

**HUMAN RIGHTS WATCH MEMORANDUM ON
THE STRATEGIC PLAN OF THE INTERNATIONAL CRIMINAL COURT
July 2006**

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I. Introduction

In December 2004 the International Criminal Court (ICC) commenced a process to develop a strategic plan (the “Strategic Plan”).¹ Human Rights Watch welcomes this initiative, which could allow the court to articulate its vision of its work, identify objectives to implement this vision, and present plans to achieve objectives. The Strategic Plan will also allow the court to identify clear divisions of labor between the court’s different units. These steps can enhance the court’s capacity to fulfill its mandate and ensure that the court has a strong sense of its future direction.

The court has indicated it will consider comments on the plan, including from States Parties and nongovernmental organizations (NGOs).² It will then submit a revised Strategic Plan to the Assembly of States Parties (ASP) in advance of its fifth session. Consultation between the ICC and States Parties on the plan can be mutually beneficial by enhancing understanding of the court’s work. At the same time, States Parties must respect the independence of the ICC as a judicial institution.³

Human Rights Watch welcomes the opportunity to comment on the Strategic Plan. The plan currently includes a number of crucial objectives, such as ensuring the full exercise of participants’ rights, promoting awareness of the court, and ensuring cooperation by states and intergovernmental organizations. The Strategic Plan also gives prominence to the need for impartial investigations, quality prosecutions, and fair and expeditious judicial proceedings. We see these as being at the heart of the ICC’s ability to achieve its difficult and unprecedented mandate to bring perpetrators of the most serious crimes to justice when national courts are unable or unwilling to do so.

At the same time, the plan lacks vision to ensure that the court’s work has resonance and relevance with the communities most affected by the crimes the ICC will investigate and try.⁴ Our field experience suggests that the ICC’s mandate will not be fulfilled solely by

¹ The court took this step in response to a recommendation by the Committee on Budget and Finance (CBF) that: “the Court prepare a set of overarching objectives and expected accomplishments for the Court as a whole reflecting the collective plans for advancing the aims of the Rome Statute.” “Report of the Committee on Budget and Finance on the work of its third session,” August 2004, ICC-ASP/3/25, [online] http://www.icc-cpi.int/asp/documentation/doc_3rdsession.html, para. 46.

² The ICC submitted a “Report on the Strategic Plan of the Court” to the CBF in April 2006 (ICC-ASP/5/CBF.1/5). ICC officials made a presentation to NGOs on the framework of the plan on May 16, 2006.

³ As noted by the CBF, “ownership of the strategic plan should remain with the Court.” “Report of the Committee on Budget and Finance on the work of its sixth session,” May 2006, ICC-ASP/5/1, [online] http://www.icc-cpi.int/asp/documentation/doc_5thsession.html, para. 56.

⁴ These communities are also referred to as “local populations” and “affected communities” in this memorandum.

conducting efficient, effective investigations leading to fair trials, however crucial those tasks are. The experience of the ad hoc international tribunals—which are seated away from the countries where the crimes occurred and where justice has been perceived as far removed by affected communities—underscores the need to prioritize efforts to make international criminal justice accessible and meaningful to local populations.

Unless the ICC makes efforts to maximize its impact with affected communities, it will fall short of achieving its mandate and will disappoint those it was created to serve. The reality that the court will conduct only a limited number of trials in each situation it investigates makes such efforts all the more important.

The plan also places too much emphasis on management and organizational issues,⁵ particularly given the plan's scope covering the next ten years. A well run institution is key to achieving the court's success, but the Strategic Plan should primarily focus on the court's longer-term vision and less on institutional management.

The Strategic Plan should include maximizing the ICC's impact with affected communities as a goal. This memorandum discusses ways the court can achieve this through: victims' participation and reparations, field engagement, outreach and communications, the complementarity principle, and initiatives to promote a lasting legacy of the ICC's work.⁶ Effectively addressing these areas poses intense challenges, but their importance requires their implementation over the long term.

