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

November 2017

The states parties of the International Criminal Court (ICC) will meet from December 4 to 14, 2017 at the annual session of the Assembly of States Parties (ASP).

The Assembly session each year is an opportunity for ICC states parties to advance serious debate on the range of challenges the ICC confronts in advancing its mandate to provide justice for mass atrocities, and to take decisions that will equip the ICC to meet these challenges. This year’s session finds states parties on the eve of a particularly important milestone: the twentieth anniversary in July 2018 of the adoption of the court’s founding treaty, the Rome Statute.

In these 20 years, states parties, ICC officials and staff, and partners in the international community and civil society have pushed the court from aspiration to reality. The ICC, although it continues to learn lessons from missteps in early practice, is increasingly positioned to act as the court of last resort that its founders envisioned. This is evidenced by recent announcements regarding new investigations in Burundi, and, subject to authorization by the court’s judges, Afghanistan. For victims in Burundi and for those of countless abuses by parties to the conflict in Afghanistan, an ICC investigation may provide a path to justice. And while the court’s cases have attracted periods of political backlash, concerted efforts by and among states parties have led to important results in overcoming opposition and stemming, for now, threats of additional withdrawals from the Rome Statute.

As the court and its supporters push forward, however, there can be no doubt that challenges to the court’s mandate are likely to continue or even increase. The upcoming year presents a changed political landscape from 1998; consensus on the importance of justice, particularly justice before the ICC, can be elusive, as can the financial and political support the court needs to be effective. It is likely that states
parties will need to be prepared to publicly and stridently support the court's mandate, and increase attention to ensuring the court has the practical support—whether in cooperation or in resources—it needs. The anniversary year should be an occasion for ICC states parties to reflect on and debate these challenges, while taking actions to promote global support for the ICC.

This briefing note sets out recommendations to states parties for the upcoming Assembly session in the following priority areas: the election of members of the Assembly's Committee on Budget and Finance; ensuring the court has resources adequate to its workload and mandate; judicial elections; making the most of this session’s plenary debate on the Rome Statute's twentieth anniversary and the coming anniversary year itself; increasing cooperation and responding to non-cooperation with ICC investigations and prosecutions; and proposed amendments to Rome Statute article 8. It also provides observations on giving greater effect to victims' voices in the choice of their legal representatives before the ICC.

I. Budget

A. Election of members to the Committee on Budget and Finance

At the upcoming Assembly session, states parties will elect six new members to the Committee on Budget and Finance.

The Committee is a subsidiary advisory organ of the Assembly charged with the “technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature, as may be entrusted to it by the Assembly of States Parties.” This includes reviewing the annual program budget proposed by the court. Members of the Committee “shall be experts of recognized standing and experience in financial matters at the international level from States Parties,” and are elected to serve as independent experts.¹

Although the Committee is a subsidiary body, and states parties have an important role to play in scrutinizing its recommendations, states parties still require the expert advice of the Committee. The Committee's work can be challenging, including because

of the unique nature of the ICC as an intergovernmental institution which is, at its core, an independent, judicial institution. The Committee needs to strike a balance between providing advice to the court and states parties with regard to financial oversight while not entering into areas of policy and practice reserved for decision-making by court officials.²

The Committee’s essential role underscores the importance of ensuring it has the most highly qualified membership.

**ICC states parties should:**
- Give careful scrutiny to the qualifications of individuals nominated for the Committee on Budget and Finance and ensure the election of the most highly qualified, expert candidates; and
- Strengthen efforts to identify, at a national level, financial experts to be nominated in future elections of members of the Committee on Budget and Finance.

**B. Ensuring resources adequate to the effective implementation of the ICC’s mandate**

At the upcoming Assembly session, ICC states parties will decide on the court’s budget for the coming year. For 2018, the ICC has requested a program budget of €147.89 million, or an increase of only 4.4 percent over its budget for 2017. The Committee on Budget and Finance has recommended a budget of €144.42 million, or an increase of 2 percent.³ Some states parties in recent years have called for zero growth in the court’s budget.

