. See ASP, “Report of the Court on measures to increase clarity on the responsibilities of different organs,” ICC-ASP/9/CBF.1/12, March 18, 2010, <http://www.icc-cpi.int/NR/rdonlyres/84F21CDA-047C-4660-9109-41AC334CoEA0/282297/GovernanceReportEng.pdf> (accessed November 5, 2010). While the preparation of the report usefully served to bring about consultation among the court’s organs and identify some common approaches to resolving overlapping areas of responsibility, there is a need to continue to monitor the report’s implementation and to make adjustments to increase coordination in key areas. The CBF has already requested the court’s presidency to prepare a “follow-up report on the implementation and operation of the governance arrangements for the sixteenth session of the Committee.” See ASP, “Report of the Committee on Budget and Finance on the work of its fourteenth session,” ICC-ASP/9/5, July 6, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-5-ENG.pdf (accessed November 5, 2010), para. 48.

³⁸ THWG, “Draft resolution on governance,” preambular paras. 4-5.

³⁹ Following a dispute over whether the CBF’s request for information about the presence of judges in The Hague contradicted the provision of judicial independence under article 40 of the Rome Statute, the CBF recommended that the “ASP may wish to clarify whether elected officials are accountable for administrative matters and the differentiation between independence in the exercise of functions versus administrative independence” and the “ASP consider its relationship to the Court, including the adequacy of its role in selecting key elected officials such as the President of the Court and the Registrar. The ASP may also wish to consider whether the office of the President of the Court should be reinforced to provide for greater vertical authority to oversee the administration of judges as well as the allocation of judges to chambers to minimize problems and costs resulting from the excusal of judges.” ASP, “Report of the Committee on Budget and Finance on the work of its fifteenth session,” ICC-ASP/9/15, September 27, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-15-ENG-AdvanceVersion.pdf (accessed November 5, 2010), paras. 32-33 (“CBF 15th Session Report”). The CBF language on the relationship between the ASP and the Court appears in the draft resolution establishing the efficiency and effectiveness facilitation, as cited above.

authority.⁴⁰ We can see no justification for these ill-conceived arguments. They serve in an unhelpful way to conflate judicial and administrative functions, but we caution states parties against overreacting by reaching beyond the appropriate boundaries of their oversight and stewardship of the court.

Third, we have standing concerns about the manner in which existing oversight mechanisms—specifically, the Committee on Budget and Finance (CBF)—have operated. Although the CBF is mandated with the “technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature, as may be entrusted to it by the Assembly of States Parties,” it has taken on a role in areas that, we think, are better guided by the expertise of court officials. Recent examples include the relationship between the court’s organs, discussed above, and the nature, scale, and duration of the court’s field presence.⁴⁴ While these issues have budgetary implications, they are fundamentally questions of court policy, not of administrative oversight. The CBF has also referred to the number of judges required to sit for reparations proceedings⁴² and addressed family visits,⁴³ matters which while carrying budgetary implications touch on judicial functions subject to independent judicial determination. That the CBF—a committee of independent budgetary experts—has been asked—at times by states parties, and at times by court officials themselves—to take up some of these issues suggests the potential for a new mechanism on efficiency and effectiveness to mix matters of judicial policy and financial oversight in an inappropriate manner.

Finally, we cannot help but note the marked discrepancy between interest in this mechanism and some states parties’ limited interest in increasing support to the court. Past elections of ICC judges have been marked by limited pools of nominees, and the ASP has not acted to establish an advisory committee on nominations, the possibility of which is provided for in article 36(4)(c) of the Rome Statute (we discuss elections of judges below). And while consultations on carrying forward the review conference’s work on cooperation may helpfully jumpstart overdue discussions within the ASP on procedures for responding to non-

⁴⁰ See below part II.B.

⁴¹ See, for example, ASP, “Report on the review of field operations,” ICC-ASP/9/12, July 30, 2010, <http://www.icc-cpi.int/NR/rdonlyres/3358BCD6-6DC3-42D6-91F8-ABC5FFED3CA6/0/ICCASP912ENG.pdf> (accessed November 14, 2010); “Report of the Court on the Kampala Field Office: activities, challenges, and review of staffing levels; and on memoranda of understanding with situation countries,” ICC-ASP/9/11, http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-11-ENG.pdf (accessed November 14, 2010).

