

# REFORMING THE INTERNATIONAL CRIMINAL COURT (ICC): PROGRESS, PERILS AND PITFALLS POST THE ICC REVIEW PROCESS

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**Summary:** The International Criminal Court is a very controversial institution. It is extensively criticised by both its critics and its supporters. This article examines what steps have been taken to reform the Court. It considers issues such as the need for better communications and messaging by the Court. The paper takes up how and why the Court needs to engage better and in more far-reaching ways with a host of role players that affect the terrain in which the Court operates. It is argued that more reform is needed in how the Court is lead, how it operates, and who the judges and staff are. It is argued that greater diversity is needed at the Court. Also taken up are how the reach of the Court can be increased beyond only prosecutions, how the Court can assist states to prosecute more cases themselves, and how the Court can become more victim centred. A core theme is how state cooperation can be enhanced. A range of suggestions are made so as to enhance the role of the Court in the years to come.

**Keywords:** International Criminal Court, International Criminal Justice, Criticisms, Reforms, Human Rights Violations, Impunity, Deterrence, ICC Review Process, Crime of Aggression, United Nations Security Council.

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## 1 Introduction

The International Criminal Court has been operating since 2002. During the two decades of its operation, it has been very controversial,<sup>1</sup> and has been heavily criticised on several fronts<sup>2</sup> by both its critics and its supporters.<sup>3</sup> Despite this, the creation of the ICC has contributed to what has become known as the “justice cascade”<sup>4</sup> and has led to some very positive developments in the global international criminal justice arena.<sup>5</sup> Previously, with a few limited exceptions, such as the Nuremburg and Tokyo tribunals and the international and internationalised institutions set up in the 1990s and thereafter, only states in their own countries were able to enforce criminal law by prosecuting individuals and handing out criminal punishment. This often meant that heads of state and other powerful individuals in a country were immune<sup>6</sup> from prosecution. This was often the case because of a lack of political will by states to hold these people accountable. Impunity reigned supreme in many parts of the world.<sup>7</sup>

The establishment of the ICC saw the formation of a permanent, but not universal,<sup>8</sup> international court, although only for very few crimes. However, the Court has not performed as optimally as it could have. It has been the subject of a great deal of concern about its track record and its ability to play the key role it was established to play.

Chief among the criticisms of the Court is that, although it has been operating for nearly 20 years, its achievements in terms of its finalised cases are lim-

- 1 A book title that reflects the turbulent times the Court has lived through, is WERLE, Gerhard, ZIMMERMAN, Andreas (eds.) *The International Criminal Court in Turbulent Times*. TMC Asser Press, 2019.
- 2 SARKIN, Jeremy. Reforming the International Criminal Court (ICC) to Achieve Increased State Cooperation in Investigations and Prosecutions of International Crimes. *International Human Rights Law Review*, 2020, Vol. 9, no. 1, pp. 27–61.
- 3 On the rhetoric used see BOEHME, Franziska. Exit, Voice and Loyalty: State Rhetoric About the International Criminal Court. *The International Journal of Human Rights*, 2018, Vol. 22, no. 3, pp. 420–445.
- 4 SIKKINK, Kathryn. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: WW Norton & Company, 2011.
- 5 FORD, Stuart. Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention. *Loyola of Los Angeles International and Comparative Law Review*, 2019, Vol. 43, pp. 101–123.
- 6 On the issue of sovereign immunity and why the ICC should take this into account more often see KERR, Christa-Gaye. Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined. *Michigan Journal of International Law*, 2020, Vol 41, pp. 195–225.
- 7 KYNESWOOD, Natalie. Limits of Law in Ending Impunity for State Crime: Time to Re-Frame the International Criminal Court’s Mandate? *State Crime Journal*, 2019, Vol 8, no. 2, pp. 219–240.
- 8 MINDUA, Antoine Kesia-Mbe. Universal Justice for a Globalized World. *Comparative Law Review*, Vol 23, no. 1, 2017, pp. 9–47.

ited. In fact, few cases have been taken up by the Court, and even fewer have been finalised.<sup>9</sup> It has only convicted about 10 of the about 45<sup>10</sup> publicly indicted people in 20 years.<sup>11</sup> About a dozen persons have had their charges dismissed or withdrawn or have been acquitted.<sup>12</sup> Such dismissals, withdrawals or acquittals reflect badly on decision-making concerning case selection and a variety of other choices made by the prosecution, including how evidence was presented to the judges. However, too little has been done to understand the complexities and difficulties of court's fact-finding processes and how little one can predict outcomes.<sup>13</sup>