Human Rights Watch is deeply concerned that the current budgeting process for the ICC will result in inadequate funding for the court to effectively implement its mandate. The Committee on Budget and Finance reported that it was difficult to verify changes in the

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court's workload that would fully justify its requested increases. Its recommendations relied, in part, on assumptions provided by the court that appeared to show the same basic workload of six investigations and three trials in 2018 as had been the case in 2017. The broader budget discourse around the court, however, is failing to adequately capture the court's profound, outstanding resource needs, in both the short and long-term.

The opening of two new investigations—in Burundi, as announced, and Afghanistan, if approved—will increase the number of situations under investigation by the court from 10 to 12. These investigations were not factored into the court's July 2017 request and use of the court's contingency fund, designed to meet unanticipated costs, could help. The contingency fund, however, was not replenished last year. This was the case even though it had fallen below the agreed €7 million threshold, a threshold lowered from €10 million by states parties in 2009. The fund now stands at €5.79 million.

The court has many other existing resource needs.

These include staffing open investigations more fully and launching new investigations in some open situations, in addition to those already in progress. They include further investment in resources to support the preliminary examination process. This is required, on the one hand, to expedite analysis and the opening of new investigations where needed, and to use the preliminary examination period effectively as a catalyst for national prosecutions. They include greater investment in outreach on the ground with affected communities and activities to facilitate victim participation and reparations proceedings.

Human Rights Watch, as well as Amnesty International, had previously called on the ICC to project a vision of its “optimal capacity,” that is, how many more investigations, cases, and trials an efficient and high-performing ICC should be able to achieve. While recognizing that states parties face legitimate budgetary constraints and that court officials have every responsibility to ensure sound management of the resources allocated to the ICC, we hoped such a vision would help ICC states parties consider how to work together towards resourcing such a vision in the coming years.

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4 Ibid., paras. 36-37.
5 Ibid., para. 165.
Instead, budget discussions at the ICC appear headed in the opposite direction.

In 2015, the Office of the Prosecutor (OTP) presented its “basic size.” This was not its optimal size, but rather “the minimum size needed to respond to demands placed on the office with ‘quality, effectiveness, and efficiency.’” This would have seen the OTP’s budget grow to €60 million by 2018; a first step, in our view, toward achieving optimal capacity. This year, however, the OTP requested just €47.170 million, which would be cut to €45.992 million if the Committee’s recommendations are accepted by states parties.

In our view, the court should be more ambitious in its budget requests. But several years of steady pressure by some states parties to hold down any growth in the court’s budget has had the effect of distorting the annual negotiations on its budget request. These negotiations have moved away from a careful appraisal of the court’s resource needs and towards a race to lower the bottom line according to what some states parties are willing to pay. It has also limited prospects for charting a course to securing a budget for the court that will afford meaningful justice to a greater number of victims. It would be unfortunate if the Committee on Budget and Finance became a tool through which to further this agenda. There is an urgent need for states parties to work together to reverse this trend.

**ICC states parties should:**

- Scrutinize the Committee on Budget and Finance’s recommendations;
- Adopt a 2018 budget for the court adequate to ensure the effective implementation of its mandate, including replenishment of the contingency fund;
- 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 reject a zero-nominal growth approach to the ICC’s budget; and
- Express, in statements to the General Debate, during budget negotiations, and at other relevant moments during the session, concern that the current budgeting process is not sufficiently concerned with a careful assessment of the court’s resource needs.

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II. Judicial Elections

At its upcoming session, the Assembly will elect six new judges—a third of the ICC’s 18-member bench—each for a term of nine years. States parties’ responsibility to ensure the merit-based election of the most highly qualified individuals as ICC judges is among the most important aspects of their stewardship of the court.

