



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

November 2007

Introduction	1
More Cooperation Needed for the ICC to Be Successful	2
Political and Diplomatic Support	3
Practical Assistance	5
ASP Working Groups' Efforts on Cooperation	6
Need for Continued and Concrete Commitment to Peace and Justice	8
Elections of Judges and Registrar	10
Aggression.....	11
Strategic Planning	12

Introduction

The sixth session of the Assembly of States Parties (ASP) comes at a significant time. Over the past year, the International Criminal Court (ICC) has continued to take important steps forward. The ICC issued arrest warrants for suspects of atrocities in Darfur, took a second suspect into custody for crimes committed in the Democratic Republic of Congo (DRC), and opened an investigation into the Central African Republic (CAR). The court also strengthened its operations by increasing staffing in its field offices.¹ These offices, which are progressively becoming the face of the court vis-à-vis the affected communities, carry out vitally important activities including those related to victim and witness protection, victims' participation, support for investigations, and outreach.

The Pre-Trial Chambers had an active period as well. The court's first confirmation of charges hearing was held in the case against Thomas Lubanga Dyilo and important decisions were rendered by the judges elaborating on the novel rights for victims to act as participants in judicial proceedings.² As judges granted the first Ugandan victims the right to participate in the situation and case phases, an increasing number of applications to participate were received in the DRC situation, and the first applications related to Darfur began to be examined. The Trial Chamber is currently holding hearings in preparation for the Lubanga trial, set to start on March 31, 2008, during which important issues, such as the possibility of *in situ* hearings, are being discussed.

Despite these advances, the year was marked by growing indications that the possibility for the ICC to succeed in its mandate is threatened by insufficient cooperation and support, notably by states parties and other states that are obligated to cooperate. The government of Sudan's actions demonstrated how far states will go in blatantly frustrating the ICC's judicial orders, while a degree of silence by states parties in response raised serious concerns. At the same time, debates around peace processes in the situations under ICC investigation underscored that the imperative of justice as an integral element to establishing a durable peace is not yet universally accepted. Reflecting this, six of the nine public arrest warrants issued by the court are currently outstanding.

¹ These offices are located either in or close to the situations and are now setup for all situations under investigation.

² Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, Article 68(3).

This memorandum provides analysis and recommendations to states parties in advance of the ASP's sixth session. The principal focus of the document is the need for states parties to infuse the session with the commitment necessary to ensure that the ICC is able to operate effectively and that peace and justice go hand in hand. These issues are in our view the most critical challenges facing the institution at this time. We also make recommendations with regard to two issues on the ASP session's agenda: the election of new judges and the crime of aggression. In addition, we make recommendations on the court's strategic planning process, which will be discussed in the context of the ASP's "omnibus resolution."

This memorandum does not discuss several other significant issues on the sixth session's agenda, namely the court's budget, the review conference, and changes in the regulations to the Victims Trust Fund. With regard to these, Human Rights Watch aligns itself with the papers being produced by the relevant teams of the Coalition for the ICC, in which we participate.³ We urge delegations to consult these papers and to take up the recommendations contained therein. This is vital to maximize the success and effectiveness of the ASP.

More Cooperation Needed for the ICC to Be Successful

Without any enforcement mechanism, the ICC's success is directly related to the will of states parties to support it and to ensure necessary cooperation. This year, the Sudanese government showed in stark terms the level of resistance the ICC faces in advancing its work. The Sudanese government first refused to hand over two individuals subject to ICC arrest warrants despite its obligation to do so.⁴ The government then appointed one of the suspects, Ahmed Harun, who has remained State Minister for Humanitarian Affairs for Darfur, to a committee whose mandate includes hearing human rights complaints. The Sudanese authorities then released the other suspect, Ali Kosheib, who had been in domestic custody on unrelated charges, for lack of evidence. The Sudanese government has furthermore refused to cooperate with the ICC's on-going investigation since the arrest warrants were issued.

