



Human Rights Watch Briefing Note for the Eighteenth Session of the International Criminal Court Assembly of States Parties

November 2019

The states parties of the International Criminal Court (ICC) will meet from December 2 to 7, 2019 at the annual session of the Assembly of States Parties (ASP) in The Hague. This will be an opportunity to take important steps to strengthen the court's functioning and renew support.

In the current difficult landscape for the rules-based global order, and for accountability for the worst crimes in particular, the ICC is needed more than ever. However, the court is facing serious internal and external challenges that have hampered its effective delivery of justice. The coming year affords opportunities to seize momentum for meaningful change.

The court's performance gaps due to various factors have become very evident, underscoring the need for changes in policy, practice, and state support. In the past year, the fact that the written reasons underlying the acquittal of former Ivorian president Laurent Gbagbo were only filed six months after the oral decision, as well as the decision not to authorize an investigation in the Afghanistan situation based on a problematic interpretation of the principle of "interest of justice," highlighted some of the challenges driven by shortcomings in the court's own practice. In addition, the court faces other challenges to inform and meet victim expectations. It also needs increased cooperation, particularly when it comes to arrests, and continues to struggle with financial resources inadequate to its increasing workload.

At the same time, hostile non-member states are seeking to obstruct ICC investigations and weaken its independence. The approach taken by the United States' government under the Trump administration towards the court, which resulted in the revocation of the prosecutor's entry visa to the US, remains deeply concerning. The approach could have a chilling effect on the ICC's work in a number of country situations.

These are daunting challenges, but the election in 2020 of a new prosecutor and six new judges, provided they are conducted on the basis of merit, together with the

findings of an anticipated independent expert review described further below and other steps, could create a common framework for improvement.

Human Rights Watch calls on states parties, together with court officials and other stakeholders, to engage in a process of review of the ICC in the coming year aimed at strengthening its delivery of justice with full respect for the principles of judicial and prosecutorial independence. Member states should also take the opportunity at the upcoming Assembly session to renew their support for the court and reiterate their commitment to defend its mandate and independence. A strengthened ICC firmly supported by its states parties will be more resilient to efforts to derail its mandate.

This briefing note sets out recommendations to states parties for the upcoming Assembly session in the following priority areas: 1) enhancing the ICC’s delivery of justice through a process of review; 2) addressing challenges in the external environment; 3) ensuring adequate resources; and 4) adopting a proposed amendment to article 8.

I. Enhancing the ICC’s delivery of justice through a process of review

In the past year, discussions took place in different fora and among various stakeholders—including states parties, the court and civil society—about strengthening the effective functioning of the ICC. On May 10, the president of the court, on behalf of the three court principals, sent a letter to the president of the Assembly calling for an “independent comprehensive expert review of the Court’s performance.”¹

Following a retreat by the Assembly’s Bureau on June 13, the presidency of the Assembly produced a document (the Matrix) that attempted to coordinate the various discussions around the court’s performance to distill a number of concrete and actionable issues to strengthen the ICC and the Rome Statute system.² The Matrix was conceived as a living document, a framework for discussions, and a tool for tracking progress in a multi-tiered process of review.

The proposal for an independent expert review was given further currency through the Matrix. This proposal has now received broad support from states parties, the court,

¹ Bureau of the Assembly of States Parties to the Rome Statute of the International Criminal Court (ASP), “Agenda and Decisions,” 5th Meeting, June 7, 2019, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Bureau-5.pdf (accessed November 14, 2019), p. 3.

² Bureau of the ASP, “Agenda and Decisions,” 6th Meeting, June 14, 2019, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Bureau-6.pdf (accessed November 14, 2019), pp. 1-2; “Agenda and Decisions,” 7th Meeting, July 17, 2019, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Bureau-7.pdf (accessed November 14, 2019), pp. 1-2.; [Draft Working Paper] “Meeting the challenges of today for a stronger Court tomorrow; Matrix over possible areas of strengthening the Court and Rome Statute System,” October 11, 2019, on file with Human Rights Watch.

and civil society. In addition, the Matrix envisions parallel initiatives by the court, states parties, and other stakeholders to enhance the work of the ICC and to strengthen the Rome Statute system more broadly. All these initiatives under the umbrella of the process of review should be carried out in synergy with each other and in full respect of the court's judicial and prosecutorial independence.