Recommendations for elements to be incorporated into the revised version of the Strategic Plan are detailed in each section of the memorandum. Cognizant that the court operates within tight budgetary constraints, most recommendations do not require substantial additional resources.

While it is not entirely clear how detailed the court intends to make the Strategic Plan, discussion of concrete steps to achieve objectives is lacking in the current version. Our recommendations reflect the level of detail we believe is needed.⁷ More explanation of

⁵ These are mainly addressed in the third goal of the Strategic Plan, "A model for public administration: Excel in achieving desired results with minimal resources through streamlined structures and processes while maintaining flexibility and guaranteeing accountability; drawing upon sufficient qualified and motivated staff within a caring environment and a non-bureaucratic culture." This goal includes fifteen objectives compared to fewer than ten objectives for the other two goals. ICC presentation of the draft Strategic Plan, May 16, 2006.

⁶ Most of these areas are cited in some form in the current version of the Strategic Plan, but the plan does not adequately envision utilizing these to maximize the effect of the ICC's work with local populations.

⁷ Human Rights Watch understands the court has already begun to develop "strategies on certain key issues while the strategic plan was being developed." Where these exist, they should also be included in the plan. See "Report on the Strategic Plan of the Court," para. 25.

objectives, and criteria to evaluate their implementation, are also needed.⁸ These are vital to the plan's better articulating the ICC's vision and how the court intends to realize its goals. Greater detail will also facilitate assessment of the amount of resources required for future court operations.

As the "engine" of the ICC, the ability of the Office of the Prosecutor (OTP) to move forward with effective investigations and prosecutions is crucial to the court's capacity to bring justice for serious crimes. Its selection of situations, cases and charges will be key to the court's legitimacy and credibility. The ICC's ability to conduct fair and expedient judicial proceedings will be fundamental to its success. This memorandum does not delve deeply into these functions because their significance in the Strategic Plan is not at issue.⁹ Nevertheless, additional explanation of objectives and strategies to ensure effective investigations and prosecutions, and quality judicial proceedings, are needed in the plan.¹⁰

II. Summary of the Strategic Plan

The Strategic Plan consists of a mission statement, goals, and objectives. The mission statement provides that, "the International Criminal Court will:

- Fairly, effectively and impartially investigate, prosecute and conduct trials of the most serious crimes;
- Act transparently and efficiently; and
- Contribute to long lasting respect for and enforcement of international criminal justice, to the prevention of crime and to the fight against impunity."

The goals which support the mission statement are stated as:

- Quality of justice;
- A well-recognized and adequately supported institution; and

⁸ Human Rights Watch understands the court will prepare an "implementation plan" and "strategic indicators" for evaluating implementation of the Strategic Plan by August 2006. In addition, organ-specific strategies will be developed to supplement the plan where needed. "Report on the Strategic Plan of the Court," para. 6. The Strategic Plan should include the court's "implementation plan" and "strategic indicators."

⁹ See Section II. Human Rights Watch notes that the OTP is also producing its own strategic plan.

¹⁰ For example, the objectives under the goal "quality of justice" include quality standards for victims, witnesses, and defendants, and a system to address security risks. However, the plan does not explain what standards constitute "quality standards."

- A model of public administration.

Objectives are listed under each goal in bullet-point format. Approximately thirty objectives are provided, divided into short-term (one- to three-year) and long-term (four- to ten-year) objectives.¹¹

III. Beyond Investigations and Trials: Maximizing Impact with Affected Communities

A. Victims' Participation and Reparations

Victim's participation and reparations at the ICC¹² provide important opportunities for the court to enhance its impact with affected communities. The Strategic Plan makes significant references to victims,¹³ but does not adequately address this aspect.

