

Human Rights Watch Memorandum for the Fifth Session of the Assembly of States Parties to the ICC

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I. Introduction

The fifth session of the Assembly of States Parties (ASP) has the potential to be a milestone in the evolution of the International Criminal Court (ICC). For the first time, states parties should have significant opportunities to discuss substantive aspects of ICC policy and practice at an ASP session. While scrupulously respecting the ICC's independence, states parties must make the most of these opportunities in order to promote the court's development as an institution that can achieve its mandate to bring perpetrators of the most serious crimes to justice when national courts are unable or unwilling to do so. In making the most of the opportunities for discussion, states parties will also increase their understanding of the court's work and challenges, which will enable the ASP to more effectively exercise its functions. States parties must further take decisions at this ASP session to ensure that the ICC has necessary support and cooperation. The ICC has now moved more fully to an operational phase and it is actively in need of cooperation to conduct investigations and trials.

During the past year, the ICC made important strides. On March 17, 2006, Thomas Lubanga, a Congolese militia leader, became the first person surrendered to the ICC.¹ Following Lubanga's arrest and transfer to the court, Pre-Trial Chamber I held proceedings in his case and issued notable decisions² on aspects of the Rome Statute.³ The potential for participation by victims at the ICC also took a step forward: the court received more than 100 applications and granted four victims the opportunity to participate in the Lubanga case.⁴ In addition, investigations regarding crimes committed in the Democratic Republic of Congo

¹Lubanga allegedly committed the war crime of conscripting and enlisting children under the age of 15 and using them to participate in hostilities on the territory of the Democratic Republic of Congo. See "First Arrest for the International Criminal Court," ICC press release, March 17, 2006, <http://www.icc-cpi.int/press/pressreleases/132.html> (accessed November 8, 2006).

²Issues addressed include victims' participation, complementarity, and gravity. See, for example, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, July 28, 2006, and Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, February 24, 2006. Decisions in the *Lubanga* case are available at <http://www.icc-cpi.int/cases/RDC/c0106.html> (accessed November 6, 2006).

³Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002.

⁴See, for example, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06, July 28, 2006; Decision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0080/06 et a/0105/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo, October 20, 2006.

(DRC), northern Uganda, and Darfur continued throughout the year. Significant progress in the court's institutional growth furthermore took place: notably, the court prepared a Strategic Plan to guide its operations for years to come. Other positive developments include increased ICC presence and activities in situation countries.

These are welcome advances, particularly given the enormous challenges continually faced by the ICC. One of the most significant challenges is the court's dependence on external cooperation to complete essential tasks. For example, more than one year after arrest warrants by the ICC were issued in the northern Uganda situation against five leaders of the Lord's Resistance Army, not one warrant has been executed. Additional challenges include ongoing security concerns; logistical constraints; and the difficulty of customizing operations to each situation under investigation.

Critical gaps also exist. Most significantly, the ICC continues to place insufficient emphasis on making its work relevant to the communities most affected by the crimes committed. While fair and expeditious investigations and trials are the most fundamental aspects of the court's work, the ICC will fail in its mission if it lacks resonance with the communities that have suffered most directly as a result of heinous crimes committed.

This paper lays out 27 recommendations to encourage the ASP to promote the positive development of the ICC, including by granting resources for priority areas, and for the ASP to consider how it can ensure that the ICC obtains necessary cooperation. These are essential to the court achieving its mandate to end impunity for the most serious crimes, and ensuring that it does not disappoint those it was created to serve.

II. The Strategic Plan and Maximizing the ICC's Impact with Affected Communities

A. Why Making the Court Meaningful to Affected Communities Matters

With the ICC based far from the countries where the crimes were committed, the court runs the risk of being perceived as distant and irrelevant by the people it was created to serve. Unlike a national court whose authority is implicitly accepted, the ICC has no deep-rooted legitimacy in the situations it investigates. It may be viewed with suspicion, if not hostility, by those who fear its work.

As a result, taken by themselves, fair and expeditious investigations and trials will not be enough for the ICC to be a success, regardless of how difficult these tasks are. The ICC also needs to prioritize robust, sustained, and strategic efforts to reach local populations in situation countries. Engaging these communities will not change the minds of those seeking to subvert the ICC's work, but it will provide an essential counterweight to inaccurate or misleading information.

While the communities most affected by the crimes may be difficult to reach, the ICC cannot afford to neglect them. The experience of the ad hoc international criminal tribunals underscores the adverse effect of failing to maximize impact with affected communities. Outreach at those tribunals—which are seated away from where the crimes occurred, as the ICC will be—was not pursued until years after the tribunals were established. Communities in the countries where the crimes occurred perceived the tribunals as very removed. In the case of the International Criminal Tribunal for the former Yugoslavia (ICTY) the initiative to conduct outreach was indeed prompted when court officials realized their work was poorly perceived by affected communities, which was hampering investigation efforts. Although outreach programs since then have worked to improve public opinion, it has been difficult to overcome negative and inaccurate perceptions of the tribunals' work.

Making the ICC's work meaningful to affected communities is also essential to help strengthen respect for the rule of law in situation countries and the court's potential deterrent effect. In this regard, targeted initiatives by the ICC to act as a catalyst for effective investigations and fair and expeditious trials of serious crimes by national courts will be crucial. The fact that the ICC will conduct only a limited number of trials in each situation it investigates makes such efforts all the more important.

The ICC needs to integrate into every facet of its activities that it is working on behalf of multiple audiences. While the international community is one important constituency, so too are local populations in situation countries. These populations must have the opportunity to take meaning from the court's efforts.

B. ICC Strategic Plan

Following a request from the Committee on Budget and Finance in 2004⁵ the court developed the Strategic Plan, which helps to identify common institutional goals, to guide budgeting,

⁵ Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC-ASP), "Report of the Committee on Budget and Finance," ICC-ASP/3/18, August 13, 2004, http://www.icc-cpi.int/library/asp/ICC-ASP-3-18-CBF_report_English.pdf (accessed October 27, 2006), para. 46.

and to increase states parties' understanding of ICC operations. The plan is an excellent initiative. The plan allows the court to articulate how it perceives its mandate, and to identify objectives and concrete strategies to achieve its goals.

The plan is also an important vehicle through which states parties and the ASP can have appropriate and crucial substantive dialogue with the ICC about its policy and practice. As a judicial institution, the ICC's independence, including its ownership over the Strategic Plan, must be respected at all times. However, while recognizing that the court retains exclusive control over the plan, states parties and the ASP can and should provide the ICC with feedback and input on it.

Over the past year, the ASP Working Group in The Hague (HWG) organized a sub-group on the plan, which met five times and invited briefings by ICC officials and nongovernmental organizations (NGOs). Following consultation with states parties and NGOs, the ICC prepared a revised plan.⁶

The fifth session of the ASP provides a significant opportunity that we urge states parties to utilize to discuss the revised plan and take action to promote further improvements. As discussed below, the plan includes key objectives, but continues to lack crucial elements.

Human Rights Watch recommends:

- 1) Time should be allocated to a working group to discuss the Strategic Plan during the ASP session.**

We understand that the HWG sub-group on the Strategic Plan will present to the Bureau and the ASP a report reflecting discussions among participating states parties to date. However, we believe that time should also be devoted to discussing the Strategic Plan and the sub-group's report during a working group at the ASP session. This would allow states parties that are not represented in The Hague, or have otherwise been unable to participate in the work of the sub-group throughout the year, to discuss the plan.