³ The papers are available at the Coalition for the International Criminal Court's webpage on the ASP's sixth session, at <http://www.iccnw.org/?mod=asp6>.

⁴ Although not a party to the ICC, Sudan is obliged pursuant to Security Council Resolution 1593 to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor." See United Nations Security Council, Resolution 1593 (2005), S/RES/1593 (2005), para. 2.

Such actions are an egregious affront to the victims of the crimes. They also reflect stunning disregard by the government of Sudan for the international community, especially the Security Council that referred Darfur to the ICC, and are a frontal assault on the court's credibility.

Experience has shown that concerted efforts and active wielding of states' political, diplomatic, and economic weight can be decisive in compelling cooperation with tribunals, including convincing recalcitrant governments to turn over suspected war criminals.⁵ With more than 100 states parties, including permanent and non-permanent Security Council members, the ICC should be able to widely benefit from such types of efforts in order to advance its work. As discussed below, however, much more is needed by states parties. In particular, this should comprise increased clear, consistent political and diplomatic support for the court's activities, insistence on cooperation with respect to specific incidents where obstruction is occurring, and practical assistance.

Political and Diplomatic Support

Over the last year, states parties took a number of opportunities to affirm in broad strokes the importance of the ICC's work and the general need for cooperation.⁶ During the 62nd Session of the General Assembly's general debate, for example, a number of states parties' interventions discussed the ICC, with some citing the need for cooperation.⁷ A few states parties on the Security Council, namely the United Kingdom, Belgium and Slovakia, also raised the significance of the ICC and the need for cooperation at a Security Council summit meeting on peace and security in Africa in September.⁸

⁵ For example, Serbia's surrender of 20 indicted persons to the International Criminal Tribunal for the former Yugoslavia (ICTY) in 2005 and more recent surrender of other accused were directly related to pressure around negotiations over its accession to the European Union (EU). Similarly, the EU making cooperation with the ICTY a precondition to accession negotiations with Croatia helped lead to the arrest of Croatian commander Ante Gotovina in the Canary Islands in 2005. More recently, pressure by a number of countries led to the arrest of former Liberian president Charles Taylor to face trial at the Special Court for Sierra Leone in March 2006 after he had been living in Nigeria.

⁶ This occurred, not surprisingly, most extensively following ICC President Kirsch's presentation of the annual report on the court to the UN General Assembly. See "Presidents of International Court of Justice, International Criminal Court President Reports to General Assembly," UN press release, GA/10652, November 1, 2007, <http://www.un.org/News/Press/docs/2007/ga10652.doc.htm> (accessed November 5, 2007).

⁷ Coalition for the ICC, "Excerpts from the General Debate of the 62nd Session of the General Assembly, 25 September – 3 October 2007," <http://www.iccnw.org/documents/GeneralDebateExcerpts2007.pdf> (accessed November 5, 2007).

⁸ United Nations Security Council, 5749th Meeting, S/PV.5749, September 25, 2007, <http://daccessdds.un.org/doc/UNDOC/PRO/No7/515/72/PDF/No751572.pdf?OpenElement> (accessed November 5, 2007), pp. 6, 11, and 15.

Following the presentation of the ICC's annual report to the General Assembly in November, a number of states parties raised the need for Sudan to cooperate with the ICC or the need for the court's arrest warrants regarding Darfur and northern Uganda to be enforced.⁹ Denmark, Australia, and the United Kingdom also explicitly referred to the need for Sudan to cooperate in the General Assembly general debate or Security Council meetings.¹⁰ At the same time, states parties – including those on the Security Council – did not for the most part actively react to Sudan's flagrant attacks on the court's credibility and failure to cooperate. States parties also missed crucial opportunities to raise the issue where it was relevant and appropriate, such as during the Security Council mission to Sudan in June, which took place only one week after the ICC prosecutor briefed the council on the warrants.¹¹ Most states parties on the Security Council also failed to raise the ICC at all during the summit meeting on peace and security in Africa, including France, which convened the meeting.¹² Similarly, not nearly enough was said regarding the warrants during a high-level consultation on Darfur at the United Nations (UN) in September, and there are indications that states parties do not regularly raise the warrants in bilateral meetings with Sudanese authorities.