A. Independent Expert Review

Human Rights Watch sees the creation of a group of independent experts tasked with assessing a select number of issues confronting the court as an appropriate step toward meaningful improvement in the court's policy and practice. In order for such independent expert review to be credible, legitimate, and ultimately effective, it should be grounded in the fundamental principles of independence and expertise. Its sole purpose should be to move the ICC forward in delivering on its essential mandate:

- *Independence* – The experts should be independent from the court, states parties, and other stakeholders. Ensuring such independence goes to the heart of the credibility and legitimacy of the review.
- *Expertise* – The group of independent experts should include eminent individuals with the necessary professional backgrounds to address a cross-section of issues facing the court. Their specialized technical knowledge should be rooted in extensive high-quality professional experience.

In addition, this independent expert review should be transparent and inclusive. Human Rights Watch believes that the experts should engage with a broad range of relevant stakeholders who can provide diverse perspectives, including civil society organizations from ICC situation countries.

The presidency of the Assembly, in consultation with states parties, court officials, and civil society, produced draft terms of reference for an independent expert review and is in the process of identifying individuals who could form the group of independent experts tasked with carrying out this review. At this writing, states parties are continuing consideration of the terms of reference, how to address the financial resources needed to support the independent expert review, and an Assembly resolution on the broader review process of the ICC and the Rome Statute system. These and the list of experts identified by the presidency should be ironed out ahead of the upcoming Assembly session in order to ensure smooth approval by the Assembly. This will allow the group of independent experts to start its work right after the conclusion of the session. States parties should avoid reopening negotiations on the independent expert review at the Assembly session to make last-minute changes that could undermine an independent, expert, and purpose-driven process. If set up in a timely manner, this independent expert review can provide important guidance in the

election of the new prosecutor and six new judges at the December 2020 Assembly session, and thereafter, when those officials take office.

The terms of reference for the expert review should provide a broad mandate; this is essential to ensuring an independent and holistic review, including identification of additional issues that have not been apparent to stakeholders involved, to date, in the development of the Matrix. The terms of reference and Assembly resolution on the broader review process should also recognize the importance not only of the experts' independence, but additionally respect for judicial and prosecutorial independence. This is critical for the process and, looking ahead, to court and state party consideration of the outcome of the review. The Assembly resolution should include an acknowledgment that the organs of the court will be responsible for considering appropriate measures in response to relevant expert group recommendations. Indeed, some of the topics identified in the Matrix and which could be the subject of expert review—in particular, prosecutorial strategies in the context of preliminary examinations, case selection and prioritization, and completion strategies—raise sensitive questions at the heart of prosecutorial discretion, and, in turn, independence.³

Recommendations to ICC states parties:

- Express, in statements during the Assembly session, including the General Debate, strong support for the independent expert review of the court's practice and affirm the importance of ensuring that all efforts to enhance the court's delivery of justice and to strengthen the Rome Statute system are carried out in synergy with each other while safeguarding the principles of judicial and prosecutorial independence.
- Finalize, within the Bureau, the terms of reference for the independent expert review – including the names of the experts – and recommend them to the Assembly for adoption.
- Finalize agreement on the financial resources necessary for the independent expert review and the means for providing these resources ahead of the Assembly session in order to avoid reopening negotiations during the session that could stall the establishment of the group of independent experts.
- Adopt, as the Assembly, the terms of reference for an independent expert review as recommended by the Bureau – including the names of the experts identified by the presidency of the Assembly – and avoid reopening negotiations during the Assembly session.

³ [Draft Working Paper] "Meeting the challenges of today for a stronger Court tomorrow; Matrix over possible areas of strengthening the Court and Rome Statute System," October 11, 2019, on file with Human Rights Watch, pp. 13-15.