1. The importance and difficulties of realizing victims' participation and reparations

Victims' participation has the potential to increase the relevance of the ICC among affected communities. It can break down the barriers that have traditionally separated victims and international judicial processes, by enabling victims to have some involvement in the court's proceedings. Reparations can also play an important role in enhancing the court's resonance with local populations: reparations can have strong symbolic importance as they may be seen to acknowledge the gravity of the crimes and the suffering caused. Reparations may also provide the most tangible reflection of the ICC's contribution to victims.

In order to achieve these benefits, affected communities must understand the rights of victims to participate and to receive reparations. This will help to ensure that victims are able to exercise these rights, and have realistic expectations about them.

There are numerous challenges to ensuring that affected communities have an adequate understanding of these rights, challenges that are magnified by the absence of precedents

¹¹ ICC presentation of the draft Strategic Plan, May 16, 2006.

¹² For the first time, victims have the opportunity at an international criminal tribunal to serve as "participants" in the proceedings. As participants, victims are empowered to present their views and concerns beyond giving testimony as witnesses. It is also the first international tribunal offering victims the possibility to receive reparations. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, *entered into force* July 1, 2002, arts. 68(3) and 75.

¹³ The court's goal to provide "quality of justice" is defined as including "ensuring full exercise of the rights of all participants." ICC presentation of the draft Strategic Plan, May 16, 2006.

to rely on and learn from. Experience has shown that the workings of a complex criminal proceeding, particularly at an international justice mechanism, may be confusing or even daunting to many victims. Lack of information may discourage them from applying to participate or to receive reparations, or from actively participating. For example, we understand from partners in the Democratic Republic of the Congo (DRC) that many victims and organizations working with victims are awaiting more information on reparations before deciding whether to apply to participate or apply to receive reparations. Other challenges include:

- Possible reluctance by victims to participate due to fear of reprisals, lack of trust in ICC operations, or lack of information about protection measures;¹⁴
- The need to respond to potentially large numbers of victims who could come forward;
- The difficulty of reaching victims in rural or insecure areas;
- Tensions between different victims groups;
- The risk that only the most organized victims will participate or receive reparations;
- The need to avoid creating unrealistic expectations on the part of victims about participation and reparations; and
- Ensuring adequate legal representation for victim participants.

Sustained efforts over time will be needed to overcome the obstacles involved.

2. Key components to realizing victims' participation and reparations

The Strategic Plan should emphasize the role of victims in the court's activities, and seek to utilize victims' participation and reparations to maximize the ICC's impact with affected communities. The plan should include the following strategies to achieve this:

- Disseminating information to affected communities on:
 - The role of victims at the court and the limitations of this role;
 - How to apply to participate;
 - How to apply to receive reparations; and
 - Court policies on participation and reparations as they are decided by the judges.¹⁵

¹⁴ For instance, partners in Uganda have expressed that Ugandans do not believe that the five suspects from the Lord's Resistance Army leaders will be arrested and sent to the ICC. They are therefore hesitant to come forward to participate, for fear of reprisal.

- Making information available to affected communities in an accessible format for persons who may lack education, be illiterate, or speak particular languages and dialects.
- Reaching out to victims in remote areas or places where security is fragile or non-existent.¹⁶

Given logistical, financial, and security constraints, victim participants will likely not attend the majority of proceedings. Legal representatives will be responsible for informing them about some developments, but the court should also incorporate steps in the plan to provide broader information about the proceedings to victim participants.

The Strategic Plan should reflect that all court organs share the responsibility to implement victims' rights and to ensure that a range of victims of crimes investigated by the ICC are represented in the court's work. For instance, the OTP may include charges that are representative of the range of crimes committed in a situation, allowing a variety of victims to participate.¹⁷ Victims interact with the different organs at different stages. Every organ must account for this interaction and keep victims' rights in mind at all times.