The Court's costs have also come under scrutiny for the amount spent.<sup>14</sup> Some have claimed that the Court is a very expensive exercise with very little practical effect. Some agree with Helena Cobban, who states that "it is time to abandon the false hope of international justice", as these institutions "have squandered billions of dollars, failed to advance human rights, and ignored the wishes of victims they claim to represent."<sup>15</sup> Certainly, the high cost of establishing and running the Court when it has indicted and prosecuted so few is a large reason for the criticism.<sup>16</sup>

No doubt the Court's use of its resources can be better controlled. Nevertheless, if its workload increases, which needs to occur for its reach to be better felt

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- 9 On the criticism that many cases do not concern serious crimes but violations concerning the administration of justice see, RICHARDSON, Lucy. Offences Against the Administration of Justice at the International Criminal Court: Robbing Peter to Pay Paul? *Journal of International Criminal Justice*, 2017, Vol. 15, no. 4, pp. 741–774.
  - 10 On an analysis of some of the numbers and to understand some of them as far as the role of the Court is concerned see, GOODMAN, Sarah J. The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations. *Inquiries Journal*, 2020, Vol. 12, No. 09. (online). Available at: <http://www.inquiriesjournal.com/a?id=1806>. Accessed: 20.02.2012
  - 11 HIBBERT, Sarah. The Bemba Acquittal: A Blow to the ICC's Legitimacy in a Time of Crisis. *Temple International and Comparative Law Journal*, 2019, Vol. 34, pp. 95–127.
  - 12 On the problems concerning what happens to those who are acquitted see HELLER, Kevin Jon. What Happens to the Acquitted? *Leiden Journal of International Law*, 2008, Vol. 21, pp. 663–680.
  - 13 On these difficulties see COMBS, Nancy Amoury. Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law. *Harvard International Law Journal*, 2017, Vol. 58, pp. 47–125.
  - 14 ZAVALA, Osvaldo. The Budgetary Efficiency of the International Criminal Court. *International Criminal Law Review* 2018, Vol. 18, no. 3, pp. 461–488. See an article addressing the budgetary issues concerning the building of a new headquarters for the ICC, SAINT-JAMES, Virginie. The Construction of the Seat of the International Criminal Court in The Hague: From Symbolism to Controversy. *Les Cahiers de la Justice*, 2018, Vol. 4, pp. 647–658.
  - 15 COBBAN, Helena. Thinking Again: International Courts. *Foreign Policy*, 2009, October.
  - 16 MUNDIS, Daryl A. Improving the Operation and Functioning of the International Criminal Tribunals. *American Journal of International Law*, 2000, Vol. 94, No. 4, pp. 759–773.

and its impact to increase, it will need more resources.<sup>17</sup> However, as the Court gets most of its funding from states, this will only occur if state cooperation with the Court increases.<sup>18</sup> The need for state cooperation can be seen in the fact that about a dozen of the ICC accused are fugitives and still not in the hands of the Court. This is because of a disinclination on the part of several states to cooperate with the Court.<sup>19</sup> These states provide little in the way of assistance with investigations and handing over suspects to the Court. State cooperation issues also affect whether the Court can be funded better, as well as issues such as defending the Court against criticism when necessary.<sup>20</sup> These issues will be taken up later.

This article reviews what progress has been made to reform the Court and what pitfalls it should address in the years to come. In this regard, Sadat has noted that states have a choice to either “lean in”<sup>21</sup> or to leave the ICC.<sup>22</sup> While the latter was an issue to some extent, as is noted in the article, as far as African states were concerned some years ago,<sup>23</sup> the leave campaign has not made much ground.<sup>24</sup> Besides Burundi, only the Philippines has withdrawn from the ICC which became official in 2019.<sup>25</sup> While Gambia threatened to do so, it was only South Africa that attempted to do so in October 2016.<sup>26</sup> However, it did

