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Too Few Trials, Too Many Tribulations: The ICC's Terrible Year and Where to Go from Here

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TOO FEW TRIALS, TOO MANY TRIBULATIONS: THE ICC’S TERRIBLE YEAR AND WHERE TO GO FROM HERE

*Elizabeth Evenson**

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In June 2018, the International Criminal Court (ICC) appeals chamber reversed what had been the court’s most significant verdict: a 2016 conviction of a former Congolese vice-president, Jean-Pierre Bemba, for crimes committed in the Central African Republic.¹ This was significant because it was the court’s first conviction for crimes of sexual and gender-based violence and on the basis of command responsibility, and because Bemba was among the most senior-ranking officials to appear for trial at the court.²

An acquittal needs to be understood as a legitimate outcome to any justice process, but, in context, the decision touched off alarm bells about the health of the institution. For one, the appeals chamber decision came ten years after Bemba was surrendered to the court, and fifteen years or more after the crimes underlying the case were committed.³ For another, given that the prosecution had only ever brought one core international crimes case arising out of its first Central

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1. Prosecutor v. Jean-Pierre Bemba Gombo, ICC-1/05-01/08 (June 8, 2018).
2. Géraldine Mattioli-Zeltner, *High-Profile ICC Warning to Commanders on Rape*, HUMAN RIGHTS WATCH (Mar. 21, 2016), <https://www.hrw.org/news/2016/03/21/dispatches-high-profile-icc-warning-commanders-rape> [<https://perma.cc/9DNN-U95R>].
3. *Background: Jean-Pierre Bemba Gombo*, INT’L JUSTICE MONITOR, <https://www.ijmonitor.org/jean-pierre-bemba-gombo-background/> [<https://perma.cc/P6RS-YZNP>].

African Republic investigation, the acquittal left the court utterly empty-handed when it came to delivering on victims' expectations for redress.⁴ In addition, beyond the majority opinion, there were two separate concurring opinions and a dissent; some observed this could make it difficult to discern key holdings in the future.⁵ A statement by the ICC president appeared to chastise the prosecution's post-judgment statement, in which she expressed concern about aspects of the majority decision.⁶

The acquittal also attracted attention given the court's slim record. By that June, fifteen years after starting operations, there had been convictions in only three other cases for core international crimes and an acquittal in one.⁷ Judges had discontinued proceedings, or the prosecution had dropped charges for lack of evidence, in just as many cases.⁸

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4. Elise Keppler, *No Redress for Central African Victims*, HUMAN RIGHTS WATCH (June 11, 2018), <https://www.hrw.org/news/2018/06/11/no-redress-central-african-victims> [<https://perma.cc/94ZG-5TVU>].
 5. See Joseph Powderly and Niamh Hayes, *The Bemba Appeal: A Fragmented Appeals Chamber Destabilizes the Law and Practice of the ICC*, PHD STUDIES IN HUMAN RIGHTS (June 26, 2018), <http://humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html> [<https://perma.cc/9N29-7KW6>]; Douglas Guilfoyle, Part II-This is Not Fine: The International Criminal Court in Trouble, EJIL: TALK! (Mar. 22, 2019), <https://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/#more-17006> [<https://perma.cc/Q8FP-SN57>].
 6. See Press Release, ICC, Statement of the President of the Court in relation to the case of Mr Jean-Pierre Bemba Gombo (June 14, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180614-pres-stat> [<https://perma.cc/5337-LYBP>].
 7. As of June 2018, the prosecution had secured convictions in cases against Thomas Lubanga Dyilo, Germain Katanga, and Ahmad Al Faqi Al Mahdi. Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Judgement (Dec. 1, 2014); Prosecutor v. Katanga, ICC-01/04-01/07, Judgement pursuant to article 74 of the Statute (Mar. 7, 2014); Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgement and Sentence (Sept. 27, 2016). Mathieu Ngudjolo Chui was acquitted. Prosecutor v. Ngudjolo, ICC-01/04-02/12 A, Judgement (Apr. 7, 2015). A trial chamber has since convicted Bosco Ntaganda on all 18 counts of crimes against humanity brought by the prosecutor. See ICC: Congo Warlord Guilty of Crimes Against Humanity, HUMAN RIGHTS WATCH (July 8, 2019), <https://www.hrw.org/news/2019/07/08/icc-congo-warlord-guilty-crimes-against-humanity> [<https://perma.cc/CL5A-B33C>].
 8. Pre-trial chambers did not confirm cases in one case each arising out of the Darfur, Sudan and Democratic Republic of the Congo situations. See *Closed Stage*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/Pages/closed.aspx> [<https://perma.cc/GXA4-NYM9>] (explaining how an ICC case closes and listing cases that are in the closed stage). In one Kenya case, the pre-trial chamber did not confirm charges against one defendant, while a trial chamber, by a majority, subsequently vacated

Terminated cases included those against the president and deputy president of Kenya, proceedings their administration doggedly sought to undermine by any means necessary. The administration successfully capitalized on opposition to the court from some African leaders, as well as the court's exclusive focus on investigations on the continent up to that point, throwing up a specter of mass withdrawal of African states parties from the treaty.⁹ While a mass withdrawal failed to materialize, it created a political and diplomatic distraction for ICC member states (one that still lingers in state party discussions), at a time when states should have been heavily engaged in building practical and political support for the court as a new institution.¹⁰ After all, the court's record is also a product of state failure to assist in the arrest of more than a dozen ICC fugitives.¹¹

The Bemba appeals decision dropped like another stone onto a pile of concerns about the ICC. It was a pile that was still holding, but as more and more pieces began to drop in the following months—culminating in the decision of an ICC pre-trial chamber to turn down an Afghanistan investigation—it took the shape of a landslide that threatens the credibility of the Rome Statute system. Without swift action - but more importantly effective and principled action - to shore up the court's foundations, serious questions about its ability to fully deliver on its mandate will remain.