ICC states parties have nominated 12 candidates. Given the current composition of the bench and consistent with the Rome Statute’s requirements of “equitable geographic representation” and a “fair representation of female and male judges,” this year, minimum voting requirements are in effect for five female judges, one judge from the Asia-Pacific region, one judge from the Africa region, and one judge from the Latin America and Caribbean region. In addition, the Rome Statute requires that the court’s bench consist of at least nine “List A” judges—that is, judges with established competence and experience in criminal law, procedure, and proceedings—and at least five “List B” judges—that is, judges with established competence in relevant areas of international law such as international humanitarian law and the law of human rights, as well as extensive experience in a relevant professional legal capacity. At this election, minimum voting requirements are in place with regard to one “List A” judge and one “List B” judge.⁸

Human Rights Watch has previously expressed support for the Assembly’s establishment of an Advisory Committee on Nominations 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. States parties should give serious consideration to the ACN’s report in deciding which candidates to support in the upcoming judicial election.⁹ In addition, states parties may benefit from reference to the responses provided to the Coalition for the ICC (CICC) questionnaire for judicial candidates. Audio recordings of panel discussions conducted by the CICC with the candidates in September 2017 are also available.¹⁰

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Even where Rome Statute criteria are satisfied, there is still considerable leeway in determining which individuals are best suited to serve as ICC judges.

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 practical experience in criminal trials. Managing the court’s proceedings effectively—meaning pre-trial and trial proceedings that run efficiently while respecting the rights of defendants and victims—requires judges familiar with the demands of criminal trials. Human Rights Watch continues to believe that states parties should prioritize electing “List A” candidates since judges with previous experience in criminal law and procedure will be best placed to meet the demands of ICC proceedings.

In addition, Human Rights Watch has consistently urged court officials to prioritize the court’s impact for victims and affected communities. Ensuring effective victim participation in court proceedings is an important component of increasing the court’s local impact. Human Rights Watch calls on states parties to consider candidates’ familiarity with and appreciation for the key role victims play at the court in their assessment of nominees.

Ultimately, as we have advocated in previous judicial elections, states parties should resist the practice of “vote-trading” where states agree to support one another’s candidates with minimal regard to the individual’s qualifications.

**ICC states parties should:**
- Prioritize the election of candidates with substantial practical experience in criminal trials;
- Consider candidates’ familiarity with and appreciation for the critical role of victims in ICC proceedings; and
- Put aside narrow interests and vote only for the most highly qualified candidates.

**III. Rome Statute at 20**

Twenty years after the Rome Statute’s adoption, the ICC is needed more than ever. The court’s potential workload is growing as human rights crises multiply amid an alarming disregard for international humanitarian law.

For the court to succeed, its officials continue to need to learn lessons from its early years whether in improving investigations, the pace of proceedings, or, critically, ensuring the court delivers meaningful justice for victims and communities affected by
the crimes committed before it. The latter requires more attention to the selection of cases, deepening outreach and engagement on the ground, and giving greater effect to victim participation in court proceedings.

But equally important, the ICC needs the strong backing of states parties. This support is necessary to facilitate the court’s daily judicial work and through private and public diplomacy to protect its mandate, independence, and legitimacy when they are under threat.

Robust engagement between states parties has proven to be an essential bulwark for the ICC. Most recently, collective efforts by ICC states parties have led to substantial progress in responding to the first announced withdrawals from the Rome Statute.

The ICC came up against unprecedented difficulties last October and November when Burundi, Gambia, and South Africa announced their intention to become the first states to withdraw from the court. In a major development, 16 African governments spoke out to oppose withdrawal and reaffirm support for the ICC in their capitals, New York, Addis Ababa, and The Hague between November and March: Botswana, Burkina Faso, Cape Verde, Côte d’Ivoire, Democratic Republic of Congo, Ghana, Lesotho, Liberia, Mali, Malawi, Nigeria, Senegal, Sierra Leone, Tanzania, Tunisia, and Zambia.

In February, the new Gambian government announced it was dropping plans for Gambia to withdraw from the ICC. In March 2017, the South Africa government also abandoned domestic legislation to leave the ICC, suspending its withdrawal plans. Only Burundi has moved forward, with its withdrawal becoming effective on October 27, 2017.

