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## The International Criminal Court: Current Challenges and Prospect of Future Success

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# THE INTERNATIONAL CRIMINAL COURT: CURRENT CHALLENGES AND PROSPECT OF FUTURE SUCCESS

*Milena Sterio\**

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### I. INTRODUCTION AND BACKGROUND ON THE ICC

The International Criminal Court (ICC) was created in 1998, and it became operational in 2002.<sup>1</sup> The ICC was established during a time period of significant movement in the field of international criminal law: the Yugoslavia and Rwanda tribunals were established in 1993 and 1994 respectively, through Security Council resolutions, and the creation of a permanent international criminal court was viewed as complementary to the existing ad hoc accountability mechanisms.<sup>2</sup> The creation of the ICC was followed by the establishment of further ad hoc tribunals, such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon.<sup>3</sup>

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1 See Mark Tran, *Background: International Criminal Court*, THE GUARDIAN (Jan. 26, 2019), <https://www.theguardian.com/world/2009/jan/26/international-criminal-court> [https://perma.cc/6LPM-F226]. For a detailed history about the ICC’s establishment, see *About the Court*, COALITION FOR THE INT’L CRIM. CT., <http://iccnw.org/?mod=icchistory> [https://perma.cc/SDS8-X5KF].

2. For a discussion of the ICTY’s and the ICTR’s impact on the ICC, see Stuart Ford, *The Impact of the Ad Hoc Tribunals on the International Criminal Court*, in THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 307-09 (Milena Sterio & Michael P. Scharf eds., 2019).

3. *Id.* at 311-12.

Thus, the ICC's birth can be situated within a period of activism in international criminal law, resulting in the creation of new accountability mechanisms focused on the prevention and punishment of atrocity crimes.

The ICC was originally viewed as an enormous success for the field of international criminal law, and for the proposition that those who commit atrocity crimes should face individual criminal responsibility. "The court's mere existence has . . . served as a catalyst for accountability."<sup>4</sup> The initial enthusiasm for the court has significantly waned over the past two decades, in light of the court's weak record of convictions, the ongoing turmoil among the court's judges, as well as the court's contentious relationship with some of the world's powers, including the United States.<sup>5</sup> At the 17<sup>th</sup> Assembly of States Parties, the United Kingdom publicly criticized the court for its alleged failure to meet expectations set at the Rome Statute negotiations in 1998.<sup>6</sup> According to the United Kingdom's statement at the ASP, "[W]e cannot bury our heads in the sand and pretend everything is fine when it isn't. The statistics are sobering. After [nearly] 20 years, and 1.5 billion Euros spent we have only three core crime convictions."<sup>7</sup>

The following section will describe some of the most significant challenges that the ICC is currently facing, in order to assess how serious the court's current struggles are in light of its core mission of ending impunity.

## II. ICC AND CURRENT CHALLENGES

The ICC is currently facing significant challenges which may put the court's legitimacy into question. These challenges include a weak record of prosecutions, discord among the court's judges, and a difficult relationship with the world's great powers, such as Russia and the United States.

First, the ICC has been in existence for seventeen years; since its inception, the court has successfully convicted only eight defendants.<sup>8</sup>

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4. James A. Goldston, *Don't Give Up on the ICC*, FOREIGN POLICY (Aug. 8, 2019), <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/> [<https://perma.cc/PHS4-8XGP>].

5. *See generally id.*

6. Foreign & Commonwealth Office, *UK Statement to ICC Assembly of States Parties 17<sup>th</sup> Session*, UK.GOV (Dec. 5, 2018), <https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session> [<https://perma.cc/QM7T-AL72>].