- 2) During the general debate and working group on the plan, states parties should welcome the Strategic Plan and stress the need for the court, in the plan, to more substantially seek to maximize its impact with affected communities.**

⁶ ICC-ASP, "Strategic Plan of the International Criminal Court," August 4, 2006, ICC-ASP/5/6, http://www.icc-cpi.int/library/asp/ICC-ASP-5-6_English.pdf (accessed October 27, 2006) ("Strategic Plan").

The Strategic Plan reflects substantial effort by the ICC and should be welcomed.⁷ The plan also appropriately features the need for impartial investigations, quality prosecutions, and fair and expeditious judicial proceedings. These are at the heart of the ICC's achieving its difficult and unprecedented mandate. The plan further includes crucial objectives such as ensuring the full exercise of victim participant rights, and promoting awareness about the ICC.

Nevertheless, the plan continues to lack critical elements, namely in relation to maximizing the ICC's impact with affected communities.⁸ The latest version of the plan shows increased attention to the importance of reaching local populations in situation countries. However, it does not reflect a comprehensive vision, series of objectives, or strategies to make the ICC's work meaningful to these populations, including by promoting justice at the national level. This is of particular concern as, over time, the Strategic Plan will likely become standard reading for those seeking to familiarize themselves with the ICC.

States parties should encourage for the plan to better reflect that affected communities are a key ICC constituency that must be adequately reached. In this regard, additional objectives and strategies in the following areas should be added to the Strategic Plan in order for the ICC to more appropriately seek to maximize impact with affected communities:

- victims' participation and reparations;⁹
- field activities in the situations under investigation;¹⁰
- outreach and communications with local populations;¹¹ and
- utilizing the complementarity principle to promote national accountability efforts.¹²

⁷ Consistent with the ICC's independence, it would be wholly inappropriate for the ASP to seek to vote, approve, or decide in any way on the plan. As noted by the Committee on Budget and Finance "it [i]s essential that ownership of the strategic plan should remain with the Court and that it enjoy the support of States Parties." ICC-ASP, "Report of the Committee on Budget and Finance on the work of its sixth session," ICC-ASP/5/1, May 4, 2006, http://www.icc-cpi.int/library/asp/ICC-ASP-5-1_English.pdf (accessed October 27, 2006), para. 56.

⁸ For a more detailed discussion of these issues, see *Human Rights Watch Memorandum on the Strategic Plan of the International Criminal Court*, July 2006, <http://hrw.org/backgrounder/ij/memoo706/index.htm>. While the memorandum comments on a previous version of the plan, many of the concerns remain.

⁹ For example, the Strategic Plan should envision widely disseminating information to affected communities on the role of victims at the court, and on policies and procedures for participation and reparations. Such information should be accessible to persons who speak languages or dialects particular to the local community, and available to victims in remote areas or places where security is fragile. For more information, see *Human Rights Watch Memorandum on the Strategic Plan of the International Criminal Court*, pp. 4-7.

¹⁰ For more detail on how field activities can be utilized to promote the court's impact in situation countries, see below, Section II.E ("Geographic Location of Court Activities and Premises").

¹¹ For more detail on how outreach and communications can be utilized to promote the court's impact in situation countries, see below, Section II.D ("Outreach and Communications").

The lack of detail and strategies to achieve objectives throughout the plan is another gap.¹³ States parties should encourage more information and implementation strategies to be provided as a matter of priority, especially with regard to key areas listed above.

We understand that the HWG has requested more dialogue with the court on a number of these same key areas, which is welcome. In order to allow wider participation by states parties in the discussions, discussion with the ICC on these areas should start at the ASP session if possible.

3) In the resolution on the Strategic Plan, states parties should express an intention to hold future consultation on the plan.

We understand that an ASP resolution on the plan is intended at the upcoming session, which we welcome. In addition to highlighting a number of substantive points about the plan (as detailed above), the resolution should provide for continued dialogue by states parties on this important issue by:

- calling for the HWG sub-group to remain seized of the matter and for the ICC to continue to consult the sub-group and civil society about the plan;
- requesting that the ICC utilize its report on activities to the sixth ASP session to describe the plan's implementation;¹⁴ and
- indicating that a working group will meet during the sixth ASP session on the Strategic Plan.

C. Office of the Prosecutor Strategic Plan, Policy and Practice

As part of the Strategic Plan process, the ICC Office of the Prosecutor (OTP) has developed its own strategic plan.¹⁵ As the OTP is the “driving engine” of the court, this is particularly

¹² For example, the Strategic Plan should envision implementing targeted initiatives to enhance the capacity of national courts in situation countries to prosecute serious crimes. This could include: sharing expertise with national justice system staff through dialogue about investigating and trying serious crimes; providing relevant evidence to national justice sector staff when the ICC-OTP comes across it; and encouraging states parties and intergovernmental organizations to assist in strengthening national judicial systems. For more information, see *Human Rights Watch Memorandum on the Strategic Plan of the International Criminal Court*, pp. 12–14.

¹³ In this regard, however, we welcome recent consultations by the Registrar with staff to develop strategies to implement the Registry’s mandate and mission. See “Eighth Diplomatic Briefing of the International Criminal Court, 26 October 2006,” Information Package, document on file with Human Rights Watch, p. 7.

¹⁴ This is consistent with the ICC’s welcome intention to report annually on progress on the Strategic Plan. See Strategic Plan, para. 56. This report could also include a description of the challenges faced in implementing the Strategic Plan.

welcome. The OTP also has recently issued several documents for consultation with states parties, civil society, and other stakeholders.¹⁶ Taken together, these documents are crucial to understanding OTP policy and practice. They also increase the transparency of the OTP. This is important to avoid questions about the OTP's independence and impartiality given the political sensitivities of the ICC's work.

In decisions on policy and practice, the independence of the prosecutor must be vigorously respected. This does not mean, however, that states parties should avoid dialogue on these issues. Discussion will contribute to the ICC's best possible development by allowing the OTP to have feedback based on accumulated experience. It will also enable the OTP to further increase transparency and understanding of its work. Hearings with state parties, civil society, and other stakeholders on OTP policy and practice were held in The Hague and New York in September and October 2006. We look forward to continued dialogue on these issues.

Human Rights Watch recommends:

- 4) States parties should continue to engage in dialogue on OTP policy and practice and the OTP plan.**

While the OTP has taken impressive strides in the past three years and made positive evolution in certain practices, a number of concerns, which are discussed below, exist.

Only a few years after the election of the prosecutor, the office is carrying out investigations in three situations that bear out the reasons the court was created. These are situations characterized by mass murder, widespread use of rape, and forced displacement of populations on the basis of ethnicity. The OTP has obtained six arrest warrants and custody of one accused.

Nevertheless, Human Rights Watch believes certain policies and decisions raise concerns, particularly as they could undermine perceptions of the prosecutor's impartiality or capacity

¹⁵ Strategic Plan, p. 6. See also Office of the Prosecutor, International Criminal Court (ICC-OTP), "Report on Prosecutorial Strategy," September 14, 2006, http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf (accessed November 6, 2006) ("OTP Report on Prosecutorial Strategy").

¹⁶ For example, see ICC-OTP, "Report on the activities performed during the first three years (June 2003 – June 2006)," September 12, 2006, http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf (accessed October 27, 2006) ("Activities Report"); ICC-OTP, "Criteria for Selection of Situations and Cases," draft policy paper on file with Human Rights Watch, June 2006.

to have impact in the fight against impunity.¹⁷ The most notable of these are the OTP's stated policies of inviting voluntary referrals,¹⁸ utilizing a sequential approach to investigations,¹⁹ and targeting "those who bear the greatest responsibility."²⁰ There are also concerns regarding discrepancies between policy and practice, such as in regards to the policy of filing charges that are representative of crimes committed.²¹

As for the OTP strategic plan, we believe the objectives articulated in the plan are in general sensible.²² However, we see problems with the estimates put forward. Although we understand why both states parties and the OTP would like to have a sense of the future quantitative workload of the OTP, the "figures"—proposing to conduct four to six investigations and two trials in the next three years²³—are not particularly informative or

¹⁷ For a more detailed discussion of these issues, see Human Rights Watch, *The Selection of Situations and Cases for Trial before the International Criminal Court*, No. 1, October 2006, <http://www.hrw.org/backgrounder/ij/ij1006/index.htm>; and *ICC Prosecutor's Public Hearing for NGOs: Intervention by Richard Dicker*, October 18, 2006, <http://hrw.org/backgrounder/ij/oral1006/>.