With regard to northern Uganda, states parties also missed opportunities to advance the ICC's efforts. As the peace talks on northern Uganda continued in Juba, Southern Sudan, some states parties seemed keen at certain points for the ICC's involvement to be sidelined or to support measures contrary to the Rome Statute, which would lead to impunity for ICC

⁹ For example, Portugal, speaking on behalf of the EU after the ICC president's report to the General Assembly, "urged the Government of the Sudan, in particular, to cooperate with the Court." Australia, Canada, Liechtenstein, Mexico, New Zealand, Norway, and Trinidad and Tobago (on behalf of the Caribbean Community) also made positive interventions in this direction. See "Presidents of International Court of Justice, International Criminal Court President Reports to General Assembly," UN press release, November 1, 2007.

¹⁰ Before the UN Security Council, the United Kingdom representative stated: "There can be no impunity in Darfur. Sudan should fully cooperate with the International Criminal Court." United Nations Security Council, 5749th Meeting, S/PV.5749, September 25, 2007, <http://daccessdds.un.org/doc/UNDOC/PRO/No7/515/72/PDF/No751572.pdf?OpenElement> (accessed November 5, 2007), p. 15. During the UN General Assembly general debate, Denmark indicated, "we must implement ICC arrest warrants and bring perpetrators to justice" in discussing Darfur, and Australia, "call[ed] on the Government of Sudan to act on the warrants.... [and] to arrest Minister of State for Humanitarian Affairs, Ahmad Harun, and militia leader Ali Kushayb and hand them over to the Court." Coalition for the ICC, "Excerpts from the General Debate of the 62nd Session of the General Assembly, 25 September – 3 October 2007," p. 6.

¹¹ "Security Council diplomats welcome acceptance of hybrid force for Darfur, while stressing need to keep pressure on government, rebels," UN Security Council news release, June 26, 2007, <http://www.un.org/news/press/docs/2007/sc9061.doc.htm> (accessed November 8, 2007); Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council pursuant to UNSCR 1593 (2005), June 7, 2007, http://www.icc-cpi.int/library/organs/otp/lmo_20070607_en.pdf (accessed November 8, 2007).

¹² See United Nations Security Council, 5749th Meeting, S/PV.5749, September 25, 2007.

suspects. Significantly, displaced persons with whom Human Rights Watch spoke in March 2007 flagged that the failure to execute the arrest warrants for leaders of the Lord's Resistance Army (LRA) since they were issued in 2005 has fueled opposition to the ICC's involvement in northern Uganda.

States parties' political and financial support has been essential to the ICC's establishment, but without targeted concerted efforts to advance the ICC's objectives, this court will fail. With its unprecedented judicial mandate, the ICC is unique among permanent international institutions. It is not enough for states parties to have created the court; states parties must be actively engaged in pushing its efforts forward.

States parties should regularly signal the general significance of the court in order to create an overall climate in which cooperation is understood as required. States parties must also indicate in specific situations before the ICC the value they attach to cooperation with the court alongside other objectives. States parties should encourage intergovernmental organizations like the United Nations to do the same. We recognize that states parties need to manage advancing a range of interests. Nevertheless, silence, especially in the face of direct attacks on the court's credibility, sends a message that is inconsistent with states parties' commitments to support the ICC.

Practical Assistance

Judicial and logistical assistance to the ICC by states parties and intergovernmental organizations is also key to the court conducting its work. Such assistance may take a variety of forms and includes activities such as information sharing, facilitating interviews with witnesses, providing transport, and relocating witnesses.