⁴² ASP, “CBF 15th Session Report”, para. 68.

⁴³ See Human Rights Watch, “Memorandum for the Eighth Session of the International Criminal Court Assembly of States Parties,” November 9, 2009, <http://www.hrw.org/en/node/86458>, pp. 25-27.

cooperation, discussed above, those consultations have not produced specific proposals by states parties as to the manner in which an exchange of best practice will be carried forward.⁴⁴ Reference to a possible “standing body” on cooperation does not appear in the report resulting from these consultations.⁴⁵

Against this backdrop, we urge states parties to:

- Proceed with caution and thought in deciding whether to establish the proposed mechanism to facilitate dialogue with court officials on court efficiency and effectiveness.

States parties should keep the following considerations in mind:

First, they should carefully consider what they expect to achieve before proceeding to establish this mechanism. States parties—in consultation with the court—should give additional consideration to defining “efficiency” and “effectiveness” in order to provide a more appropriate framework for its work.

Second, states parties should ensure scrupulous respect for the court’s judicial independence and appropriate deference to the expertise of its officials in policy setting. This will require close coordination with the court in the areas identified for discussion. As to the matters already proposed—governance, the relationship of the ASP to elected officials, and legal framework—and as other matters are suggested, the views of court officials should be sought as to any possible interference with judicial independence and discretion in policy setting.

Third, if a mechanism is established, its facilitators or members should follow the lead of court officials in identifying recommendations. We note, for example, that the ICC presidency has offered to provide a report on its interpretation of the relationship of elected officials to

⁴⁴ The report states that the ASP “might wish to consider how it wishes to progress the decision contained in operative paragraph 8 of the Declaration on Cooperation adopted in Kampala, which states that the Review Conference ‘Decides that the Assembly of States Parties should, in its consideration of the issue of cooperation, place a particular focus on sharing experiences’” and points to the stocktaking exercise as one possible model, while “[a]nother approach would be for the Assembly to carry out this task by other means and procedures.” THWG, “Draft cooperation report,” paras. 16-17.

⁴⁵ A July 2010 Bureau meeting had indicated that discussions were underway on a “possible mechanism to institutionalize the work on cooperation, e.g., the establishment of a Working Group of the Assembly” as part of the follow-up to the review conference. See ASP Bureau, “Twelve ICC-ASP Bureau Meeting: Agenda and Decisions,” July 6, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2010Bureau12-D-06072010.pdf (accessed November 14, 2010), p. 2.

the ASP to the CBF;⁴⁶ a report prepared by the judges on their own procedures and any possible gains to either efficiency or effectiveness to a change in procedures would similarly be of assistance. States parties should also ensure that civil society representatives participate in the work of the mechanism; as close observers of the ICC, and with additional experience monitoring the work of other international criminal tribunals, civil society representatives have relevant expertise to bring to a dialogue.

Finally, states parties may wish to defer establishment of this mechanism pending the outcome of the “assurance mapping study into the current internal and external oversight mechanisms of the Court” commissioned by the Bureau.⁴⁷ This study—requested in the context of ongoing work to set up the inspection and evaluation functions of the independent oversight mechanism—will review the means already available to the ASP to provide management oversight; these include the Office of Internal Audit, the External Auditor, the Audit Committee, the Committee on Budget and Finance, and the Independent Oversight Mechanism.⁴⁸ The study could help further refine the role of any new mechanism in the context of this considerable array of oversight tools—which also include an existing facilitation on strategic planning—avoiding duplication and ensuring a proper balance between the ASP’s management oversight regarding the administration of the court, and the judicial independence of the court and its elected officials.

