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# A PROGRAM FOR THE NEXT ICC PROSECUTOR

*Alex Whiting<sup>1</sup>*

As the International Criminal Court (ICC) begins the process of selecting the next Prosecutor, it finds itself at a critical moment. Few people believe that the institution has lived up to expectations. The court has brought relatively few cases, and many have not succeeded.<sup>2</sup> While convictions were achieved in the Lubanga, Ntaganda, Katanga, and Al Mahdi cases, as well as in the obstruction of justice cases arising out of the Bemba prosecution, many other cases failed at the confirmation stage, during or after trial, or on appeal.<sup>3</sup> The future looks grim. Presently, there is just one case at trial (Ongwen) and only three in the pipeline (Al Hassan, Yekatom, and Ngäissona).<sup>4</sup> Many accused remain at large, and some of the investigations being undertaken by the Prosecutor (Georgia, Burundi, Afghanistan?) appear to offer little prospect of producing actual cases in The Hague.<sup>5</sup> As the UK Foreign Office stated at the ICC Assembly of States Parties in December 2018,

The statistics are sobering. After 20 years, and 1.5 billion Euros spent we have only three [now four] core crime convictions. As others have said, and I quote “it is undeniable that the Rome project still falls short of the expectations of the participants at that ground-breaking conference in Rome”. The time has come for States to take a fundamental look at how the Court is operating. We need to work together to address the challenges,

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1. Professor of Practice at Harvard Law School; Co-chair of the Editorial Committee of the Journal of International Criminal Justice.
  2. Jane Stromseth, *Is the ICC Making a Difference?*, JUST SECURITY (Dec. 6, 2017), <https://www.justsecurity.org/47717/icc-making-difference/> [<https://perma.cc/3RV3-7VSJ>].
  3. *See Cases*, INT’L CRIMINAL CT., <https://www.icc-cpi.int/Pages/cases.aspx> [<https://perma.cc/3MK2-T3T4>].
  4. *Id.*
  5. *See ICC Prosecutor Calls for Afghanistan War Crimes Investigation*, NPR (Nov. 3, 2017, 5:56 PM), <https://www.npr.org/sections/thetwo-way/2017/11/03/561842662/icc-prosecutor-calls-for-afghanistan-war-crimes-investigation> [<https://perma.cc/AJ8B-ZQBE>]; Nika Jeiranashvili, *Georgia – A Unique Case For The ICC*, INT’L JUST. MONITOR (Mar. 8, 2017), <https://www.ijmonitor.org/2017/03/georgia-a-unique-case-for-the-icc/> [<https://perma.cc/YQ7J-SC2M>]; Toby Sterling & Katharine Houreld, *Burundi Rejects International Criminal Court War Crimes Investigation*, REUTERS (Nov. 10, 2017), <https://www.reuters.com/article/us-warcrimes-burundi/burundi-rejects-international-criminal-court-war-crimes-investigation-idUSKBN1DA1IH> [<https://perma.cc/K6BJ-WGUX>].

for the future health of the Court, a Court that we care about deeply.<sup>6</sup>

What are these challenges? In the early years, and particularly at the moment of change in 2012 from the first Prosecutor to the second,<sup>7</sup> it might have seemed that they largely concerned issues of personnel, management, and policy. Now that the Court is nearly through its second prosecutor<sup>8</sup>, however, it is also clear that there exist problems of institutional design. The next Prosecutor will need to chart a path that meets these challenges – mindful that there is no realistic option to revise the Rome Statute – and find a way to achieve success for the institution, however that ends up being defined. The aim of this article will be to analyze the challenges currently facing the ICC and propose a three-part program for the next Prosecutor. Although the ICC is a relatively young institution, it may not get many more chances to get it right. If the next Prosecutor fails, the institution may never recover.