This piece highlights some of the additional developments of the past months that have heightened concerns about the ICC. It then analyzes the need for the ICC in today's world and the challenges that

charges against the two remaining defendants, including Kenya's deputy president, William Ruto, following what the judges termed a systematic effort to corrupt witnesses. *Id.* In the second Kenya case, the pre-trial chamber similarly did not confirm charges against one defendant, while the prosecution subsequently withdrew charges against the two remaining defendants, including Kenya's president, Uhuru Kenyatta, for lack of evidence. *Id.* In that case, the court found the government was in breach of its cooperation obligations. *Id.* Other cases have been closed, either because of the death of the defendant or following a successful admissibility challenge. *Id.*

9. Kenneth Roth, *Africa Attacks the International Criminal Court*, THE N.Y. REVIEW OF BOOKS (Feb. 6, 2014), <https://www.nybooks.com/articles/2014/02/06/africa-attacks-international-criminal-court/> [<https://perma.cc/N67Z-VAZC>].
10. See, e.g., Elizabeth Evenson, *Breaking the Rules: Kenya, the ICC, and the Twelfth Assembly of States Parties Session*, in GLOBALIZATION AND ITS IMPACT ON THE FUTURE OF HUMAN RIGHTS AND INTERNATIONAL CRIMINAL JUSTICE 437–59 (M. Cherif Bassiouni ed., 2015).
11. See *Defendants at Large*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/defendants?k=At%20large> [<https://perma.cc/694G-B6UM>].

have prevented the court from more fully delivering on its mandate. It concludes with recommendations on the way forward.

THE ICC'S TERRIBLE YEAR

A few months after the Bemba decision, the U.S. government went on the offensive against the court.¹² It saddled the institution and its states parties with another political challenge to the court's legitimacy.¹³ In a September 2018 speech in Washington, D.C., then-U.S. National Security Advisor John Bolton resumed his role as the ICC's chief opponent, announcing the US would break ties with the court and threatening to sanction ICC staff and member countries should ICC investigations touch U.S. nationals or U.S. allies.¹⁴ The context was the ICC prosecutor's then-pending request for an investigation in Afghanistan,¹⁵ an investigation that might have included conduct by U.S. Central Intelligence Agency and military personnel, and the prosecutor's preliminary inquiry into the situation in Palestine. Bolton's remarks were confirmed by U.S. President Donald Trump from the UN General Assembly podium,¹⁶ and in March 2019, the U.S. acted on those threats, ultimately revoking the prosecutor's visa to the United States.¹⁷

In January 2019, a trial chamber acquitted, by a majority, the former president of Côte d'Ivoire, Laurent Gbagbo, and a co-defendant, without requiring the defense to mount a case.¹⁸ This was played out

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12. Elizabeth Evenson, *US Takes Aim at the International Criminal Court*, HUMAN RIGHTS WATCH (Sept. 11, 2018), <https://www.hrw.org/news/2018/09/11/us-takes-aim-international-criminal-court> [<https://perma.cc/3RQ6-YZUS>].
 13. *See id.*
 14. *Id.*
 15. *Id.*
 16. Donald Trump, President of the United States, Remarks by President Trump to the 73rd Session of the United Nations General Assembly (Sept. 25, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>).
 17. *US Threatens International Criminal Court*, HUMAN RIGHTS WATCH (March 15, 2019), <https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court> [<https://perma.cc/D23D-5VFZ>]; Mike Corder, *US Revokes Visa for International Court Prosecutor Bensouda*, ASSOCIATED PRESS (Apr. 5, 2019), <https://www.apnews.com/a5e0748b9b7443e683c6a0f4e0c7d509> [<https://perma.cc/5967-U4Z7>].
 18. Press Release, International Criminal Court, ICC Trial Chamber I Acquits Laurent Gbagbo and Charles Blé Goudé from All Charges (Jan.

in the context of a situation in which the prosecution's failure to bring cases against those supportive of President Alassane Ouattara, who allegedly committed grave crimes, had already polarized opinion about the court domestically.¹⁹ The judges did not issue detailed written reasons simultaneously with the acquittal, and a written judgement was only filed in July.²⁰ This challenged court efforts to explain the decision to Ivorians. The prosecution is likely still to appeal.

Other developments—including a lawsuit by a small number of the court's judges before the International Labour Organization seeking a pay rise,²¹ after states parties failed to take decisive action on the request, and the decision of the Japanese government to appoint one of the court's judges as its ambassador to Estonia while she was still serving on a trial chamber²² (she later resigned the ambassadorship)—brought unflattering attention to the court's bench.²³

In some respects, these developments still did not feel like they marked some particularly new or different moment. As serious as they were, most of all for the individual victims looking to the court for redress, problems in investigations and too-little attention to the court's real world impact were not new, and had been the focus of advocacy and attention for some time.²⁴ What felt new, perhaps, was that the

15, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1427> [<https://perma.cc/PU4R-KRPE>].