B. Investigative capacity of the independent oversight mechanism

At its eighth session, the ASP decided to create an independent oversight mechanism (IOM) in accordance with article 112(4) of the Rome Statute.⁴⁹ Human Rights Watch supported the establishment of an IOM in order to equip the court and the ASP to respond more effectively to allegations of serious misconduct, increasing the institution’s transparency and accountability. The IOM’s investigative capacity was to be implemented immediately, subject to the ASP’s approval of the IOM’s functions, regulations, rules, protocols and procedures, as prepared by the IOM’s temporary staff.⁵⁰ These “functions, regulations, rules, protocols and procedures” appear to have two constituent parts—one, an operational

⁴⁶ ASP, “CBF 15th Session Report,” para. 32.

⁴⁷ “Draft decision of the Bureau to commission the assurance mapping study into the existing oversight mechanisms of the Court,” para.1, annex to ASP, “Sixteenth ICC-ASP Bureau Meeting: Agenda and Decisions,” October 28, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2010-Bureau16-D-28Oct2010.pdf (accessed November 4, 2010).

⁴⁸ THWG, “[Draft] Report on the Independent Oversight Mechanism,” October 27, 2010 (on file with Human Rights Watch), paras. 29-30 (“Draft IOM Report”).

⁴⁹ ASP, “Establishment of an independent oversight mechanism,” ICC-ASP/8/Res.1, November 26, 2009, para. 1 in *ASP Eighth Session Official Records*, p. 12.

⁵⁰ *Ibid.*, paras. 3, 6(b).

mandate, and the other, a manual of procedures. Together with the necessary amendments to the existing legal instruments of the court, the adoption by the ASP of these two documents would permit the operationalization of the IOM's investigative capacity.⁵¹

Significant work has been carried out by the IOM's temporary head and in consultation with The Hague Working Group and court officials in the development of the IOM's operational mandate. The Office of the Prosecutor, however, registered a number of concerns about the potential for the IOM's mandate to interfere with that office's investigations and to run counter to that office's independence and the prosecutor's authority over the management and administration of the office as provided by article 42 of the Rome Statute.⁵²

Over the course of extensive consultations in The Hague Working Group, some amendments were made to the draft mandate purporting to address these concerns; of particular importance, certain procedural safeguards with regard to IOM-initiated investigations (*proprio motu* investigations) "regarding the operational activities of the Office of the Prosecutor and the execution of judicial activities" were included directly in the operational mandate.⁵³ A proposal by the prosecutor that investigations of staff should only proceed with the approval of the relevant head of organ (or, where the head of the organ did not consent to investigation, via an appeal to the ASP),⁵⁴ however, was not accepted by the temporary IOM head or The Hague Working Group. They agreed that subjecting investigations to the consent of a head of organ would violate their independence, while

⁵¹ THWG, "Draft IOM Report," para 37.

⁵² See the summary of these concerns in *ibid.*, paras. 43-47, 55-56.

⁵³ These safeguards are:

- (a) The respective Organ Head is notified prior to the initiation of the case to provide their views on the information obtained and any matters of factual relevance, which shall be carefully considered by the Head of the independent oversight mechanism; and
- (b) If a case is initiated, the respective Organ Head is provided the further opportunity to comment upon the investigation report compiled by the independent oversight mechanism prior to the findings being finalized to ensure all factual matters have been obtained and considered; any comments shall be duly attached as an annex to the investigation report.

"Independent Oversight Mechanism Operational Mandate—Final Draft," October 25, 2010, para. 19 n.8, annex to THWG, "Draft resolution on the Independent Oversight Mechanism," October 27, 2010 (on file with Human Rights Watch). Other changes to the draft operational mandate included excluding OTP intermediaries from the IOM's jurisdiction, *ibid.*, para. 2, n.3, and making the IOM's right of access "subject to confidentiality considerations envisaged by the Rome Statute in the context of judicial proceedings, a pre-existing obligation of confidentiality to the originator of the information or document, the safety and security of witnesses, victims and third parties, and the protection of national security information of State Parties," *ibid.*, para. 16 & n. 6. See also discussion in THWG, "Draft IOM Report," paras. 50-51.