Finally, the Strategic Plan should recognize that intermediaries can extend the ICC's work, but cannot substitute it. The court has emphasized reliance on intermediaries, such as NGOs, to implement victims' participation and reparations by disseminating information and assisting victims in filling out forms.¹⁸ Seeking the assistance of intermediaries is understandable: some NGOs have strong relationships with victim populations and expertise in the local culture, and the ICC has limited resources. However, local NGOs may have limited capacities to assist the court, and may face

¹⁵ For instance, Pre-Trial Chamber I recently issued an important decision on the participation of six victims in court proceedings. This decision holds that Article 68(3) of the Rome Statute is applicable at the investigation stage. It also provides that victims may participate when a matter is still defined as a situation, in addition to when it has been later narrowed to specific accused persons. If confirmed, this decision should be explained in an accessible manner to victims and organizations working with victims, to provide greater clarity on participation. "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6," (Pre-Trial Chamber I), January 17, 2006.

¹⁶ For more recommendations about disseminating information to victims, see Victims Rights Working Group, "Victim Participation at the International Criminal Court: Summary of Issues and Recommendations," November 2003, [online] <http://www.vrwg.org/Publications/1.html>, p. 15.

¹⁷ The Registrar can also inform and facilitate the participation of a broad range of victims; judges will take decisions on the participation of victims.

¹⁸ The 2006 ICC budget states: "Strategies for informing victims, disseminating standard application forms and ensuring appropriate assistance to victims in making their applications and throughout the proceedings necessarily depend on developing and maintaining relations with intermediaries on the ground ..." See "Proposed Programme Budget for 2006 of the International Criminal Court," August 24, 2005, [online] http://www.icc-cpi.int/asp/documentation/doc_4thsession.html, para. 441.

security risks to providing assistance. We understand that the court has not been able to secure firm cooperation from many potential partners. This underscores the importance of the court conducting the core of this work, at least in its first years.

B. Field Engagement

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. The Strategic Plan lists “development of options for the geographic location of the court’s activities” (the “Geographic Options”) as an objective,¹⁹ but does not provide any details. The plan should indicate objectives and strategies to utilize field engagement to help make the ICC’s work accessible and meaningful to local populations.²⁰ The necessity of “field engagement” in the country where the crimes occurred for the ICC to maximize its impact with affected communities cannot be overstated. By field engagement, we mean a substantive, sustained presence of the court in situation countries,²¹ when the security situation allows it, including through:

- Visits to situation countries by top ICC officials;
- Establishment of field offices;
- Decentralization of certain core functions, such as investigations, by locating responsible staff in the field; and
- Holding *in situ* proceedings.²²

These are explored in more detail below.

1. The importance and difficulties of field engagement

Field engagement is central to the court’s ability to maximize its impact in several ways. Presence by court staff in the field brings the court physically and culturally closer to local populations. Court activities conducted in situation countries—particularly any proceedings held *in situ*—will likely create more interest from affected communities than

¹⁹ This is listed under the goal of “quality of justice.”

²⁰ Human Rights Watch understands that the ICC intends to detail the Geographic Options within three years. However, it is crucial that the Strategic Plan provide at least some clarity on the ICC’s vision and plans for field activities.

²¹ In some instances, “field” may also refer to countries that are neighbors of situation countries.

²² The Rome Statute expressly provides for the possibility of holding proceedings elsewhere than the seat of the court in The Hague. Rome Statute, art. 3(3).

activities in The Hague. Many States Parties have expressed their hope that the ICC will soon consider seriously the possibility to hold some proceedings *in situ*.²³

Local partners in the DRC and Uganda have expressed frustration about ICC staff “flying in and out” of their countries. They have indicated that the absence of ongoing engagement by ICC staff has created false expectations about the court. Increased ICC staff presence in the field may make the court more sensitive to the needs of affected communities and provide staff with a better appreciation of the local culture and context.

Court activities in the field could also facilitate interaction between the court and domestic justice systems in situation countries. This can contribute to enhancing respect for the rule of law and human rights, and strengthening national judicial institutions in these countries (for more discussion of this, see this section, parts D and E, below.) *In situ* proceedings may provide even greater opportunities for such interaction.