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- 17 FORD, Stuart. What Investigative Resources Does the International Criminal Court Need to Succeed: A Gravity-Based Approach. *Washington University Global Studies Law Review*, 2017, Vol. 16, pp. 1–70.
  - 18 ZENGINKUZUCU, Dikran M. Enforcement of the Cooperation Obligation with the ICC for the Accountability Under International Criminal Law. *Journal of International Criminal Law* 2021, Vol. 2, no. 1, pp. 1–17.
  - 19 GREENAWALT, Alexander KA. Decisions Pursuant to Article 87 (7) of the Rome Statute on the Refusal of the Republic of Malawi and the Republic of Chad to Comply With the Cooperation Requests Issued by the Court With Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Int’l Crim. Ct.) & African Union response. *International Legal Materials* 2012, Vol. 2, pp. 393–417.
  - 20 SADAT, Leila Nadya. “Reforming the International Criminal Court:” Lean In” or” Leave””. *Washington University Journal of Law and Policy*, 2020, Vol. 62, pp. 51–76.
  - 21 “Lean in” means, in other words, to remain within the ICC fold. On some of the reasons for doing so see, PEREZ-LEON-ACEVEDO, Juan-Pablo. Why Retain Membership of the International Criminal Court? *International Organizations Law Review*, 2018, Vol 15, pp. 364–387.
  - 22 SADAT, Leila Nadya. “Reforming the International Criminal Court:” Lean In” or” Leave””. *Washington University Journal of Law and Policy*, 2020, Vol. 62, pp. 51–76.
  - 23 ROSSI, Christopher R. Hauntings, Hegemony, and the Threatened African Exodus from the International Criminal Court.” *Human Rights Quarterly*, 2018, Vol. 40, no. 2, pp. 369–405.
  - 24 SARKIN, Jeremy. Understanding the Changing Relationship of South Africa and the International Criminal Court: Towards a Culture of Greater Impunity in Africa? *Themis: Revista de Direito*, 2017, Vol. 32, pp. 7–33.
  - 25 SARKIN, Jeremy. Understanding South Africa’s Changing Positions on International Criminal Justice: Why the Country Wanted to Withdraw From the ICC and Why It May Remain in the ICC For the Time Being. *Cadernos de Estudos Africanos*, 2020, Vol. 40, pp. 85–108.
  - 26 SARKIN, Jeremy. Understanding South Africa’s Changing Positions on International Criminal Justice: Why the Country Wanted to Withdraw From the ICC and Why It May

not follow the correct procedure domestically and thus was forced to revoke its withdrawal.<sup>27</sup> Therefore, because so few withdrawals have occurred, it seems as though reforming the Court is the major focus of states that are parties to the Rome Statute.

Thus, it is reforming the Court that has been the subject of attention of those within the ICC arena. There seems to be a commitment to make a substantial number of changes; indeed some have already begun. However, many problems remain for the Court to address.<sup>28</sup> There are many areas where the Court needs reform.<sup>29</sup> The article therefore examines what steps have been taken to reform the Court and looks at some of the recent developments that indicate a commitment to move the reform agenda forward and the context of some of the criticisms levelled at the Court. It considers a variety of matters where more reform is needed, such as the need for better communications and messaging. In this respect, the article takes up how and why the Court needs to engage better and in more far-reaching ways with a host of role players that affect the terrain in which the Court operates.

The article takes up the issue of widening the defendant state pool, in that a great deal of criticism has occurred because the Court has only really had African defendants and there is a widespread attitude that only weak states can be and are targets of the ICC. The issue of leadership in the Court is addressed, both with the new Prosecutor, and as far as the judges are concerned. It is argued that while some changes have been made, substantially more reform is still needed in how the Court is lead and operates, and who the judges and staff are. It is argued that greater diversity in the Court needs to be achieved. The article therefore considers issues with how judges are selected and looks at problems between the judges.

Also taken up are issues such as how the reach of the Court can be increased beyond only prosecutions, how the Court can assist states to prosecute more cases themselves, and how the Court can become more victim centred. A core theme is how state cooperation can be enhanced, as this is an issue which, unless improved, will continue to affect the Court negatively in a variety of ways.

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Remain in the ICC For the Time Being. *Cadernos de Estudos Africanos*, 2020, Vol. 40, pp. 85–108.

27 SARKIN, Jeremy. Understanding South Africa's Changing Positions on International Criminal Justice: Why the Country Wanted to Withdraw From the ICC and Why It May Remain in the ICC For the Time Being. *Cadernos de Estudos Africanos*, 2020, Vol. 40, pp. 85–108.

28 SARKIN, Jeremy. Reforming the International Criminal Court (ICC) to Achieve Increased State Cooperation in Investigations and Prosecutions of International Crimes. *International Human Rights Law Review*, 2020, Vol. 9, no. 1, pp. 27–61.