Some positive action was taken to ensure such assistance this year. For example, some states concluded witness relocation agreements, and ten states parties ratified the Agreement on Privileges and Immunity of the ICC.¹³ The Democratic Republic of the Congo also facilitated the transfer of an ICC suspect to The Hague while other states parties

¹³ United Nations General Assembly, "Report of the International Criminal Court," U.N. Doc. A/62/314, August 31, 2007, http://www.icc-cpi.int/library/organs/presidency/ICC_Report_to_UN_2006_2007_English.pdf (accessed November 5, 2007), paras. 50 and 52 ("ICC Annual Report to the UN").

provided logistical support in the field.¹⁴ Operational assistance from the United Nations was significant as well.¹⁵

At the same time, there are a range of legal instruments that have yet to be completed by governments and intergovernmental organizations that are necessary to create the foundation in law for crucial assistance. For example, only a very small number of states parties have concluded enforcement of sentences agreements,¹⁶ and many more witness relocation agreements are needed. As for intergovernmental organizations, the ICC's relationship agreement with the African Union has yet to be concluded. Meanwhile, the European Union, which is made up almost entirely of states parties, has dragged its heels in integrating ICC cooperation into the rules of engagement for its force for CAR and Chad. As the first real test of implementation of the ICC's relationship agreement with the European Union, this is particularly disconcerting.

ASP Working Groups' Efforts on Cooperation

Over the course of the year, the ASP working groups in The Hague and New York took steps to enhance cooperation. Under the facilitation of the Netherlands and Denmark, consultations were held and a valuable, comprehensive report was produced ("Report of the Bureau on Cooperation"). The report identifies a range of crucial steps states parties should take to promote cooperation, including: 1) designating national focal points to coordinate court-issues across government institutions; 2) utilizing bilateral contacts and activities in regional and international organizations to generate political momentum for the timely surrender of suspects; 3) raising the ICC when discussing relevant matters, such as peacekeeping mandates, Security Council missions, and peace initiatives; and 4) establishing a follow-up mechanism for the working groups' efforts, such as an ASP focal point on cooperation.¹⁷

¹⁴ See "Second arrest: Germain Katanga transferred into the custody of the ICC," ICC press release, October 18, 2007, <http://www.icc-cpi.int/press/pressreleases/284.html> (accessed November 5, 2007).

¹⁵ "Report of the International Criminal Court," paras. 43-55.

¹⁶ Ibid, para. 52; "The United Kingdom of Great Britain and Northern Ireland signs an Agreement on the enforcement of sentences," ICC news release, November 8, 2007, <http://www.icc-cpi.int/press/pressreleases/300.html> (accessed November 8, 2007); "Austria Becomes the first State to sign an Agreement with the ICC on the Enforcement of Sentences," ICC news release, October 27, 2007, <http://www.icc-cpi.int/press/pressreleases/116.html> (accessed November 13, 2007).

¹⁷ Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC-ASP), "Report of the Bureau on cooperation," ICC-ASP/6/21, October 19, 2007, http://www.icc-cpi.int/library/asp/ICC-ASP-6-21_English.pdf (accessed November 5, 2007).

It is vital that the report on cooperation is followed up on in a deliberate and focused manner and that efforts by states parties to promote cooperation are intensified. We see the upcoming ASP session as a significant moment in which states parties can advance these objectives. Accordingly, we urge states parties at the sixth ASP session to:

- Publicly call on Sudan in the general debate to arrest and surrender ICC suspects;
- Indicate in the general debate and the relevant sections of the omnibus resolution dedication to specific and ongoing efforts to ensure cooperation, including at appropriate moments at the UN and in interactions with non-cooperating states. States parties should also cite concrete steps taken to advance cooperation if they can be publicly mentioned;
- Endorse the Report of the Bureau on Cooperation and express support in the general debate and the omnibus resolution for an ASP focal point on cooperation. Such a focal point could in particular work informally with ICC officials throughout the year as necessary to identify cooperation challenges. The focal point could further report on the status of cooperation at the following ASP;
- At this ASP, hold and actively participate in an informal meeting to get acquainted with the Report of the Bureau on Cooperation and to identify next steps to build off the report's conclusions, including follow-up mechanisms. Such a meeting would provide a valuable opportunity for states parties, court officials, and non-governmental organizations to exchange views; and
- Plan to convene a working group on cooperation during the ASP's seventh session to discuss work undertaken by states parties to follow up on the Report of the Bureau on Cooperation.