Situation countries are often unstable, creating complex security challenges. Where the country is undergoing armed conflict or where the government does not welcome ICC involvement, these challenges will obviously be intensified. Logistical constraints and financial costs create additional obstacles, particularly to holding any proceedings *in situ*. Substantial time and effort will be required to overcome these challenges. However, the Strategic Plan and Geographic Options are important opportunities for the court to take initial steps toward achieving effective field engagement.

2. Key components of the court’s approach to field engagement

The Strategic Plan should envision coordination and a common vision among the ICC’s different organs and staff based in The Hague and the field. A number of specific activities detailed below should also be included.

²³ During the U.N. General Assembly meeting on the ICC in November 2005, Uganda said the following: “Once trial proceedings begin, it may be in the interests of the court and natural justice to hold such proceedings in the vicinity where the crimes were committed, i.e. *in situ*, taking into consideration logistical concerns and access to the court by victims.” During the ASP in December 2005, Nigeria said the following on behalf of the twenty-seven African States Parties: “[T]he strategy of the court should ensure that justice is actually done. What we mean by this is that justice has to be seen to be done by the affected communities.... [T]rials should, as much as possible be carried out in the localities or region where the crime took place.... This would leave a legacy of lasting respect for the enforcement of international justice directly to communities suffering the break down of the respect of the rule of law.” See [online] <http://www.iccnw.org/?mod=ga60> and <http://www.iccnw.org/?mod=asp4>. See also “Report of the U.N. Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,” August 23, 2004, S/2004/616, [online] <http://www.un.org/Docs/sc/sgrep04.html>, para. 44.

a. Visits by top ICC officials to situations under investigation

The Strategic Plan should propose that top ICC officials regularly visit the field²⁴ to:

- Raise the ICC's public profile through contacts with local and international media;
- Demonstrate the court's attention to the views of affected communities by engaging in a two-way dialogue with civil society about the operations of the court; and
- Evaluate the court's field operations.

a. ICC field offices and decentralization of functions

The Strategic Plan should include the ICC's establishing, where possible, field offices in every country where it is conducting investigations. When the security situation does not allow, offices in neighboring countries should be considered. Field offices should have a comprehensive role throughout the period of ICC involvement, and be established as soon as possible after the Prosecutor opens an investigation.²⁵

The Strategic Plan or the Geographic Options should also address the court's approach to the staffing, location, and functions of field offices. While the court's approach will need to be tailored to each situation, we see the following aspects as important:

- Staffing: National staff should be hired to work in field offices. This will be essential to provide information about the domestic context, which will help ensure that activities in areas such as outreach and witness protection can be appropriately formulated;
- Location: Field offices should be established as close as possible to, if not in, the areas where victims are located. These should be in addition to field offices in capitals. Offices in capitals are important as a base of operations and for relations with government officials, but they may not be accessible to affected communities who live in remote areas.²⁶

²⁴ In this regard, Human Rights Watch welcomes the recent visits to the field by top ICC officials. The Registrar visited Uganda (Kampala and Gulu in the North) and Chad at the end of March and beginning of April 2006, and the Chief Prosecutor and Deputy Prosecutor (Prosecutions) visited Kinshasa on April 2-4, 2006.

²⁵ Human Rights Watch welcomes the establishment of several field offices to date.

²⁶ Local partners in Uganda have expressed this sentiment about the ICC field office in Kampala. Another illustration of this issue is from the experience of the International Criminal Tribunal for Rwanda (ICTR): According to some analysts, the information center established by the ICTR in Rwanda's capital Kigali, while "attractive to a tiny part of the urban elite ... offers little to the majority of Rwandans, who are illiterate and live in rural areas." See Eric Stover and Harvey M. Weinstein, eds., *My neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (New York: Cambridge University Press, 2004), p. 56.

