



## **Human Rights Watch**

### **Submission to the Independent Expert Review of the International Criminal Court**

**April 15, 2020**

The role of the International Criminal Court (ICC) as the crucial court of last resort for the worst international crimes remains as critical as ever. Serious crimes committed in violation of international law persist and victims of atrocities around the globe look to the court for justice when all other doors are closed. The court is a central actor in asserting the rule-of-law globally by helping to show that no one is above the law. And yet, the court faces serious internal and external challenges that have hampered its delivery of justice and disappointed legitimate expectations of victims and affected communities.

The Assembly of States Parties (ASP) decision to commission an Independent Expert Review, following the request by the court's leadership for a review of its performance, is a significant step to address these challenges.<sup>1</sup> The review process, along with elections in 2020 of the court's next prosecutor and six new judges, offers an important opportunity to launch processes aimed at meaningful improvement in court performance. The court and states parties should seize these opportunities fully. A higher performing court, with greater support from states parties, is urgently needed to improve victims' access to justice. The court's mandate is under pressure at a time of weakened commitment to the global rule-of-law and its effective functioning is essential to secure progress in the fight against impunity. Changes aimed at strengthening the court's policy and practice will also ensure the court is equipped to face politicized opposition to extending the reach of individual criminal responsibility even to the most powerful, as its founders created it to do.

Human Rights Watch submits the following observations and recommendations to assist the experts in their review. The court's ability to be a powerful affirmation of the rule-of-law is only possible where that message is heard and understood by those victimized by criminality. Our

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<sup>1</sup> See Assembly of States Parties (ASP), "Review of the International Criminal Court and the Rome Statute System," Resolution ICC-ASP/18/Res.7, December 6, 2019, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-Res7-ENG-ICC-Review-resolution-17Dec19-1530.cln.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG-ICC-Review-resolution-17Dec19-1530.cln.pdf) (accessed April 7, 2020), para. 6.

analysis below highlights opportunities in which the court’s activities could be increasingly oriented towards the affected communities that lie at the heart of the court’s work.

For the expert review to be effective, it will need to be perceived as credible and legitimate by all stakeholders. This necessitates inclusive and transparent processes and scrupulous respect for the review’s independence and for the court’s judicial and prosecutorial independence. Some of the topics that may be the subject of review and are addressed below—prosecutorial strategies in preliminary examinations, case selection and prioritization, completion strategies, and processes to support judicial decision-making—raise sensitive questions at the heart of this independence. For these reasons, Human Rights Watch expects that the majority of the review’s recommendations may be directed at court officials for their consideration. At the same time, state party and ASP support is highly relevant to the court’s success.

## **1. Investigations and prosecutions**

### *Strengthening investigations and prosecutions*

Human Rights Watch urges the Independent Expert Review to pay particular attention to strengthening investigations and prosecutions by the Office of the Prosecutor (OTP).

In 2008, Human Rights Watch made a number of recommendations based on our observation of OTP practice.<sup>2</sup> The office’s record as its first cases reached the court’s judges underscored the need to strengthen investigative practices.<sup>3</sup> Changes announced by the OTP in its 2012-2015 strategic plan, published in October 2013, addressed issues it considered essential to improving the quality and efficiency of the office’s work. Based on our earlier research, three key changes appeared to be particularly important.

First, the office shifted away from focused investigations to more open-ended investigations that consider multiple case hypotheses.<sup>4</sup> This shift addresses concerns that by settling on a case hypothesis too early in its investigations, and pursuing only this case hypothesis in investigations, the office had sometimes overlooked evidence, impairing what it was ultimately

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<sup>2</sup> See Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, July 2008, [https://www.hrw.org/sites/default/files/reports/icc0708\\_1.pdf](https://www.hrw.org/sites/default/files/reports/icc0708_1.pdf), pp. 45-58.

<sup>3</sup> As of November 2013, in cases that had gone forward to a confirmation hearing, judges declined to confirm charges against 4 out of 14 defendants. In the two cases that had proceeded to a verdict by that point, one had resulted in a conviction and one in an acquittal. For an assessment of the office’s investigative practices as of October 2012, see War Crimes Research Office, American University Washington College of Law, “Investigative Management, Strategies, and Techniques of the International Criminal Court’s Office of the Prosecutor,” October 2012, <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-16-investigative-management-strategies-and-techniques-of-the-international-criminal-courts-office-of-the-prosecutor/> (accessed April 12, 2020).

<sup>4</sup> International Criminal Court Office of the Prosecutor (OTP), “Strategic plan June 2012-2015,” October 11, 2013, <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> (accessed April 7, 2020), para. 23.

able to prove at confirmation or at trial.<sup>5</sup> Second, the OTP decided to only seek arrest warrants or summonses where cases are as trial ready as possible, or where there are prospects of being trial ready within a reasonable time period.<sup>6</sup> Third, the office indicated it would increase its field presence and country knowledge.<sup>7</sup> These shifts have been maintained by the OTP as a matter of strategy and it has also made other changes reflected in its strategic plans.<sup>8</sup>

While Human Rights Watch has not had the opportunity to publish further detailed research assessing the OTP's investigative practices, the need to strengthen the office's investigations and prosecutions nevertheless remains a core concern.<sup>9</sup> As the OTP acknowledges, it has continued to suffer significant setbacks in court.<sup>10</sup> While acquittals are an essential part of judicial proceedings where the evidence does not support conviction, the low rate of convictions before the court raises questions about the capacity of the office to effectively amass evidence and develop sound case theories to deliver justice for crimes committed. The office recognizes the need to strengthen current practice.<sup>11</sup> The Independent Expert Review has a critical role to play in assessing the changes the OTP has made and what steps are needed to ensure the office moves forward the strongest possible cases.

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<sup>5</sup> The external expert review and lessons drawn from the Kenya situation, commissioned by the OTP, and which focused on the earliest years of the OTP's engagement in the situation, described the approach as "target-based." See "ICC OTP Kenya Cases: Review and Recommendations; Executive Summary of the Report of the External Independent Experts," para. E17, annex I to "Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation," November 26, 2019, <https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf> (accessed April 7, 2020).