19. *Making Justice Count: Lessons from the ICC's Work in Cote d'Ivoire*, HUMAN RIGHTS WATCH (Aug. 4, 2015), <https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire> [<https://perma.cc/HC52-7GPA>].
20. *See ICC Prosecutors to Appeal Acquittal of Former Ivory Coast President Laurent Gbagbo*, FRANCE 24 (Sept. 16, 2018), <https://www.france24.com/en/20190916-icc-prosecutors-appeal-acquittal-former-ivory-coast-president-laurent-gbagbo> [<https://perma.cc/8JT4-PTBX>].
21. Marlise Simons, *In The Hague's Lofty Judicial Halls, Judges Wrangle Over Pay*, N.Y. TIMES (Jan. 20, 2019), <https://www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html> [<https://perma.cc/DT3V-KTCU>].
22. Kevin Jon Heller, *Ntaganda Defence Reacts to the Judge Ozaki Revelations*, OPINIO JURIS (Jan. 4, 2019), <http://opiniojuris.org/2019/04/01/ntaganda-defence-reacts-to-the-judge-ozaki-revelations/> [<https://perma.cc/QB49-CNGX>].
23. *See Simons, supra* note 22; *ICC: Congo Warlord Guilty of Crimes Against Humanity*, HUMAN RIGHTS WATCH (July 8, 2019), <https://www.hrw.org/news/2019/07/08/icc-congo-warlord-guilty-crimes-against-humanity> [<https://perma.cc/CS3U-9UNL>] (noting that Ntaganda filed a request to disqualify the judge, but the request was ultimately rejected by a plenary of judges).
24. For example, the NGO Coalition for the ICC has an outreach and communications team that has repeatedly stressed the importance of

margin of error was shrinking as the court's stature brought increased scrutiny. Still, even Bolton's noxious offensive was charged with a silver lining of revitalizing state party support to rally against external threats by a discreditable U.S. administration.²⁵ The end of 2018 also saw arrests in the court's first cases in its second Central African Republic investigation, which is focused on the conflict there since 2012.²⁶

But in April, a pre-trial chamber rejected the prosecution's request to open an investigation in Afghanistan.²⁷ Judges found that the

strengthened engagement with affected communities. See *Communications and Outreach*, COALITION FOR THE INT'L CRIMINAL CT., <http://www.coalitionfortheicc.org/communications-and-outreach> [<https://perma.cc/367Y-CZRH>]. The Victims' Rights Working Group, also created through the Coalition for the ICC, has addressed the constellation of issues surrounding effective victim participation and representation before the court, including the delivery of reparations. See *Who We Are*, VICTIMS' RIGHTS WORKING GROUP, <http://www.vrwg.org/about-vrwg/who-we-are> [<https://perma.cc/6J9D-PDPK>]. See also Elizabeth Evenson, *Making Justice Count: Lessons from the ICC's Work in Cote d'Ivoire*, HUMAN RIGHTS WATCH (Aug. 4, 2015), <https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire> [<https://perma.cc/3JCG-B4GW>]; *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, HUMAN RIGHTS WATCH (Sept. 15, 2011), <https://www.hrw.org/report/2011/09/15/unfinished-business/closing-gaps-selection-icc-cases> [perma.cc/H86Q-QPPN]; *Impunity Restored? Lessons learned from the failure of the Kenyan cases at the International Criminal Court*, KENYANS FOR PEACE WITH TRUTH AND JUSTICE (Nov. 23, 2016), <https://kptj.or.ke/impunity-restored-lessons-learned-from-the-failure-of-the-kenyan-cases-at-the-international-criminal-court/> [<https://perma.cc/WN77-DRJB>]; AM. UNIV. WASH. COLL. OF L. WAR CRIMES RESEARCH OFFICE, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNOLOGIES OF THE INT'L CRIMINAL COURT'S OFFICE OF THE PROSECUTOR (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/> [<https://perma.cc/WCT7-HH4Y>].

25. Adam Taylor, *John Bolton Hates the International Criminal Court. That Might Make Other Countries Love It*, WASH. POST (Sept. 10, 2018), <https://www.washingtonpost.com/world/2018/09/10/john-bolton-hates-international-criminal-court-that-might-make-other-countries-love-it/> [<https://perma.cc/397E-UQEU>].
26. Elise Keppler, *Justice Moves Ahead in the Central African Republic*, HUMAN RIGHTS WATCH (Dec. 12, 2018), <https://www.hrw.org/news/2018/12/13/justice-moves-ahead-central-african-republic> [<https://perma.cc/DT8W-MSJB>].
27. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 96 (Apr. 12, 2019).

prosecution had satisfied its burden as to the existence of crimes within the court's jurisdiction and the absence of national proceedings that would cut off its mandate.²⁸ They nonetheless found that an investigation would not be in "the interests of justice," a term of art in the Rome Statute, because the cooperation challenges—likely a nod to the Trump administration's threats, as well as political developments in Afghanistan—were so steep as to limit the likelihood of successful prosecution.²⁹ The prosecution, they concluded, should invest its scarce resources elsewhere.³⁰