Much of what has been written about the ICC's problems, and how to fix them, has focused on quality and efficiency.<sup>9</sup> The first Prosecutor was initially credited for building up the Office of the Prosecutor (OTP) and putting the court on the map by moving quickly to bring cases.<sup>10</sup> But later, he was excoriated for bringing thinly investigated cases that failed when brought to court.<sup>11</sup> The second Prosecutor committed the

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6. Andrew Murdoch, Legal Dir. to the Int'l Criminal Ct. Assembly of States Parties, 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/2JFU-DL9V].
  7. Colum Lynch, *Bensouda to Replace Moreno-Ocampo as ICC Prosecutor*, FOREIGN POLICY (Nov. 30, 2011, 11:11 PM), <https://foreignpolicy.com/2011/11/30/bensouda-to-replace-moreno-ocampo-as-icc-prosecutor/> [https://perma.cc/HW66-QJ2E].
  8. *See 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/V9DR-Y5NX].
  9. *See, e.g.*, Int'l Bar Ass'n, *Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress* 8 (Jan. 2011).
  10. Karen L. Corrie, *International Criminal Law*, 46 INT'L LAW 145, 151 (2012) ("While often a lightning rod for criticism, Moreno-Ocampo has successfully established a well-functioning structure for the OTP, and pushed it to be efficient and proactive."); Kirsten Ainley, *The International Criminal Court on Trial*, 24 CAMBRIDGE REV. INT'L AFF. 309, 318 (2011) ("[T]he [p]rosecutor . . . at the ICC [has] shown real courage in [his] initial actions.").
  11. Janet H. Anderson, *Ocampo's Shadow Still Hangs over the ICC*, INT'L JUST. TRIB. (June 18, 2018),

office to a more cautious and deliberate approach and pledged to mount more open-ended investigations and to bring cases only when they were thoroughly investigated and essentially ready for trial.<sup>12</sup> While not all of the cases have succeeded during the second Prosecutor's tenure, there has been an improvement in the strength of the cases.<sup>13</sup> But one cost is that the OTP has brought many fewer cases overall, creating the risk of empty courtrooms in the future.<sup>14</sup> Commentators continue to urge the prosecution to bring stronger cases and to work more efficiently.<sup>15</sup> These remedies are echoed on the side of the judges: more attention is being paid to the selection process for judges, and under the direction of President Fernandez, the judges undertook efforts to render their practices more efficient, particularly in the pre-trial phase.<sup>16</sup>

While there certainly continues to be room to improve the quality and efficiency of the ICC's investigations, prosecutions, and

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<https://www.justicetribune.com/blog/ocampos-shadow-still-hangs-over-icc> [<https://perma.cc/947N-5TVA>].

12. Alex Whiting, *ICC Prosecutor Announces Important Changes in New Strategic Plan*, JUST SECURITY (Oct. 24, 2013), <https://www.justsecurity.org/2215/icc-prosecutor-announces-important-strategic-plan/> [<https://perma.cc/84L7-T6RW>].
13. See Alex Whiting, *The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), <https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/> [<https://perma.cc/3HRJ-875W>].
14. Alex Whiting, *Difficult Days Ahead for the International Criminal Court*, JUST SECURITY (Dec. 19, 2016), <https://www.justsecurity.org/35627/difficult-days-icc/> [<https://perma.cc/GW3C-H6Y4>].
15. See, e.g., *Bemba Judgment Warrants Better Investigations and Fair Trials – Not Efforts to Discredit the Decision*, AMNESTY INT'L, (June 19, 2018), <https://hrij.amnesty.nl/bemba-verdict-warrants-better-investigations-and-fair-trials/> [<https://perma.cc/4ADE-XB82>]; Patryk Labuda, *The ICC's 'Evidence Problem,' The Future of International Criminal Investigations after the Gbagbo Acquittal*, VÖLKERRECHTSBLOG (Jan. 18, 2019), <https://voelkerrechtsblog.org/the-iccs-evidence-problem/> [<https://perma.cc/J3AP-7ADH>]; Richard Dicker, *The Court is Now More Important than Ever*, ICC FORUM (June 28, 2018), <https://iccforum.com/anniversary> [<https://perma.cc/JX7E-5NGN>] (“The Office has worked to draw lessons from missteps and implement better investigative and proofing practices, but it's a long road to go.”).
16. See Elizabeth Wilmshurst, *Strengthen the International Criminal Court*, CHATHAM HOUSE (June 12, 2019), <https://www.chathamhouse.org/expert/comment/strengthen-international-criminal-court> [<https://perma.cc/3V6E-UU2L>]; Press Release, Int'l Criminal Ct., *ICC Judges Agree on Measures to Improve Efficiency of Criminal Process* (June 22, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1121&ln=en> [<https://perma.cc/HD5B-DSKD>].