Related Human Rights Watch Materials

- “Support Needed to Tackle ICC Shortcomings,” Human Rights Watch news release, July 16, 2019, <https://www.hrw.org/news/2019/07/16/support-needed-tackle-icc-shortcomings>.
- Marina Riera Rodoreda, “Standing with Victims on International Justice Day,” Human Rights Watch dispatch, July 17, 2019, <https://www.hrw.org/news/2019/07/17/standing-victims-international-justice-day>.

B. Parallel initiatives by the court and states parties

In the past year, ICC officials have engaged in efforts to improve the effectiveness and efficiency of the court’s operations, including through the formulation of three, interlinked strategic plans for the Office of the Prosecutor, the registry, and the court,⁴ and the adoption by the judges of guidelines on the process of judgment drafting as well as for the timeframe for issuing key judicial decisions.⁵ Alongside these efforts, and together with the work to launch an independent expert review of the court’s performance, states parties have started to identify and address issues to enhance the court’s delivery of justice and strengthen the Rome Statute system. These include the review of the procedure for the nomination and election of judges.

At its nineteenth session, the Assembly will elect six new judges—a third of ICC’s 18-member bench—for a period of nine years. States parties have an enormous responsibility to ensure the merit-based election of the most highly qualified individuals as ICC judges. This is among the most important aspects of their stewardship of the court. In view of next year’s election, states parties are negotiating an Assembly resolution to strengthen the process of judicial nomination and election. Human Rights Watch welcomes this initiative and urges the Assembly to adopt this standalone resolution to address weaknesses and gaps in the current process. These include the following:

Mandate of the Advisory Committee on Nomination of Judges – Human Rights Watch has previously expressed support for the Assembly’s establishment of an Advisory Committee on Nomination of Judges (ACN), which is mandated to “prepare information and analysis, of a technical character” on the qualifications of individual judicial candidates and present its analysis to states parties for consideration. Human Rights

⁴ Office of the Prosecutor (OTP), International Criminal Court (ICC), “Strategic Plan, 2019-2021,” July 17, 2019, <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> (accessed November 14, 2019); “Registry Strategic Plan (2019-2021),” July 17, 2019, <https://www.icc-cpi.int/itemsDocuments/190717-reg-strategic-plan-eng.pdf> (accessed November 14, 2019); “International Criminal Court Strategic Plan (2019-2021),” July 17, 2019, <https://www.icc-cpi.int/itemsDocuments/20190717-icc-strategic-plan-eng.pdf> (accessed November 14, 2019).

⁵ “ICC judges hold retreat, adopt guidelines on the judgment drafting process and on the timeframe for issuance of key judicial decisions,” ICC press release, ICC-CPI-20191007-PR1485, October 7, 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1485> (accessed November 14, 2019).

Watch views the advisory role of the ACN as crucial in guiding states parties' decisions on judicial elections. Nevertheless, the ACN's terms of reference, adopted by the Assembly, have limited its effectiveness. Some of these limitations have been documented recently by the Open Society Justice Initiative, in its October 2019 report, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*. For example, the ACN's terms of reference base its work on Rome Statute article 36 requirements, rather than a broader definition of qualifications. *Raising the Bar* notes that even with these mandate limitations the ACN has introduced positive changes. These include requiring information regarding national procedures for judicial nominations and, in 2017, providing a basic assessment of "formally qualified" as compared to "particularly well qualified." But it finds significant scope for the ACN to strengthen the rigor with which it approaches and communicates its assessments, including by requesting additional information regarding candidates.⁶ Consistent with the report's recommendations, states parties should consider amending the ACN's terms of reference to strengthen its mandate and to empower explicitly the committee in its assessment of candidates and national nominating procedures (see recommendations below).

Period of judicial nomination: The period of time allocated for judicial nomination by states parties currently ends only five months before the election by the Assembly. This is an insufficient amount of time for the ACN to complete its work in a meaningful way and states parties should consider amending the calendar for judicial nomination in view of the 2020 election.

Candidates' substantial practical experience in criminal trials: Human Rights Watch's close observation of the court's functioning since it began operations in 2003 has highlighted the importance of electing judges who possess substantial experience in criminal trials. Managing the court's proceedings effectively requires judges familiar with the demands of complex criminal trials. Human Rights Watch continues to believe that states parties should prioritize nominating and electing candidates with previous experience in criminal law and procedure as they will be best placed to meet the demands of ICC proceedings.