- Functions: The court should agree on how to accommodate the different functions to be carried out at field offices. For instance, outreach calls for spaces that are accessible to the public, while investigations require confidentiality and security.
- Decentralization: While the court's operational center will remain in The Hague, some ICC staff should be based in the field on a permanent or semi-permanent basis to fulfill relevant functions. Functions might include: investigations, witness protection and support, victims' participation, cooperation and outreach. Field staff should also be allowed sufficient autonomy and seniority to fulfill their functions.

b. In situ proceedings

In light of the unique challenges posed by holding *in situ* proceedings, a gradual approach by the ICC is warranted. In the short term, the ICC should assess the logistical, security, political and financial aspects of holding *in situ* proceedings. This assessment should be made with input from field office staff and presented to the Assembly of States Parties. In the long term, the ICC should draw on this research to consider holding at least partial *in situ* proceedings on the basis of relevant criteria, such as the symbolic nature of particular proceedings for affected communities, and the security arrangements they entail. Possibilities might include proceedings involving testimony of key witnesses, final moments in the presentation of the case, or the reading of the judgment.

C. Outreach and Communications

Outreach and communications are crucial ways for the court to maximize the impact of trials with local populations. Quality judicial proceedings in The Hague that are not perceived as relevant to affected communities would be a missed opportunity. As currently formulated, the Strategic Plan creates the impression that outreach and communications are primarily means to secure cooperation and support for the court.²⁷ This is indeed an important possible outcome, but the Strategic Plan should take a broader view.

1. The importance and challenges to effective outreach and communications

Outreach and communications can help demonstrate that justice is being done, by providing the tools to local communities to develop an accurate understanding of the court's work, including complex legal proceedings.²⁸ Outreach and communications can

²⁷ "Increased awareness and understanding of the Court's activities" and "ensuring the publicity of all proceedings for local and global audiences" are two objectives under the goal of "a well-recognized and adequately supported institution." ICC presentation of the draft Strategic Plan, May 16, 2006.

²⁸ For discussion of the challenges to ensuring awareness and understanding of the court, see this section part A.

also help strengthen respect for the rule of law and accountability for serious crimes more generally, by enhancing perceptions about the role of justice for serious crimes and contributing to the court's potential deterrent effect.²⁹

Unlike a national court whose authority is implicitly accepted, the ICC has no deep-rooted legitimacy in the countries where it will work. It will also operate in communities that are polarized and wartorn. These facts make effective outreach and communications all the more important, but create challenges. Notably, those threatened by the court can be expected to do their utmost to promote misinformation about the court.³⁰

2. Components of the court's approach to outreach and communication

We see three key phases for the court's plans on outreach and communications.³¹ The first phase should be making general information about the court and its mandate accessible to local populations.³² The second phase should be holding events where court staff can have direct exchanges with local communities, such as town hall meetings. This will give a human face to an otherwise abstract institution and allow these communities to express their views to court staff. As the ASP has noted, outreach is about more than providing information; it is about *engaging* communities.³³ The third phase should be informing local populations about developments in ICC proceedings. Given that trials are long and complex, the court will need to identify creative approaches to update local audiences in a way that sustains their interest. This may include video summaries, radio summaries, or partial *in situ* proceedings.

²⁹ For instance, during a meeting in April 2006 between a Human Rights Watch researcher and the leader of an armed group allegedly responsible for grave human rights violations in Katanga in the DRC, the leader mentioned the recent arrest on an ICC warrant of Thomas Lubanga, and expressed his intention to investigate abuses committed by his troops because he did not want to "end up like Lubanga."

³⁰ For discussion of other challenges related to outreach and communications, see this section, part A.

³¹ Human Rights Watch notes that the ICC is preparing a detailed strategic plan specifically on outreach activities (the "Outreach Plan"), in response to a request by the ASP. See "Strengthening the International Criminal Court and the Assembly of States Parties," adopted by the Fourth Assembly of States Parties, December 3, 2005, [online] http://www.icc-cpi.int/asp/asprecords/ASP_4thsession.html, para. 22. We understand that this plan will address specific strategies for each of the situations under investigation, including the structure of the outreach office, and the court's relationship with other actors conducting outreach. We also understand that external consultations will soon take place on the Outreach Plan. At the same time, the Strategic Plan should articulate at least some of the court's plans for outreach and communications.