¹⁸ Investigation resulting from voluntary referrals where the other criteria of the Rome Statute are met is not in itself problematic. However, the prosecutor's emphasis and encouragement of voluntary referrals creates the risk that the OTP—and as a consequence, the court as a whole—may be perceived as a tool in the hand of the referring government. The possibility for the prosecutor to use his proprio motu authority to conduct investigations is, among other things, an important tool to preserve his independence. For more detailed discussion of this point, see Human Rights Watch, *Intervention by Richard Dicker*, pp. 3–4.

¹⁹ The prosecutor has indicated that his office will investigate all groups in a situation "in sequence," suggesting that one case will be investigated at a time. In some instances, for practical reasons, it may be necessary to conduct investigations in this manner. However, the formal adoption of this approach may have negative implications, including for the perception of the prosecutor's impartiality. For example, while the ICC has issued an arrest warrant against a Hema militia leader, Thomas Lubanga, our recent field research in eastern DRC indicates that the absence of warrants against Lendu leaders has led to a strong perception within the Hema community and others that the ICC is carrying out "selective justice." See Human Rights Watch, *Selection of Situations and Cases*, pp. 5–6.

²⁰ The substantive thrust of this approach, targeting those accused at the highest levels in government and among insurgent armed groups, is sensible. However, adopting a stated policy to focus on "those who bear the greatest responsibility" limits unnecessarily the OTP's scope and, as a result, its potential deterrent effect. See Human Rights Watch, *Selection of Situations and Cases*, pp. 11–15.

²¹ For instance, two years of investigation by the OTP in the DRC has not yielded a broader range of charges against Lubanga. Charging those responsible for the most serious crimes committed in Ituri with representative crimes for which there is a strong evidentiary basis is crucial for the victims of these crimes, and for ending the culture of impunity in the DRC and in the Great Lakes region. For more information, see Joint letter from Human Rights Watch and other groups to Luis Moreno-Ocampo, chief prosecutor, International Criminal Court, July 31, 2006, <http://hrw.org/english/docs/2006/08/01/congo13891.htm>.

²² The objectives are: "to further improve the quality of the prosecution, aiming to complete two expeditious trials[;] to conduct four to six new investigations of those who bear the greatest responsibility in the Office's current or new situations[;] to gain the necessary forms of cooperation for all situations to allow for effective investigations and to mobilize and facilitate successful arrest operations[;] to continuously improve the way in which the Office interacts with victims and addresses their interests[; and] to establish forms of cooperation with states and organisations to maximize the Office's contribution to the fight against impunity and the prevention of crimes." OTP Report on Prosecutorial Strategy, p. 3.

²³ Strategic Plan, p. 6; OTP Report on Prosecutorial Strategy, p. 7.

helpful. They unnecessarily limit the scope of the OTP's action as they cannot take into account that more serious crises could arise that would require the OTP's urgent attention. These figures also are unclear as to whether these investigations and charges will be representative of the crimes committed and target those persons most responsible for the crimes committed, including those in the upper echelons of power, as they should do. As a result, we note that these figures will not provide an appropriate benchmark for evaluating the OTP's performance.

5) In the resolution on the ICC Strategic Plan, the ASP should encourage future consultation on the OTP plan, in part through the HWG sub-group on the ICC Strategic Plan, and encourage more detail in the OTP plan.

Dialogue on the OTP plan is valuable and should be continued, while respecting the OTP's ownership over the plan. One way to ensure that dialogue on the OTP plan continues is for states parties to indicate that the HWG sub-group on the Strategic Plan should be utilized as one means of future discussion about the OTP plan.

In addition to the concerns above, the OTP plan lacks adequate detail. Of particular note, "positive complementarity" is referenced as a guiding principle without any significant elaboration.²⁴ More detail is needed in revised versions of the OTP plan.

D. Outreach and Communications

Effective outreach and communications in situation countries is a key means for the ICC to maximize its impact. It provides the tools to local communities to understand the court's prosecution of alleged perpetrators and the commitment by the international community to ensure accountability for serious crimes. Effective outreach and communications are all the more important for communities that are polarized and war-torn. Those threatened by the ICC can be expected to promote misinformation about it.

During the fourth ASP session, states parties aptly stressed the importance of outreach to the ICC's success.²⁵ Prompted by this interest and a request from the ASP, the court has now

²⁴ OTP Report on Prosecutorial Strategy, p. 4

²⁵ For example, Sierra Leone, Germany, and Belgium convened a joint hearing at the 2005 ASP to discuss the importance of outreach for international justice institutions. States also made supportive statements during the general debate of that ASP. See, for example, Statement delivered by Ambassador Allieu I. Kanu, Head of Delegation of Sierra Leone, at the Fourth Session of the ICC-ASP General Debate, Statement of the Republic of Uganda at the Fourth Session of the ICC-ASP, delivered by Amb. Mirjam Blaak, and Statement of H.E. Mr. Vital Budu Tandema, Head of Delegation of DRC (delivered in French), December 2, 2005. Statements from the general debate are available at <http://www.iccnow.org/?mod=BrowserDoc&type=13&module=592>

produced a “Strategic Plan for Outreach” (Outreach Strategy).²⁶ As discussed below, the Outreach Strategy is a highly positive step, although some areas still require improvement.

At this ASP session, we urge states parties to take action to promote further positive development in the ICC’s outreach and communications efforts.

Human Rights Watch recommends:

- 6) In the general debate and a working group on the Strategic Plan, states parties should emphasize the importance of outreach, welcome recent positive steps in the ICC’s approach on outreach, and encourage further efforts.

The ICC has made significant progress in its outreach and communications over the year and demonstrated a heightened commitment to these issues, which states parties should welcome. This is reflected through outreach workshops, recruitment of national and international staff to conduct outreach and communications, and requests for increased funding for outreach and communications activities.²⁷ The Outreach Strategy also reflects a dramatic improvement in the court’s conceptualization of outreach. Specifically, the strategy recognizes the importance of outreach to the court’s work, the need for outreach to start as early as possible in the situations under investigation, and that outreach is the responsibility of the Registry, in collaboration with other judicial actors (such as the OTP and defense). The Outreach Strategy further incorporates key elements—including practical measures—to conduct effective outreach by identifying target groups;²⁸ specific tools;²⁹ the

(accessed November 8, 2006). See also ICC-ASP, Resolution ICC-ASP/4/Res.4, adopted December 3, 2005, ICC-ASP/4/32, http://www.icc-cpi.int/library/asp/ICC-ASP-4-Res4_English.pdf (accessed November 6, 2006), para. 22 (“Recognizes the importance for the Court to engage communities in situations under investigation in a process of constructive interaction with the Court, designed to promote understanding and support for its mandate, to manage expectations and to enable those communities to follow and understand the international criminal justice process and, to that end, encourages the Court to intensify such outreach activities and requests the Court to present a detailed strategic plan in relation to its outreach activities to the Assembly of States Parties, in advance of its fifth session”).