7. *Id.*

8. Douglas Guilfoyle, *Part I This is not Fine: The International Criminal Court in Trouble*, EJIL: TALK (Mar. 21, 2019), <http://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal->

Out of the eight convictions, one has been overturned on appeal (Bemba), one resulted from a guilty plea (Al Mahdi), and four resulted from Article 70 administration of justice offenses.<sup>9</sup> The latter four offenses all arise out of the Central African Republic investigation and involve light sentences of 6 months to 3 years.<sup>10</sup> The remaining convictions for core crimes include Katanga (DRC), who was sentenced to 12 years but was ultimately transferred back to DRC custody with “sentence served” after only 8 years; Lubanga (DRC), who was sentenced to 14 years, and Al Mahdi (Mali), who pled guilty and was sentenced to 9 years.<sup>11</sup> Most recently, the ICC Trial Chamber convicted an additional defendant, Ntaganda.<sup>12</sup> Of several charges of crimes against humanity and war crimes; as of today, this defendant has not been sentenced but it is safe to assume that the imposed sentence will be serious, in light of the gravity of crimes for which Ntaganda was convicted.<sup>13</sup>

It would be imprudent to criticize the court for not convicting all defendants – all courts are supposed to respect defense rights, to operate on the presumption of innocence for all defendants, and it is rare for any court to have a 100 percent conviction rate. However, it is possible to criticize the court’s prosecutor for initiating so few prosecutions and for presenting weak cases. In the *Gbagbo* case in particular, which resulted in an acquittal, the Trial Chamber lambasted the Office of the Prosecutor (“OTP” or “Prosecutor”) for having presented such a disorganized and weak case.<sup>14</sup> In *Gbagbo*, the prosecutor struggled from the beginning.<sup>15</sup> At the confirmation of charges stage, the Pre-Trial Chamber criticized the prosecutor for attempting to build its case of crimes against humanity based on hearsay evidence from NGO reports and press articles.<sup>16</sup> The Pre-Trial Chamber gave the prosecutor five extra months to collect additional evidence which would withstand

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court-in-trouble [<https://perma.cc/6YAY-QVMD>] [hereinafter Guilfoyle, *This is not Fine Part I*].

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Judgment, ¶ 1203 (July 8, 2019).

13. *Id.*

14. Thijs Bouwknegt, *Gbagbo An Acquittal Foretold*, JUSTICEINFO.NET (Jan. 31, 2019), <https://www.justiceinfo.net/en/tribunals/icc/40156-gbagbo-an-acquittal-foretold.html> [<https://perma.cc/NV6Q-K6W7>].

15. *Id.*

16. *Id.*

scrutiny and result in the confirmation of charges against Gbagbo.<sup>17</sup> During Gbagbo's trial, the prosecution called multiple witnesses and presented thousands of pages of documents, but was unable to link Gbagbo to the violence that took place in Cote d'Ivoire.<sup>18</sup> At the close of trial, which took several years, the trial chamber asked the prosecutor to submit an additional brief which would explain and better organize all of the evidence which the OTP had submitted during trial.<sup>19</sup> And on January 15, 2019, the Trial Chamber acquitted Gbagbo, after it granted a no case to answer motion at the end of the prosecution's case.<sup>20</sup> The Trial Chamber was exceptionally critical of the prosecution.<sup>21</sup> Judges criticized the prosecutor for her poor handling of the physical evidence, her reliance on hearsay testimony, and her distorted evidence gathering.<sup>22</sup> In addition, Trial Chamber judges were critical of the prosecutor's overly complex case theory; Judge Henderson observed that "[t]he prosecutor's narrative is largely internally coherent and prima facie plausible," and that she lacked "almost any direct evidence for her version of events" and thus "advanced an elaborate and multi-faceted evidentiary argument that is built almost entirely upon circumstantial evidence."<sup>23</sup> And Judge Tarfusser referred to the prosecutor's approach as "a vortex of circularity, self-reference and repetition that has not made the Chamber's task any easier."<sup>24</sup> Trial Chamber judges also criticized the prosecutor for her filings, poor courtroom technique and management of the courtroom time.<sup>25</sup> The Gbagbo prosecution has been referred to as a "fiasco" by former ICC judge Christine Van Den Wyngaert.<sup>26</sup> As Douglas Guilfoyle has noted, "the circumstances of the acquittal would appear a stinging rebuke."<sup>27</sup>

Moreover, it may be argued that a weak court delivering so few convictions has fallen short of its goals of fighting impunity and

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17. *Id.*

18. *Id.*

19. *Id.*

20. Bouwknecht, *supra* note 14.

21. Douglas Guilfoyle, *A Tale of Two Cases: Lessons for the Prosecutor of the International Criminal Court (Part II)*, EJIL: TALK! (Aug. 29, 2019), <http://www.ejiltalk.org/a-tale-of-two-cases-lessons-for-the-prosecutor-of-the-international-criminal-court-part-ii/> [https://perma.cc/7MAH-5X6M] [hereinafter Guilfoyle, *A Tale of Two Cases Part II*].