Looking further back in the court’s history, the ICC overcame efforts of the United States government under the George W. Bush administration to undermine the court. This was largely due to unified, firm support by states parties.

Challenges to and controversy about the ICC’s mandate will never fully recede or abate. For as long as the ICC is doing its job, it will engender intense opposition from those who have reason to fear accountability. Given trends in the current global landscape, this is likely to be all the truer in the near future. The commitment of states parties to the court, a global judicial institution rooted in defense of the rule of law, provides an essential counterpoint.
Human Rights Watch urges ICC states parties to use the Rome Statute’s anniversary as a vehicle to renew and reinvigorate demonstrable political support for the ICC, and to ensure that the court will be able to depend on that support when it is most needed.

Over the course of 2018, ICC states parties could take several actions to this end:

- Make the case for supporting the ICC, through the private and public statements of government officials, particularly at the highest levels. This could include public statements in the course of high-level bilateral meetings or on the occasion of multilateral summits. These statements are particularly important when and where the ICC needs specific forms of cooperation;
- Formulate or re-formulate and make public its government’s strategy of support to the ICC. This can be an opportunity to make the case for the court’s relevance and importance in today’s political landscape in furthering the government’s key policy priorities;
- Convene, with ministerial participation, conferences on the ICC to mark the twentieth anniversary. Such events could be convened nationally, regionally, or through multilateral organizations to give visibility to its government’s backing of the ICC. These events would also provide a forum for discussion and planning between governments with regard to strengthening support to the ICC;
- Take steps to increase cooperation with the court, including by implementing the Rome Statute into national legislation and concluding cooperation agreements with the ICC on the relocation of witnesses, interim release, and enforcement of sentences;
- Make contributions to the ICC’s voluntary funds, including the Trust Fund for Victims and the Trust Fund for Family Visits; and
- Urge other governments to join the Rome Statute, using the July 2018 anniversary as a target date for accession.

ICC states parties should also make the most of the plenary debate on the twentieth anniversary at the upcoming Assembly session, to be held on December 13, to move these initiatives forward. The debate is also an opportunity to begin to identify key issues that will need to be addressed to increase political support to the court. In 2018, at the seventeenth Assembly session, ICC states parties should hold an additional plenary debate to take stock of the anniversary year and measure progress toward strengthening support to the court.
**ICC states parties should:**

- Participate actively in the planned plenary debate on the Rome Statute’s twentieth anniversary, including by sending high-level representation, where feasible;
- Express, in General Debate statements or interventions during the plenary debate on the twentieth anniversary, its government’s commitment to the ICC and the importance of that commitment to advancing other key policy priorities;
- Identify, in statements to the plenary debate, themes for discussion over the coming anniversary year with regard to advancing support to the ICC, such as:
  - strengthening political and diplomatic support, including before the UN Security Council and regional intergovernmental organizations;
  - clarifying the court’s essential role in defending the rule-of-law;
  - renewing attention to arrest strategies and other necessary cooperation;
  - addressing the growing gap between the need for accountability and the resources available to the ICC; and
  - making progress toward universal ratification of the Rome Statute;
- Announce, in statements to the plenary debate, planned initiatives, such as high-level conferences, to mark the twentieth anniversary;
- Include language in the Omnibus resolution reflecting the importance of the twentieth anniversary of the Rome Statute as an opportunity to revitalize commitment to the ICC and memorializing key outcomes and areas for further discussion emerging out of the plenary debate on the twentieth anniversary of the Rome Statute; and
- Decide to hold a further plenary debate on the twentieth anniversary of the Rome Statute during the seventeenth Assembly of States Parties session in 2018.