<sup>6</sup> OTP, "Strategic plan June 2012-2015," para. 4. The external expert review of the Kenya situation concluded that the decision to delay in-country investigations in Kenya until after the confirmation of charges hearings meant these investigations faced considerably weakened conditions, including a propaganda campaign against the court, a lack of government cooperation, and increased witness interference. See "ICC OTP Kenya Cases: Review and Recommendations; Executive Summary of the Report of the External Independent Experts," paras. E17-E18.

<sup>7</sup> OTP, "Strategic plan June 2012-2015," para. 48. Having investigators based in situation countries for a longer period of time, rather than conducting shorter missions from The Hague, should permit investigators to develop stronger networks for cooperation, as well as contacts with potential witnesses, react more flexibly to changing circumstances on the ground, and, overall, increase the office's appreciation of context, informing prosecutorial strategies. See Human Rights Watch, *Courting History*, pp. 55-58.

<sup>8</sup> See, e.g., OTP, "Strategic Plan 2016-2018," November 16, 2015, [https://www.icc-cpi.int/iccdocs/otp/EN-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf) (accessed April 7, 2020), paras. 56, 65, 87, 99; "Strategic Plan 2019-2021," July 17, 2019, <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> (accessed April 7, 2020), paras. 16, 17, 24, 46.

<sup>9</sup> See, e.g., Human Rights Watch, "Briefing Note for the Seventeenth Session of the International Criminal Court Assembly of States Parties," November 21, 2018, [https://www.hrw.org/sites/default/files/supporting\\_resources/en\\_hrw\\_asp17\\_a4.pdf](https://www.hrw.org/sites/default/files/supporting_resources/en_hrw_asp17_a4.pdf), p. 5.

<sup>10</sup> These include the vacating of charges against William Ruto and Joshua arap Sang, the acquittal of Laurent Gbagbo and Charles Blé Goudé following a no-case-to-answer motion (now under appeal), and the reversal, on appeal, of the conviction against Jean-Pierre Bemba. See OTP, "Report on the Implementation of the OTP Strategic Plan, 2016-2018," August 23, 2019, <https://www.icc-cpi.int/itemsDocuments/20190823-otp-report-SP-2016-2018-eng.pdf> (accessed April 14, 2020), para. 17. The office has secured final convictions in four cases and a conviction against Bosco Ntaganda in July 2019 on charges that were expanded considerably through additional investigations following his surrender to the court in 2013. See "ICC: Congo Warlord Guilty of Crimes Against Humanity," Human Rights Watch news release, July 8, 2019, <https://www.hrw.org/news/2019/07/08/icc-congo-warlord-guilty-crimes-against-humanity>. Appeals are pending in the Ntaganda case.

<sup>11</sup> See OTP, "Strategic Plan 2019-2021," paras. 6, 14-17.

Another specific concern that could be the focus of the experts' assessment is the pace of current investigations. While shifts in the prosecutor's strategies were likely to require lengthier investigations than in the earlier phases of the office's work, long delays in active investigations are limiting the access of victims to justice and reinforcing or raising perception problems. This includes the Georgia, Côte d'Ivoire and second Central African Republic (CARII) situations. In CARII, it has been more than a year since arrest warrants were first made public for two suspects affiliated with the anti-balaka, one fighting force responsible for crimes in the conflict. Observers in the Central African Republic have raised deep concern about the lack of charges made public involving crimes committed by the other major armed force in the conflict, the Seleka, and the risk that impartial justice will not be delivered.<sup>12</sup>

### **Recommendations to the Independent Expert Review**

- Assess factors that affect the OTP's ability to put forward strong cases in court supported by sufficient evidence.
- Identify ways to reinforce the office's commitment, as stated in its "Strategic Plan, 2019-2021," to promote a culture of critical thinking and recommend monitoring and evaluation processes.
- Examine steps the OTP could take to deepen the office's country knowledge and presence of investigators.

### *Selection and prioritization of cases*

The prosecutor's selection of cases—whom to try and for what—provides the earliest and most visible measure of whether and how the court will bring justice to the victims of grave international crimes in the situations before the court. The ability of the ICC to have a positive impact in affected communities will be closely linked to its selection of cases. Its selection of cases also provides the framework in which the court's other actors need to carry out their own responsibilities.<sup>13</sup> In addition, the exercise of the OTP's prosecutorial discretion in a manner that affirms the office's independence and impartiality is central to broader perceptions of the ICC. The prosecutor's independence in the selection of cases should be vigorously defended by states parties. (While not the focus of these comments, this is true of decisions to seek investigations in new situations as well.)

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<sup>12</sup> See Lydie Nzengou, "CAR's Civil Society is preoccupied by the ICC's policy which consists of prosecuting alleged criminals from only one political side" (La Société Civile Centrafricaine Est Préoccupée par la Politique de la CPI qui Consiste à Poursuivre les Présumés Criminels d'un Seul Côté), *Mbi la Gué*, December 16, 2019, <https://mbilague.info/la-societe-civile-centrafricaine-est-preoccupee-par-la-politique-de-la-cpi-qui-consiste-a-poursuivre-les-presumes-criminels-dun-seul-cote/> (accessed April 7, 2020); Tigranna Zakaryan, "A Chance to Rebuild the Court's Reputation: Civil Society Perspectives on the ICC in Central African Republic," *International Justice Monitor*, December 13, 2019, <https://www.ijmonitor.org/2019/12/a-chance-to-rebuild-the-courts-reputation-civil-society-perspectives-on-the-icc-in-central-african-republic/> (accessed April 7, 2020). For a discussion of the perception problems raised by the absence of cases against pro-Ouattara forces in Côte d'Ivoire, see Human Rights Watch, *Making Justice Count: Lessons from the ICC's Work in Côte d'Ivoire*, August 2015, [https://www.hrw.org/sites/default/files/report\\_pdf/cdio815\\_4up.pdf](https://www.hrw.org/sites/default/files/report_pdf/cdio815_4up.pdf), pp. 40-43.

<sup>13</sup> See Human Rights Watch, *Making Justice Count*, p. 21.