³² The court has indicated a reliance to a large extent on local actors to conduct outreach and communications. See "Report on the activities of the Court, Fourth session of the Assembly of States Parties," September 16, 2005, [online] http://www.icc-cpi.int/asp/documentation/doc_4thsession.html, para. 77. As discussed in this section, part A, the plan should recognize that the court itself needs to conduct the bulk of its outreach and communications activities. See also "Memorandum to State members of the Assembly of States Parties," Human Rights Watch, November 2005, [online] <http://www.iccnw.org/?mod=browserdoc&type=21&module=592&b=3>, pp. 2-5.

³³ "Strengthening the International Criminal Court and the Assembly of States Parties," para. 22 ("The Assembly of States Parties 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....").

Additionally, the court should regularly use international and national media to react to developments in the situations under investigation. Addressing inaccurate information is crucial to avoid misperceptions. Also, timely dissemination of public information, such as statements by the Prosecutor about ongoing abuses in the DRC or Darfur, may contribute to stemming abuses.³⁴

D. The Complementarity Principle

The purpose of the court is to prosecute the most serious crimes of concern to the international community when national courts are unable or unwilling to do so. To maximize the effect of these prosecutions, however, the Strategic Plan should envision the ICC acting as a catalyst for effective investigations and fair and expedient trials of serious crimes by national courts in certain instances. The court's application of the "complementarity principle"³⁵ allows important opportunities for the court to take limited steps to promote credible national accountability efforts.

1. The importance and difficulties of leveraging the complementarity principle

Promoting national prosecutions can help ensure greater accountability for serious crimes. This will increase the benefit of the ICC's work with affected communities.

However, the ICC may encounter serious obstacles in promoting national prosecutions. In situation countries, states that are unwilling to investigate serious crimes are unlikely to be interested in drawing from ICC expertise and practice to enhance their capacity. States that are unable to investigate serious crimes might have such limited capacity as to preclude the possibility of any fair and expedient trials at the national level. Given the breadth of the ICC's responsibilities, there are also limitations on how much the court can focus on national prosecutions. Within these constraints, however, the court should begin to identify ways in which it can leverage the complementarity principle to encourage states to bring perpetrators of serious crimes to justice.³⁶

2. Key components to utilizing the complementarity principle to promote national prosecutions

³⁴ U.N. High Commissioner for Human Rights Louise Arbour recently stated, "I believe we must call on the ICC to act more robustly, and visibly discharge the mandate ... that the Security Council has conferred on it." See "UN rights chief urges ICC to act on Darfur," Reuters, May 11, 2006.

³⁵ This principle provides that the ICC will exercise its jurisdiction only when states are unable or unwilling.

³⁶ This approach may be incorporated in the Strategic Plan in its third mission statement: "The ICC will... contribute to long lasting respect for and the enforcement of international criminal justice, to the prevention of crime and to the fight against impunity." However, the plan does not appear to identify objectives to achieve this goal. ICC presentation of the draft Strategic Plan, May 16, 2006. See also "Informal expert paper: The principle of complementarity in practice," 2003, [online] <http://www.icc-cpi.int/otp/complementarity.html>, p. 3

Where serious crimes have been committed, but the court has not exercised jurisdiction, this could be accomplished through a two-pronged approach: creating a credible prospect that the court may exercise its jurisdiction, while also pressing states to fulfill their responsibility to investigate serious crimes.³⁷ This will be particularly useful where national courts have capacity, but have not pursued prosecutions. Strategies to implement this approach should include:

- Fact-finding and analysis missions to countries where serious crimes are being investigated by the OTP; and
- Public and private communications by the ICC prosecutor with national authorities about the possible role of the ICC in such countries, as has been done in Colombia.