**Recent Human Rights Watch materials**


**IV. Cooperation**

**A. Increasing cooperation**

Securing effective cooperation in its cases remains a central challenge for the ICC.
Human Rights Watch welcomes the continued attention of ICC states parties to increasing cooperation with the ICC, particularly through the Assembly’s facilitation on cooperation—currently under the leadership of France and Senegal—and plenary discussions during the Assembly session on cooperation. A focus of efforts this year has been on cooperation in the context of the court’s financial investigations, which have relevance to evidence collection, deterrence, and asset recovery for purposes of reparations proceedings. States parties are expected to adopt a declaration on cooperation in financial investigations and asset recovery as an annex to the cooperation resolution at the upcoming Assembly session.11

States parties have also given attention to another issue relevant to cooperation with the court: the development of procedures to guide consultations under Rome Statute article 97. Article 97 provides for consultations between a government and the court when a government identifies difficulties in implementing the ICC’s cooperation requests. At the request of the South African government, states parties established a working group on article 97 in June 2016.12 Unfortunately, the consultations of the working group have taken place behind closed doors, without opportunity for input by nongovernmental organizations. The procedures are expected to be adopted at the upcoming session as part of an Assembly resolution.

B. Responding to non-cooperation
Through the Assembly’s regional focal points, states parties have also continued their review of procedures related to non-cooperation. These procedures, adopted in 2011, relate to both “informal” responses to deter non-cooperation in the arrest of ICC suspects, and “formal” responses to judicial findings of non-cooperation.13

This year there have been no new formal findings of non-cooperation sent to the Assembly of States Parties or UN Security Council. An ICC pre-trial chamber determined

that South Africa had failed to cooperate in the arrest of President Omar al-Bashir of Sudan, but declined to refer the matter to the Assembly. Nonetheless, the issue remains of critical importance. Three non-cooperation findings referred to the Assembly last year—against the governments of Djibouti, Uganda, and Kenya—were acknowledged in the 2016 Bureau report on non-cooperation and Omnibus resolution, but have not been the subject of follow-up action.\footnote{14} Proceedings with regard to whether Jordan violated its obligations under the Rome Statute when al-Bashir visited the country for an Arab League summit in March are pending before a pre-trial chamber. Al-Bashir made a return visit to Uganda without facing arrest in November 2017.

Last year, the focal points on non-cooperation developed a useful “toolkit” to help guide informal responses by states parties to work together to deter non-cooperation in arrest and surrender. The toolkit is available from the Assembly’s website, and should be given greater visibility among states parties.\footnote{15}

It is important that the Assembly continues its review of the non-cooperation procedures.

As it has in the past, Human Rights Watch urges the Assembly to ensure that it acts to take up its responsibilities under article 87(7) to enforce the court’s judicial findings of non-cooperation. A clear response from the Assembly is key to give meaning to these findings, to bring about future cooperation, and to deter other states from non-cooperation. The Assembly’s current procedures outline a clear, if only permissive process for responding to formal findings of non-cooperation, but stop short of prescribing specific steps the Assembly can take collectively to respond to non-cooperation findings. Human Rights Watch looks forward to further review of the procedures and possible revisions, and to the eventual identification of such steps. In our view, the aim of the ongoing review should be to stimulate reflection and to secure

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consensus around recommended actions going forward to ensure that a commitment to respond to non-cooperation can be more easily translated into concrete action on the part of the Assembly and states parties.

**ICC states parties should:**

- Express, in statements to the general debate, plenary cooperation session, plenary session on the Rome Statute’s twentieth anniversary, and other relevant moments during the Assembly session, the importance of the Assembly’s continued attention to cooperation, as well as regret at the detrimental impact non-cooperation has on the court’s investigations and prosecutions;
- Commit, in general debate, plenary cooperation session, and other statements at the Assembly session, to engage actively in a review of the Assembly’s non-cooperation procedures and to their effective implementation in practice with regard to specific judicial findings of non-cooperation;
- Participate actively in the plenary debate on cooperation; and
- Include language in the Omnibus resolution mandating the Bureau to continue review of the effective implementation of the Assembly’s non-cooperation procedures.