There have been significant gaps in the OTP's selection of cases. These include the absence of cases against senior leaders (as in the Ituri investigation in the Democratic Republic of Congo) or against different or a broader range of groups (as in Libya, Mali, and the Kivus investigation in the Democratic Republic of Congo). There have also been missteps in its decisions to sequence cases against different groups, as in Ituri and Côte d'Ivoire. This has led to a loss of confidence in the court as an independent or impartial institution in some situations.<sup>14</sup> At times, these issues could have been minimized through better communication by the OTP about its decisions. In Uganda, for example, the OTP has never ruled out investigation of abuses by Ugandan government forces but has also never taken such an investigation forward. Impunity for serious abuses by Ugandan government forces has been a persistent concern of people in northern Uganda. More regular updates and explanation about the ICC's approach to those abuses are needed.<sup>15</sup> This has been replicated with regard to the CARII investigation, as discussed above. Beyond specific missteps, in all open situations under investigation, the number of cases brought by the office has been insufficient to address accountability needs. Many of these gaps, some long-standing, should be addressed by future ICC investigations.

These gaps have been to a certain degree the product of practice rather than policy.<sup>16</sup> The office's recent introduction of a "case selection document" to identify and record all potential cases in a situation replaces a more ad hoc approach, and should advance the office's stated goal of "represent[ing] as much as possible the true extent of the criminality which has occurred within a

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<sup>14</sup> See Human Rights Watch, *Making Justice Count*, pp. 40-43; *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 2011, <https://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf>, pp. 12-22, 24-29, 31-33, 34-36.

<sup>15</sup> See Human Rights Watch, *Unfinished Business*, pp. 24-29; Lino Owor Ogora, "Civil Society in Uganda Outraged by Controversial Newspaper Article Clearing Ugandan Army of Committing War Crimes," *International Justice Monitor*, February 7, 2018, <https://www.ijmonitor.org/2018/02/civil-society-in-uganda-outraged-by-controversial-newspaper-article-clearing-ugandan-army-of-committing-war-crimes/> (accessed April 7, 2020).

<sup>16</sup> The office's emphasis in its 2016 "Case Selection and Prioritisation Policy" on an impartial assessment of allegations against all groups or parties within a particular situation and commitment for "the charges chosen [to] constitute, whenever possible, a representative sample of the main types of victimisation and of the communities which have been affected by the crimes in that situation" should ensure the court's cases remain responsive to victims' experiences. See OTP, "Policy paper on case selection and prioritisation," September 15, 2016, [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) (accessed April 7, 2020), paras. 20, 45. In addition, the office moved away as a matter of strategy from an overly rigid approach to "sequencing," that is, pursuing cases against one group in a given situation, and then investigating other groups. This approach gave rise to significant perceptions of bias in the OTP's Ituri investigations. See Human Rights Watch, *Courting History*, pp. 50-53. In its "Report of the Court on the Basic Size of the Office of the Prosecutor," the OTP indicated that it would plan to conduct simultaneous investigations to cover all sides to a conflict. 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](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-21-ENG.pdf) (accessed April 7, 2020), para. 24. The office's indication in its 2016 policy regarding the need to prioritize the roll-out of cases, however, could replicate some of the problems raised by its sequencing approach, in that it could lead to considerable time delays between the emergence of cases against different groups. The policy recognizes the "the impact of investigations and prosecutions on the victims of the crimes and affected communities" and the "impact and the ability of the office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis" as criteria governing prioritization decisions, and these criteria should be given particular weight. See OTP, "Policy paper on case selection and prioritisation," para. 50.

given situation.”<sup>17</sup> Giving effect to this goal, however, will require the office to bring forward considerably more cases per situation than has been the practice to date.<sup>18</sup>

Unfortunately, the office remains without the budgetary resources needed to support more effective application of its policy. It has signaled that it will need to prioritize between cases even more strictly given its expectation that the number of open situations will continue to increase in the coming years.<sup>19</sup> The need for increased vision by the OTP to address this dilemma and for states parties to address the lack of adequate resources without compromising on the court’s mandate is discussed below.

### **Recommendations to the Independent Expert Review**

- Revisit budgetary assumptions contained in the office’s “Basic Size” (as last updated in 2016) to determine resources necessary to support the office’s prosecutorial strategy and limit the considerable delay and need for prioritization in the roll-out of selected cases.
- Examine options for increased consultation by the OTP with affected communities to better inform decisions regarding case selection and prioritization in the light of the experiences of victims.<sup>20</sup>

## **2. Preliminary examinations and positive complementarity**

The ICC is a court of last resort, stepping in only where national authorities do not prosecute serious international crimes. Governments may avoid the ICC’s intervention by showing the ICC prosecutor that they are conducting genuine investigations. This can give the ICC prosecutor important leverage with these authorities during preliminary examinations, serving as a pressure point to promote progress on the delivery of justice for grave crimes domestically. By making the

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<sup>17</sup> See OTP, “Policy paper on case selection and prioritisation,” paras. 10-15, 45.

<sup>18</sup> The office’s “Strategic Plan, 2019-2021” indicates it may shift to “narrower cases.” Although it makes clear that these will be used as a means toward achieving cases against those most responsible, we are concerned that in practice they could become a substitute for such cases. Implementing this strategic direction requires more cases per situation—narrower cases in the short term together with cases aimed at holding those most responsible to account. This is in tension with the plan’s indication, cited below, that resource constraints will require an even stricter prioritization between cases. Narrower cases could serve to dominate the court’s docket as a result. See 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>.

<sup>19</sup> OTP, “Strategic Plan, 2019-2021,” para. 22. We raised concerns in 2011 that “the ICC and its prosecutor [would] increasingly ‘hollow out’ the court’s approach to its situations under investigation. That is, the ICC may take on more situations, but do less and less in each situation to square demand with limited resources.” Human Rights Watch, *Unfinished Business*, pp. 1-2.

<sup>20</sup> Human Rights Watch recommends that these consultations could be assisted by developing a strategy to take into account (a) how to make the best use of analysis conducted during the preliminary examination process, particularly when it comes to information collected as to the “interests of victims”; (b) how to make the best use of the written, victims’ representation process conducted pursuant to article 15; (c) whether an article 15-like process with regard to written, victims’ representations should be replicated, even where investigations are opened pursuant to state or Security Council referrals; and (d) how to conduct consultations with victims, while taking steps to minimize risks to them and their representatives or intermediaries.

most of its unique leverage, the OTP has a critical role to play in expanding the fight against impunity by catalyzing national proceedings.