Vote-trading: States parties should resist the practice of "vote-trading," in which states agree to support one another's candidates with minimal regard to the individual's qualifications. States parties should publicly commit to making merit the decisive criterion and discouraging voting on a *quid pro quo* basis.

⁶ Open Society Justice Initiative, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*, October 28, 2019, <https://www.justiceinitiative.org/uploads/7627a69c-dc69-43da-a58c-c66162f1c2b0/raising-the-bar-20191028.pdf> (accessed November 14, 2019), pp. 7-8, 43-49.

The ICC's ability to effectively try cases rests on the quality of its judges and only the strongest candidates should be nominated, and ultimately, elected.

States parties also exercise a crucial role in the election of the ICC prosecutor. The election of an individual who exemplifies the qualifications provided for in article 42 of the Rome Statute—an extremely competent person of high moral character with extensive practical experience in criminal cases as well as appropriate managerial experience—is essential. The public's first encounter with the ICC and its greater familiarity with the institution often will come through the investigations of its prosecutor.

When it comes to prosecutorial elections, the deepest, broadest pool of highly qualified nominees is of critical importance. States parties should not treat the election of the ICC prosecutor as they might any other election for a position within an international organization. To carry out its mandate in challenging times, the ICC requires a prosecutor with relevant experience and expertise who meets Rome Statute requirements, and who demonstrates an ethic of public service and commitment to the ICC's mandate as well as an understanding of the international landscape. Individual candidates should be evaluated on the basis of their merits, regardless of state party nomination. In this regard, the role of the Committee on the Election of the Prosecutor in assessing and recommending candidates is crucial.

As noted above, states parties are also expected to adopt an Assembly resolution setting in place a broader process to review the ICC and the Rome Statute system. The resolution is expected to identify priorities to be addressed by states parties in 2020, and Human Rights Watch looks forward to engaging with states parties as they identify areas of focus for next year. With the upcoming elections of the next prosecutor and six new judges states parties should also prioritize these elections, along with continued improvement in nomination and election processes.

Recommendations to ICC states parties:

- Affirm in General Debate statements the importance of states parties nominating and electing candidates in the upcoming judicial election on the basis of merit and making statements regarding merit throughout the election period.
- Adopt a standalone Assembly resolution with changes directed at improving the judicial nomination and election process. These could include:
 - Amending the terms of reference of the ACN to strengthen its mandate by requiring a more rigorous assessment of the candidates and specifying that the ACN should clearly indicate if a candidate does not qualify for judicial service;
 - Modifying the calendar for judicial nomination to allow a longer period of time for the ACN's assessment of candidates;

- Urging states parties to nominate and elect candidates with substantial practical experience in complex criminal trials; and
- Urging states parties not to engage in “vote-trading” during judicial election.
- Affirm in General Debate statements the importance of states parties evaluating candidates for the post of ICC prosecutor and electing the next prosecutor on the basis of merit.
- Include language in the Assembly resolution on the broader review of the ICC and the Rome Statute system affirming that all efforts by different stakeholders should respect the principles of judicial and prosecutorial independence.
- Prioritize in the review process consideration of how the court, states parties, and civil society can revitalize a genuine dialogue on ensuring the ICC has resources adequate to its workload (see part III below).

II. Addressing Challenges in the External Environment

Human Rights Watch welcomes recognition in the Matrix of the importance of examining how states can provide cooperation to the court and addressing other challenges arising out of the external environment in which the court works. This builds on state party discussions over several years. As the court, states parties, and other stakeholders move forward with the review process described above, including on these topics, it is also essential that states parties work during the Assembly session, at the national level, and in multilateral fora to make visible political support for the court, particularly when its mandate is challenged or politically contentious.