Notably, the next briefing by the ICC prosecutor to the Security Council on the progress of the Darfur investigation will coincide with the ASP sixth session. This opportunity only further underscores the importance of states parties clearly indicating at the ASP session that Sudan must arrest and surrender ICC suspects. We urge delegations attending the ASP session to attend the prosecutor's report to the council, which will also be taking place at the UN. Attendance by a large group of states parties would send a powerful signal to the Security Council and the government of Sudan.

Need for Continued and Concrete Commitment to Peace and Justice

As the ICC seeks to fulfill its mandate in ending impunity for the crimes of most serious concern to the international community, not surprisingly, it has become involved in situations where conflict is ongoing. In fact, such situations are arguably the most significant for the ICC to pursue given the possibility that the credible threat of prosecution can contribute to ending ongoing abuses.

Where conflicts are active, it is likely that peace negotiations or other initiatives aimed at stopping the fighting will take place in parallel to the ICC's work. Indeed, this is currently the case in all situations in which the ICC is involved: northern Uganda, Darfur, the DRC, and the CAR.

Unquestionably, there are sensitivities in such scenarios and at times apparent tensions between achieving peace and justice, especially in the short-term. It is, however, particularly important at such moments that states seek to advance both objectives without forsaking one for the other. It is also crucial that states maintain clear support for the ICC's involvement. Any other approach would be not only inconsistent with states parties' declared commitments,¹⁸ but also short-sighted.

History has shown the devastating consequences of impunity.¹⁹ For example, we believe that the failure to address justice in the Comprehensive Peace Agreement between northern and southern Sudan has encouraged the Sudanese government and other parties to import abusive strategies from southern Sudan to the conflict in Darfur. Such strategies include the direct targeting of civilians, "scorched earth" tactics, and the use of rape as a weapon of war. In the eastern Democratic Republic of Congo, we have similarly seen that continued violence appears to be fueled by the impunity that has largely existed for alleged perpetrators of serious crimes.

Experience also has belied claims that justice thwarts peace. For example, the unsealing of the indictment of former Liberian president Charles Taylor for crimes committed in Sierra

¹⁸ In ratifying the Rome Statute, States Parties committed to the principle that genocide, crimes against humanity, and war crimes should no longer go unpunished. The Rome Statute states: "grave crimes threaten the peace, security and well-being of the world" and that putting an end to impunity for the most serious crimes will "contribute to the prevention of such crimes." Rome Statute, preamble.

¹⁹ In one of the more striking examples, in Sierra Leone in 1999, the rebel leader Foday Sankoh, who had been implicated with his Revolutionary United Front (RUF) in many war crimes, received an amnesty in exchange for signing the Lomé Peace Accord. Only months later, the RUF went on to commit war crimes by taking hundreds hostage and committing rampant sexual assault.

Leone – which was issued while he attended peace talks to end conflict in Liberia – was strongly criticized by some at the time for being poorly timed and potentially jeopardizing the negotiations. Yet, only a couple of months later a peace agreement on Liberia was concluded as Taylor stepped down from power. Taylor’s later arrest in Nigeria and transfer to the Special Court for Sierra Leone has furthermore helped enhance stability in the region.