This was shocking. Shocking in what gave rise to the appearance of capitulation to external pressure, most of all, but also in the eating away of the court's mandate were the decision followed to its logical conclusion across the court's work. The very nature of that work requires the court to confront powerful interests opposed to accountability. Cooperation is also dynamic and subject to influence—as changes in domestic politics and the pressure applied by the United States and the European Union shows in the context of cooperation with the tribunal for the former Yugoslavia.³¹ Requiring guarantees of cooperation from the outset renders the ICC's investigations a null set.³²

Of course, the decision did not bar the court's doors. In fact, appeals proceedings have been launched with regard to the Afghanistan decision. Work goes on—including a fresh request from the prosecution to investigate crimes connected to the forced displacement of the Rohingya from Myanmar into Bangladesh.³³ Work goes on at ICC headquarters and in its country offices, in the scrum of diplomats in The Hague and in New York charged with following ICC matters, and in civil society organizations globally who speak out against abuses, support victims, and catalyze government support for justice. But the court is facing very significant questions as to whether it will be allowed (politically) and whether it is capable (in its own practices, policies, and legal framework) of delivering on its founders' ambitions twenty years ago in Rome Addressing these questions in a manner that pushes

28. *Id.*

29. *Id.* ¶ 95.

30. *Id.*

31. VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 65 (2008).

32. See Param-Preet Singh, *In Afghanistan, the ICC Abandons the Field*, HUMAN RIGHTS WATCH (April 23, 2019), <https://www.openglobalrights.org/In-afghanistan-the-ICC-abandons-the-field/> [<https://perma.cc/XFB4-KMHL>].

33. Param-Preet Singh, *ICC Prosecutor Seeking to Investigate Crimes Against Rohingya*, HUMAN RIGHTS WATCH (June 26, 2019), <https://www.hrw.org/news/2019/06/26/icc-prosecutor-seeking-investigate-crimes-against-rohingya> [<https://perma.cc/3XKT-R42V>].

the ICC forward—rather than scales back on those ambitions—is the essential task now.

IS THE ICC WORTH SAVING?

The ICC's founding treaty, the Rome Statute, was adopted in 1998.³⁴ This was on the back of horrific atrocities, including genocides in Rwanda and Bosnia.³⁵ Individual tribunals had been set up by the UN to address these situations.³⁶ This gave new impetus to long-standing ambition to create a permanent court with a mandate over the world's worst crimes.³⁷ A permanent, international court to enforce the global rule of law by prosecuting these crimes—and doing so impartially, not as a matter of victor's justice—would help to turn the page on the 20th century's history of rampant crimes committed with impunity.³⁸

Built into the Rome Statute system was the ambition to bring together its global reach with its local application.

Global reach because although the court is treaty based, meaning its widest application is within states parties, through the UN Security Council and through *ad hoc* acceptance of the court's jurisdiction by states, its reach could be potentially universal.³⁹ This, along with the absence of immunities within the statute, meant that the court could in theory act to ensure that no one was above the law, no matter how powerful they or their allies might be.⁴⁰ This year, against the backdrop of considerable controversy and problems in state party compliance in

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34. Rome Statute of the International Criminal Court, *in force on* July 17, 1998, 2187 U.N.T.S. 90.
 35. *See Rome Statute of the International Criminal Court: Overview*, UNITED NATIONS, <http://legal.un.org/icc/general/overview.htm> [https://perma.cc/5NQX-CRVU].
 36. *UN Documentation: International Law*, DAG HAMMARSKJOLD LIBRARY (May 2, 2019), <https://research.un.org/en/docs/law/courts> [https://perma.cc/P4RZ-VW7E].
 37. INT'L CRIMINAL CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 1, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> [https://perma.cc/U7UK-MHZ2].
 38. *See* Richard Dicker and Amy Braunschweiger, *Interview: The Future of International Justice Amid Boundless Cruelty*, HUMAN RIGHTS WATCH (July 11, 2018), <https://www.hrw.org/news/2018/07/11/interview-future-international-justice-amid-boundless-cruelty> [https://perma.cc/8SGA-LG2Q].
 39. *See* Rome Statute of the International Criminal Court, *supra* note 37, art. 12–13.
 40. *See* Rome Statute of the International Criminal Court, *supra* note 37, art. 27.

the arrest of former Sudanese President Omar al-Bashir, ICC appeals judges confirmed that there is no head-of-state immunity for sitting leaders before the court where it otherwise has jurisdiction.⁴¹

Alongside a global reach for the court itself, local application of international criminal law was built into the treaty.⁴² The Rome Statute sets up the ICC as a court of last resort—it can only intervene where national authorities cannot or do not act to prosecute these crimes.⁴³ It sets in place the ICC as a court, but also a broader Rome Statute system for justice rooted in the national law and courts of ICC states parties.⁴⁴

In spite of the sizeable efforts to put in place this innovative and *sui generis* court—which also has strong provisions in its treaty on sexual and gender-based crimes and victims’ rights—many thought at the time that it might not actually be needed, that the horrors of the 20th century would not be repeated.