adjudications, there is a growing recognition that the court also faces institutional design challenges.<sup>17</sup> The single conflict tribunals for Nuremberg, the former Yugoslavia, Rwanda, Sierra Leone and Cambodia have all been, to greater or lesser degrees, successful, if success is defined as effectively bringing a range of cases to capture the range of criminality that occurred during the conflict at issue.<sup>18</sup> But scaling up this model to a global court has severely tested the design.<sup>19</sup> While the range of potential activities of the court have dramatically increased, the authority and budget of the court have remained the same,<sup>20</sup> and the political support for the institution has waned and been diluted across a broad range of activities.<sup>21</sup>

The result is that the ICC is constructed on a series of fault lines. On the one hand, its scope of potential activities is vast. Its jurisdiction is expansive, covering the territory of 122 States Parties, the actions of non-States Parties within the borders of those States Parties, and any situations referred to the court by the UN Security Council.<sup>22</sup>

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17. See e.g., Douglas Guilfoyle, *Part I- This is Not Fine: The International Criminal Court in Trouble*, EJIL: TALK! (Mar. 21, 2019), <https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/> [<https://perma.cc/F4JX-6VPD>].
  18. See Mohammad Rabiul Islam, *The International Criminal Court: Its Success and Limitations for Pursuing International Justice*, 5 J. CIV. & LEGAL SERV. 2 (2016); Carolyn Kenney & John Norris, *International Justice on Trial?*, CTR. FOR AM. PROGRESS 8–28 (Mar. 2018), <https://cdn.americanprogress.org/content/uploads/2018/03/26112219/InternationalJustice-report.pdf> [<https://perma.cc/D3H9-NYYX>].
  19. See Judge Hans-Peter Kaul, Second Vice-President of the Int'l Criminal Court, Keynote Address at the Salzburg Law School on International Criminal Law: The International Criminal Court - Current Challenges and Perspectives (Aug. 8, 2011), <https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf> [<https://perma.cc/TAM8-HYJZ>].
  20. Stuart Ford, *What Investigative Resources does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOBAL STUD. L. REV. 1, 1 (2017).
  21. See *Facing Political Attacks, Limited Budget, International Criminal Court Needs Strong Backing to Ensure Justice for Atrocity Crimes, President tells General Assembly*, U.N. (Oct. 29, 2018), <https://www.un.org/press/en/2018/ga12084.doc.htm> [<https://perma.cc/W289-SAPG>].
  22. *The States Parties to the Rome Statute*, INT'L CRIMINAL CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [<https://perma.cc/3E3F-WSG5>]; *Understanding the International Criminal Court*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> [<https://perma.cc/H6Q8-X2J9>].

Accordingly, the court presently has eleven investigations open, though several are now largely inactive.<sup>23</sup> While the court has jurisdiction over just four crimes<sup>24</sup>, it can prosecute a wide range of acts within the context of an armed conflict.<sup>25</sup> Additionally, crimes against humanity have been expansively defined, as illustrated by the broad range of cases brought by the court, from the massive killings in Sudan, to the more narrow and temporally contained post-election violence in Kenya and Côte d'Ivoire.<sup>26</sup> Further, the Rome Statute requires the Prosecutor to investigate whenever there are grounds to do so.<sup>27</sup> Finally, the modes of liability under Articles 25 and 28 reach a broad range of conduct and actors: essentially any person who intentionally participates in, or contributes to, a crime within the jurisdiction of the court may be liable.<sup>28</sup> Thus, the jurisdiction, law, and procedure of the ICC all push the court towards a broad range of investigations across the globe.

