



Office of the Prosecutor, International Criminal Court, “Strategic Plan, 2019-2021”

Comments of Human Rights Watch

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Human Rights Watch provides the following comments on the “Strategic Plan, 2019-2021” (draft Strategic Plan) of the Office of the Prosecutor of the International Criminal Court (ICC).

The draft Strategic Plan acknowledges that the Office and the ICC face a “critical juncture.” As we see it, the court has achieved limited successes at a time when weakened regard for the global rule of law and politicized attacks on the court have decreased its margin for error. Court officials need to urgently address shortcomings in policy and practice to confront an emerging crisis of public confidence in the institution. Renewed state party commitment to the vision of the Rome Statute’s drafters—backed up by financial and political support, as well as judicial cooperation—is also essential. But the court itself must lead the way.

The stakes are high. The court’s existence exerts an invaluable normative force for justice and law reform debates; a diminished ICC would have significant consequences for advancing the norm of accountability globally.

We note the Office’s plan to prepare a report assessing its performance over the period covered by its previous strategic plan and would urge it to consider further adapting this strategic plan and its implementation in light of its findings. While we support an independent expert committee to assess the court’s performance and make recommendations, and welcome the openness of the Office, alongside the court’s president, judges, and registrar, to such an assessment, we urge the prosecutor, as she enters the last two years of her term, and the Office to take steps to address lessons learned without delay.

Strategic goals 1-2: to achieve a high rate of success in court; to increase the speed, efficiency and effectiveness of preliminary examinations, investigations and prosecutions

A. An impossible dilemma

The draft Strategic Plan acknowledges that, on the one hand, “stakeholders expect the Office [of the Prosecutor] to deliver more and better results, preferably within a shorter time and for some, within existing or with even fewer resources,” and, on the other hand, “in the coming years, the Office expects to face an increase in the number of situations under investigation as its ongoing preliminary examinations progress, while resources are unlikely to increase significantly” (para 12).

This is a critical challenge. The court’s work in 11 situations already subject to investigations is far from done—due to the need to bring additional cases to afford meaningful justice and

complete a robust prosecutorial program and the absence of arrests in existing cases. And yet there are several additional situations where ICC investigations could be opened. This has been a creeping dilemma for the Office over several years, but it has been compounded and grown more acute with each year and each new situation.

The draft Strategic Plan goes on to note some of the strategies identified that may help to address these tensions. These include greater efficiency and the development of completion strategies. Completion strategies developed as part of court-wide initiatives could guard against pressure to “move on” before the court can responsibly wind down its activities in any given situation.

But largely the draft Strategic Plan leaves this dilemma unanswered, indicating that it is exploring options while “committed to engaging in open and frank dialogue with stakeholders regarding their expectations and the Office’s operational reality given its resources” (para. 12).

There are no easy answers here. Rome Statute crimes are being committed with impunity in too many places, and efforts to support national justice have been insufficient. But the Office should provide its own vision for reckoning with tough choices. The Office thus far has sought to cope with more situations by restricting the number or scope of cases or subjecting progress to available resources. Indeed, the plan emphasizes that, under current conditions, the Office “will need to exercise its prosecutorial discretion even more stringently to prioritise amongst the different cases identified” (para. 25). But this has already left the court with too shallow of a footprint. And when cases fail, as they have, this can collapse an entire situation. There have been significant legitimacy costs.

Meanwhile states parties, in their opposition to fully funding the court’s annual budget requests, are already providing an unsatisfactory answer. Limited funding and the court’s heavy docket were background factors considered in the judges’ interpretation given to the “interests of justice” in Pre-Trial Chamber II’s decision on Afghanistan. And a failure to grapple with a mounting workload may be used as a pretext for demands to scale back on the ICC’s work. The result may be politically convenient for some but would jeopardize the ICC’s role as a court of last resort, mandated to address entrenched impunity whether for actors from weaker states or more powerful ones. The prosecutor has shown significant courage in bringing forward tough cases over her tenure, and we would encourage the Office to bring that same courage to this difficult discussion.

B. Relying on narrower cases

For similar reasons, we would urge caution when it comes to the Office’s proposal to focus on narrower, sequential cases (para. 27).

The plan makes clear that narrower cases will be used as a means toward achieving cases against those most responsible, but we are concerned that in practice, they could become a substitute. Implementing this strategic direction would require not just open-ended, in-depth investigations—already a pre-requisite and recognized as such in the Office’s strategy documents since 2013—but also a prosecutorial program of more cases per situation. That is because both narrower cases to increase courtroom success rates in the short-term, together with

cases aimed at more senior perpetrators to include those most responsible will be needed. This is in tension, however, with the draft Strategic Plan's indication, cited above, that even stricter prioritization between cases is likely needed. Narrower cases could serve to dominate the court's docket, crowding out the more ambitious cases the ICC was set up to prosecute. This has already been our assessment, for example, in the Democratic Republic of Congo, where case selection choices have left behind significant impunity gaps.

Strategic goal 6: to further strengthen the ability of the Office and its partners to close the impunity gap.

Efforts to achieve greater coordination between different actors in the fight against impunity to provide broader accountability beyond the specific cases brought before the ICC, as previously envisioned in strategic goal 9 of the 2016-2018 Strategic Plan, are essential. We welcome the focused approach presented in the draft Strategic Plan under goal 6. We note, however, that the draft Strategic Plan does not specifically refer either to particular opportunities presented in situations under investigation and preliminary examination.

When it comes to situations under investigation, building up national capacity to support the investigation and prosecution of serious international crimes may be a necessary element of successful completion strategies. This does not mean that the Office itself needs to act as a development agency, but rather—along with other court and external actors—lend expertise and seek to broker necessary assistance.

In situations under preliminary examination, the [Office's engagement with national authorities](#), alongside the efforts of other partners, may spur national investigations. This role will only be applicable in *some* situations under preliminary examination and is subsidiary to the Office's primary role in this phase to reach a determination as to whether or not to seek to exercise the court's jurisdiction. But making the most of engagement during this phase holds out significant potential for expanding the reach of justice beyond the cases the ICC will prosecute itself.

The court's role in positive complementarity initiatives remains a contested subject and has been challenged on a variety of grounds by states parties. We see it as a key 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 out the national capacity of states parties. This requires court officials engaging other actors such as states parties and international development agencies. We recommend that deepening the Office's positive approach to complementarity in situations under investigation and preliminary examination be explicitly recognized in strategic goal 6.