Unfortunately, the ICC as a court remains as relevant today, if not more so, given the ongoing commission of Rome Statute crimes. The Rome Statute has been an engine of important law reform where the treaty has been implemented in national law, which could one day increase the local application of its law.⁴⁵ But in many places, the technical capacity, and perhaps more importantly, political will to support independent, impartial investigations of serious international crimes remains lacking.⁴⁶ Support is available to national prosecutions of international crimes, but some mechanisms set up in recent years - like the EU toolkit on complementarity and an Assembly of States Parties platform to facilitate this assistance - have not been fully utilized.⁴⁷ While there are some alternatives to ICC action, so far, these are simply too few.

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41. *See ICC: Jordan Was Required to Arrest Sudan’s Bashir*, HUMAN RIGHTS WATCH (May 6, 2019), <https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir> [https://perma.cc/T8JQ-GHPP].
 42. *See Rome Statute of the International Criminal Court*, *supra* note 37, art. 17.
 43. *Id.*
 44. *See id.*
 45. *See Implementing Legislation on the Rome Statute*, PARLIAMENTARIANS FOR GLOBAL ACTION, <https://www.pgaction.org/ilhr/rome-statute/implementing-legislation.html> [https://perma.cc/EE4T-C67K].
 46. *See Pressure Point: The ICC’s Impact on National Justice*, HUMAN RIGHTS WATCH (May 3, 2018), <https://www.hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and> [https://perma.cc/RMK2-8NER].
 47. High Representative of the European Union for Foreign Affairs and Security Policy and European Commission, *Joint Staff Working*

CHALLENGES IN PRACTICE

If the need for the ICC as a particularly important vehicle for accountability remains, the challenges in practice have been enough to question whether the court can ever work as intended.

That is not to say that the Rome Statute project is not without successes. The ICC's existence is exerting a powerful normative force. For example, the quest for justice for the situation in Syria was blocked by political divides within the UN Security Council on an ICC referral.⁴⁸ But it was then channeled into the creation, by the UN General Assembly, of an innovative investigative mechanism to prepare case files for future prosecutions.⁴⁹ The engagement of the ICC prosecution with national authorities can be a plus-factor for justice, as in Guinea and to a lesser extent Colombia, although practice needs to be strengthened and better supported by other partners to realize greater effects.⁵⁰

But in its own investigations and prosecutions, as a court engaged in a diverse range of countries, the ICC has underperformed. There have been lengthy court proceedings; divergent approaches by chambers on key issues; challenges in selecting cases and getting cases the prosecution brings to trial, and once at trial, in securing convictions;

Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap Between International and National Justice, SWD, at 26 (Jan. 31, 2013), https://ec.europa.eu/europeaid/sites/devco/files/joint-staff-working-document-on-advancing-the-principle-of-complementarity-2013_en_12.pdf; *Complementarity and the International Criminal Court: Platform for Technical Assistance*, INT'L CRIMINAL CT., https://asp.icc-cpi.int/en_menus/asp/complementarity/Documents/ICC%20complementarity%20template%20platform%20EN.pdf (last visited Oct. 23, 2019).

48. *Russia and China Veto UN Move to Refer Syria to ICC*, BBC NEWS (May 22, 2014), <https://www.bbc.com/news/world-middle-east-27514256> [<https://perma.cc/Y925-DFHP>].
49. *Syria: UN General Assembly Adopts Resolution on War Crimes Investigations*, HUMAN RIGHTS WATCH (Dec. 21, 2016), <https://www.hrw.org/news/2016/12/21/syria-un-general-assembly-adopts-resolution-war-crimes-investigations#> [<https://perma.cc/G6U4-9DVA>].
50. HUMAN RIGHTS WATCH, *PRESSURE POINT: THE ICC'S IMPACT ON NATIONAL JUSTICE* 5 (2018), https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf [perma.cc/NEU8-XPSU]. See Jane Stromseth, *Is the ICC Making a Difference?*, JUST SECURITY (Dec. 6, 2017), <https://www.justsecurity.org/47717/icc-making-difference> [<https://perma.cc/75KH-LEEW>] (including a broader analysis of other impacts of the ICC).

questions on defense and victims' rights, including the development of legal aid policies; and a shallow footprint in countries where investigation take place. Together these limit the ICC's impact.⁵¹ As noted above, these issues are not new, but they have come thundering to the forefront over the past year.

A turbulent landscape on which the ICC works has sharpened attention to the court's missteps.

This is not 1998. There is a broader retreat underway from the global rule of law. As noted above, the U.S. has returned to the hostile approach it took during the ICC's earliest years. The most immediate context for U.S. action was the potential Afghanistan investigation that could have touched on U.S. conduct there.⁵² But the U.S. has made clear that it might also act to undermine other potential ICC investigations.⁵³ The Philippines and Burundi withdrew from the court when faced with potential investigations,⁵⁴ while the Russian government "unsigned" the ICC treaty as the prosecution reported on progress in its preliminary inquiry of the situation in Ukraine.⁵⁵

The reasons for the court's underperformance need to be better understood.