The office's role is part of what is known as "positive complementarity," that is, efforts aimed at supporting national justice efforts and implementing the Rome Statute's complementarity principle in practice. This role in positive complementarity initiatives—whether in situations under preliminary examination or, on a court-wide basis, in situations under investigation—has been challenged by some states parties, which have questioned the resource implications for the court's budget and the legal basis in the Rome Statute.<sup>21</sup> We see it as an essential element of strengthening the Rome Statute system, in which the court serves as an essential backstop for justice, but where efforts are also invested in building up national capacity. The court is not a development agency, but court officials nonetheless remain a key resource.<sup>22</sup> Every avenue for accountability should be pursued.

When it comes to preliminary examinations, the goal of catalyzing national justice is secondary. The OTP's primary goal should remain a timely determination of whether the office will seek to exercise the ICC's jurisdiction. Encouraging national cases—clearly identified by the OTP as a "policy objective"—will only be applicable in some situations.<sup>23</sup> The OTP has appropriately pursued this only where certain underlying conditions are met.<sup>24</sup>

Human Rights Watch compared the office's practice across four situations (Colombia, Georgia, Guinea, and the United Kingdom/Iraq). We concluded that expectations about what the OTP can achieve to catalyze national justice should remain realistic. Stubborn obstacles to trying the most serious crimes before national courts mean that many preliminary examinations will result in the need to open ICC investigations. And yet, in each situation, we identified positive steps that were at least partly attributable to the office's engagement. The strongest impact has been in Guinea,

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<sup>21</sup> See 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, p. 1275.

<sup>22</sup> See Human Rights Watch, *Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference*, May 2010, <https://www.hrw.org/sites/default/files/reports/ij0510webwcover.pdf>, pp. 46-49.

<sup>23</sup> See OTP, "Policy paper on Preliminary Examinations," November 2013, [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) (accessed April 8, 2020), paras. 100-103.

<sup>24</sup> The OTP's approach, generally, is to defer to domestic authorities for a certain amount of time where it determines that genuine proceedings are or can be conducted. To that end, "[w]here potential cases falling within the jurisdiction of the Court have been identified, the office will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes." OTP, "Policy Paper on Preliminary Examinations," para. 101. The OTP's practice is to intensify positive complementarity activities during "Phase 3," that is, only after the OTP has concluded that a reasonable basis exists to believe that crimes within the ICC's jurisdiction have been committed. An exception to this might be where there are already significant national proceedings, such that even at Phase 2 the OTP has the opportunity to engage with authorities regarding these proceedings. The OTP's efforts to encourage national proceedings unfold in one or two circumstances: either where national proceedings have already been opened, or, even there where there are no national proceedings, if a government states its intention to investigate. See Human Rights Watch, *Pressure Point: The ICC's Impact on National Justice: Lessons from Colombia, Georgia, Guinea, and the United Kingdom*, May 2018, [https://www.hrw.org/sites/default/files/report\\_pdf/ij0418\\_web\\_o.pdf](https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_o.pdf), p. 158.

where, while the case has yet to go to trial, over time the OTP, together with other key international actors, has spurred incremental progress by national officials. We believe the OTP should seek to make the most of its leverage to press national efforts forward. Our recommendations identify shifts in OTP practice that could improve its impact, while also noting the central role for other international partners to amplify the office’s efforts.<sup>25</sup> These recommendations acknowledge the difficult balance the OTP needs to seek to leave open space for national authorities to act, while being willing—and being seen as willing—to conduct its own investigations if they do not, provided the ICC’s other jurisdictional requirements are met.

Consideration of whether timelines should be attached to preliminary examinations has been proposed as part of the overall review process underway.<sup>26</sup> Preliminary examinations should last only as long as needed to fulfil their purpose. Where there are limited prospects of encouraging national prosecutions, the analysis should proceed rigorously to a determination as to whether or not an ICC investigation is merited. But where the office considers that there are prospects for catalyzing genuine proceedings, subjecting preliminary examinations to strict timelines is incompatible with the flexibility this engagement requires.

A better approach is for the office to make increased use of benchmarks. The use of benchmarks can stimulate national authorities to take specific steps, and where publicly communicated, can signal to partners and civil society how to amplify the office’s efforts. In Guinea, for example, the OTP identified as benchmarks the need to visit the crime scene and interview key witnesses. In Colombia, by contrast, more general discussions with national authorities appeared not to have convinced some officials that the ICC would be prepared to open investigations into army killings, lessening the office’s influence. The OTP can develop such benchmarks through its assessment of national proceedings and engaging national authorities, NGOs, and other stakeholders to determine what concrete steps are needed to advance these proceedings. The use of benchmarks also allows the OTP to identify where such steps are not being taken and the time for deference to national proceedings has ended.<sup>27</sup>

In assessing complementarity, it is important to recall that the genuineness of national proceedings refers to the ability and willingness of national authorities to investigate potential cases that might otherwise be heard before the ICC, rather than a general assessment of the legal system. As the OTP has indicated, “[i]f an otherwise functioning judiciary is not investigating or

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<sup>25</sup> See Human Rights Watch, *Pressure Point*, pp. 1-19.

<sup>26</sup> See ASP, “Meeting the challenges of today for a stronger Court tomorrow Matrix over possible areas of strengthening the Court and Rome Statute system,” November 27, 2019, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-review-Matrix-v2-27Nov19-1740.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-review-Matrix-v2-27Nov19-1740.pdf) (accessed April 8, 2020), p. 10. The office provided some guidance in its 2015 “Basic Size” regarding the expected length of examinations. See ASP, “Report of the Court on the Basic Size of the Office of the Prosecutor,” p. 37.

<sup>27</sup> See further discussion in Human Rights Watch, *Pressure Point*, pp. 10-14, 19-21.

prosecuting the relevant case(s), the determining factor is the absence of relevant proceedings.”<sup>28</sup> Human Rights Watch’s research and advocacy regarding national trials suggests that the absence of political will to support independent investigations and prosecutions is often a key barrier to domestic cases.<sup>29</sup>

### **Recommendations to the Independent Expert Review**

- Consider ways for the OTP to advance more quickly through the earliest phases of preliminary examinations, including by reallocating a greater share of resources to these phases. Our research and OTP experience suggests that opportunities to engage with national authorities regarding progress in specific cases increase after the office has already determined that there are potential ICC cases.<sup>30</sup>
- Examine, based on the OTP’s experience to date, how benchmarks could be further used to press for progress in national investigations and prosecutions during the course of preliminary examinations and other steps to increase transparency.