⁵⁴ See Office of the Prosecutor, ICC, cover note transmitting proposed amendments to draft IOM operational mandate, October 22, 2010 (on file with Human Rights Watch).

introducing an ASP appeal procedure was likely to lead to delay and breaches of confidentiality, and could possibly violate the independence of both the IOM and the OTP.⁵⁵

Human Rights Watch agrees that subjecting the IOM's *proprio motu* power to initiate investigations to consent of the head of an organ would undercut its independence. We also see no conflict between that *proprio motu* power and the prosecutor's authority over his office as provided in article 42 of the Rome Statute. At the same time, and as the report of the discussions in The Hague Working Group⁵⁶ and the introduction of some safeguards into the draft mandate indicate, see above, there are legitimate concerns to be addressed to ensure that the IOM's investigative mandate does not open the door to politically motivated complaints or otherwise compromise the court's independence and functioning as a judicial institution. It seems likely that the IOM's manual of procedures—as a “practical guide that explains how the IOM will undertake its investigations and, allows Court personnel to have an understanding of the IOM activities”—will shed further light on how these concerns will be managed in practice.⁵⁷

We therefore recommend that the ASP:

- Defer adoption of the IOM's operational mandate or only provisionally adopt the mandate until the manual of procedures has been drafted and presented for adoption.

This would not delay the IOM's functioning given that both documents must be adopted before it can become operational, but would permit further consideration as to whether any additional safeguards in the mandate itself are required as the IOM's procedures are articulated. Getting the balance right between an effective and credible IOM and the court's independence as a judicial institution is too important of a task to rush.

We understand the view of the temporary head of the IOM that drafting of the manual of procedures cannot proceed efficiently if the operational mandate is open to fundamental

⁵⁵ THWG, “Draft IOM Report,” paras. 52-61; THWG, “Draft operational mandate for the independent oversight mechanism: IOM response to the OTP proposed operational mandate of 22 October 2010,” October 25, 2010 (on file with Human Rights Watch), para. 5.

⁵⁶ See, for example, THWG, “Draft IOM Report,” paras. 50, 52

⁵⁷ For example, we would expect that the manual of procedures might elaborate further the safeguards to be employed in the initiation of IOM investigations regarding OTP and judicial activities, as well as the definition of misconduct.

revision.⁵⁸ We recommend that while deferring or only provisionally adopting the IOM's operational mandate the ASP indicate in resolution language at this Assembly session that the manual of procedures is to be drafted on the basis of the draft operational mandate as forwarded by The Hague Working Group. This will give presumptive weight to the language of the mandate and provide the temporary head of the IOM a sufficient basis on which to prepare the manual of procedures, while also giving the ASP flexibility to revisit the mandate prior to its final adoption if issues emerging in the drafting of the manual require.

C. Election of ICC judges and the ICC prosecutor

In the next period, ICC states parties will hold a number of significant elections, chief among them the election of six new judges and the next ICC prosecutor.⁵⁹ States parties cannot afford to shirk their profound responsibilities when it comes to the nomination and election of individuals for these positions.

As the nominators and electors of judges, states parties have a responsibility to provide the court with the best possible bench. This is all the more important as the work of the ICC's pre-trial, trial, and appeals divisions continues to expand and gain visibility. The performance of its judges in the courtroom and in their judicial rulings provide key tests of the court's effectiveness and credibility. With three trials shortly underway and the departure following the next elections of four judges currently serving in the trial division, expertise in criminal cases and the management of criminal trials is particularly important.

States parties also exercise an essential role in the election of the ICC prosecutor. Ensuring sound prosecutorial strategy through the election of an individual who exemplifies the qualifications provided for in article 42 of the Rome Statute—a highly competent person of high moral character with extensive practical experience in the prosecution or trial of criminal cases—is essential. The public's first encounter with the ICC and its greater familiarity with the institution often will come through the investigations of its prosecutor.

When it comes to both judicial and prosecutorial elections, the deepest, broadest pool of highly qualified nominees is of critical importance. States parties should not treat the election of ICC judges and its prosecutor as they might any other election for a position within an international organization. To carry out its mandate as a judicial institution charged with upholding the fair trial rights of individuals and bringing meaningful justice to

⁵⁸ Statement delivered by the Temporary Head of the Independent Oversight Mechanism, Ms. Beverly Mulley, to the informal consultations of The Hague Working Group on 19 October 2010 (on file with Human Rights Watch), p. 2.