The ICC has faced recurrent politicized opposition. At each juncture, concerted efforts by states parties have assisted in overcoming that opposition and keeping open the space needed for the court to work independently. Last year’s Assembly session took place in the shadow of renewed efforts by the US government to discredit the court’s legitimacy and threats to court officials and member states. In March, the US followed through on one of these threats, announcing a policy of visa bans on ICC staff involved in the court’s potential investigation of US nationals in Afghanistan. It made clear that the policy also applied to investigations of its allies’ nationals, including Israel, and that it would take further action, including imposing sanctions, “if the ICC does not change its course.”⁷ The Trump administration confirmed in early April that it had revoked ICC Prosecutor Fatou Bensouda’s visa.⁸

⁷ See “Remarks to the Press of Michael R. Pompeo, Secretary of State, March 15, 2019,” <https://www.state.gov/remarks-to-the-press-6/> (accessed November 14, 2019); see also “US Threatens International Criminal Court,” Human Rights Watch news release, March 15, 2019, <https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court#> (accessed November 14, 2019).

⁸ Marlise Simons and Megan Specia, “U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes,” *New York Times*, April 5, 2019, <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html> (accessed November 14, 2019).

These threats and actions are a clear attempt to bully the court from its scrutiny of US conduct. States parties have responded, including by working together publicly to press back on US threats.⁹ Unfortunately, in denying the prosecutor authorization to investigate in Afghanistan on questionable legal grounds, the ICC pre-trial chamber has given rise to the perception that the court is vulnerable to this pressure.¹⁰

With the pre-trial chamber decision now on appeal, the US has made clear that its policy remains in force, essentially restating its threats as judges take up consideration of the issue.¹¹

Hearings scheduled in the appeal from December 4-6 coincide with this year's Assembly session. At the heart of the appeal is the pre-trial judges' use of an extremely broad approach to the "interests of justice" that appears to premise investigations on guarantees of state cooperation. It is true that criminal investigations in situations of ongoing conflict are difficult and resource-intensive, and the cooperation by states subject to the court's investigations, as well as other key bodies, like the UN Security

⁹ Groups of states parties issued two joint statements in September 2018 and March 2019, and the Assembly, in the first operative paragraph in their Omnibus resolution at its seventeenth session "[r]econfirm[ed] its unwavering support for the Court as an independent and impartial judicial institution, reiterate[d] its commitment to uphold and defend the principles and values enshrined in the Rome Statute and to preserve its integrity undeterred by any threats against the Court, its officials, and those cooperating with it, and renew[ed] its resolve to stand united against impunity." See "Brazil declares support for the International Criminal Court (ICC)," BrazilGovNews, October 8, 2018, <http://www.brazil.gov.br/about-brazil/news/2018/10/brazil-declares-support-for-the-international-criminal-court-icc> (accessed November 14, 2019); Lichtenstein UN official Twitter, @LiechtensteinUN, "In addition to recent national statements in support of the independence of the #ICC, the following statement has been endorsed by 22 Foreign Ministers." 4:48 PM, March 29, 2019, Tweet, <https://twitter.com/LiechtensteinUN/status/1111777186418167815> (accessed November 14, 2019); ASP, "Strengthening the International Criminal Court and the Assembly of States Parties," Resolution ICC-ASP/17/Res.5, December 12, 2018, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf (accessed November 14, 2019), para. 1. The European Union issued a statement expressing its concern following the announcement of the visa policy in March 2019, and in June 2019, the General Assembly of the Organization of American States underscored its determination to "preserve [] [the Rome Statute's] integrity by showing resilience to the threats against the Court, its officers, and others working with it." See European Union External Action, "Statement by the Spokesperson on the International Criminal Court," March 15, 2019, https://eeas.europa.eu/headquarters/headquarters-homepage/59733/statement-spokesperson-international-criminal-court_en (accessed November 14, 2019); General Assembly of Organization of American States, Resolution on International Law, AG/RES. 2930 (XLIX-O/19), adopted on June 27, 2019, in "Declarations and Resolutions Adopted by the General Assembly," Forty-Ninth Regular Session, June 26-28, 2019, Medellín, Colombia, AG/doc.5682/19 rev. 1, November 4, 2019, p. 24, <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/Resoluciones-Declaraciones.asp> (accessed November 14, 2019).