Some factors are within the control of the court itself—mistakes made in the policies and practices of ICC officials.⁵⁶ These include poor

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51. Cf. James A. Goldston, *Don't Give Up on the ICC*, FOREIGN POLICY (Aug. 8, 2019, 4:18 AM), <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/> [<https://perma.cc/AVT9-6PZK>].
 52. Evenson, *supra* note 13.
 53. *Remarks to the Press: Michael R. Pompeo, Secretary of State*, U.S. DEP'T OF STATE (Mar. 15, 2019), <https://www.state.gov/remarks-to-the-press-6/> [<https://perma.cc/D3D5-RDSW>].
 54. Param-Preet Singh, *Philippines Pullout From ICC Won't Block Justice for 'Drug War'*, HUMAN RIGHTS WATCH (Mar. 18, 2019, 8:32 AM), <https://www.hrw.org/news/2019/03/18/philippines-pullout-icc-wont-block-justice-drug-war> [<https://perma.cc/77FW-PGGS>]; *Burundi: ICC Withdrawal Major Loss to Victims*, HUMAN RIGHTS WATCH (Oct. 27, 2016, 12:00 AM), <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims> [<https://perma.cc/5VLS-TYGP>].
 55. Rachel Denber & Elizabeth Evenson, *Moscow Holds International Justice in Contempt*, HUMAN RIGHTS WATCH (Nov. 17, 2016, 6:08 PM), <https://www.hrw.org/news/2016/11/17/moscow-holds-international-justice-contempt> [<https://perma.cc/8KKJ-5JXK>].
 56. *Courting History*, HUMAN RIGHTS WATCH (July 28, 2008), <https://www.hrw.org/report/2008/07/11/courting-history/landmark-international-criminal-courts-first-years> [<https://perma.cc/G6L7-832Y>].

choices in early investigative methodologies and strategies, now acknowledged by the Office of the Prosecutor.⁵⁷

Other factors have to do with the role of ICC states parties. The court relies to a very significant degree on cooperation and other support by states—in arrests, in investigations, in addressing witness and victim protection and witness interference, and in meeting defense rights.⁵⁸ It also relies on states to elect its officials and provide sufficient funding.⁵⁹ There have been gaps (and at times, obstruction) in each of these areas.⁶⁰ Years of demand by some states parties—including Colombia, France, Germany, Italy, Japan, Spain, and the United Kingdom, in varying degrees (to hold down increases in the court's budget, sometimes couched as a call for “zero nominal growth”)—have deprived the court of the resources it needs to deepen its impact.⁶¹

It was thought that a permanent court would have several advantages, including the ability to act more quickly during ongoing conflict.⁶² But in fact, when it comes to political support, its permanence has largely operated to its detriment. While creating a new

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57. See INT'L CRIMINAL CT., STRATEGIC PLAN 2012-2015, 13-14 (Oct. 11, 2013), <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> [<https://perma.cc/RDT3-AWSA>].
58. Rome Statute of the International Criminal Court, *supra* note 37, at art. 89-93.
59. *How the Court Works*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/about/how-the-court-works> [<https://perma.cc/9YX8-RM6Z>] (last visited Oct. 15, 2019).
60. See Allan Ngari, *The ICC is as Strong as the Support it Gets from States*, INST. FOR SEC. STUDIES (July 17, 2018), <https://issafrica.org/iss-today/the-icc-is-as-strong-as-the-support-it-gets-from-states> [<https://perma.cc/28FZ-VG5F>].
61. Elizabeth Evenson & Jonathan O'Donohue, *States Shouldn't Use ICC budget to Interfere with Its Work*, AMNESTY INT'L (Nov. 23, 2016, 4:22 PM), <https://www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/> [<https://perma.cc/YDW3-NW34>]. For a discussion of the discourse around the court's annual budget, see *Briefing Note for the Sixteenth Session of the International Criminal Court Assembly of States Parties*, HUMAN RIGHTS WATCH (Nov. 20, 2017, 12:00 AM), <https://www.hrw.org/news/2017/11/20/human-rights-watch-briefing-note-sixteenth-session-international-criminal-court> [<https://perma.cc/SUP6-7RLA>]. See also Elizabeth Evenson & Jonathan O'Donohue, *The International Criminal Court at Risk*, HUMAN RIGHTS WATCH (May 6, 2015, 8:24 AM), <https://www.hrw.org/news/2015/05/06/international-criminal-court-risk> [<https://perma.cc/X3AJ-YPMA>].
62. *Rome Statute of the International Criminal Court: Some Questions and Answers*, UNITED NATIONS, <http://legal.un.org/icc/statute/iccq&a.htm> [<https://perma.cc/FT8P-94EQ>].

tribunal would be a heavy political and financial lift, something not so dissimilar turns out to be required for each new ICC situation. Additional budgetary allocations, but also building anew the political consensus and support for the ICC to act, and specific networks for practical assistance in investigations, for the defense, to support outreach and victims, tailored to each country's situation are needed. Security Council and state party referrals have hardly proven to be the guarantor of cooperation on the sustained basis required for success.

States parties remain engaged on the ICC. This includes dedicated focal points in some ministries and embassy staff in The Hague.⁶³ There have been significant policy initiatives to address cooperation.⁶⁴ But the court's permanence can facilitate a fatigue in which the ICC lacks sustained attention to its sizeable and enduring cooperation needs day-in and day-out, as well as the creativity to rethink and adapt to new situations.