²⁶ ICC-ASP, “Strategic Plan for Outreach of the International Criminal Court,” ICC-ASP/5/12, September 29, 2006, http://www.icc-cpi.int/library/asp/ICC-ASP-5-12_English.pdf (accessed November 6, 2006) (“Strategic Plan for Outreach”).

²⁷ United Nations General Assembly, “Report of the International Criminal Court,” U.N. Doc. A/61/217, August 3, 2006, http://www.icc-cpi.int/library/organs/presidency/ICC_Report-to-UN_2006_English.pdf (accessed November 6, 2006), paras. 33–38 (“ICC Annual Report to the UN”); ICC-ASP, “Proposed Programme Budget for 2007 of the International Criminal Court,” ICC-ASP/5/9, August 22, 2006, http://www.icc-cpi.int/library/asp/ICC-ASP-5-9_English.pdf (accessed November 6, 2006), pp. 135–139 (“ICC Proposed Programme Budget for 2007”).

²⁸ This includes, inter alia, victims, women, journalists, and the public at large. ICC-ASP, “Strategic Plan for Outreach,” paras. 18–31.

²⁹ This includes, inter alia, radio debates, town hall meetings, trainings, and visual materials. Ibid., paras. 48–61.

creation of a specialized unit in headquarters and teams in the field on outreach;³⁰ and tailored strategies for each situation under investigation.³¹ The development of situation-specific strategies is particularly important as the ICC faces different contexts and challenges that must be overcome in each country in which it operates. The strategies demonstrate enhanced analysis of the needs in each situation, along with creative ways to respond to them.

At the same time, other components are needed and states parties should urge their incorporation. Specifically, in addition to conducting outreach with elite groups (such as religious and cultural leaders), more efforts to reach a wider audience should be included where possible (such as through “town hall” meetings). Targeting elite groups is important, but such groups may have interests that affect how they relay information to others. This can make them inappropriate intermediaries between the ICC and the general public. The Outreach Strategy also does not sufficiently identify current perceptions in each situation or initiatives to address misconceptions or outstanding questions. Increased interaction with the general public will allow the ICC to better understand these issues, thereby helping the ICC to prioritize appropriate initiatives for each situation. The hiring of local teams will hopefully also facilitate this process.

Plans related to Darfur are too minimal. We recognize the immense difficulties of operating in the context where a government opposes ICC involvement. However, significantly more can and must be done. With no arrest warrants issued some two years after the Security Council referral, states parties should stress that there is an intense need for outreach and communications to explain the court’s work and counter disillusionment in Darfur.

7) In either the “omnibus resolution” or the resolution on the ICC Plan, states parties should highlight the importance of implementing the Outreach Strategy.

The Outreach Strategy must be implemented as a matter of priority. To date, even with increases in 2006, outreach and communications activities have been insufficient, with only a minimal portion of society in situations under investigation reached.³² This is largely due to resource allocations for outreach and communications that as requested by the ICC were not

³⁰ Ibid., paras. 69–76.

³¹ Ibid., paras. 85–127.

³² ICC-ASP, “Report on the activities of the Court,” ICC-ASP/5/15, October 17, 2006, http://www.icc-cpi.int/library/asp/ICC-ASP-5-15_English.pdf (accessed November 6, 2006), para. 72 (reporting that over the year the court held 16 workshops and informational meetings in the DRC involving 1,300 participants, and 14 workshops and seminars in Uganda, involving 700 participants).

sufficient, and were even less so as approved by the ASP.³³ This has already led to lapses in information and misperceptions that have detrimentally impacted views about the court in country situations.³⁴

8) The ASP should approve budget provisions related to outreach and communications.

Effective outreach and communications require adequate resources. In this regard, increased resources requested by the court this year for an outreach unit in headquarters, teams of five local staff in country situations, and funds for production of materials are welcome;³⁵ cuts proposed by the Committee on Budget and Finance (CBF) to outreach and communications efforts in situation countries raise concern and should be rejected.³⁶

The ICC has taken an important step forward in producing a strategy that reflects substantial progress in the court's approach to outreach. It is now up to the ASP to step up and to approve the resources necessary for the ICC to implement the strategy. While the CBF has criticized the Outreach Strategy for lacking clarity,³⁷ this should not be the basis for cutting funding for outreach and communications, but rather for encouragement to improve the strategy. Moreover, cutting resources would send a signal that outreach is not a priority. The ASP must not on the one hand encourage the court to intensify its outreach activities and then cut funding for increased activities, which remain relatively limited.

³³ See ICC-ASP, "Proposed Programme Budget for 2006 of the International Criminal Court," ICC-ASP/4/5, August 24, 2005, paras. 405–419; Official Records of the 4th Session of the ICC-ASP, "Part II: External audit, programme budget for 2006 and related documents," ICC-ASP/4/32, http://www.icc-cpi.int/library/asp/Part_II_-External_audit_and_programme_budget_for_2006.pdf (accessed November 7, 2006), para. 30; see also *Human Rights Watch Memorandum for the 4th ICC Assembly of States Parties, November 2005*, <http://hrw.org/backgrounder/ij/memo1105/index.htm>, pp. 2–5.

³⁴ For example, as discussed above, in the DRC our recent field research suggests that there are perceptions that justice is selective due to the absence of warrants issued against persons associated with more than one militia group. In Uganda, we understand there has been a perception that the court is an instrument of the Ugandan government.

³⁵ ICC Proposed Programme Budget for 2007, pp. 135–139.

³⁶ Assembly of States Parties to the International Criminal Court, Report of the Committee on Budget and Finance on the work of its seventh session, ICC-ASP/5/23, November 1, 2006, http://www.icc-cpi.int/library/asp/ICC-ASP-5-23_English.pdf (accessed November 6, 2006), para. 77 ("CBF Report").

³⁷ The CBF indicated that it "remained concerned that there appeared to be no clear system for determining the levels and extent of engagement for the target audience, or any process to evaluate whether that had been achieved." CBF Report, para. 31.

E. Geographic Location of Court Activities and Premises

The Strategic Plan rightly recognizes the importance of in situ proceedings and field offices, and indicates that a priority objective is for the court to, “[f]ormulate options for different geographical locations of the Court’s resources and activities, including the requirements for the permanent premises.”³⁸ Below we discuss recommendations for the ASP to promote ICC activities and presence in situation countries and to resolve premises issues.

Field activities

Adequate field engagement³⁹ is an absolutely essential way for the ICC to bridge the gap between its base in The Hague and communities in situation countries. It is a crucial means through which the ICC can reach affected communities by bringing the court physically and culturally closer to these populations.

A number of states parties have rightly emphasized the importance of activities in situation countries, particularly at this year’s United Nations (UN) General Assembly session in which the Report of the ICC was considered.⁴⁰ The HWG sub-group on the Strategic Plan has also indicated that “options for the geographic location” for the court’s activities are a priority area for future dialogue with the ICC. During the fifth session of the ASP it will be crucial for states parties to build upon engagement to date to promote enhanced field engagement.

Human Rights Watch recommends:

- 9) During the ASP general debate and a working group on the Strategic Plan, states parties should highlight the essential importance of field engagement to maximizing the court’s impact, and encourage a range of specific field activities.

The ICC has made important advances in its field engagement over the past year, with a substantial strengthening of field offices. International and national staff from the Victims

³⁸ Strategic Plan, p. 7.

³⁹ By field engagement, we mean a substantive, sustained presence of the court in situation countries when the security situation allows it.