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Bouwknecht, *supra* note 14.

27. Douglas Guilfoyle, *A Tale of Two Cases Part II*, *supra* note 21.

detering the commission of atrocity crimes. “However, to the extent that the Court is meant to serve expressivist goals, fight impunity, or deter atrocity – it must present some credible threat to those who should fear accountability. It is often argued that the simple possibility of ICC accountability may deter atrocity that the existence of institutions may change behaviour.”<sup>28</sup>

In addition to the above, several of the prosecutor’s investigations and prosecutions have been unsuccessful. Gbagbo, whose case is mentioned directly above, as well as his aid were both acquitted at trial; the Kenyan cases involving Kenyatta and Ruto fell apart before trial, and the opening of the Afghanistan investigation was recently rejected by one of the court’s pretrial chambers.<sup>29</sup> As Jim Goldston has noted, “something is wrong when a court created to “put an end to impunity” for “the most serious crimes,” that deals with a handful of cases at a cost well in excess of \$150 million per year, produces more acquittals and dismissals of charges than convictions.”<sup>30</sup>

Second, the ICC’s judges have displayed a level of discord among themselves, have been inconsistent in their application of substantive law, and some judges have been publicly embroiled in a salary dispute.<sup>31</sup> All of these issues may contribute to a negative perception of the court as a failed institution. It appears that ICC judges do not get along.<sup>32</sup> According to Guilfoyle, “there are very worrying signs of a breakdown in collegiality among the ICC judges which is damaging both the formal coherence of court decisions and its wider legitimacy.”<sup>33</sup> Recently, such discord has escalated to a higher level when Judge Ibanez Carranza dissented from a decision assigning a different judge to preside over an appeal (Judge Ibanez Carranza complained that she had never been

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28. Guilfoyle, *This is not Fine Part I*, *supra* note 8.

29. Dionne Searcey & Palko Karasz, *Laurent Gbagbo, Former Ivory Coast Leader, Acquitted of Crimes Against Humanity*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/world/africa/laurent-gbagbo-ivory-coast-icc.html> [<https://perma.cc/WY2A-FN8G>]; *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, BBC NEWS (Dec. 5, 2014), <https://www.bbc.com/news/world-africa-30347019> [<https://perma.cc/2RDC-V4BU>]; *ICC Judges Reject Opening of an Investigation Regarding Afghanistan Situation*, INT’L CRIM. CT. (Apr. 12, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1448> [<https://perma.cc/P5UM-AG3N>].

30. Goldston, *supra* note 4.

31. Douglas Guilfoyle, *Part III This is not Fine: The International Criminal Court in Trouble*, EJIL: TALK! (Mar. 25, 2019), <https://www.ejiltalk.org/part-iii-this-is-not-fine-the-international-criminal-court-in-trouble/> [[perma.cc/4FQD-7ZS7](https://perma.cc/4FQD-7ZS7)] [hereinafter Guilfoyle, *This is not Fine Part III*].

32. *Id.*

33. *Id.*

assigned to preside over an appeal).<sup>34</sup> Her dissent was rebutted by a joint declaration by the ICC President and Judge Hofmanski, and Judge Ibanez Carranza then publicly characterized the issuance of such a joint declaration as a potential abuse of administrative functions.<sup>35</sup> As Kevin Jon Heller observed, “you know things are bad at the Court when disagreements over presiding judge appointments is spilling out into the public.”<sup>36</sup>