Beyond state party cooperation, the court's permanence in an era in which Rome Statute crimes are being committed in far too many places around the globe has also gradually brought on an even more profound challenge.

The court has eleven open situations under investigation and is seeking investigations in Bangladesh/Myanmar and, depending on the outcome of appeal proceedings, Afghanistan.⁶⁵ There are several other preliminary examinations pending which may satisfy the Rome Statute criteria for investigation.⁶⁶ As the prosecutor's current strategic plan

63. *See, e.g., Recommendations on States' Cooperation with the International Criminal Court*, INT'L CRIMINAL CT. (Nov 13, 2019, 4:01 PM), [https://www.icc-cpi.int/news/seminarBooks/66%20Recommendations%20Flyer%20\(ENG\).pdf](https://www.icc-cpi.int/news/seminarBooks/66%20Recommendations%20Flyer%20(ENG).pdf) [https://perma.cc/BF5Y-5HES] (presenting key components of the ICC-ASP/6/Res.2 on strengthening the ICC and the Assembly of States Parties).

64. *See, e.g., Assembly of States Parties Cooperation Documents*, INT'L CRIMINAL CT., https://asp.icc-cpi.int/en_menus/asp/bureau/WorkingGroups/Cooperation/Pages/default.aspx [https://perma.cc/K3BK-Z9LT] (last visited Mar. 8, 2020).

65. *Situations Under Investigation*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/Pages/Situations.aspx> [https://perma.cc/8J8V-8BVQ]; *ICC Prosecutor Seeks Bangladesh and Myanmar Investigation*, REUTERS (June 26, 2019, 6:24 AM), <https://www.reuters.com/article/us-war-crimes-myanmar/icc-prosecutor-seeks-bangladesh-and-myanmar-investigation-idUSKCN1TR187> [https://perma.cc/S8EG-VZLF]; *ICC Prosecutor Granted Leave to Appeal the Decision Rejecting Afghanistan Investigation*, COALITION FOR THE INT'L CRIMINAL CT. (Sept. 23, 2019), <http://www.coalitionfortheicc.org/afghanistan-investigation> [https://perma.cc/JNL2-ZJ4E].

66. *Preliminary Examinations*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/pages/pe.aspx> [https://perma.cc/82MC-ZXVA].

acknowledges, “stakeholders expect the Office [of the Prosecutor] to deliver more and better results, preferably within a shorter time and some expect this to be accomplished within the bounds of 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 significantly increase.”⁶⁷

As we have noted elsewhere, this is a critical challenge with few easy answers.⁶⁸

This leaves the court at a crossroads. In one direction, the court is needed to do more than ever, and, at least prior to the decision on Afghanistan, it was on the verge of showing its power as a court and a system to take on situations thought to be beyond the reach of justice.⁶⁹ In the other, the ICC is facing credible questions as to whether it and its states parties are up-to-the task, especially in difficult political times. Can the court better succeed or will these challenges result in efforts to curtail the court’s founding ambitions, undercutting victims’ access to justice and rolling back on the international community’s commitment to the fight against impunity?

WHERE TO GO FROM HERE

States parties—particularly following a speech by the United Kingdom at the 2018 annual meeting of ICC states parties⁷⁰—are seized of the court’s challenges and have set in motion a review process.⁷¹ The scope and modalities for this review process remain to be

67. INT’L CRIMINAL CT. OFFICE OF THE PROSECUTOR, STRATEGIC PLAN 2019–2021, 12 (July 17, 2019), <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> [<https://perma.cc/R7DS-CCK6>].

68. *See Office of the Prosecutor, International Criminal Court, “Strategic Plan, 2019-2021” Comments of Human Rights Watch*, HUMAN RIGHTS WATCH (June 10, 2019), <https://www.hrw.org/news/2019/11/13/office-prosecutor-international-criminal-court-strategic-plan-2019-2021-comments> [<https://perma.cc/AN7N-DXVR>].

69. *See* Goldston, *supra* note 51.

70. Andrew Murdoch, Legal Dir. to the Int’l Criminal Court, UK Statement to ICC Assembly of States Parties at its 17th Session in The Hague (Dec. 5, 2018), <https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session> [<https://perma.cc/F6WQ-763P>].

71. BUREAU OF THE ASSEMBLY OF STATES PARTIES, BUREAU RETREAT: “MEETING THE CHALLENGES TODAY FOR A STRONGER COURT TOMORROW” 12 (July 10, 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/Bureau%20retreat%20summary.10Jul19.1000.pdf [<https://perma.cc/2PKE-L5CZ>]; *see also* BUREAU OF THE ASSEMBLY OF STATES PARTIES, SEVENTH MEETING AGENDA AND DECISIONS 4 (July 17, 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-

identified, but there are certainly real opportunities to address challenges—including a review of nomination and election procedures for judges and a thorough, merit-based, search for the court’s next prosecutor, to be elected in 2020.⁷²

There is a genuineness to state party concern and participation in discussions around this review process. Certainly, that commitment and attention is to be welcomed, particularly where it has overlapped with efforts by states to lead on responding to the political challenges of the day, like the US’s threats, through joint statements and Assembly resolutions.⁷³

But states’ agendas are many. The United Kingdom has been clear in its demands for “timelines” and “closure strategies” to the prosecutor’s “cases,” including its preliminary examinations.⁷⁴ Attention to the prosecutor’s preliminary examination practice and the need, on a court-wide basis, to consider when and how to wind-down work in situations under investigation to enhance the court’s legacy are important. Yet one of the prosecutor’s preliminary examinations concerns allegations of abuse in Iraq by UK forces that national courts have thus far failed to prosecute.⁷⁵ Demands for budgetary limits have been justified in the past by trumping up the court’s purported inefficiencies in its use of resources, for example, at one point, the

ASP-18-Bureau-7.pdf [<https://perma.cc/3PHH-98PZ>] (describing the development of a “matrix” of issues for further discussion and, subsequent to the meeting, the Bureau’s approval of preliminary work by the Assembly president regarding an independent expert review of the court).