¹⁰ In turning down the prosecutor's request for authorization to investigate, the judges found that given what they considered to be limited prospects for success due to cooperation challenges, an investigation would not be in the "interests of justice." See Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, No. ICC-02/17, April 12, 2019, https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF (accessed November 14, 2019), para. 96. The judges speculated that "changes within the relevant political landscape both in Afghanistan and in key states" would limit cooperation in an investigation. *Ibid.*, para. 94. That was most likely a nod to Afghanistan peace talks and the Trump administration's attacks on the ICC.

¹¹ "U.S. Policy on the International Criminal Court Remains Unchanged," U.S. Department of State press statement by Michael R. Pompeo, Secretary of State, October 9, 2019, <https://www.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/> (accessed November 14, 2019).

Council, has too often been weak. The answer, however, is not to neuter the court's mandate and constrain its ability to act in the face of serious international crimes. Rather, states should renew their commitment to overcoming cooperation challenges and to provide the court with resources adequate to the demands of its workload. By using this deeply flawed approach to assess the prosecutor's request for an investigation – and speculating about political considerations in determining the viability of an investigation – the pre-trial chamber judges have undermined the court's credibility.

States parties will need to grow more resolute in defending the court's independence, in order to avoid a chilling effect on its work. They also need to defend the vision underlying the Rome Statute and which the Afghanistan pre-trial chamber decision challenges—that is, the vision of a court of last resort to tackle entrenched impunity within its jurisdiction, regardless of the nationality of perpetrators.

This is not easy, particularly considering that these threats are part of the weakening of commitment to a rules-based international order more broadly, which affects key institutions, such as the UN Security Council, on which the ICC also depends for support. States parties should continue to seize opportunities to voice clear support for the ICC, including at the upcoming Assembly session, and to include support for the ICC in their bilateral or multilateral dialogues with the US administration, among other steps.

To encourage fresh thinking about and activity on this difficult landscape, states parties should also find opportunities during the Assembly session, whether in General Debate statements, plenary discussions, or side events, to identify the underlying political challenges in the external environment and develop new approaches to meeting them. Addressing the acute challenges posed to the court—and making further progress on longstanding goals related to cooperation, complementarity, and universality—should be linked to deeper assessment of how to shore up commitment to the rule-of-law globally and with it, the norm of accountability. Recognizing the ICC as a bulwark against the erosion of this norm could open new avenues to mainstream and express support for justice, including in other multilateral fora and regional bodies.

Recommendations to ICC states parties:

- Send high-level representation to make strong General Debate statements in support of the ICC, bearing in mind the importance these statements have in the eyes of affected communities who look to the court for justice when all other avenues are closed. These statements should emphasize the importance of the ICC as a bulwark against the erosion of the rules-based international order and express a willingness to defend the court from threats to its independence and effective

functioning, as well as the integrity of the Rome Statute. These statements should also defend the vision underlying the Rome Statute, that is, a court of last resort to tackle entrenched impunity within its jurisdiction, regardless of the nationality of perpetrators;

- Identify opportunities during the Assembly meeting to discuss challenges in the external environment, in particular, political measures against the court, and to link support for the ICC with other efforts to buttress the rules-based international order, including in other fora like the UN General Assembly and Human Rights Council;
- Announce, in General Debate statements, during the cooperation plenary session, or under other relevant agenda items, these or other concrete pledges of assistance:
 - Continued attention to raising awareness of the ICC and Rome Statute system with national audiences, including the general public;
 - Commitment to mainstream the ICC and related issues within and across national governments and into the work of the UN and other international and regional organizations;
 - Strengthened efforts to pursue targeted strategies to encourage additional Rome Statute ratifications.
- Retain and strengthen language in the Omnibus resolution resolving to work together as states parties to address threats to the legitimacy and independence of the ICC; and
- Publicize Assembly participation and General Debate statements nationally through press statements and conferences, the use of social media, and other communication tools.

Related Human Rights Watch materials

- “Q&A: The International Criminal Court and the United States,” Human Rights Watch Questions-and-Answers document, March 15, 2019, <https://www.hrw.org/news/2019/03/15/qa-international-criminal-court-and-united-states>.
- Param-Preet Singh, Human Rights Watch, “In Afghanistan, the ICC Abandons the Field,” *OpenGlobalRights*, April 23, 2019, <https://www.hrw.org/news/2019/04/23/afghanistan-icc-abandons-field>.