⁴⁰ For example, African states parties encouraged “the Court to make plans for holding hearings in the area where the crimes have been committed as this would enhance the deterrent effect of the Court and justice will be seen to be done.” Statement by Mr. Sabelo Sivuyile Maqungo, on behalf of African Member States to the International Criminal Court Statute before the General Assembly, October 9, 2006, http://www.southafrica-newyork.net/pmun/view_speech.php?speech=271690 (accessed October 27, 2006). At the 2005 session of the ASP, African states parties also expressed that “trials should, as much as possible, be carried out in the localities or region where the crime took place.” Statement by Professor J.A. Ayua, Solicitor-General of the Federal Republic of Nigeria, on behalf of African States Parties to the ICC at the 4th ASP, December 3, 2005, http://www.iccnow.org/documents/NigeriaAfricanSPs_GeneralDebate_3Dec05.pdf (accessed November 6, 2006).

Participation and Reparations Section and from the Victims and Witnesses Unit now are working in offices in both the DRC and Uganda. Recruitment of outreach teams comprised of national staff has also been finalized for the DRC and Uganda field offices.⁴¹ In addition, in this year's proposed budget, the ICC shows the potential cost of in situ proceedings and expenses related to visits to situation countries by ICC officials.⁴²

States parties should utilize the ASP general debate and working group on the Strategic Plan to further advance field engagement, by stressing the importance of field activities and their role in making the court's work meaningful to affected communities. States parties should also encourage the ICC to include the following field activities in its "geographic options" to assist the court in maximizing its impact:

- regular visits to situation countries by top ICC officials;
- establishing field offices in every situation under investigation as close as possible to where victims are located, to the extent security allows;
- adapting field offices to accommodate the different needed functions, such as outreach (which requires publicly accessible spaces), and investigations (which require privacy);
- basing ICC staff, including national staff, in field offices on a long-term basis to address certain core functions, such as witness protection and victims' participation; and
- holding in situ proceedings.

10) In the resolution on the Strategic Plan, the ASP should encourage the ICC to formulate and provide to the ASP its "geographic options" as a matter of priority.

11) The ASP should approve budget provisions related to field activities.

It will come as no surprise that field presence and activities require funding. Given their importance, all allocations for such efforts should be approved.

Premises

At the upcoming ASP, major questions over both interim and permanent premises for the ICC are again on the agenda. Over the past year, the ICC has had to work from buildings in four locations in different parts of The Hague due to overcrowding at the primary interim premises. This situation is far from ideal as it can hamper effective coordination among staff within and

⁴¹ "Public Information and Outreach Teams for DRC and Uganda recruited," *ICC Newsletter*, No. 9, October 2006, http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL9-200610_En.pdf (accessed October 27, 2006), p. 3.

⁴² ICC Proposed Programme Budget for 2007, Annex X, p. 189.

across divisions at the ICC. Moreover, no decision has been made regarding the type of permanent premises that will be established, namely whether a new building will be constructed or an existing building will be adapted. It will be important for the ASP to resolve these issues, especially so that ICC officials who have already devoted substantial attention to premises issues can turn their attention to other matters. In order to address this:

12) The ASP should pass a resolution on the ICC interim and permanent premises.

The Hague Working Group has worked on these issues in the past year and an expert meeting was recently convened to move the process forward. We understand that the working group is preparing a draft resolution for the ASP about permanent premises, and that this resolution may express an intention to move forward with the Alexanderkazerne site. A resolution that decides on the type of permanent premises that will be established would be welcome. The resolution should also approve a new plan for interim premises that better addresses the need for efficiency and coordination across the ICC without additional costs to the court. Finally, the resolution should establish a mechanism through which informed and timely decisions on next steps to create permanent premises can be made. In order to be effective, the mechanism should include representatives from the ICC, the host state, the Committee on Budget and Finance, and the ASP, as well as persons with technical expertise, and should meet regularly.

13) The ASP should support the establishment of an ICC Project Office on the permanent premises, as proposed in the ICC draft 2007 budget.

This will allow the court to develop necessary in-house expertise, and allow staff who have been working on this issue to return to their core functions. This requires approval of two positions for this office included in the proposed budget,⁴³ which the CBF has endorsed.

F. Budget

The CBF is responsible for the technical examination of documents submitted to the assembly that are of a financial, budgetary, or administrative nature, including reviewing and making recommendations concerning the court's budget.⁴⁴ As discussed below, we have several concerns about current CBF practice and about proposed cuts to priority areas,

⁴³ ICC Proposed Programme Budget for 2007, paras. 419–424.

⁴⁴ ICC-ASP, First Session, “Establishment of the Committee on Budget and Finance,” ICC-ASP/1/Res.4, [http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp_records\(e\).pdf](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp_records(e).pdf) (accessed November 7, 2006), para. 3.

which we believe may need to be rejected. These include proposed cuts to investigations,⁴⁵ cooperation,⁴⁶ outreach and communications,⁴⁷ and witness protection.⁴⁸ We see these as priority areas for the ICC, given their connection to the court’s fundamental task of investigating and prosecuting serious crimes and maximizing the impact of this work with affected communities.

Human Rights Watch recommends:

- 14) The ASP should request that the CBF explain its reasoning behind all proposed cuts.**

There are a number of proposed cuts for which insufficient or no justification is provided in the most recent CBF report, including for activities to promote cooperation.⁴⁹ In order to properly complete its work, we believe the CBF must explain the reasoning behind proposed cuts. Otherwise its decisions appear arbitrary. The lack of justification for cuts further raises questions as to whether CBF sessions have become too short for adequate interaction with ICC officials and full consideration of the budget.⁵⁰

- 15) The ASP must be adequately engaged in reviewing proposed cuts to key areas and should consider rejecting proposed cuts as appropriate.**

Consistent with the ASP’s functions under article 112(d) of the Rome Statute, the ASP cannot abdicate its responsibility to “[c]onsider and decide the budget for the Court.” The ASP must not adopt the CBF’s proposed cuts, especially in priority areas, without first determining that they are appropriate and do not undermine needed funding.

⁴⁵ The CBF proposes to cut a P3 analyst for the fourth investigation. CBF Report, para. 66.

⁴⁶ Proposed cuts to the ICC’s work related to ensuring cooperation are addressed in greater detail in Section III.B, below.

⁴⁷ These cuts are addressed in detail in the previous section.

⁴⁸ The CBF recommended that three P2 associate protection officers not be established and converted them into general temporary assistance; that a P2 associate operations officer for situation IV be cut; and that an increase in travel intended for missions to negotiate witness relocation agreements and the provision of witness protection and support, including witness escort travel, be cut. CBF Report, para. 75.

⁴⁹ For example, the CBF “recommended that the P-3 International Cooperation Adviser post should not be approved” without providing any explanation.

⁵⁰ In its latest report, the CBF agreed that its April session should be extended from three to four days. CBF report, para. 128. The ASP should support this request and consider whether extending the October session, during which the CBF specifically considers the draft budget of the court, would also assist the CBF in providing more explanations about its decisions. Extending sessions could also enable the CBF to consult experts in particular court functions, such as witness protection. The ASP should consider recommending that the CBF consult such experts, as appropriate.

The CBF indicated that the ICC framed its budget proposals for 2007 in comparison to the 2006 budget, but the 2006 budget was based on assumptions that only partially materialized.⁵¹ The CBF further indicated that a preferable approach would have been to compare the 2007 budget proposals to actual anticipated expenditures for 2006; it noted that “such an approach would [have] highlight[ed] a difference of an approximately 40 percent increase between projected implementation for 2006 and the 2007 budget.”⁵² We see the benefits of comparing future budgets to the previous year’s actual anticipated expenditures, and hope that the ICC will do this next year. It will also be important for the ICC to continue to enhance its expertise in making cost projections concerning its functions. Nevertheless, the fact that the court’s approach in preparing its budget figures may not be the most preferable and that the budget has effectively undergone a significant increase are not sufficient to justify specific cuts, particularly in priority areas.