### **3. Seeking greater coherence in the court’s jurisprudence and timeliness in judicial decision-making**

The ICC’s ability to effectively try cases, including ensuring scrupulous respect for fair trial rights, rests on the quality of its judicial decision-making. ICC judges hand down judgments that significantly influence international criminal law jurisprudence and deeply impact the lives of victims and affected communities, in addition to providing important managerial and leadership functions essential to the court’s operation.

While we have followed initiatives undertaken by the bench to assess needed rule amendments and the development of the Chambers Practice Manual, Human Rights Watch has not conducted recent research regarding the working methods of the judiciary. We are concerned, however, by the need to ensure greater coherence in the court’s jurisprudence. Fragmented opinions can make it difficult to discern key holdings, as was the case in the appeals chamber decision in the Bemba case.<sup>31</sup>

The time required to issue decisions also requires examination. In the Afghanistan situation, the pre-trial chamber delivered its decision on the prosecutor’s request for authorization to investigate 17 months after it was made. In the Gbagbo and Blé Goudé case, the judges did not

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<sup>28</sup> OTP, “Policy Paper on Preliminary Examinations,” para. 46.

<sup>29</sup> See Human Rights Watch, *Making Kampala Count*, pp. 50-53.

<sup>30</sup> See Human Rights Watch, *Pressure Point*, pp. 14-16.

<sup>31</sup> Beyond the majority opinion, there were two separate concurring opinions and a dissent. See Joseph Powderly and Niamh Hayes, “The Bemba Appeal: A Fragmented Appeals Chamber Destabilises the Law and Practice of the ICC,” *PhD studies in human rights* (blog), June 26, 2018, <http://humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html> (accessed April 8, 2020).

issue detailed written reasons simultaneously with the acquittal; a written judgment was only filed six months later. This created significant confusion in Côte d'Ivoire and challenged court efforts to explain the decision to Ivorians. It played out in the context of a situation in which the prosecution's failure to bring cases against those supportive of President Alassane Ouattara and who allegedly had committed grave crimes had already polarized opinion about the court domestically, as noted above. ICC judges have recently agreed to deadlines for key judicial decisions and included these in the Chambers Practice Manual.<sup>32</sup>

### **Recommendation to the Independent Expert Review**

- Consider measures that could enhance coherence in the court's jurisprudence, including further changes to the Chambers Practice Manual and recommended training for newly elected judges in the court's procedures, caselaw, and institutional arrangements.

## **4. Completion strategies**

The Office of the Prosecutor's 2019-2021 Strategic Plan commits to developing a policy on the completion of situations under investigation and this is echoed in the court-wide strategy.<sup>33</sup> Development of court-wide completion strategies for each ICC situation under investigation should be rooted in greater clarity on the meaning and utility of such strategies. In our view, and drawing lessons from the ad hoc tribunals and Special Court for Sierra Leone, these situation-specific strategies should be developed as soon as possible from the outset of a new situation and define what the court seeks to achieve by the end of its work in a given situation. They should set benchmarks to assess progress toward those goals. This should include the goal of contributing to "positive complementarity" efforts to support national authorities to investigate and prosecute ICC crimes, an essential part of the court's potential legacy in situation countries. In this way, completion strategies will help embed court activities, including the prosecution's selection of cases, discussed above, in a clear vision aimed at maximizing the court's impact in affected communities. They could also help to project to states parties the court's resource needs and how resources will be directed in the long-term. In addition to court-wide consultation,

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<sup>32</sup> ICC, "Chambers Practice Manual," November 29, 2019, <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf> (accessed April 8, 2020), pp. ii-iii.

<sup>33</sup> See OTP, "Strategic Plan 2019-2021," para. 23; ICC, "Strategic Plan 2019-2021," July 17, 2019, <https://www.icc-cpi.int/itemsDocuments/20190717-icc-strategic-plan-eng.pdf> (accessed April 15, 2020), p. 11. The United Kingdom has proposed the need for a "closure strategy" for the court's cases, including situations under preliminary examination. See Statement by Andrew Murdoch, Legal Director to the International Criminal Court Assembly of States Parties, at its 17th session in The Hague, December 5, 2018, <https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session> (accessed April 8, 2020). In our view the completion of a preliminary examination, with either a decision to open or seek authorization to open an investigation or to close the preliminary examination where Rome Statute criteria are not met for an ICC investigation, presents very different issues to the kinds of completion strategies for situations under investigation we discuss here.

strategies should be rooted in engagement with national authorities and affected communities.<sup>34</sup> In the implementation of these strategies, the court should be able to rely in some situations on its Assembly of States Parties to broker assistance between states parties and other international actors to support capacity-building efforts to enable the transfer of court responsibilities to national authorities.<sup>35</sup>

### **Recommendations to the Independent Expert Review**

- Consider whether a consultation process, with particular attention to the experience of the ad hoc tribunals and Special Court for Sierra Leone, could support the court’s design of a general “template” for completion strategies, to be adapted on a situation-by-situation basis.
- Recommend completion strategies cover the range of court functions and identify areas where assistance by national authorities, other states, and international partners will be necessary to support completion strategies.

## **5. Country offices and outreach**

While recognizing that country offices may not be feasible in every situation, Human Rights Watch advocates for the establishment of ICC offices as early as possible from the outset of investigations.<sup>36</sup> The ICC’s presence in situation countries facilitates specific court mandates, ranging from investigations to witness protection to outreach, and could include *in situ* proceedings. But they are also a key vehicle through which to root the court’s work in situations under investigation, ensure court activities are responsive to national developments, enhance

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<sup>34</sup> See Elizabeth Evenson and Alison Smith, “It’s a Journey, Not a Destination: Court-Wide Completion Strategies in ICC Situations Under Investigation Can Promote a Shared Vision of the Court’s Mandate, Guiding Its Exercise and Bringing on Board Support From Other Actors,” *ICC Forum*, <https://iccforum.com/completion#Evenson> (accessed April 9, 2020).