72. BUREAU RETREAT: “MEETING THE CHALLENGES TODAY FOR A STRONGER COURT TOMORROW”, *supra* note 71, at 1; *The ICC Prosecutor Elections 2020*, COALITION FOR THE INT’L CRIMINAL CT. (Aug. 7, 2019), <http://coalitionfortheicc.org/news/20190807/icc-prosecutor-election-2020> [<https://perma.cc/JUG9-85RG>].
73. *See, e.g., Brazil Declares Support for the International Criminal Court (ICC)*, GOV.BR (Oct. 8, 2018), <http://www.brazil.gov.br/about-brazil/news/2018/10/brazil-declares-support-for-the-international-criminal-court-icc> [<https://perma.cc/NCM2-R6YJ>] (reprinting text of joint declaration of 35 member states); Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties Resolution*, ICC-ASP/17/Res.5 (Dec. 12, 2018), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf [<https://perma.cc/9RBP-LHMP>].
74. *See* Murdoch, *supra* note 70.
75. Clive Baldwin, *Chilcot Report: We Need to See Senior Figures Held Criminally Responsible for Iraq War Crimes*, HUMAN RIGHTS WATCH (July 6, 2016, 9:06 AM), <https://www.hrw.org/news/2016/07/06/chilcot-report-we-need-see-senior-figures-held-criminally-responsible-iraq-war> [<https://perma.cc/LEB8-Z45C>].

position of some states parties that court outreach programs to affected communities were not within the court's core mandate.⁷⁶

There needs to be real attention paid to any signs that the review process will be used as a Trojan horse with which to impede judicial and prosecutorial independence, rather than to undertake changes necessary to strengthen the court. What is challenging, however, is that a vision for some of "strengthening" the court could include, as the pre-trial chamber's Afghanistan decision seems to suggest, cutting back on the full ambitions of the Rome Statute in light of the challenges the project has faced to date.⁷⁷

But a court without those ambitions would not be one worth having. To mitigate these risks, any review process of the court's work should be anchored in an assessment first by an independent group of experts. These experts should be independent of the court and of states parties. They should be career professionals with demonstrated expertise in investigating, prosecuting, defending, and adjudicating complex criminal offenses, as well as managing bodies comparable to the ICC's organs. They could assess court practice and recommend changes. While the experts themselves, once appointed and in consultation with the court, states parties, and civil society, should set the specific terms of references themselves, their assessment should be aimed at how the court's mandate can be better implemented in practice, for example, through strengthened investigations and improved management of judicial proceedings, rather than revisiting the court's purpose or mission. Similar assessments have been carried out for the *ad hoc* tribunals and the Special Court for Sierra Leone.⁷⁸

76. Matias Hellman, *Challenges and Limitations of Outreach, Contested Justice*, in *CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS* 267 (Christian De Vos, Sara Kendall, & Carsten Stahn eds., 2015), <https://www.cambridge.org/core/books/contested-justice/challenges-and-limitations-of-outreach/5B3C42F22E848CE81DDD53A3DD893D9D/core-reader> [<https://perma.cc/Z7EH-F87D>].

77. *Cf.* Christian De Vos, *Investigation in Afghanistan: A Bad Decision with Bad Implications*, *INT'L JUSTICE MONITOR* (Apr. 15, 2019), <https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/> [<https://perma.cc/Q6EB-24XT>].

78. *See* Rep. of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/634 (1999), https://digitallibrary.un.org/record/406194/files/A_54_634-EN.pdf [<https://perma.cc/6Q8A-KXJG>]; Rep. on the Special Court for Sierra Leone Submitted by the Independent Expert Antonio Cassese (Dec. 12, 2006), <http://rscsl.org/Documents/Cassese%20Report.pdf> [<https://perma.cc/83YW-7DJG>].

To be sure, alongside an independent expert panel, the court on its own can continue to learn lessons from its practice and implement changes. States parties can similarly examine their own practices and start to work on issues that require more urgent action (for example, strengthening the procedures for the nomination and election of judges). But these “internal” and *ad hoc* change processes appear insufficient in light of the challenges that the past year displayed. Meanwhile, by memorializing these findings and recommendations in a public report, and addressing the court’s work holistically, the independent expert panel’s work would serve as a common and credible reference point. This is currently lacking in discussions about review and reform. An independent expert panel would help ensure the right kind of change to support, rather than erode, the determination of Rome that “the most serious crimes of concern to the international community as a whole must not go unpunished.”⁷⁹

79. Rome Statute of the International Criminal Court, *supra* note 35, at pmbl.