⁵⁹ The elections are expected to be held at the tenth ASP session or at a resumed tenth session.

victims of mass atrocity effectively, credibly, and expeditiously, 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.

The latter is critical to ensure prioritization of the institution's welfare and its further, positive, institutional development. As part of this ethic and commitment, nominees should have a strong familiarity of the ICC's functioning and demonstrate a willingness to commit themselves fully to their functions, including by undertaking necessary training in its procedures, caselaw, and institutional arrangements, if elected.

When it comes to judicial nominees, states parties should:

- Put forward only the most highly qualified candidates, who match their qualifications with a deep commitment to the ICC's success.

States parties should also:

- Work together with civil society organizations to create a climate in which nominations that do not meet these qualifications are considered as inconsistent with states parties' commitment to the ICC.

We understand discussions are under way within the Bureau to develop terms of reference for a Bureau search committee to identify candidates and facilitate election of the next prosecutor.⁶⁰ As states parties consider the possibility of forming a search committee, they should:

- Keep in mind the importance of a process that is conducted with transparency and which gives priority to the election of the most highly qualified candidate; and
- Provide for dialogue between civil society and any Bureau search committee established.

⁶⁰ See ASP, "Fifteenth ICC-ASP Bureau Meeting: Agenda and Decisions," October 19, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2010-Bureau15-D-27Oct2010.pdf (accessed November 14, 2010), para. 5.

III. Responding to Recent Setbacks in Africa

In 2010, Africa experienced two setbacks to ensuring justice for victims of genocide, war crimes, and crimes against humanity. The first was the African Union's (AU) renewed call in July for its members not to cooperate with the International Criminal Court in arresting Sudanese President Omar al-Bashir, for whom the court has issued two arrest warrants. The second were visits by President al-Bashir to two ICC states parties—Chad and Kenya—without arrest. As discussed below, the circumstances surrounding these developments suggest that their significance should not be overstated. At the same time, they pose unprecedented challenges that are unlikely to dissipate in the near-term. We offer below several recommendations for states parties and other interested stakeholders for managing these challenges.

A. Putting the setbacks in context

Despite major concerns regarding the July 2010 decision,⁶¹ the history of how it was reached suggests that its substance does not accurately reflect the current position of African governments regarding the ICC. For example, several African ICC states parties actively worked for a far more favorable text that excluded the call for non-cooperation and criticism of the prosecutor's conduct; in addition, changes states parties understood would be reflected in the final text did not appear.⁶² Furthermore, some ICC states parties—South Africa and Botswana—registered strong public opposition to the decision after it was adopted.⁶³

With regard to the visits by President al-Bashir, support within the Kenyan government for his visit to Kenya notably was far from uniform. Key Kenyan government officials indicated

⁶¹ The decision: reaffirms a call for AU member states not to cooperate in the arrest of President al-Bashir; rejects “for now” the opening of an ICC liaison office in the Ethiopian capital, Addis Ababa; and criticizes the conduct of the ICC prosecutor on the basis that he “has been making egregiously unacceptable, rude and condescending statement[s]” in the case against President al-Bashir and “other situations in Africa.” Assembly of the African Union, “Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC),” Assembly/AU/Dec.296 (XV), Kampala, July 27, 2010, paras. 5, 8 and 9.

⁶² Civil society telephone, email, and in person exchanges with diplomats, July and August 2010. See also Barry Malone, “African nations divided over Bashir genocide charge,” Reuters, July 25, 2010, <http://uk.reuters.com/article/idUKTRE66O1NR20100725> (accessed September 16, 2010).