III. Ensuring adequate resources

ICC states parties will decide during the Assembly session on the court’s budget for the coming year. For 2020, excluding interest on the host state loan, the ICC has requested €147.17 million or an increase of 1.8 percent over its €144.55 million budget approved for 2019. The Committee on Budget and Finance has recommended a budget of €145.71 million, or an increase of just 0.81 percent. The Committee’s recommendations, if

adopted, would result in a minimal 1.2 percent increase for the Office of the Prosecutor, while the registry and judiciary will again see decreases.¹²

For more than a decade, Human Rights Watch has expressed concern that the call by some states parties for zero growth in the court’s budget has been one factor in undermining a genuine dialogue between the court, states parties, and civil society as to the resources adequate to deliver on the court’s mandate, as well as the willingness of ICC officials to come forward with budget requests more adequate to meet the court’s workload. We recognize that the significant change needed in court practices and policies to enhance its performance—as referenced above—has likely become a further factor.

But negotiations to set the annual budget of the court appear to be drifting ever further and further away from ascertaining and meeting real resource needs in light of the workload the court faces. While the Office of the Prosecutor in 2015 projected that to conduct six active investigations it would require a yearly budget of €60.6 million,¹³ it expects to conduct nine active investigations next year—eight of these simultaneously—in 11 open situations while requesting only €47.94 million.¹⁴ The court’s budget request for 2020 also indicates that a lack of resources has impeded the Office’s progress in its Burundi investigation and previously delayed the start of its second Cote d’Ivoire investigation. The Office indicates that its Georgia investigation will continue “within the available resources.”¹⁵ The court will also need resources to support the opening of an investigation in the situation in Bangladesh/Myanmar following the pre-trial chamber’s decision on November 14.¹⁶

The Committee on Budget and Finance noted that “[a]ll the more, the Court needs to set priorities.”¹⁷ The Office of the Prosecutor refers in its 2019-2021 plan to “further prioritisation” among other measures to attempt to square the expectation that it “deliver more and better results, preferably within a shorter timeframe and some expect this to be accomplished within the bounds of existing, or with even further

¹² ASP, “Report of the Committee on Budget and Finance on the work of its thirty-third session,” ICC-ASP/18/15, November 13, 2019, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-15-ENG.pdf (accessed November 14, 2019), paras. 19, 274.

¹³ ASP, “Report of the Court on the Basic Size of the Office of the Prosecutor,” ICC-ASP/14/21, September 17, 2015, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-21-ENG.pdf (accessed November 14, 2019), paras. 7, 14.

¹⁴ ASP, “Proposed Programme Budget for 2020 of the International Criminal Court,” ICC-ASP/18/10, July 25, 2019, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-10-ENG.pdf (accessed November 14, 2019), paras. 110, 159.

¹⁵ *Ibid.*, paras. 113, 121, and 126.

¹⁶ Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19, November 14, 2019, https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF (accessed November 14, 2019).

¹⁷ ASP, “Report of the Committee on Budget and Finance on the work of its thirty-third session,” ICC-ASP/18/15, November 13, 2019, para. 29.

resources,” with the reality that it “expects to face an increase in the number of situations under investigation as its ongoing preliminary examinations progress, while resources are unlikely to increase.” But there are real limits to what kinds of prioritization can take place before the court’s mandate is severely compromised.

When it comes to the selection of cases, in our view, the prosecution has actually been overly selective in bringing cases in situations under investigation.¹⁸ The prosecutor can approach its selection of cases with greater vision, including embedding those choices in “completion strategies,” that seek to define, from as early as possible at the outset of a new situation, how the court will determine when its mandate is complete. This will provide a key framework for assessing what is needed for it to wind down its activities in a given situation, including the transfer of responsibilities to national authorities, where possible, and projecting the resources required over a multi-year period.