The court can also encourage trials of serious crimes in national courts by urging states to apply Rome Statute standards. Ways for the court to accomplish this include calling on states to ratify the Rome Statute and harmonize national legislation with the Rome Statute, and raising awareness about ICC jurisprudence.³⁸

While the ICC is not a national justice reform project, in countries under ICC investigation it can undertake targeted initiatives to enhance the capacity of their national courts to prosecute serious crimes. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has been criticized for missing the opportunity to positively impact justice systems in the former Yugoslavia; former ICTY staff expressed hope that the ICC will interact more extensively with states on domestic prosecution of war crimes.³⁹ Given that the ICC will likely only conduct a limited number of trials of alleged perpetrators for each situation under investigation, promoting the possibility for greater

³⁷ This role has been envisioned by the ICC Prosecutor from early in his tenure. See "Paper on some policy issues before the Office of the Prosecutor," September 2003, [online] http://www.icc-cpi.int/otp/otp_policy.html, pp. 2-3 ("To the extent possible the Prosecutor will encourage States to initiate their own proceedings... The existence of the Court has already encouraged States to incorporate as domestic law the crimes within the jurisdiction of the Court. Even before the initiation of any investigation by the Court itself, the use of this legislation will be a major step in bringing to justice the perpetrators of atrocities.").

³⁸ The ICC president and judges have taken welcome steps in this regard, including meetings with government officials from non-States Parties, and speaking on the need for effective implementing legislation. For instance, in December 2005 President Kirsch visited India and Pakistan and met with parliamentarians, government officials, judges, civil society and the media. See "*ICC newsletter #7*," April 2006, [online] <http://www.icc-cpi.int/library/about/newsletter/index.html>.

³⁹ See "The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings," David Tolbert, *The Fletcher Forum of World Affairs*, Volume 26:2 Summer/Fall 2002, pp. 5 and 13 ("The United Nations has spent hundreds of millions of dollars creating a uniquely important court, which has clearly served a significant role in the region, yet a huge opportunity will be lost. Instead of serving as an important tool of legal development and as a catalyst for local war crime prosecutions, the tribunal will apparently fold its operations without contributing much to either the justice systems in the region or the prosecution of war crimes... There is scope for this important assistance to be delivered in some cases, and the failure to use the ICTY's experience and expertise in the local courts in Bosnia should not be repeated.").

accountability through national prosecutions in situation countries is all the more important.⁴⁰ Several low cost strategies could be employed by ICC staff in situation countries to implement this objective:

- Sharing expertise with national justice system staff through dialogue about investigating and trying serious crimes;⁴¹
- 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.⁴²

E. Legacy

Maximizing the court's impact with affected communities is not only important in the short term, but in the longer term. This includes leaving a lasting legacy long after the court has completed its work in a situation country. We see two broad ways in which the court can achieve this, both of which have been discussed in previous sections:

- Contributing to respect for the rule of law; and
- Strengthening national justice systems, in particular as related to ensuring accountability through domestic prosecutions for serious crimes.

The Strategic Plan should identify leaving a meaningful legacy as an objective and identify strategies to achieve this objective. They should be considered from the outset of ICC operations in every situation.⁴³

⁴⁰ The Prosecutor has stated: "The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means." See "Paper on some policy issues before the Office of the Prosecutor," September 2003, [online] http://www.icc-cpi.int/otp/otp_policy.html, p. 3.

⁴¹ See Human Rights Watch, "Justice in Motion: The Trial Phase of the Special Court for Sierra Leone," *A Human Rights Watch Report*, vol. 17, no. 14(A), October 2005, [online] <http://hrw.org/reports/2005/sierraleone1105/>, p. 36.

⁴² In this regard, Human Rights Watch welcomes the 2004 initiative of the European Commission and six donors active in the DRC to conduct an audit of the justice system in consultation with national authorities, and to develop a coordinated plan of action in which transitional justice issues figured prominently.

⁴³ "Report of the U.N. Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," p. 16.