29 BOWER, A. Contesting the International Criminal Court: Bashir, Kenyatta, and the Status of the Nonimpunity Norm in World Politics. *Journal of Global Security Studies*, 2019, Vol. 4, No. 1, pp. 88–104.

A range of suggestions are made as to what reforms are needed to enhance the role of the Court in the years to come. This is critical to ensure that victims have an institution that can really play the role it was envisaged to play, so as to impact levels of impunity and ensure that fewer human rights violations are committed around the world.<sup>30</sup>

## 2 ICC Review Process

The Court, and those in leadership positions in the Rome Statute system in general, including the Assembly of States Parties, have recognised that issues exist and set in motion processes to deal with them.<sup>31</sup> Most importantly, an independent review process was set up by the Assembly of States Parties in December 2019.<sup>32</sup> Then, a resolution was adopted to identify and apply measures to bolster and improve the performance of the ICC.<sup>33</sup>

The ICC review, chaired by South African Judge Richard Goldstone,<sup>34</sup> a former Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda,<sup>35</sup> and involving a range of other international experts,<sup>36</sup> was carried out very efficiently.<sup>37</sup> This can be seen in the very useful report that it delivered which examined a multitude of issues and made substantial recommendations for reform within the remit

30 On the issues relating to impunity see POLITI, Mauro. *The Rome Statute of the International Criminal Court: A Challenge to Impunity*. London: Routledge, 2017.

31 BUCHWALD, Todd F. The Path Forward for the International Criminal Court: Questions Searching for Answers." *Case Western Reserve Journal of International Law*, 2020, Vol. 52, pp. 417–431.

32 ICC ASSEMBLY OF STATE PARTIES Resolution No. 18 Resolution 7. *Terms of Reference for the Independent Expert Review of the International Criminal Court*. (online). Available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-Res7-ENG-ICC-Review-resolution-17Dec19-1530.cln.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG-ICC-Review-resolution-17Dec19-1530.cln.pdf). Accessed: 15.03.2021.

33 ICC ASSEMBLY OF STATE PARTIES Resolution No. 18 Resolution 7. *Terms of Reference for the Independent Expert Review of the International Criminal Court*. (online). Available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-Res7-ENG-ICC-Review-resolution-17Dec19-1530.cln.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG-ICC-Review-resolution-17Dec19-1530.cln.pdf). Accessed: 15.03.2021.

34 See GOLDSTONE, Richard. The Crime Prevention Potential of the International Criminal Court Depends Upon its Credibility and the Support it Receives from Governments and Especially those of States Parties to the Rome Treaty. In STEINBERG, Richard H (ed). *Contemporary Issues Facing the International Criminal Court*. Leiden: Brill Nijhoff, 2020, pp. 213–219

35 See further on Goldstone in TERRIS, Daniel. *The Trials of Richard Goldstone*. New Brunswick: Rutgers University Press, 2018.

36 ICC ASSEMBLY OF STATE PARTIES Resolution No. 18. *Meeting the Challenges of Today For a Stronger Court Tomorrow: Matrix Over Possible Areas of Strengthening the Court And Rome Statute System*. (online). Accessed at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-review-Matrix-v2-27Nov19-1740.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-review-Matrix-v2-27Nov19-1740.pdf). Accessed: 15.03.2021.

37 BUCHWALD, Todd F. The Path Forward for the International Criminal Court: Questions Searching for Answers. *Case Western Reserve Journal of International Law*, 2020, Vol. 52, pp. 417–431.

of the Court and the Assembly of States Parties.<sup>38</sup> The report provides a wealth of information on the strengths and weaknesses of the Court and suggests 384 reforms to deal with the challenges the Court system is facing, reforms which the Court ought to adopt.<sup>39</sup>

However, the report ought not to be the end of the process. There needs to be ongoing engagement with what the Court does to achieve the changes that the review recommends. Benchmarks should be put in place to ensure that goals are set, and then yearly measurements taken to monitor the extent to which they are met<sup>40</sup> and to identify where changes are still needed. In short, the reform process needs to be an ongoing process and progress ought to be constantly monitored and progress and regression noted and acted on.

### 3 Recent progress on reforming the Court

There have already been momentous developments for the Court in the wake of the ICC review that have occurred already in 2021. A number of these developments reflect the acceptance by the Court that a variety of changes are needed, while some are fortuitous, such as the election of a new Prosecutor, which just happened to occur at this time.