We welcome the Office’s indication of its plan to develop a policy on completion strategies, and recommend these be approached on a court-wide basis given implications for a range of court activities.¹⁹ But to deliver more successfully on the court’s mandate, and to secure the court’s legacy and legitimacy, it is likely that the prosecution will need to bring *more* cases per situation, rather than fewer. When it comes to opening new investigations, it is of deep concern that the pre-trial chamber invoked the court’s limited resources as part of its rationale for denying the prosecution authorization to investigate in Afghanistan.²⁰

These are only some indications of the mismatch between resources and workload. The upcoming review process and report of the group of independent experts may provide a bridge back towards a shared understanding of the court’s optimal capacity and what will be needed to build up the financial resources—alongside the political support referenced above—necessary to support full delivery on the mandate provided by the Rome Statute.

¹⁸ See Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 2011, <https://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf> (accessed November 14, 2019); Human Rights Watch Comments on the ICC Office of the Prosecutor Draft Policy Paper on Case Selection and Prioritisation, May 3, 2016, <https://www.hrw.org/news/2016/05/03/human-rights-watch-comments-icc-office-prosecutor-draft-policy-paper-case-selection> (accessed November 14, 2019).

¹⁹ OTP, “Strategic Plan, 2019-2021,” July 17, 2019, para. 23; see also Elizabeth Evenson and Alison Smith, “Completion, Legacy, and Complementarity at the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, http://www.npwi.org/sites/default/files/ressources/ASmith_OxfordUniversityPress2015.pdf (accessed November 14, 2019), pp. 1259-1276.

²⁰ See Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, No. ICC-02/17, April 12, 2019, para. 95.

Recommendations to ICC states parties:

- Scrutinize the Committee on Budget and Finance’s recommendations, adopt a 2020 budget for the court adequate to ensure the effective implementation of its mandate, and replenish the Working Capital and Contingency Funds.
- Affirm, in statements to the General Debate, during budget negotiations, and at other relevant moments during the session, the importance of ensuring the court has adequate resources to cope with increased demand for accountability and call for improvements to the current budgeting process to that end, while rejecting a zero-nominal growth approach to the ICC’s budget.

Additional Human Rights Watch materials

- Human Rights Watch Comments on the ICC Office of the Prosecutor Strategic Plan for 2019-2021, June 10, 2019, <https://www.hrw.org/news/2019/11/13/office-prosecutor-international-criminal-court-strategic-plan-2019-2021-comments>.

IV. Adopting a proposed amendment to article 8

In August 2019, Switzerland deposited a proposed amendment to the Rome Statute with the UN Secretary-General. The amendment would make the intentional use of starvation of civilians as a method of warfare a war crime under the Rome Statute in the context of non-international armed conflicts under article 8. This is currently only included as a war crime in the context of international armed conflicts (article 8(2)(b)(xxv)).

Human Rights Watch supports the adoption of this amendment. Starvation of the civilian population as a method of warfare is already prohibited under customary international law in both non-international and international armed conflicts.²¹

In adopting the amendment, however, states parties should avoid confirming the understanding included when other amendments to article 8 were adopted by the Assembly in 2017.²² Under that understanding, the court would be unable to exercise its jurisdiction over the crime when committed by a non-member state’s nationals or on its territory. The court ordinarily has jurisdiction over war crimes committed on the territory of states parties or parties accepting the court’s jurisdiction on an *ad hoc* basis, even when committed by the nationals of states non-parties.²³ Article 121(5),

²¹ International Committee of the Red Cross, “Rule 53. Starvation as a Method of Warfare,” https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rules3 (accessed November 14, 2019).

²² See “Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court,” Resolution ICC-ASP/16/Res.5, December 14, 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf (accessed November 14, 2019), preambular para. 2 (“*confirming* [the Assembly’s] understanding that in respect to this amendment the same principle applies in respect of a State party which has not accepted this amendment applies also in respect of States that are not parties to the Statute.”).

²³ Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, article 12.

which sets out the procedure for amendments to article 8, excludes jurisdiction with respect to the nationals or territory of a state party that has not accepted an amendment. It does not provide this same exclusion for the nationals or territory of non-member states.

Recommendation to ICC states parties:

- Adopt and work towards the prompt entry into force of the proposed amendment to Rome Statute article 8.