At the same time, the investigative and prosecutorial tools of the court are limited,<sup>29</sup> the budget is constrained,<sup>30</sup> the court's procedures are onerous,<sup>31</sup> and the human resources policies stultifying.<sup>32</sup> The model of the ad-hoc tribunals, and the track record of the early years of the ICC, strongly indicate that the international criminal justice project succeeds best when there is focus, when a tribunal can concentrate on its investigations into a conflict for a sustained period. The scope of the ICC's activities, however, renders such focus difficult, if not impossible.

Moreover, while the prosecutor is "independent" in the sense of being able to decide on cases and priorities on her own, the OTP lacks any real independent authority or power to fulfill its mission.<sup>33</sup> It is

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23. *Situations Under Investigation*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/pages/situation.aspx> [<https://perma.cc/D7AX-Y7GZ>].
  24. *How the Court Works*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/about/how-the-court-works> [<https://perma.cc/HMD9-HVJ9>].
  25. *See id.*
  26. *See* CONG. RESEARCH SERV., INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES (2011).
  27. Rome Statute of the International Criminal Court art. 53, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].
  28. *Id.* art. 25–28.
  29. *See id.* art. 53–61.
  30. *See id.* art. 113–18.
  31. *See id.* art. 62–85.
  32. *See id.* art. 34–52.
  33. *See* Anthony Wang, *On the Failed Authority of the International Criminal Court*, INT'L POL'Y DIG. (June 15, 2018), <https://intpolicydigest.org/2018/06/15/on-the-failed-authority-of-the-international-criminal-court/> [<https://perma.cc/6R27-6HJ3>].

entirely dependent on state cooperation, and to a lesser extent the cooperation of non-governmental organizations and international institutions, to conduct its business.<sup>34</sup> And this cooperation is not a one-time given affair; it has to remain constant throughout the preliminary examination, investigation, prosecution, and ultimate adjudication. The ICC has already experienced the devastating effects of cooperation, or political support, first being turned on and then later turned off (*see* Sudan, Kenya, Libya, etc.).<sup>35</sup>

And so here exist additional fault lines within the structure of the court. The ICC's central aim is to investigate and prosecute structures of authority, whether state or non-state actors, but it is dependent on structures of authority to do so.<sup>36</sup> Moreover, pursuant to the complementarity principle, the ICC only has jurisdiction if the national jurisdiction is unable or unwilling to investigate and prosecute the crimes itself, but when the ICC gains jurisdiction, it usually has to rely on these very same national authorities, the ones that could not or would not investigate the crimes, to conduct its investigations.<sup>37</sup> The single conflict tribunals largely succeeded in slipping by these tensions because of their focus, longevity, and support from outside actors.<sup>38</sup> These fixes are less available in a global court. The court's limited budget only exacerbates the problem, thinning the resources available to confront each situation.

Further, as compared to the ad-hoc tribunals, the procedures of the ICC are more demanding.<sup>39</sup> To be sure, as a criminal court, it is necessary that the ICC's processes be rigorous and fully protective of defendants' rights. At the end of the day, the prosecution is required to prove individual criminal responsibility beyond a reasonable doubt, and a criticism of Nuremberg, and to some extent the early days of the ad-hoc tribunals, has been that at times these procedures were

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34. *See id.*; *see* Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L. J. 243, 244-45 (2006).

35. *See* Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18 INT'L J. HUM. RTS. 444 (2014).

36. Alex Whiting, *Investigations and Institutional Imperatives at the ICC*, in THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS 128, 131 (Martha Minow ed., 2015) [hereinafter Whiting, *Investigations and Institutional Imperatives*].

37. *See Understanding the International Criminal Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> [<https://perma.cc/T83Q-VLET>].