In addition to displaying public animosity toward one another, ICC judges have been divided in their application of the law, resulting in inconsistent judgements and contributing toward uncertainty in the definition and development of legal norms in the field of international criminal law. For example, in the Ruto and Sang “no case to answer” decision, the Trial Chamber announced its decision through a reference to separate opinions which gave different reasons for decision.<sup>37</sup> This “appears to signal a breakdown of the deliberative process if those who agreed on the outcome could not agree on a common set of reasons.”<sup>38</sup> Moreover, Judge van den Wyngaert wrote a scathing dissent from the Trial Chamber judgment in *Katanga*, to which Judges Cotte and Diarra responded in a joint separate opinion, and Judges Tafusser and Trendafilova dissented strongly from the Appeals Chamber judgment in *Ngudjolo and Chui*.<sup>39</sup> And Judges van den Wyngaert and Morrison, in the *Bemba* Appeal, accused their colleagues from the Trial Chamber of not attaching enough importance to the strict application of the burden

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34. Kevin Jon Heller, *Well, the Gbagbo “No Case to Answer” Appeal Should Be Interesting*, OPINIO JURIS (Jan. 22, 2019), <http://opiniojuris.org/2019/01/22/well-the-gbagbo-no-case-to-answer-appeal-should-be-interesting/> [perma.cc/2UM7-C9DU].

35. Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, ICC-02/11-01/15 OA14, Joint Declaration of Judge Eboe-Osuji and Judge Hofmański on the Procedure on the Election of Presiding Judges, ¶ 3 (Jan. 22, 2019), available at [https://www.icc-cpi.int/RelatedRecords/CR2019\\_00213.PDF](https://www.icc-cpi.int/RelatedRecords/CR2019_00213.PDF) [perma.cc/HQE6-A8DQ]; Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, ICC-02/11-01/15-1242-Anx3, Statement of Judge Ibáñez Carranza with respect to the Joint Declaration of the President of the Court and the President of the Appeals Division on the Procedure on the Election of Presiding Judges, ¶ 2 (Jan. 24, 2019), available at [https://www.icc-cpi.int/RelatedRecords/CR2019\\_00303.PDF](https://www.icc-cpi.int/RelatedRecords/CR2019_00303.PDF) [perma.cc/E367-MTN2].

36. Heller, *supra* note 34.

37. *See generally* Prosecutor v. Ruto and Sang, ICC-01/09-01/11, Decision on Defence Applications for Judgments of Acquittal, ¶¶ 147-150 (Apr. 5, 2016).

38. Guilfoyle, *A Tale of Two Cases Part II*, *supra* note 21.

39. Hemi Mistry, *The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals*, 17 INT’L CRIM. L. REV. 17 (2017).

and standard of proof and to the due process rights of the accused.<sup>40</sup> While some of the judicial disagreement in terms of substantive law can be attributed to the fact that the court's judges come from different countries and legal traditions, it can also be observed that judges from other ad hoc tribunals (most notably the ICTY) also came from diverse backgrounds but were nonetheless able to come to an agreement regarding substantive law in a significant number of cases.<sup>41</sup> Moreover, it may also be argued that while some disagreement and dissent among judges is permissible and does not signal a lack of collegiality, the above-mentioned strongly worded dissents, where judges accuse one another of unfairness or of having acted *ultra vires*, does display a level of animosity which threatens to undermine the ICC's perceived legitimacy. Additionally, the lack of consensus over substantive law among ICC judges is damaging to the court because this disables the court from developing coherent jurisprudence on difficult or novel legal issues stemming from the Rome Statute. "The result is a mess for anyone attempting to discern what the applicable law on point is at the ICC..."<sup>42</sup>

In addition, some ICC judges have been involved in a pseudo-public dispute over their salaries.<sup>43</sup> While these judges may have valid claims regarding their compensation, this type of a dispute contributes to a largely negative perception of the court as an elite institution whose members are out of tune with reality.

Third, the ICC has had a difficult relationship with the world's superpowers, including Russia, China, and the United States.<sup>44</sup> Russia and China have repeatedly vetoed draft Security Council resolutions which would have referred the Syrian situation to the ICC.<sup>45</sup> And because of increased polarization within the Security Council, Russia and China opposing the United States, the prospects of any future Security Council referrals are slim.<sup>46</sup> In addition, the ICC had a difficult

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40. Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-3636-Anx2, Separate Opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, ¶ 4 (June 8, 2018), available at [https://www.icc-cpi.int/RelatedRecords/CR2018\\_02989.PDF](https://www.icc-cpi.int/RelatedRecords/CR2018_02989.PDF) [perma.cc/YS3H-8H3W].