<sup>35</sup> Discussions can draw on previous work carried out by Assembly focal points on complementarity and reports prepared by the court. These highlighted initial elements for completion strategies and the connection to efforts directed at building capacity in national jurisdictions to facilitate the transfer of court responsibilities. See ASP, “Report of the Court on complementarity: Completion of ICC activities in a situation country,” ICC-ASP/12/32, October 15, 2013, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-32-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-32-ENG.pdf) (accessed April 9, 2020); see also Secretariat of the ASP, “Complementarity Seminar on completion strategies across the ICC’s activities,” April 4, 2019, [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/Documents/4April%20Seminar%20Completion%20Strategies%20Summary%2016May2019%201803.pdf](https://asp.icc-cpi.int/en_menus/asp/complementarity/Documents/4April%20Seminar%20Completion%20Strategies%20Summary%2016May2019%201803.pdf) (accessed April 9, 2020). The Assembly has mandated its Secretariat to “facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions.” It hosts an online platform but has been limited to engaging “within existing resources.” See ASP, “Strengthening the International Criminal Court and the Assembly of States Parties,” Resolution ICC-ASP/18/Res.6, December 6, 2019, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-Res6-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res6-ENG.pdf) (accessed April 9, 2020), para. 133.

<sup>36</sup> To date, limited consideration has been given to the opening of country offices in preliminary examinations. At the ICC, public information activities in situations under preliminary examination have been considered to be the responsibility of the OTP, while the Outreach Unit’s mandate with the court’s Registry kicks in once situations are under formal investigation. The Assembly has recognized the need for “early outreach from the outset of the Court’s involvement, including during the preliminary examination stage.” See ASP, “Strengthening the International Criminal Court and the Assembly of States Parties,” Resolution ICC/ASP18/Res.6, December 2019, para. 66.

communication between the court and affected communities, and support activities aimed at securing the court's long-term legacy. The latter includes positive complementarity initiatives.

The Registry's outreach activities are a particularly central component of the court's engagement with affected communities, with the aim of ensuring justice is not only done, but seen to be done. Outreach also enables victims to access their rights before the court and can create favorable conditions for investigations. These activities are facilitated by country offices where those exist and through the Outreach Unit of the Registry's Public Information and Outreach Section. To reach national or regional audiences, outreach activities directed to communities within the scope of charges brought by the Office of the Prosecutor in given cases need to be integrated with broader public information activities.

The court's approach to country offices has evolved positively. Initially conceived narrowly as supporting investigations and witness protection, country offices expanded to include staff associated with outreach, the facilitation of victim participation, and the Trust Fund for Victims. Following the Registry's ReVision, country offices are headed by "chiefs of country offices." Human Rights Watch advocated for this high-level leadership to improve the strategic orientation of court activities towards maximizing local impact and to facilitate better coordination between Registry mandates.<sup>37</sup> Effective implementation of this new structure requires close coordination with relevant sections in The Hague to ensure coherence across the court's work.

The Registry plans to "devise and agree on a sustainable framework for the introduction, operation and closure of country offices" in coordination with the OTP.<sup>38</sup> In Human Rights Watch's assessment, decisions about scaling up and down country offices have prioritized supporting judicial activities, as opposed to ensuring decisions are also rooted in an assessment of how the ICC's presence can advance the court's local impact.<sup>39</sup> Delay in opening the Georgia country office is one example. Although investigations were authorized in January 2016, a country office was not opened until December 2017. An office may not have been needed from the outset to support investigations, as those investigations scaled up. But there were immediate public information needs, given limited knowledge in the country and region about the ICC and the lengthy period of preliminary examination.<sup>40</sup>

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<sup>37</sup> See Human Rights Watch, *Making Justice Count*, pp. 22-30.

<sup>38</sup> See Registry, ICC, "Registry Strategic Plan (2019-2021)," July 17, 2019, <https://www.icc-cpi.int/itemsDocuments/190717-reg-strategic-plan-eng.pdf> (accessed April 9, 2020), p. 9.

<sup>39</sup> For an overview of activities and phases as they relate to the Registry's activities in situation countries, see ASP, "Final report of the Court on the Court-wide impact of the OTP Basic Size model," ICC-ASP/15/34, November 14, 2016, [https://asp.cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-34-ENG.pdf](https://asp.cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-34-ENG.pdf) (accessed April 9, 2020), pp. 11-20.

<sup>40</sup> See Stephanie Maupas, "If the ICC Fails in Georgia, It Will be the Same in Afghanistan and Palestine: Interview with Nika Jeiranashvili," July 5, 2017, <https://www.justiceinfo.net/en/tribunals/icc/33785-if-the-icc-fails-in-georgia-it-will-be-the-same-for-afghanistan-and-palestine.html> (accessed April 9, 2020). For a discussion regarding the impact on outreach activities given delays in scaling up the Côte d'Ivoire office, see Human Rights Watch, *Making Justice Count*, pp. 20, 46-57.

The same goes for decisions about scaling down country offices. Redeployment of resources between country offices has been used as a cost-saving measure, but where these decisions are taken in the absence of a longer-term strategy, they can undermine the court’s relationship with affected communities. The decision in 2014 to scale back all outreach activities in Uganda due to the absence at the time of arrests was criticized by local groups as “risk[ing] sending a message that the Court has now given up.”<sup>41</sup> The Outreach Unit had to scale up its presence in Uganda a few months later when Dominic Ongwen was transferred to The Hague in early January 2015. The court’s 2020 budget request indicates that it has taken the “first steps” to downsize its presence in Democratic Republic of Congo.<sup>42</sup> As far as we are aware, however, the court has yet to develop a completion strategy for the situation.

As an alternative to relying on judicial developments to direct decisions about opening, scaling, and closing of country offices, Human Rights Watch has recommended that the Registry develop organ-wide, country-specific strategies for maximizing local impact with affected communities. These strategies should define how the Registry’s mandates can contribute to impact, with a view toward developing specific action plans. They will require coordination with the OTP and could be developed as part of court-wide completion strategies.<sup>43</sup>

### **Recommendations to the Independent Expert Review**

- Consult widely with country-based ICC staff.
- Assess current levels of satisfaction with the court’s performance within affected communities, to the extent information is available to the review process, and recommend measures the court could take to access such information on an ongoing basis. These assessments could be built into the court’s performance indicators. While the performance indicators assess the transparency and efficiency of proceedings and victims’ access to the court (including indicators relevant to the ICC’s country offices and outreach activities), they rely on data about court activities.<sup>44</sup> External evaluations or survey data collected by the court could also be considered, first to set baselines and, later, to assess progress.
- Recommend steps to ensure the court’s country-based activities maximize its local impact.
- Consider whether additional measures are needed to promote communication and coordination between country offices and The Hague.