38. Whiting, *Investigations and Institutional Imperatives*, *supra* note 36, at 129-30.

39. *Id.* at 130.

deficient<sup>40</sup>. Nonetheless, the particular procedures at the ICC are distinctly and remarkably layered, extensive, prolonged, and onerous. Beyond providing the accused a fair chance to defend himself or herself, they extend the proceedings (allowing opportunities for focus and support to dissipate), create excessive opportunities to re-open and revisit questions of fact and law, and absorb valuable resources.<sup>41</sup>

Finally, prosecutors, judges, and academics often pay little attention to human resource concerns, but the “permanence” of the ICC may have also subtly, but importantly, changed the workforce there. Everyone who went to the single conflict ad-hoc tribunals knew that their time at the institution was limited, which for the most part created a sense of urgency and helped maintain focus.<sup>42</sup> The ICC is largely staffed, however, by long-term and even permanent personnel,<sup>43</sup> making it hard to sustain energy and intensity, challenge established practices, or introduce new ideas and approaches.

There are two frequent responses to these institutional design challenges. One is to acknowledge and then ignore them, imagining that they can simply be willed away. Within this approach we see two kinds of appeals. First, appeals to the court just to do better: find better evidence, bring stronger cases, find non-witness evidence, make better choices and decisions, work more efficiently, and so on.<sup>44</sup> Second, appealsto states to step up: by increasing the court’s budget and providing greater cooperation and political support.<sup>45</sup> These appeals are necessary and important, and there is without question room to do

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40. See Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, THE ATLANTIC (Apr. 1946), available at <https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/> [https://perma.cc/4XEC-V5RN].
  41. See Whiting, *Investigations and Institutional Imperatives*, *supra* note 36, at 139–40.
  42. See generally Press Release, Security Council, Security Council Stresses Importance, Urgency, of Restoring Rule of Law in Post-Conflict Societies, U.N. Press Release SC/8209 (Oct. 6, 2004).
  43. See *About*, INT’L CRIM. CT., <https://www.icc-cpi.int/about> [https://perma.cc/MA7B-ZJPB].
  44. See, e.g., Stef Blok, *The International Criminal Court Must Do Better. Reforms are Urgently Needed*, WASH. POST (Dec. 2, 2019), <https://www.washingtonpost.com/opinions/2019/12/02/international-criminal-court-must-do-better-reforms-are-urgently-needed/> [https://perma.cc/9G4J-LENG].
  45. See, e.g., Press Release, General Assembly, Facing Political Attacks, Limited Budget, International Criminal Court Needs Strong Backing to Ensure Justice for Atrocity Crimes, President Tells General Assembly, U.N. Press Release GA/12084 (Oct. 29, 2018) (describing the President of the ICC’s request for support from U.N. General Assembly).



better and more, but at some point, they run into the realities of the court's structure and design. No amount of hard work or hoping for greater cooperation will solve the tensions that are built into the court's foundation.

The second response is to reconceptualize what the court is and to focus less on the ICC as a "court" and more on its role as a beacon or model or symbol or spur for others to act.<sup>46</sup> Here is where it becomes a success simply to begin an investigation (see, e.g., some of the commentary on the Afghanistan situation) because it shines a spotlight and calls out impunity.<sup>47</sup> Here too is where the endlessly discussed, and pursued, notion of complementarity comes into play.<sup>48</sup> Maybe the ICC cannot do much itself, but that is ok because it will incentivize states to act and prosecute cases themselves (even though the premise of the ICC's jurisdiction is that the state is unwilling or unable to prosecute itself<sup>49</sup>). There is a narrow truth to both of these notions – the court as symbol, and the dynamics of complementarity – but at bottom they are limited by their dependence on the court first succeeding *as a court*. The symbolic force of opening an investigation, or the ability to motivate states to bring cases themselves, will dissipate and disappear if the court proves itself unable to deliver on its core mission. The court's force lies in prosecutions and convictions, not in announcements and pronouncements.