More recently, in northern Uganda, the prosecutor’s issuance of arrest warrants for LRA leaders is widely credited with prompting them back to the negotiating table for peace talks. The agreement on accountability and reconciliation signed between the parties on June 29 as part of the talks is also illustrative. LRA leaders not surprisingly have sought to use peace talks to escape prosecution. In this effort, they have insisted that the warrants somehow be “dropped” as a precondition to achieving peace. The negotiations, however, have rightly reflected that this is not possible. In an effort to find an acceptable way forward, the parties agreed on June 29 to the need for trials of those who “bear particular responsibility” for serious crimes, envisioning national prosecutions of such alleged perpetrators.²⁰

Human Rights Watch supports the ICC warrants for LRA leaders. We also recognize that the Rome Statute prefers national trials where states are willing and able to conduct them. It is unclear if the envisioned national trials would meet the Rome Statute’s requirements and other necessary international standards. It is the ICC judges who will ultimately determine whether such trials would be an acceptable alternative to ICC proceedings.

Major challenges undoubtedly still lie ahead to successfully concluding the Juba talks. Nevertheless, the June 29 agreement is an instance where insistence on justice has not spoiled peace efforts and has advanced discussions on accountability.²¹

The relationship between peace and justice is much more than a theoretical debate and exercise. It often frames the challenging reality that the court faces in the situations under investigation. It is essential that states parties remain committed to the court’s mandate and denounce efforts to forsake justice even in specific and difficult situations. States parties must act in accordance with their declared commitment to both peace and justice, including where there are tensions to be managed in the short-term. Moreover, allowing justice to be

²⁰ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, Juba, Sudan, June 29, 2007, paras. 5.1, 6.1.

²¹ Confession and reconciliation measures without any prosecutions initially were the focus of discussions. In addition, the envisioned national trials appear to cover a larger group of alleged perpetrators than those for whom the ICC has issued arrest warrants.

rejected, sidelined, or compromised in exchange for possible gains in peace negotiations risks undercutting critical advances over the past decade in signaling that committing serious crimes will not be tolerated.

Within this context, we believe that it is essential for states parties to use the upcoming ASP session to reaffirm that justice is essential to a lasting peace. Specifically, we urge states parties in the general debate and omnibus resolution to:

- Stress that ensuring perpetrators of the most serious crimes are held accountable is crucial and a critical component to establishing a durable peace, including in ICC situations. In the omnibus resolution, such statements can build on existing language in the omnibus resolution from the ASP's fifth session;²² and
- Stress commitment to work to advance both peace and justice in concrete situations currently before the ICC. Such expressions in the general debate would be particularly timely with regard to northern Uganda.

Elections of Judges and Registrar

At the upcoming ASP session, states will vote to elect three new judges. Consistent with procedures adopted by the ASP, two of the judges elected must be candidates with criminal law and criminal trial experience (“list A”). The other judge may have established competence in international law and experience in a professional legal capacity relevant to the ICC’s judicial experience (“list B”) instead of meeting list A’s qualifications.²³

In electing new judges, states parties must put aside politics and vote only for the most highly qualified judges. This approach is consistent with what Human Rights Watch urged in

²² The resolution states: “Convinced that the International Criminal Court is an essential means of promoting respect for international humanitarian law and human rights, thus contributing ...to the prevention of armed conflicts, the preservation of peace and the strengthening of international security and the advancement of post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, in accordance with the purposes and principles of the Charter of the United Nations, Convinced also that there can be no lasting peace without justice and that peace and justice are thus complementary requirements, Convinced further that justice and the fight against impunity are, and must remain, indivisible and that in this regard universal adherence to the Rome Statute of the International Criminal Court is essential.” Official Records of the Assembly of the States Parties to the Rome Statute of the International Criminal Court, Fifth session, The Hague, 23 November to 1 December 2006 (ICC-ASP/5/32), part III, Resolution ICC-ASP/5/Res.3, “Strengthening the International Criminal Court and the Assembly of States Parties,” preamble.