41. *Id.*

42. Guilfoyle, *A Tale of Two Cases Part II*, *supra* note 21.

43. Janet Anderson, *Money Matters at the ICC*, JUSTICEINFO.NET (Dec. 14, 2018), <https://www.justiceinfo.net/en/tribunals/icc/39771-money-matters-at-the-icc.html> [perma.cc/27UM-795J].

44. Goldston, *supra* note 4.

45. See *Veto List*, DAG HAMMARSKJÖLD LIBRARY, <https://research.un.org/en/docs/sc/quick> [perma.cc/N2XN-HVDY].

46. See CLAUS KREB, PRELIMINARY OBSERVATIONS ON THE ICC APPEALS CHAMBER'S JUDGMENT OF 6 MAY 2019 IN THE JORDAN REFERRAL RE AL-BASHIR APPEAL 21 (2019) (ebook).

relationship with the United States during the George W. Bush administration; during this time, the United States passed the American Servicemembers Protection Act of 2002, which was intended to prohibit American cooperation with the ICC.<sup>47</sup> Moreover, the United States concluded multiple-bilateral agreements with different countries, in order to ensure the latter would not extradite US nationals found within such countries to the court.<sup>48</sup> These agreements effectively precluded signatory countries from cooperating with the ICC in matters of extradition, and have weakened the court's ability to execute arrest warrants against some indicted individuals.<sup>49</sup> More recently, the Trump Administration has displayed overt hostility toward the court. John Bolton, who at the time served as National Security Advisor, lambasted the court and accused it of having "no jurisdiction, no legitimacy, no authority."<sup>50</sup> Bolton announced that the United States would revoke visas for the ICC personnel, and even threatened that such personnel could be arrested if present in the United States.<sup>51</sup> Although John Bolton no longer serves in the Trump Administration, it is unclear that the administration's view toward the court will improve.<sup>52</sup> In addition to the world's superpowers, other countries have not been cooperative with the ICC. In 2009 and 2010, the court issued two arrest warrants for Al-Bashir, who at the time served as President of Sudan.<sup>53</sup> Since then, Al-Bashir has been able to travel to multiple other countries, including some ICC member states, all of which failed to arrest him

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47. *U.S.: 'Hague Invasion Act' Becomes Law*, HUMAN RIGHTS WATCH (Aug. 3, 2002), <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law> [perma.cc/K2LC-ZGSL].
48. *Q & A: The International Criminal Court and the United States*, HUMAN RIGHTS WATCH (Mar. 15, 2019), <https://www.hrw.org/news/2019/03/15/qa-international-criminal-court-and-united-states#7> [perma.cc/K4LV-BMDN].
49. *See id.*
50. *Id.*
51. Rebecca Gordon, *Why Are We Above International Law?*, THE NATION (Mar. 26, 2019), <https://www.thenation.com/article/archive/rebecca-gordon-international-criminal-court-john-bolton/> [perma.cc/7XDS-M8SY].
52. Philip Ewing, *Trump Fires John Bolton in Final Break After Months Of Internal Policy Division*, NPR (Sept. 10, 2019), <https://www.npr.org/2019/09/10/724363700/trump-fires-john-bolton-in-final-break-after-months-of-policy-divisions> [perma.cc/C8VW-LFYV].
53. Tom White, *States 'Failing to Seize Sudan's Dictator Despite Genocide Charge'*, THE GUARDIAN (Oct. 21, 2018), <https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant> [perma.cc/5SGM-YP2F].

and to deliver him to The Hague.<sup>54</sup> At the 2017 Assembly of States Parties, ICC Prosecutor Bensouda gave a briefing to the Security Council; several Security Council states' representatives, following the briefing, continued to assert the proposition that Al Bashir had immunity from the court's jurisdiction, thus displaying their continued lack of cooperation with the court.<sup>55</sup>

In sum, as of today, the ICC faces serious challenges which the court will need to address in order to re-position itself as a fundamental accountability-providing mechanism in international criminal justice. The section below will suggest how the ICC should proceed going forward, so that the court can face a brighter future.