What then to do? Rather than ignoring or sidestepping the court's fundamental design, and the flaws of that design, the new Prosecutor should devise a plan to succeed within its present constraints with a three-part program to (1) bring more (and smaller) cases, (2) focus the work of the court on situations where prosecutions are possible, and (3) work with the other organs to amend the procedures and HR policies of the institution.

By far, the most important objective of the next Prosecutor should be to bring more cases. Many more cases. The ICC must prove that it can succeed at its core mission before it can do anything else, and the force of the court, moral or legal or political, will depend on proving that it can successfully prosecute cases. While there will be a temptation to bring in an outsider to be the next Prosecutor – to shake up the court and change direction – that would be a mistake if it ended

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46. See Press Release, Int'l Crim. Ct., International Criminal Court Marks Opening of the Judicial Year 2019, ICC-CPI-20190118-PR1430 (Jan. 18, 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1430> [<https://perma.cc/TP7Y-X92U>].

47. See Karen Allen, *ICC Throws Spotlight on African Injustice*, BBC (Dec. 16, 2010), <https://www.bbc.com/news/world-africa-12003954> [<https://perma.cc/ES6D-2RBH>].

48. Sarah M. H. Nouwen, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* 8 (2013).

49. See *Understanding the International Criminal Court*, *supra* note 37.

up being someone with no experience in building actual cases in an international tribunal. It is the Prosecutor who drives the OTP, and the next Prosecutor will have to be single-minded about bringing cases forward. He or she should ensure that every activity of the OTP is oriented towards that goal; only a chief Prosecutor who understands the ins and outs of international criminal investigations will know how to drive the institution to that objective, overcoming inertias and entrenched practices along the way.

And in order to bring more cases, the Prosecutor should shift the orientation of the office towards smaller cases. Already, in its last Strategic Plan, the OTP allowed for the possibility of charging lower-level cases<sup>50</sup>, but the new Prosecutor should embrace this option more fully and make it the norm. This approach will be controversial and a break in established practice; every single international criminal tribunal since Nuremberg has focused on prosecuting those most responsible.<sup>51</sup> While that mandate is not explicitly set forth in the Rome Statute,<sup>52</sup> it has been embraced as a goal of the OTP by both the first and second Prosecutors.<sup>53</sup> And if the office brings smaller cases, it is certain that it will receive criticism.<sup>54</sup> Commentators will complain that these prosecutions are unfair, that they are not strategic, and that the institution is squandering its resources.<sup>55</sup> But the ICC's design challenges mean it will be able to bring cases against high-level accused in the first instance only in rare circumstances.<sup>56</sup> If the OTP wants cases, and particularly if it wants a lot of cases, the Prosecutor will have to embrace bringing smaller prosecutions. In most cases the choice will not be, at least as an initial matter, between high-level cases and lower-level ones, but rather between lower-level ones and no cases at all.

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50. Alex Whiting, *ICC Prosecutor Signals Important Strategy Shift in New Policy Document*, JUST SECURITY (May 17, 2019), <https://www.justsecurity.org/64153/icc-prosecutor-signals-important-strategy-shift-in-new-policy-document/> [<https://perma.cc/QG6R-6VMC>] [hereinafter Whiting, *ICC Prosecutor Signals*].

51. *Id.*

52. *See* Rome Statute, *supra* note 27.

53. *See ICC Situations and Cases*, COALITION INT'L CRIM. CT., <http://www.coalitionfortheicc.org/explore/icc-situations-and-cases> [<https://perma.cc/7GV6-JTS8>].

54. *Cf.* Darryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, LEIDEN J. INT'L L. 323 (2015) (discussing how, no matter what position the ICC takes, it will receive criticism for being either too aligned with state interests, "apologist", or not aligned with state interests enough, "utopian").

55. *See id.* at 336.

56. *See* Whiting, *ICC Prosecutor Signals*, *supra* note 50.