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<sup>41</sup> Human Rights Watch, *Making Justice Count*, p. 24, n.18.

<sup>42</sup> See 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](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-10-ENG.pdf) (accessed April 9, 2020), para. 543.

<sup>43</sup> See Human Rights Watch, *Making Justice Count*, pp. 77-82.

<sup>44</sup> See ICC, “Third Court’s report on the development of performance indicators for the International Criminal Court,” November 15, 2017, <https://www.icc-cpi.int/itemsDocuments/171115-Third-Report-performance-indicators-ENG.pdf> (accessed April 9, 2020).

## 6. Family visits

The right of all detained persons to family visits is well recognized.<sup>45</sup> The ICC presidency, in a March 2009 judicial decision, held that the ICC has a positive obligation to fund family visits of indigent persons in order to give effect to their right to family visits.<sup>46</sup> In November 2009, however, the Assembly passed a resolution reaffirming many states parties' position "that according to existing law and standards, the right to family visits does not comprise a co-relative legal right to have such visits paid for by the detaining authority or any authority."<sup>47</sup> In 2010, the Assembly established a Trust Fund for family visit for indigent detainees in order to ensure that family visits are now funded entirely through voluntary contributions.<sup>48</sup>

Unfortunately, since then, states parties have not followed through on the creation of the Trust Fund. As of September 2019, five states had made donations totaling approximately 250,000 euros, but the fund has been allowed to dip to a zero balance.<sup>49</sup>

### Recommendation to the Independent Expert Review

- Consider whether more effective funding mechanisms, including returning to the use of the court's regular budget, are needed to ensure the effective protection of the rights of indigent ICC detainees to family visits.

## 7. Adequate resources

While court practice should be strengthened, the ICC's performance has also been hampered by inadequate resources in key areas. Human Rights Watch does not take a position as to the overall

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<sup>45</sup> See, e.g., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted December 9, 1988, G.A. Res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988), <https://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf> (accessed April 10, 2020), principle 19 ("A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."). Regulation of the Court 100 states that "[a] detained person shall be entitled to receive visits," ICC, "Regulations of the Court," May 26, 2004, <https://www.icc-cpi.int/Publications/Regulations-of-the-Court.pdf> (accessed April 9, 2020). Rreg. 100. Regulation of the Registry 179 provides that the "Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links." ICC, "Regulations of the Registry," March 6, 2006, <https://www.icc-cpi.int/resource-library/Documents/RegulationsRegistryEng.pdf> (accessed April 9, 2020), reg. 179.

<sup>46</sup> See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, "Decision on Mr. Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008," ICC, Case No. ICC-01/04-01/07, March 10, 2009, [https://www.icc-cpi.int/CourtRecords/CR2009\\_02787.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_02787.PDF) (accessed April 9, 2020).

<sup>47</sup> See ASP, "Family visits for indigent detainees," Resolution ICC-ASP/8/Res.4, November 26, 2009, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-8-Res.4-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.4-ENG.pdf) (accessed April 9, 2020), preambular para. 2.

<sup>48</sup> See ASP, "Financial statements for the period 1 January to 31 December 2010," ICC-ASP/10/12, July 26, 2011, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP10/OR/ICC-ASP-10-20-Vol.II-ENG-C.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/OR/ICC-ASP-10-20-Vol.II-ENG-C.pdf) (accessed April 9, 2020), p. 318.

<sup>49</sup> See ICC, "The Trust Fund for Family Visits," <https://www.icc-cpi.int/Publications/20190919-tffvisits-eng.pdf> (accessed April 13, 2020), p. 3; International Bar Association, "IBA urges State Parties' cooperation and greater support for the International Criminal Court," December 6, 2019, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=aa216004-30b5-4981-9c05-9504932d796c> (accessed April 9, 2020).

budget request submitted by the ICC each year. Rather, we have considered the court’s budget request from the perspective of identifying where inadequate resources may limit the court’s effectiveness in combating impunity.

The lack of adequate resources is particularly evident when considering the limited number of cases brought by the OTP per situation. The court’s first prosecutor requested minimal budgetary increases, reflecting the office’s policy at the time of focused, phased investigations, rotating resources within the OTP between cases.<sup>50</sup> The office received a boost in resources between 2013 and 2015, suggesting initial state party support for the changes announced to prosecutorial strategy in 2013, discussed above. But its approved budget since then has stagnated, increasing by a little over 4 million euros between 2016 and 2020 to 47.4 million euros.<sup>51</sup> This is far from the “basic size” of 61.1 million euros the OTP estimated it would need by 2021, even while setting its “pace below the level of full demand.”<sup>52</sup>

The court’s budget request for 2020 explicitly indicated that a lack of resources has impeded the office’s progress in its Burundi investigation and previously delayed the start of its second Côte d'Ivoire investigation. The office also indicated that its Georgia investigation would continue “within the available resources.”<sup>53</sup> As noted above, the OTP plans to use “further prioritisation” leading to delays in some investigations and prosecutions to attempt to square increasing demand with resources (among other measures).<sup>54</sup>

While a certain degree of prioritization is necessary, too few cases per situation has exacerbated problems in case selection gaps. This has left the court in many open situations without a sufficient footprint to deliver justice meaningfully, as discussed above. And when cases fail, the selection of too few cases can collapse an entire situation and victims’ hopes for redress, as in the court’s first Central African Republic investigation.<sup>55</sup> To deliver more successfully on the court’s mandate, and to secure the court’s legacy and legitimacy, the prosecution will need to bring more cases per situation.

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<sup>50</sup> See War Crimes Research Office, American University Washington College of Law, “Investigative Management Strategies, and Techniques of the International Criminal Court’s Office of the Prosecutor,” pp. 24-33.