⁶³ Botswana Press Agency, “Botswana stands by the International Criminal Court,” July 28, 2010, <http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court-/> (accessed September 22, 2010). Saviour Kwinika, “Sudan President Bashir, accused of war crimes, would be arrested in South Africa, says ANC,” July 28, 2010, *The Christian Science Monitor*, <http://www.csmonitor.com/World/Africa/Africa-Monitor/2010/0728/Sudan-President-Bashir-accused-of-war-crimes-would-be-arrested-in-South-Africa-says-ANC> (accessed September 16, 2010).

that they had not been consulted about the visit and significantly criticized it.⁶⁴ Parliamentarians also criticized the decision, while the visit triggered outrage among Kenyan civil society, media, and some members of the general public.⁶⁵

The broader context in which the setbacks have occurred is also relevant. First are ongoing efforts by some African leaders to exploit unevenness in the accountability landscape to present the ICC as a new form of imperialism that should not be supported.⁶⁶ This characterization has found traction among some African officials and in public debate—perhaps not surprisingly, as it draws from genuine historical geopolitical power imbalances and the legacy of injustices committed during the colonial period, for which there was no accountability. The issuance of arrest warrants for President al-Bashir—a sitting head of an African state that is not an ICC state party—and the lack of a formal response by the UN Security Council to the AU’s request to defer the case against him, have emboldened the efforts. For all these reasons, claims that the ICC is unfairly targeting Africans are likely to have some enduring resonance, irrespective of facts that show this is not the case.⁶⁷

Second, despite recent setbacks, consistent backing for the ICC among African governments and civil society across the African continent remains strong. Notably, more African states are parties to the Rome Statute than for any other region, while this August, yet another African state, the Seychelles, ratified the statute. At the review conference, African governments also reinforced African support for the court’s work. States—represented by high-level officials, including presidents and ministers—made many positive statements

⁶⁴ Peter Opiyo, “Raila slams Bashir invitation,” *The Standard*, August 30, 2010, <http://www.standardmedia.co.ke/InsidePage.php?id=2000017133&cid=4> (accessed September 16, 2010); Samuel Otieno and Isaiah Lucheli, “How Bashir was sneaked into Kenya,” *The Standard*, August 28, 2010, <http://www.standardmedia.co.ke/InsidePage.php?id=2000017088&cid=4&ttl=How%20Bashir%20was%20sneaked%20into%20Kenya> (accessed September 16, 2010).

⁶⁵ See, for example, Peter Clotey, “Kenyan Lawmaker to Demand Answers about Sudan Leader’s Visit,” *Voice of America*, August 30, 2010, <http://www.voanews.com/english/news/africa/Kenyan-Lawmaker-to-Demand-Answers-about-Sudan-Leaders-Visit--101842203.html> (accessed September 16, 2010); Christine Muthoga, “Bashir’s furtive visit to Kenya was a display of incompetent foreign policy,” *Opinion, The East African*, September 6-12, 2010, page 19, http://ea.nationmedia.com/EA/ea/2010/09/06/PagePrint/06_09_2010_019.pdf (accessed October 7, 2010).

⁶⁶ The application of international justice has been uneven, with international courts less likely to prosecute leaders of powerful states—and those they protect—than their counterparts from less powerful states. This is a major issue that should be addressed by states and civil society—but to extend, not undermine accountability—so that victims have recourse to justice, no matter where atrocities are committed. Efforts should include pressing for investigation of relevant crimes committed by officials from permanent members of the UN Security Council and their allies, and wider ratification of the Rome Treaty, although some states will continue to decline to ratify in order to avoid coming under the ICC’s jurisdiction.

⁶⁷ For discussion of the ICC’s involvement in Africa, see “Africa and the International Criminal Court,” Coalition for the International Criminal Court fact sheet, http://www.iccnw.org/documents/Africa_and_the_ICC.pdf (accessed October 7, 2010); “Protecting the Mission and Mandate of the International Criminal Court,” pp. 2-3 (accessed September 23, 2010).

during the general debate.⁶⁸ States also submitted concrete pledges of targeted assistance and continued to work for an ICC liaison office to be established in Addis Ababa.⁶⁹ Meanwhile, African civil society has firmly and consistently raised its voice in response to attacks on the court.⁷⁰

B. The road ahead

The recent setbacks intensify challenges for states and civil society in Africa that are dedicated to advancing justice for serious crimes in violation of international law. Several reflections on the long-term effort that is likely needed to address these are below.