### III. FUTURE OF THE ICC

First, the ICC's prosecutor should continue to build cases so that she can ultimately prosecute more individuals. As opposed to prosecuting presidents and prime ministers, the ICC's prosecutor could focus on lower level offenders, whose cases may be easier to put together and where the chances of conviction may be higher. The model for success here are the *Lubanga* case, which resulted in a conviction and a sentence of 14 years, and the most recent *Ntaganda* case, which resulted in a conviction on crimes against humanity and war crimes charges.<sup>56</sup> According to Professor Guilfoyle, "recent developments largely serve to confirm the unpalatable lessons I drew earlier from *Lubanga*: a narrow case, run against a rebel leader on relatively few (or at least closely related) charges can succeed. This was the model of success in *Ntaganda* . . . ."<sup>57</sup> In *Ntaganda*, a unified Trial Chamber issued a methodical judgment which affirmed that the OTP had presented a solid case.<sup>58</sup> The *Ntaganda* case map provide the OTP with a roadmap for successful future prosecutions: a case built on detailed investigation, arising out of a single situation, involving a rebel leader, accused of a relatively

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54. *Id.* (reporting that Al Bashir has been able to engage in 150 trips to countries such as China, South Africa, Saudi Arabia, Egypt, Jordan and Kenya, many of which are members of the ICC).

55. U.N. S.C. 7963rd mtg. at 2, 7, 12, 17, U.N. Doc. S/PV.7963 (June 8, 2017).

56. See Press Release, ICC, Thomas Lubanga Dyilo Sentenced to 14 Years of Imprisonment, ICC-CPI-20120710-PR824 (July 10, 2012), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr824> [perma.cc/VWX2-N4KU]; see generally Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision (July 8, 2019), available at <https://www.icc-cpi.int/drc/ntaganda> [perma.cc/X729-PXM9].

57. Guilfoyle, *A Tale of Two Cases Part II*, *supra* note 21.

58. *Id.*

narrow set of charges.<sup>59</sup> In fact, a deep investigation into crimes committed by a lower level individual, and a successful conviction of the same individual could potentially lead toward the imposition of accountability on higher-level defendants from the same country/situation. The Yugoslavia tribunal in particular was successful in this approach: the ICTY's first defendant was Dusko Tadic, a relatively unknown lower-level leader of the Bosnian Serbs; the ICTY's last defendants were Radovan Karadzic and Ratko Mladic, civil and military leaders of the Bosnian Serbs.<sup>60</sup> It may be argued that the ICTY built a successful foundation by first prosecuting lower-level leaders before reaching for those at the top, and that the investigations, gathered evidence, and prosecutorial work accomplished during the prosecution of lower-level cases paved the way toward a successful prosecution of Karadzic and Mladic. The ICC could follow the ICTY's example and the prosecutor could start building cases against lower-level defendants for existing situations, which may lead toward the indictment of leaders.

Second, the ICC's prosecutor should construct a careful strategy regarding future case selection, which should include considerations such as the prospects of a successful conviction, the possibility that the chosen case and prosecution will lead toward more prosecutions of higher-level defendants, geographic diversity to ensure that defendants from all parts of the world are investigated and prosecuted, as well as any political concerns related to the opening of a new case. When prosecuting cases, the OTP should ensure that the prosecution is the result of a long and detailed investigation, based on better in-country expertise, and that the evidence at trial is presented in a logical and well-thought out manner.

It should be noted that the OTP has already recognized the two above-mentioned concerns and has acknowledged the necessity to engage in more strategic case selection in its most recent Strategic Plan. In the Strategic Plan, the OTP acknowledged that it should "give increased consideration to the possibility of bringing cases to justice that are narrower in scope, insofar as they focus on key aspects of victimisation, particular incidents, areas, time periods, or a single accused," and that it should "consider bringing cases against notorious or mid-level perpetrators who are directly involved in the commission of crimes, to provide deeper and broader accountability and ... [to lay

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59. *Id.*

60. *See History*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/office-of-the-prosecutor/history> [perma.cc/BS6R-HGQ9].