To date, the Prosecution has only brought a few cases a year and at times has had only a single trial ongoing.<sup>57</sup> If it focuses on smaller cases, there is the potential to bring many more cases at the same time which could fundamentally alter the functioning of the court in positive ways. First, it will give the court an opportunity to show that it can function in its core mission. It is difficult to imagine the court succeeding in any other respect if it cannot succeed there. Second, a busy court will force all of the actors at the court – the prosecution, registry, judges, and even the defense – to become more efficient and practical. When the International Criminal Tribunal for the former Yugoslavia became busier, it found ways to conduct the trials more efficiently without a loss in effectiveness or fairness.<sup>58</sup> Third, prosecutions of lower-level cases will create political pressure, within the situation country and internationally, to pursue higher-level perpetrators, which could open up avenues of cooperation that could advance such cases. Put another way, a central complaint against the pursuit of lower-level cases will be that it is unfair; one way to address this unfairness will be to go after the more senior actors. Moreover, prosecutions of the smaller cases could produce evidence and witnesses allowing for stronger prosecutions of higher-level officials. Fourth, prosecutions of core acts of criminality will pave the way for national prosecutors within the state and in other states to bring forward their own cases (based either on local or on universal jurisdiction). In sum, prosecuting a multitude of cases will energize and legitimize the court, help it function effectively and efficiently, and galvanize support for justice more broadly.

As a second objective, the new Prosecutor should focus the work of the office on those situations that are likely to generate actual cases. This is tricky because it is not always predictable; both the investigations into atrocities and the political circumstances allowing for arrests can unfold in unpredictable ways. Many of the surrenders or arrests of high-level actors occurred in cases that seemed, at their beginning, almost hopeless.<sup>59</sup> Moreover, at times it may be necessary to open an investigation into a situation where fruitful investigations are impossible simply as a placeholder for future possible action. But to say that investigations can unfold in unpredictable ways is not the same as saying that the outcomes of investigations are *completely* unpredictable. And the need for the institution to focus its investigative efforts requires it to make choices. The only way to make those choices are to

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57. See Elizabeth B. Ludwin King, *Big Fish, Small Ponds: International Crimes in National Courts*, 90 INDIANA L. J. 829, 839 (2015).

58. See Alex Whiting, *The ICTY as a Laboratory of International Criminal Procedure*, in THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Bert Swart et al. eds., 2011).

59. See Whiting, *Investigations and Institutional Imperatives*, *supra* note 36, at 129.

concentrate on the gravest situations and the ones where actual cases appear to be a likely, or at least a possible, outcome.

Third, in addition to taking steps to improve the quality of the OTP's investigations, the Prosecutor should consider what institutional design elements are within his or her control and could be adjusted. Many aspects of the design cannot be changed. It is not likely that the budget of the ICC will be dramatically increased, or that states will suddenly make cooperation with the court a priority above all others. However, within the court, the Prosecutor could consider ways to improve the cumbersome procedures at the court, working with the judges to produce more sensible approaches to some of the key stages of the proceedings.<sup>60</sup> At a minimum, the Prosecutor should look for opportunities to propose more streamlined processes. Moreover, the Prosecutor should focus on the office's human resources policies and consider ways to encourage some turnover to allow for fresh energy and new ideas. The office could adopt presumptive term limits for certain positions, limit internal promotions, and consider other measures that would encourage staff to consider moving to other institutions after a stint at the court. None of these steps will fundamentally alter the character of the court, but they could help bring its design more in line with its mission.

The current challenges of the court are existential. To survive, it will be essential for the court to prove that it can succeed in its core mission of prosecuting cases. That will require a shift to prosecuting smaller cases and focusing the work of the court. This will be a departure from the approach of the ICC and the other international tribunals that preceded it, but in fact a return to the essence of what the court is.

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60. See Leila Nadya Sadat, *Politics, Procedure, and Law: Three Continuing Challenges for the ICC in its Third Decade*, ICC FORUM (June 28, 2018), <https://iccforum.com/anniversary#Sadat> [https://perma.cc/86JP-NAX3].