<sup>51</sup> See ASP, “Resolution of the Assembly of States Parties on the proposed programme budget for 2020, the Working Capital Fund for 2020, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2020 and the Contingency Fund,” Resolution ICC-ASP/18/Res.1, December 6, 2019, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-Res1-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res1-ENG.pdf) (accessed April 9, 2020), para. 1.

<sup>52</sup> See ASP, “Report of the Court on the Basic Size of the Office of the Prosecutor,” paras. 5, 39. The OTP later updated its “basic size” to project a budget of 61.1 million euros by 2021. See ASP, “Final report of the Court on the Court-wide impact of the OTP Basic Size model,” para 33.

<sup>53</sup> See ASP, “Proposed Programme Budget for 2020 of the International Criminal Court,” paras. 113, 121, and 126.

<sup>54</sup> See OTP, “Strategic Plan 2019-2021,” para. 22.

<sup>55</sup> See Elise Keppler (Human Rights Watch), “No Redress for Central African Victims,” dispatch, June 11, 2018, <https://www.hrw.org/news/2018/06/11/no-redress-central-african-victims>.

Other resource gaps exist in the court’s work, including those necessary to support critical outreach and public information activities. The court’s Outreach Unit, which is responsible for outreach activities in the country situations where the court does not have offices and also supports activities elsewhere, has four staff members.

Human Rights Watch is concerned that a lack of adequate resources may lead to calls for the court to scale back on its mandate. This would be in contrast to the ambitions of its founders to set up a court of last resort to tackle entrenched impunity and hold senior leaders to account. 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.<sup>56</sup>

Pressure by some states parties for zero growth in the court’s budget has been one factor in undermining a genuine dialogue as to the resources adequate to deliver on the court’s mandate. It has affected, in our view, the ability of ICC officials to come forward with budget requests that would more adequately address the backlog of pending investigations. Human Rights Watch has called on the OTP to provide a greater vision for reckoning with the tough choices it faces given the need both to increase the number of investigations in open situations and expand its work to new situations.<sup>57</sup> Completion strategies, discussed above, could be one tool. States parties, however, need to address the court’s lack of adequate resources. Together with Amnesty International, we proposed that the court draw on its “basic size” modeling to go further and define its “optimal” capacity. This should encompass an assessment of the number of investigations, prosecutions, and trials that a high-performing and efficient ICC, with three courtrooms in its permanent premises, could carry out to play the best possible role it can in the fight against impunity. It should include modeling the human and financial resources to support the robust engagement in situation countries necessary to ensure impact in affected communities.<sup>58</sup> The articulation of such a vision could provide a platform to renew state party consideration of how budgetary resources could be made available and on what timeframe.

### **Recommendations to the Independent Expert Review**

- Identify specific areas where resource limits have played a role in affecting the court’s performance.

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<sup>56</sup> 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,” ICC-02/17-33, April 12, 2019, [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF) (accessed April 9, 2020), para. 95. In March 2020, the appeals chamber overturned the pre-trial chamber, authorizing the prosecutor to open an investigation into the Afghanistan situation.

<sup>57</sup> Human Rights Watch, “Comments on Office of the Prosecutor, International Criminal Court, ‘Strategic Plan, 2019-2021’,” June 10, 2019, <https://www.hrw.org/news/2019/11/13/office-prosecutor-international-criminal-court-strategic-plan-2019-2021-comments>.

<sup>58</sup> See Elizabeth Evenson (Human Rights Watch) and Jonathan O’Donohue (Amnesty International), “Still falling short—the ICC’s capacity crisis,” commentary, *Open Democracy*, November 3, 2015, <https://www.hrw.org/news/2015/11/03/still-falling-short-iccs-capacity-crisis>.

- Consider whether a follow-up exercise to be conducted by the court with the assistance of independent experts is needed to develop a model of the court’s “optimal” capacity.

## **8. The Assembly of States Parties as a strategic partner on cooperation**

The ICC’s success is directly related to the will of states parties and intergovernmental organizations to support it. Without its own police force to facilitate investigations, to locate witnesses, and to apprehend suspects, the ICC must rely on the cooperation of states parties in order to fulfill its mandate. It is crucial that states parties view their responsibility to cooperate with the court as substantially more far reaching than responding to the court’s targeted demands for assistance. This court simply cannot succeed without active engagement by states parties in facilitating achievement of the ICC’s objectives.

The court’s Assembly of States Parties has a number of critical functions, including setting the court’s annual budget, electing officials, developing the court’s legislative framework, responding to non-cooperation findings, and providing management oversight to the court’s principals regarding the ICC’s administration. The ASP needs to carry out these functions in a manner that seeks to ensure the election of the most highly qualified court officials, without regard for political considerations; respects prosecutorial and judicial independence; and defers to the expertise of court officials when it comes to their setting of court policy.

We have advocated for the ASP to play a robust role as a strategic partner for the court, particularly when it comes to strengthening cooperation by states parties and other actors, including the United Nations. The Assembly has undertaken significant initiatives through its facilitators and focal points on cooperation and non-cooperation. The Assembly should resume consideration of several of these, including (1) establishing a coordination mechanism of national focal points;<sup>59</sup> (2) advancing specific recommendations in the draft Action Plan on arrest strategies;<sup>60</sup> and (3) further development and implementation of the Assembly’s procedures on non-cooperation to ensure these procedures are mandatory and provide for more specific sanctions to bring about cooperation.<sup>61</sup>

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<sup>59</sup> See Human Rights Watch, “Memorandum for the Thirteenth Session of the International Criminal Court Assembly of States Parties,” November 25, 2014,

[https://www.hrw.org/sites/default/files/related\\_material/HRW%20ASP13%20Memorandum%20Final%20ENG.pdf](https://www.hrw.org/sites/default/files/related_material/HRW%20ASP13%20Memorandum%20Final%20ENG.pdf), p. 24.

<sup>60</sup> ASP, “Report of the Bureau on Cooperation, Annex IV: Report on the draft Action Plan on arrest strategies, submitted by the Rapporteur,” ICC-ASP/14/26/Add.1, November 16, 2015, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-26-Add1-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-26-Add1-ENG.pdf) (accessed April 9, 2020).

<sup>61</sup> 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](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf) (accessed April 14, 2020), annex II (“Assembly procedures relating to non-cooperation”).