foundations for] subsequent cases against higher-level accused.”<sup>61</sup> Moreover, according to the Strategic Plan, “The quality of the work is an essential element to effectively meet the Office’s mandate and for the long-term legitimacy and credibility of the Office. If the Office needs to make a trade-off between the speed, the number of parallel investigations and the quality of the investigations, then it will prioritise the quality of its work. With the limited number of cases, it is essential to achieve a high rate of success in court if the Office is to succeed in fulfilling its mandate.”<sup>62</sup>

If choosing cases which may be politically challenging, the OTP will need to ensure that the evidence presented is sufficiently strong to combat any political pressure, as well as to develop a communications and public relations strategy to combat criticism. As mentioned above, the OTP suffered a blow earlier this year when one of the court’s pre-trial chambers refused to authorize the continuation of the Afghanistan investigation.<sup>63</sup> When this investigation began, it was relatively easy to foresee that it would cause political backlash, and if OTP wishes to pursue such cases, it needs to be ready to present strong cases and to adequately handle any ensuing political pressure.

Third, certain procedures may need to be revisited. In particular, the existence of Pre-Trial Chambers, which according to the current procedures need to confirm charges presented by the OTP, should be re-examined. Scholars have already advanced this argument: Douglas Guilfoyle, for example, has argued that “[m]any of the Pre-Trial Chamber functions could as easily be conducted by a Trial Chamber, and the confirmation of charges process substantially streamlined,” because in light of the court’s relatively few active cases, “the Pre-Trial Division... has come to seem a cumbersome and ineffective mechanism which is largely a source of delay.”<sup>64</sup> Former ICC Judge Christine Van Den Wyngaert has also criticized the existence of the Pre-Trial Chamber, and has referred to it as a “mistake in the legal architecture” because “instead of accelerating everything, it just slowed everything down.”<sup>65</sup>

Fourth, ICC judges should work on forging consensus regarding substantive law. This may entail better communication and coordination among the judges, an increased sharing of expertise and

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61. The Office of the Prosecutor, *Strategic Plan 2019-2021*, INT’L CRIM. CT., 20 (July 17, 2019), <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> [perma.cc/5YBE-XDDF].

62. *Id.* at 16.

63. *ICC: Judges Reject Afghanistan Investigation*, HUMAN RIGHTS WATCH (Apr. 12, 2019), <https://www.hrw.org/news/2019/04/12/icc-judges-reject-afghanistan-investigation> [perma.cc/5Q6J-WRDJ].

64. Guilfoyle, *This is not Fine Part III*, *supra* note 31.

65. Guilfoyle, *This is not Fine Part I*, *supra* note 8.

ideas, and an awareness from all the judges about the importance of delivering consistent and uniform decisions.

Finally, the ICC needs to foster better cooperation from its member states, as well as from other states throughout the world. The court cannot succeed if it surrounded by hostile states, as all of its investigations depend on the host country's willingness to cooperate with the court. As Douglas Guilfoyle has noted, "international criminal tribunals need powerful patrons to operate successfully"<sup>66</sup> and the ICC's future success may depend on better support and cooperation from its constituents. Thus, it is crucial for the ICC to invest resources into building strong support among its member states, and throughout the world.

The ICC is a fundamental institution in the field of international criminal justice. Its success is vital for this field, and its failure could constitute an enormous setback. As Jim Goldston recently wrote, "Perhaps the most compelling argument for investing in a more effective ICC is that letting it die would deliver a huge blow to the fight against impunity. Flawed as it is, the ICC remains a capstone of our centuries-long search for a world in which the law prevails over brute force. Giving up on it now would set back that struggle immeasurably and would be a grave disservice to the many courageous activists who have given their lives for the cause of fighting crimes against humanity and genocide."<sup>67</sup>

#### IV. CONCLUSION

The ICC has served as an agent of impunity since its inception in 1998, and its fundamental role in the field of international criminal justice as a permanent accountability mechanism remains undisputed. The court is, however, facing significant challenges which may threaten its legitimacy. These challenges can be surmounted if the court is willing to take a hard look at its own procedures, prosecutorial practices, and judicial attitudes. The ICC's future may be bright if the court makes significant changes in the present.

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66. *Id.*

67. Goldston, *supra* note 4.