**Recent Human Rights Watch materials**


**V. Amendments to Article 8**

In July 2017, Belgium deposited proposed amendments to the Rome Statute with the UN secretary-general. These amendments would add four war crimes to Rome Statute article 8, specifically, the use of:

- Biological or toxin weapons;
- Anti-personnel mines;
- Weapons causing injuries by fragments that in the human body escape detection by X-rays; and
- Weapons causing permanent blindness.

Human Rights Watch supports the adoption of these amendments.
Human Rights Watch is a co-founder and serves as chair of the International Campaign to Ban Landmines, a 1997 Nobel Peace Prize Co-Laureate. As such, we work for the universalization, implementation, and compliance of the Mine Ban Treaty, including adherence by the 35 states that have not acceded to it. We also worked for the adoption in 1995 of the protocol prohibiting blinding laser weapons. The weapons covered by the proposed amendments have been widely prohibited, but, at least with regard to anti-personnel landmines, are still in use by the armed forces of two states and non-state armed groups in approximately 10 countries, particularly the armed groups affiliated with the Islamic State (also known as ISIS).

**ICC states parties should:**
- Work towards the prompt adoption and entry into force of the July 2017 proposed amendments to Rome Statute article 8.

**VI. Giving greater voice to victims in choice of counsel**

At the ICC, victims are able to participate in court proceedings in their own right, a key innovation in international justice. In practice, few victims will appear in person before the court and instead are represented by counsel. In August 2017, Human Rights Watch published a new report, *Who Will Stand for Us? Victims Legal Representation at the ICC in the Ongwen Case and Beyond*. The report is based on a review of court decisions and interviews in communities in northern Uganda affected by the charges in the case against Dominic Ongwen of the Lord’s Resistance Army. The report sought to put into context the series of controversial decisions in that case regarding the appointment and funding of victims’ legal representation, in order to assess how decisions are made before the court when it comes to who will stand on behalf of victims.

In our analysis, the decisions in the Ongwen case, while unique in some respects, overall reflect a concerning trend at the ICC to take over decision-making about who will stand for victims. This is despite the protections provided in ICC Rule of Procedure and Evidence 90 regarding victims’ right to choose counsel or to be assisted by the Registry to choose a common legal representative, with court-appointed counsel envisioned only as a last resort. The court has cited a number of legitimate reasons for doing so—including holding down the cost and length of trials and ensuring effective representation—but as a result, the views and preferences of victims about their counsel have come to be only a relevant, but not necessarily determinative or even predominant consideration in the court’s decision-making.
Choice matters here because it helps victims develop a sense of trust that their counsel will represent their views. It is not the only way to empower victims or ensure effective representation. But the ICC needs to take every opportunity it can get to deepen its local impact and legitimacy.

The report—which builds on the recommendations of other nongovernmental organizations, including REDRESS and Avocats sans Frontières—calls for a fresh approach at the court. It includes a number of recommendations to the court’s judges and its Registry regarding the use of Rule 90 that we believe will bring about greater transparency in the court’s process and refocus the court’s attention on the actual situation of victims in a particular case. We also recommend that the judges develop an interpretation of the court’s rules that is realistic about the role legal aid—a key issue in the Ongwen case—plays in enabling choices of counsel.

While new policies and practices will need to be developed and implemented by the court’s judges and the Registry, there is an important role here for states parties. For new policies to succeed, they may need additional support in the court’s budget, including for legal aid and to deepen engagement on the ground.

**ICC states parties should:**

- Affirm, in statements during the Assembly session, including at relevant side events on victims’ rights, the importance of ensuring meaningful victim participation and the necessity of court outreach and engagement in affected communities to that end;
- Signal, in statements during the Assembly session, willingness to provide support for the necessary resources that may be required to implement changes in court policy and practice aimed at empowering victims in proceedings, including when it comes to decisions about their legal representation; and
- Oppose language in the Omnibus resolution regarding the ongoing review of the court’s legal aid policy that would require new proposals to fall within the court’s existing resources; this could preclude debate regarding important changes needed to better support effective and meaningful legal representation of victims.

**Recent Human Rights Watch materials:**