²³ Rome Statute, Article 36(3).

advance of the ICC's first judicial elections in 2003.²⁴ Many elections at the United Nations and other international institutions have been characterized by "vote-trading," where states agree to support one another's candidates with minimal regard to the individual's qualifications. However, vote-trading can lead to the election of poorly qualified judges. It is imperative that states elect the best legal minds and the most qualified jurists to ensure a skilled and representative bench. The judges elected will be at the cutting-edge of a rapidly developing system of international justice. Principle and merit should rule the day.

Human Rights Watch also believes that all newly elected judges from this point forward should have criminal trial experience. The ICC is beginning what will necessarily be complex and highly charged trials. Seasoned practitioners are in our view infinitely better placed to conduct them. Indeed, the practice of other international and hybrid criminal tribunals has shown that criminal trial experience is vital to judges effectively managing the courtroom and conducting proceedings that are both expeditious and adhere to the full range of international fair trial standards. We urge states parties to review closely each candidate's qualifications and to only elect those with the most relevant experience. We also urge states parties to nominate judges in the future who have criminal trial experience.

At the sixth session, the ASP may decide to make recommendations with regard to a new registrar who will be elected by the ICC judges.²⁵ We urge states parties to recommend only the most highly qualified candidates. An effective registrar in our view should have exceptional competence in matters of administration while also having an ability to conceptualize and advance a proper vision for the ICC's work.

Aggression

A substantial portion of the ASP's sixth session will be devoted to the crime of aggression. Human Rights Watch's institutional mandate includes a position of strict neutrality on issues of *jus ad bellum*, because we find it the best way to focus on the conduct of war, or *jus in bello*, and thereby to promote our primary goal of encouraging all parties to a conflict to respect international humanitarian law.²⁶ Consistent with this approach, we take no position on the substance of a definition of the crime of aggression.

²⁴ "ICC: Electing Best Judges is Critical," Human Rights Watch news release, January 31, 2003.

²⁵ Rome Statute, Article 43(4).

²⁶ The only exceptions that Human Rights Watch has made to this policy is to call for military intervention where massive loss of human life, on the order of genocide, can be halted through no other means, as was the case in Bosnia and Rwanda in the 1990s.

At the same time, Human Rights Watch is deeply concerned about proposals that a UN Security Council determination be required to “trigger” any exercise of the ICC’s jurisdiction over the crime.²⁷ Having the Security Council act as the gatekeeper to the court’s exercise of jurisdiction would subordinate the court to the decisions of a political body with a highly politicized decision-making process. The approach would undercut the court’s independence, and also its legitimacy, authority and credibility.²⁸ Accordingly, we urge states parties to reject any proposal that gives the Security Council exclusive control over the ICC’s exercise of jurisdiction over a crime under its subject matter jurisdiction.

Strategic Planning

Last year the ICC engaged in a process of developing a strategic plan.²⁹ Human Rights Watch believes that this is an important way for the court to articulate its vision of its work, objectives to implement this vision, and plans to achieve objectives.

Human Rights Watch has previously raised concerns that the ICC’s plan does not adequately address the court’s achieving resonance and relevance with communities most affected by the crimes that it investigates and tries.³⁰ While effective investigations and fair, efficient trials are the core business of the court, the ICC will not fully achieve its mandate unless it is meaningful to the populations for whom justice is being done.

Last year, under the facilitation of France, the ASP working group in The Hague produced a report which welcomed the court’s work on the plan and encouraged the ICC to further elaborate on several issues as a matter of priority. These mostly related to the court’s ability to make its work meaningful to affected communities and included: location of court activities, including field activities; the role of victims; outreach and communications; and

²⁷ See ICC-ASP, “Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression,” July 25, 2007, ICC-ASP/6/SWGCA/INF.1, http://www.icc-cpi.int/library/asp/ICC-ASP-6-SWGCA-INF.1_English.pdf (accessed November 7, 2007).