First, states could consider:

- Calling increased attention to the basis for the AU's call for non-cooperation in the arrest of President al-Bashir—namely, that the Security Council has ignored its July 2008 request to defer the case against him.⁷¹

This could help to reduce the virulence of ICC-focused attacks.⁷² This is because the AU's reasoning is clear that much of its concern vis-à-vis the ICC relates to Security Council inaction, and not the court itself. In addition, the Security Council has not in fact ignored the AU's deferral request, although it has not expressly granted or rejected it. Notably, just 10 days after the AU's Peace and Security Council first called for a deferral on July 21, 2008, the UN Security Council formally acknowledged the request in Security Council resolution 1828,

⁶⁸ For example, the Tanzanian president said, "It is imperative that States Parties... fully support the Court to bring justice to...victims," while the Central African Republic justice minister indicated his government, "seizes the opportunity... to reiterate... support for the International Criminal Court and faith in its mission." The Nigerian attorney general and justice minister pledged that Nigeria would "do everything possible to ensure full implementation of the Statute in Nigeria," and the Namibian justice minister indicated that Namibia, "fully supports the Court's work in promoting cooperation with the ICC." See International Criminal Court, General Debate – Review Conference Statements, May 31, 2010, http://www.icc-cpi.int/Menus/ASP/ReviewConference/GENERAL+DEBATE+_+Review+Conference.htm (accessed September 23, 2010) (Translation from French for Central African Republic statement by Human Rights Watch).

⁶⁹ See Letter from the Kenyan attorney general to the African Union commission chairperson, June 3, 2010, http://www.coalitionfortheicc.org/documents/AULO-African_SPs_Letter.pdf (accessed September 16, 2010).

⁷⁰ Regarding pledges, see Review Conference of the Rome Statute, "Pledges". With regard to civil society, see, for example, "Civil Society Declaration on Africa and the Review Conference of the Rome Statute of the International Criminal Court," Human Rights Watch news release, May 24, 2010, <http://www.hrw.org/node/90620>.

⁷¹ See Assembly/AU/Dec.245 (XIII), Sirte, July 3, 2009, paras. 9, 10; Assembly/AU/Dec. 296 (XV), Kampala, July 27, 2010, paras. 4, 5.

⁷² Even among officials that strongly support the ICC, concern has mounted that the council has disrespected the AU by failing to respond positively or negatively to its request. African Union, Report of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Addis Ababa, June 8-9, 2009, MinICC/Rpt, para. 18 (R. 6) (on file with authors).

which was adopted on July 31, 2008.⁷³ The deferral request was also discussed in a formal meeting of the Security Council on Resolution 1828, during which a number of Security Council members expressed views on a deferral and the absence of the council granting a deferral.⁷⁴ Finally, the lack of a formal response from the council does not support the conclusion that it has ignored the issue. Where there is no consensus among council members, means for a formal response are basically non-existent.⁷⁵

Second, in the face of possible further attempts by President al-Bashir to visit the territory of ICC states parties, states parties, in Africa and elsewhere, should:

- Increase valuable coordination to promote his arrest or states parties otherwise upholding their treaty obligations.

Coordination could include consultations and informal discussions among officials. The ASP may serve as one useful forum in this regard. One major issue is addressing claims that AU calls for non-cooperation in arresting President al-Bashir somehow take precedence over ICC treaty obligations.⁷⁶ Various legal arguments addressing this claim merit further attention.⁷⁷ First and foremost, though, the Rome Statute is a multilateral treaty with binding international obligations—including cooperation in arrest of suspects—that states have taken on when becoming parties to the court. A visit by President al-Bashir clearly raises the prospect that ICC states parties will breach their obligations to the ICC irrespective of the AU decision, and states parties should therefore arrest al-Bashir if he enters their territory, or at

⁷³ United Nations Security Council, Resolution 1828 (2008), S/RES/1828 (2008), preambular paragraph.