Toward this end, the ASP must at the least review and critically assess the implications of the proposed cuts. Indeed, increases in investigations, witness protection, outreach, and cooperation appear reasonable—and even conservative—given the demands of these tasks. Moreover, it is important that the ASP not simply indicate that the court could compensate for the cuts with funds from other areas; the ASP should at least identify suggestions from which functions “funds from other areas” might be taken.

To avoid duplicating the work of the CBF, the ASP might consider holding thematic discussions to discuss the CBF recommendations, as was done during the ASP’s fourth session. During such discussions, we would recommend that the ASP pose questions to ICC officials regarding the impact of proposed CBF cuts for priority areas. Such questions should include the following:

- Considering that the prosecutor is planning to open an investigation in a fourth situation before the end of 2006, what will be the impact to OTP investigations of cutting the proposed P3 analyst for a fourth situation?⁵³ In this regard, have allocations for

⁵¹ “The Court explained that the 2006 budget had been based on assumptions of trials starting in May and July. Neither of those assumptions had materialised...” CBF Report, para. 40.

⁵² “The Committee welcomed the clarity of the budget presentation and the layout of the proposed budget document itself, noting a continuous improvement in the Court’s work in that area. The Committee was nevertheless concerned at the general approach. In each of the programmes and sub-programmes, the budget proposals for 2007 were compared with the 2006 budget, which had been developed to meet workload assumptions as they appeared in the summer of 2005, that had only partially materialised. As a result, the 2006 budget had been significantly underspent and could not therefore be considered a sound baseline for consideration of the 2007 budget. Similarly, much of the commentary related only to perceived growth rather than justifying the overall budget... A preferable approach would have been to compare the 2007 budget with projected implementation for 2006, linking the increases to workload assumptions.” CBF Report, paras. 48–49.

⁵³ CBF Report, para. 66.

- investigative staff been sufficient to date? Additionally, what are the implications to witness protection of cutting a proposed new officer for a fourth situation?⁵⁴
- Considering the need for witness relocation agreements and possible escorting of witnesses, what are the implications for witness protection of cutting proposed travel by the Victims and Witnesses Unit?⁵⁵
 - Considering the need for intensified outreach activities, what will be the impact to outreach activities of cuts to proposed production of materials, including printing, audiovisual materials, and video link?⁵⁶

Moreover, given their importance, the ASP should tend toward rejecting cuts to priority areas such as investigations, outreach and communications, witness protection, and cooperation. Finally, to facilitate consideration of the budget and CBF report in the future, the ASP should also request the CBF to make its report available at least several weeks before the ASP session.

III. ASP Functioning and Cooperation

A. Improved ASP Structure and Working Methods

An active ASP is crucial for the assembly to properly exercise its functions under the Rome Statute and to ensure that the ICC becomes an effective institution. As a new and unique court facing enormous challenges, the ICC needs close, but appropriate, scrutiny and feedback.

In this regard, the significant strengthening of ASP working methods during the past four years is welcome. The Bureau now holds regular meetings, with eight meetings in 2006, and has taken steps to improve transparency and coordination with non-Bureau members, such as by providing public reports of meetings.⁵⁷ The Bureau's two permanent working groups also meet regularly; interact with the ICC, NGOs and experts; produce reports to facilitate the ASP's work; and assist in preparation for the ASP session. These practices should continue.

⁵⁴ Ibid., para. 75.

⁵⁵ Ibid.

⁵⁶ Ibid., para. 77.

⁵⁷ The appointment of vice presidents in The Hague also helps to facilitate dialogue between the diplomatic communities in New York and The Hague. Reports on the Bureau's meetings are available at <http://www.icc-cpi.int/asp/aspbureau.html> (accessed November 6, 2006).

They facilitate important sustained engagement with ICC issues and will hopefully enable the ASP to reach significant decisions at the upcoming session.

This year's ASP session includes other enhancements including a longer general debate at the commencement of the session, and a longer session overall. The longer session creates important opportunities for the ASP to discuss issues in greater depth and to minimize the number of parallel informal working groups, which hampers the ability of smaller delegations to participate effectively. Both the longer session and the general debate should further enable discussions to move from the largely technical budgetary discussions that have consumed the majority of past sessions to more substantive and overarching discussion of the ICC's work and challenges.

In addition to these steps, we believe several additional actions detailed below should be taken to ensure that the ASP is able to play its role effectively in promoting positive development of the ICC, including by improving the quality of work produced by working groups, which has been uneven.

Human Rights Watch recommends:

- 16) States parties should take steps to increase active participation in the working groups and the annual session.**
- 17) The ASP should set clearer timeframes and mandates for working groups, along with requesting that groups meet regularly, as appropriate.**
- 18) The ASP should request that the ASP Secretariat provide substantive support to the working groups when needed and should provide resources to the Secretariat for this purpose.**

B. Cooperation

Ensuring that the ICC receives necessary cooperation is an important aspect of the Rome Statute. It is also absolutely crucial to the court's success. Given the ICC's mandate, withholding of cooperation—both by governments and individuals—is predictable. But with no enforcement mechanisms of its own, the ICC is totally dependent on the cooperation it receives. With the ICC now actively investigating and prosecuting cases, it is essential that the ASP actively takes steps to ensure the court achieves necessary cooperation to do its work.

Experience from the ad hoc tribunals and the Special Court for Sierra Leone underscores the crucial importance of cooperation. Some of their biggest challenges have related to the need for cooperation to ensure arrests of indictees or to carry out investigations. In this regard, pressure by states has been crucial to the wave of voluntary surrenders to the ICTY, and the recent surrender of Charles Taylor to the Special Court.

States parties have rightly stressed the importance of cooperation, and their commitment to assisting the court to achieve cooperation.⁵⁸ But while some efforts have occurred to date,⁵⁹ they are far from adequate. For example, lack of execution of arrest warrants against leaders of the Lord's Resistance Army (LRA) has been a significant obstacle to the ICC's progress in prosecuting crimes committed in the situation in northern Uganda.⁶⁰ Current developments related to peace talks in Juba, Southern Sudan, may make immediate action to secure arrest inappropriate. However, the Juba process should not obscure that the arrest warrants against the LRA leaders have not been executed for more than one year after they were unsealed.⁶¹

Execution of warrants is precisely the type of area where substantial assistance to the ICC by states parties and the ASP must occur.⁶² This should include active efforts by states on

⁵⁸ This emphasis was evident in the recent UN General Assembly session in which the report of the ICC was considered (October 9, 2006). Statements by states parties are available at <http://www.iccnow.org/?mod=browserdoc&type=13&module=1006> (accessed November 6, 2006).

⁵⁹ This includes: the ICC's conclusion of agreements with the UN and EU, with the host state on detention and transport of suspects, and with a few states on the relocation of witnesses; the signing of an agreement with Austria on the enforcement of sentences; ratification of the Agreement on Privileges and Immunities of the Court by 42 states parties; enactment by 35 countries of implementing legislation; and establishment of the New York Liaison Office. See Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, ICC-PRES/01-01-06, April 10, 2006, entry into force May 1, 2006, http://www.icc-cpi.int/library/about/officialjournal/ICC-PRES-01-01-06_English.pdf (accessed November 6, 2006); "Austria Becomes the first State to sign an Agreement with the ICC on the Enforcement of Sentences," ICC press release, October 27, 2005, <http://www.icc-cpi.int/press/pressreleases/116.html> (accessed November 6, 2006); Coalition for the International Criminal Court (CICC), "Ratification and Signature of the Agreement on the Privileges and Immunities of the Court (APIC), by Region," http://www.iccnow.org/documents/CICC_APIClist_10oct26_updated.pdf (accessed November 6, 2006); ICC-ASP, Report on the activities of the Court, ICC-ASP/5/15, October 17, 2006, paras. 86, 100. See also Amnesty International's webpage on the status of implementing legislation: <http://web.amnesty.org/pages/icc-implementation-eng> (accessed November 6, 2006).