²⁸ For further discussion of this issue more generally, see Human Rights Watch, *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* (New York: Human Rights Watch, 1998), <http://www.hrw.org/reports98/icc/>, section C “Role of the Security Council” and section D “How an Investigation is Triggered” (“In order to establish an independent and effective Court it is absolutely essential that the prosecutor be empowered to initiate investigations ex officio on the basis of reliable information... If only states and the Security Council can trigger prosecutorial investigations, the proper functioning of the Court will be dependant on the political motivations of these entities”).

²⁹ 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 November 5, 2007).

³⁰ Human Rights Watch, *The Strategic Plan of the International Criminal Court: A Human Rights Watch Memorandum*, no. 1, July 2006, <http://hrw.org/backgrounder/ij/memoo7o6/ijo7o6.pdf>.

positive complementarity.³¹ A resolution adopted by the fifth ASP further echoed the report, inviting ongoing dialogue between the court and the ASP Bureau on the plan, such as regarding the plan's "concrete implementation" and "cross-cutting issues" including the location of ICC activities, victims, and outreach and communication.³² The ASP resolution further invited the ICC to submit an update on the strategic plan at the sixth ASP session.

The detailed outreach strategy issued by the ICC in 2006 is welcome.³³ The work undertaken by the court on a strategy with regard to victims, which we understand is currently being elaborated, is also welcome. We also understand that court officials and staff have made advances in further developing the strategic plan with regard to certain areas identified by them as priorities, such as decision making processes and personnel management at the court.

We, nonetheless, are concerned that overall progress in providing strategies in key areas has been limited in 2007. In particular, we regret that strategies with respect to positive complementarity and location of court activities, including *in situ* proceedings, have not been developed. Notably, the feasibility of *in situ* proceedings already is being explored by ICC judges in the case against Thomas Lubanga Dyilo.³⁴ In addition, we understand that the post of Strategic Planning Coordinator, which was approved for this year's budget to assist in further development and implementation of strategies and will be attached to the presidency, has yet to be filled.

We recognize that developing detailed strategies building on a strategic plan is an intensive effort. However, experience to date regarding outreach and the ICC's field offices has shown the importance of officials and staff working to identify court wide strategies and objectives to enhancing the court's effectiveness in the areas that receive this reflection.

³¹ ICC-ASP, "Report of the Bureau on the strategic planning process of the International Criminal Court," ICC-ASP/5/30, November 20, 2006, http://www.icc-cpi.int/library/asp/ICC-ASP-5-30_English.pdf (accessed November 7, 2007), paras. 21-25.

³² Official Records of the Assembly of the States Parties to the Rome Statute of the International Criminal Court, Fifth session, The Hague, 23 November to 1 December 2006 (ICC-ASP/5/32), part III, Resolution ICC-ASP/5/Res.2, paras. 3 and 4.

³³ 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 5, 2007).

³⁴ ICC, Prosecutor v. Thomas Lubanga Dyilo, Transcript of Hearing (Status Conference), The Hague, September 4, 2007, ICC-012/04-01/06, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-50_en.pdf (accessed November 7, 2007), p. 4.

At the upcoming session, we urge states parties to signal their continued commitment to the court's strategic planning and encourage timely progress on key areas. Specifically, we urge states parties in the omnibus resolution to:

- Affirm the significance of the strategic planning process;
- Invite the court to submit the strategy regarding victims and also strategies on positive complementarity and location of the ICC's activities as soon as possible;
- Invite the court to prepare an updated strategy on outreach and communications within a reasonable period; and
- Invite continued dialogue with the ASP Bureau, while respecting the court's independence, on forthcoming material related to strategic planning.

In addition, we understand a hearing will be convened by states parties on outreach during the upcoming ASP session, as has been done in the previous two sessions. It will be important for states parties to attend this hearing and to signal the significance of effective outreach and communications. Human Rights Watch is preparing a separate briefing paper for this hearing that summarizes findings on ICC outreach and communications based on field missions conducted to situation countries over the past year.