⁷⁴ Notably, the Russian government indicated that a deferral was not possible at the time “as a result of resistance by a number of Security Council members”; the Libyan government similarly stated: “Despite all the reasons that we put forward to justify our proposed amendments to the draft resolution [in favor of deferral], we did not receive the hoped-for response from certain Council members.” United Nations Security Council, 5947th Meeting, S/PV.5947, July 31, 2008. There are indications the council has also discussed the deferral request informally on several occasions, including in a meeting with AU officials during a Security Council trip to Addis Ababa in May 2009. Human Rights Watch email exchanges with Security Council Report analyst, September 16 and October 7, 2010.

⁷⁵ Council members are unwilling to table a resolution that is likely to be vetoed, or is unable to garner enough support. Meanwhile, other paths for council action, such as presidential or press statements, require consensus. Council members also tend to avoid drawing attention to issues where consensus is lacking as it highlights impotence by the council to act.

⁷⁶ See Kenyan Ministry of Foreign Affairs, Kenya’s response to the decision of the pre-trial chamber informing the UN Security Council and the ASP to the Rome Statute about the presence of President Omar Hassan al-Bashir of the Sudan in the territory of the republic of Kenya, Aide Memoire, attachment to Letter from Thuita Mwangi, permanent secretary in the Kenyan government, to all heads of mission and heads of division concerning government statement on the presence of President Omar al-Bashir, August 29, 2010, para. 4 (on file with Human Rights Watch).

⁷⁷ These include that obligations related to a decision of a regional organization do not trump those that flow from a multilateral treaty.

a minimum prevent visits by him.⁷⁸ Moreover, arrests are critical to allowing the ICC to function; it cannot move forward with cases when suspects are at large.

Third, African ICC states parties should:

- Make efforts to support the ICC at AU meetings, and to make clear that suspected war criminals are not welcome in their territory; and
- Affirm regularly and clearly support for the ICC in domestic, regional, and international fora.

Together, these will be crucial as attacks on the ICC continue. Additional legislation to implement the Rome Statute is also needed more widely, along with more active participation by African ICC states parties at ASP sessions.⁷⁹

Finally, ICC states parties should continue to support the court's efforts toward establishment of an African Union Liaison Office and:

- Allocate resources in the court's budget for continued engagement with the African Union institutions and missions in Addis Ababa, Ethiopia.

As discussed above, the July 2010 decision rejects “for now” the establishment of an ICC liaison office in Addis Ababa. As a consequence of this decision, the Committee on Budget and Finance recommended that no resources be allocated to the AU liaison office.⁸⁰ While the AU decision is regrettable, particularly in light of significant efforts of African states parties to see the office's establishment, the absence of an office should not mean the absence of dialogue with the AU.

The objective underlying the ASP's decision last year to go forward with opening an ICC office in Addis Ababa—to permit court officials to engage with AU embassies and ensure ready access by embassy officials and staff to unbiased information about the court and its

⁷⁸ This is consistent with the most recent AU decision on the ICC, which requests that states balance their ICC and AU obligations. See Assembly/AU/Dec.296(XV), July 27, 2010, para. 6.

⁷⁹ To our knowledge, only six states in Africa—Burkina Faso, Central African Republic, Kenya, Senegal, South Africa, and Uganda—have enacted comprehensive ICC implementing legislation. To date, African ICC state party attendance and participation at ASP sessions has been uneven, although some African states consistently engage in ASP sessions with strong advance preparation and high-level involvement.

⁸⁰ ASP, “CBF 15th Session Report,” para 90.

activities—remains as relevant as ever. Although it will be difficult to achieve the same level of engagement in the absence of an office, regular visits of a court official to Addis are still likely to be productive and can lay the groundwork necessary for an eventual reversal of the AU decision on the office. States parties should therefore request information from the court about the resources necessary to facilitate these visits and ensure that resources are made available in the court’s budget for 2011. This is all the more important if cuts across the board to the court’s travel budget recommended by the Committee on Budget and Finance are maintained by states parties in their final decision on the 2011 budget.⁸¹

⁸¹ See *ibid.*, para. 75.