⁶⁰ As already noted above, to date the ICC has issued arrest warrants for six individuals, of which one, in relation to the DRC investigation, has been executed (Thomas Lubanga Dyilo). See *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Warrant of Arrest, February 10, 2006.

⁶¹ The arrest warrants for five senior leaders of the LRA were unsealed on October 13, 2005. See "Warrant of Arrest unsealed against five LRA Commanders," ICC press release, October 14, 2005, <http://www.icc-cpi.int/press/pressreleases/114.html> (accessed November 6, 2006).

⁶² As described by a representative of the Ugandan government, "The LRA, including the five named in the ICC arrest warrants, are located in three countries, two of whom are members of the ICC and one of whom signed an agreement with the OTP to arrest. Within these three countries, there are five military forces that may be able to assist in arrest. These include the

whose territories the suspects may be, and by states that have a particular commitment, resources, or influence that can advance the suspect's surrender. Efforts should at a minimum include strategizing by such states, including with other relevant actors like the UN Department of Peacekeeping Operations. Additional crucial forms of cooperation that may be needed by the ICC in all situations include logistical support; providing evidence; executing searches and seizures; tracing assets; providing witness relocation; and making incarceration facilities available.

The lack of sustained and robust engagement to secure arrests after the unsealing of the LRA warrants raises questions about prospects for the ICC to conduct trials.⁶³ Notably, senior ICC officials have identified cooperation as a major concern in recent public statements and at diplomatic briefings.⁶⁴

ICC officials have an important role to play in highlighting what kind of cooperation is needed and expected, along with the ICC's own strategies to secure it. They have not made such information clear enough to date, although ICC efforts to keep states parties informed about its work and challenges, and to strengthen the OTP's capacity regarding cooperation are welcome.⁶⁵ At the same time, the ASP and states parties must effectively play their role in ensuring cooperation. The actions listed below should be taken to advance this objective.

national armies of Uganda, DRC, Sudan as well as the UN peacekeeping forces of MONUC and UNMIS.... Giving [e]ffect to the warrants of arrest is the responsibility of the state parties to the ICC. The Government of Uganda has done what it can to fulfill its obligations. However, the GoU would like to stress that successful execution of the arrest warrants required concerted international and regional cooperation... What Uganda has experienced serves as an example of the acute need for international cooperation to give effect to ICC arrest warrants and makes us realize even more the need for all States Parties to cooperate with the ICC in fulfilling their obligations." "Second Public Hearing of the Prosecutor of the ICC: Intervention by Ambassador M. Blaak," The Hague, September 25, 2006, document on file with Human Rights Watch. See also Letter from the Solicitor-General of Uganda to the Registrar of the International Criminal Court, October 4, 2006, document on file with Human Rights Watch.

⁶³ At the same time, we appreciate that some efforts in these areas have been undertaken, some of which cannot be made public due to their sensitivity. We also note efforts by UN peacekeeping forces to "seek out" LRA leaders in Garamba Park and the unfortunate death of eight Guatemalan peacekeepers in this effort. See, for example, Emmy Allio, "UN Plot to Nab Otti Backfires," *New Vision* (Uganda), January 29, 2006; Blake Lambert, "UN steps up peace efforts in Congo ahead of April vote," *Christian Science Monitor*, January 30, 2006.

⁶⁴ President of the ICC's Address to the United Nations General Assembly, October 9, 2006, http://www.icc-cpi.int/library/organs/presidency/PK_20061009_en.pdf (accessed November 6, 2006); "Eighth Diplomatic Briefing of the International Criminal Court, 26 October 2006," Information Package, document on file with Human Rights Watch; ICC, Report on the activities of the Court, ICC-ASP/5/15, October 17, 2006, para. 7.

⁶⁵ In this regard, ongoing dialogue undertaken by the ICC with states parties (such as regular diplomatic briefings and meetings with the Friends of the ICC and regional organizations and reports to the UN General Assembly) has occurred.

Actions at the upcoming ASP to promote cooperation

- 19) States parties should consider holding a working group on cooperation during this ASP session.**

A working group on cooperation during the ASP session could be highly useful as cooperation is an important and timely issue that includes a number of avenues for the ASP to explore. Even a brief working group could help kick-start discussions between states parties and the ICC about ways to address cooperation issues most effectively. It would also allow the ICC to provide more explicit information to states parties about the assistance it needs.

- 20) In the omnibus resolution, states parties should highlight the importance of effective cooperation and request that the Bureau consider creating a working group during the year to focus on cooperation.**

We understand that some initial discussion at the ICC and between states parties has taken place regarding creating a working group on cooperation to meet throughout the year. Such a group could take up important tasks to assist the ICC. Its work could focus on the types of measures the ASP could take proactively to encourage cooperation; analysis of the role of the ASP in relation to cooperation (which might potentially include preparatory work regarding the ASP's role vis-a-vis non-cooperation consistent with articles 87 and 112 of the Rome Statute); and encouraging states parties to adopt implementing legislation.

The working group could further serve as an important first point of contact and dialogue for the ICC with the ASP should cooperation needs and difficulties arise. The existence of the group could play a role in providing the ICC with “political back-up” as it seeks cooperation.

- 21) States parties should consider, in close coordination with the ICC, creating ad hoc task forces to address particular cooperation challenges in a practical manner as they arise.**

Such task forces might provide a useful forum for states parties, the ICC, and other relevant actors to strategize on responding to specific cooperation challenges. It could include states parties most committed or with the most influence to positively impact a cooperation issue, and invite intergovernmental organizations as relevant, such as UN agencies. Such a task force might be valuable regarding execution of the ICC arrest warrants for LRA leaders.

22) The ASP should approve budget allocations to support and strengthen the work of the ICC's International Cooperation Section.

This includes approval of international cooperation advisers for the DRC, Darfur, and northern Uganda, along with a fourth situation. In this regard, the ASP should consider rejecting the CBF's proposed cut of one of these positions.⁶⁶ It also includes support for internal reassessments to provide for information and tracking analysts in the Planning and Operations Section.⁶⁷

23) In the general debate, states parties should commit themselves to taking at least one concrete step to facilitate cooperation with the ICC by the next ASP session, and to report then on steps taken or explain why such steps were not possible.

Independent actions by states parties at their own initiative to promote cooperation

States parties should take the following actions at their own initiative to enhance cooperation with the ICC, if they have not already done so.

24) State Parties should adopt ICC implementing legislation with sufficient precision.⁶⁸

We understand that some ICC cooperation requests have been declined as the necessary national legislative framework was not in place or it was not precise enough. ICC implementing legislation with sufficient specificity on cooperation should be completed now to facilitate future cooperation.⁶⁹ Forms of cooperation encompassed should include logistical support; assistance in the questioning of persons; providing evidence in states parties' possession; executing searches and seizures; and identifying and tracing assets.⁷⁰

25) States parties should conclude agreements on the relocation of witnesses.⁷¹

⁶⁶ CBF Report, para. 64.

⁶⁷ ICC Proposed Programme Budget for 2007, para. 122.

⁶⁸ This is consistent with articles 87 and 88 of the Rome Statute. Article 88 states, "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part."

⁶⁹ Where implementing legislation has already been passed that is not sufficiently precise, states parties should seek to amend the legislation, and until such amendments are made, enter into specific cooperation agreements with the ICC as necessary.

⁷⁰ See Rome Statute, art. 93.

⁷¹ This is consistent with article 93 of the Rome Statute, which states that, "States Parties shall ... comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: ... (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court; ... (j) The Protection of victims and witnesses and the preservation of evidence."

In prosecutions involving serious crimes, witness protection is almost always a major issue and witness relocation can be essential in certain instances. Given that the ICC operates in ongoing conflicts, the ability to relocate witnesses outside the country is even more important. We understand that only a few relocation agreements have been concluded to date, which is unfortunate.

26) States parties should conclude agreements on the enforcement of sentences.⁷²

Offering incarceration facilities to accommodate persons convicted by international criminal tribunals is admittedly one of the less appealing aspects of international justice. However, it is vitally important. That the relocation of Charles Taylor's trial to The Hague this year was stalled for more than two months pending a state's offer of such facilities if he were convicted highlights the need for states to proactively approach ensuring incarceration facilities for persons convicted by the ICC.⁷³ We are concerned that to our knowledge only one country has concluded such an agreement.⁷⁴

27) States parties should express political support and commitment to the ICC and justice

a. States parties should press for conclusion of an ICC relationship agreement with the African Union (AU).

Agreements between regional organizations and the ICC are an important way to facilitate cooperation.⁷⁵ Particularly given the ICC's current investigations in Africa, conclusion of an AU-ICC relationship agreement is especially important. We welcome recent statements by African states parties calling for this agreement and encourage additional efforts toward this goal.⁷⁶

⁷² This is consistent with articles 103–111 of the Rome Statute. Article 103(3) states, “States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence.”

⁷³ The situation with regard to Taylor was particularly troubling as the request for relocation was made on the basis of security concerns. The relocation only took place when the United Kingdom government stepped forward after more than two months to offer the needed facilities. An offer of incarceration facilities by a third government was one of the conditions set by the Netherlands government in allowing Taylor's trial to be relocated to The Hague.

⁷⁴ See “Austria Becomes the first State to sign an Agreement with the ICC on the Enforcement of Sentences,” ICC press release.

⁷⁵ In this regard, the EU-ICC relationship agreement is welcome. Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, ICC-PRES/01-01-06.

⁷⁶ The recent statement by 28 African states parties during the General Assembly session in which the Report of the ICC was considered states that these states “reiterate the call ... made last year to the African Union to conclude a relationship

b. States parties should press other states to cooperate in investigations.

Given the Sudanese government's opposition to the ICC's investigation in Darfur, such pressure may be needed vis-a-vis Khartoum. The ICC prosecutor's upcoming Security Council briefing should provide important information on cooperation with the ICC by the Sudanese government to date.⁷⁷ If Sudan is not fully complying with the prosecutor's requests for assistance, states parties should press Sudan to cooperate. In this regard, the ASP and the court might also consider utilizing criteria developed by the International Commission of Inquiry on Darfur to appraise the cooperation of the Sudanese government.⁷⁸

c. States parties should support justice and the ICC for serious crimes committed in northern Uganda

Given recent debate on justice and the ICC warrants issued against LRA leaders within the context of the recent peace talks on northern Uganda, states parties should press for an outcome that includes both a peace agreement and fair and credible prosecutions for the most serious crimes in accordance with international standards. Ending the conflict in northern Uganda is crucial for the people there, who have suffered so egregiously for nearly two decades.⁷⁹ The current talks hold promise of ending the conflict, although the end result remains unclear. Although some have argued for a peace agreement accompanied by the ICC arrest warrants against LRA leaders being dropped, credible and fair prosecutions for serious crimes are an essential component to a durable peace.⁸⁰

agreement with the International Criminal Court in the same manner as the United Nations has done." Statement by Mr. Sabelo Sivuyile Maqungo, on behalf of African Member States to the International Criminal Court Statute before the General Assembly, October 9, 2006.

⁷⁷ The prosecutor will brief the Security Council in December 2006. See United Nations Security Council, Resolution 1593 (2005), S/RES/1593 (2005), para. 8.

⁷⁸ These criteria have been identified as follows: "(1) freedom of movement throughout the territory; (2) unhindered access to all places and establishments and freedom to meet and interview any person whose testimony is considered necessary for the fulfillment of its mandate; (3) free access to all sources of information; (4) appropriate security arrangements for the personnel and documents of the commission; (5) protection of victims and witnesses and those who appear before the commission." Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence, October 10, 2006, http://www.icc-cpi.int/library/cases/ICC-02-05-19_English.pdf (accessed November 6, 2006), para. 58.

⁷⁹ Human Rights Watch has documented for years human rights violations committed by the LRA, including torture, sexual abuse, mutilations, forced recruitment through abduction of children, and forcing children to kill even members of their own families. We have also documented abuses committed by Ugandan government forces, including the beating, rape, and killing of civilians. We have consistently urged that perpetrators on both sides cease abuses and that those responsible be held to account.

⁸⁰ Some have suggested traditional justice in lieu of ICC prosecutions. While traditional justice measures may have an important role to play in a comprehensive approach to accountability and community reconciliation, they are unlikely to

States parties should also make clear that a UN Security Council deferral under article 16 of the Rome Statute would be inappropriate in this instance, and states parties on the Security Council have a particular role to play in opposing an article 16 deferral.⁸¹ In the absence of credible alternatives at the national level, such a deferral would shield the LRA leadership from prosecution, perhaps indefinitely if renewed. It might also open the door to dangerous and inappropriate interference by the Security Council in the ICC. We have already seen unprincipled use of the Security Council by one permanent member to pursue unlawful interference with the ICC through Security Council resolutions 1422 and 1487.

First and foremost, these steps are important for the people of Uganda. Such steps are also crucial for the ICC as an institution. The court could not achieve its mandate to bring justice for the most serious crimes if it were primarily reduced to a bargaining chip in peace negotiations. Its *raison d'être* to “put an end to impunity for the perpetrators” of the most serious crimes as articulated in the preamble to the Rome Statute would be nullified.

d. States parties should defend the ICC's global character

Over the past year, the ICC has faced criticisms of being a “Western court” that practices selective justice. While the critique is inaccurate, it has the potential to not only damage the court’s credibility, but its ability to obtain cooperation from states and intergovernmental organizations in completing important tasks. The fact that all situations currently under investigation are in Africa furthers this impression.

We see it as crucially important for states parties to make efforts to convey that the ICC is a global institution. States parties should indicate that the ICC now enjoys support and participation from 104 states around the world including 29 from Africa, 22 from Latin America and the Caribbean, and 12 from Asia.⁸² States parties should further indicate that they have come together with other states in a conviction that there must be fair and credible prosecutions for the most serious crimes. States parties should stress that this is consistent with international, not “Western,” law.

provide effective prosecution accompanied by fair trial guarantees—such as the right to a fair and public hearing by an independent and impartial tribunal and the presumption of innocence—which is required under international law for cases involving serious crimes.

⁸¹ Under article 16, the Security Council may defer ICC investigation or prosecution for 12 months on the basis of its Chapter VII authority. Rome Statute, art. 16.

⁸² See CICC Factsheet, “States Parties to the Rome Statute of the ICC, according to the UN General Assembly Regional Groups,” November 1, 2006, <http://www.iccnow.org/documents/RATIFICATIONSbyUNGroups.pdf> (accessed November 9, 2006).

We urge all states parties to provide such clarification at appropriate moments in national, bilateral, and multilateral fora. Of course, African and Latin American states parties are particularly well placed to do so. We believe such efforts could be especially valuable and relevant during debates in the UN General Assembly and Security Council, African Union, Organization of American States, and the ASP session.