Besides appointing a new Prosecutor, the ICC in early 2021 handed down a guilty decision<sup>41</sup> in the case of Ugandan Lord's Resistance Army (LRA)<sup>42</sup> commander Dominic Ongwen.<sup>43</sup> His conviction for the crime of forced pregnancy is a first for the Court and only the second for sexual and other gender-based

38 ICC ASSEMBLY OF STATES PARTIES Resolution No. 19. Independent Expert Review of the International Criminal Court and the Rome Statute System. (online). Available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf). Accessed: 15.03.2021.

39 ICC ASSEMBLY OF STATES PARTIES Resolution No. 19. Independent Expert Review of the International Criminal Court and the Rome Statute System. (online). Available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf). Accessed: 15.03.2021.

40 See generally on putting in place processes to measure performance at the ICC, JONES, Annika. Measuring Performance and Shaping Identity: Performance Indicators and the International Criminal Court. *Journal of International Criminal Justice*, 2020, Volume 18, No. 4, pp. 825–850,

41 ICC Trial Judgment ICC-02/04-01/15-1762-Red 04 February 2021 | Trial Chamber IX | Decision Case: The Prosecutor v. Dominic Ongwen Situation: Situation in Uganda <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/04-01/15-1762-Red>

42 See further WASONGA, Joseph Otieno. *The International Criminal Court and the Lord's Resistance Army: Enduring Dilemmas of Transitional Justice*. New York: Routledge, 2019.

43 HASSELLIND, Filip Strandberg. The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen. *Social & Legal Studies*, 2020, pp. 1–20. His case raised important issues for international criminal justice. See NORTJE, Windell. Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court. *International Criminal Law Review*, 2017, Vol. 17, No. 1, pp. 186–207.



violence crimes.<sup>44</sup> This seems to indicate a commitment by the Court to target gender crimes,<sup>45</sup> which are rampant around the world.<sup>46</sup> In this vein, the Court also appointed a Focal Point for Gender Equality at the Court on 8 March 2021.<sup>47</sup>

On the same day, the Court issued a reparations order to victims from the Democratic Republic of Congo in the case of *The Prosecutor v. Bosco Ntaganda*.<sup>48</sup> Ntaganda was found guilty on 8 July 2019 of war crimes and crimes against humanity.<sup>49</sup>

Other cases have also begun at the ICC in 2021, including a case from the Central African Republic.<sup>50</sup> Additionally, the ICC has found in 2021 that it has jurisdiction to hear matters concerning Palestine.<sup>51</sup> Shortly after the jurisdiction verdict, the Prosecutor announced the opening of an investigation into crimes committed concerning Palestine.<sup>52</sup> This puts the Court further at odds not only

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44 See generally GREY, Rosemary, MCLOUGHLIN, Kasey, and CHAPPELL, Louise. Gender and Judging at the International Criminal Court: Lessons From 'Feminist Judgment Projects'. *Leiden Journal of International Law*, 2021, Vol. 34, no. 1, pp. 247–264. On the issues the court still needs to do to promote issues of gender equality and addresses sexual violence see SURESH, Veena. The Victims' Court? An Analysis of the Participation of Victims of Sexual Violence in International Criminal Proceedings. *Groningen Journal of International Law*, 2021, Vol. 8, No. 2, pp. 244–269.

45 This has been a criticism of the court in the past. See D'AOUST, Marie-Alice. Sexual and Gender-Based Violence in International Criminal Law: A Feminist Assessment of the Bemba Case." *International Criminal Law Review*, 2017, Vol. 17, No. 1, pp. 208–221.

46 SARKIN, Jeremy. A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World. *Human Rights Quarterly*, 2018, Vol. 40, No. 1, pp. 1–36.

47 ICC. *Press Release International Women's Day 2021. ICC appoints Focal Point for Gender Equality*. (online). Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1573>. Accessed: 15.03.2021.

48 ICC. *The Prosecutor v. Bosco Ntaganda*. Reparations Order ICC-01/04-02/06-2659 08 March 2021. (online.) Available at: [https://www.icc-cpi.int/CourtRecords/CR2021\\_01889](https://www.icc-cpi.int/CourtRecords/CR2021_01889). PDF. Accessed: 15.03.2021.

49 ICC. *The Prosecutor v. Bosco Ntaganda*. Trial Judgement ICC-01/04-02/06-2359 08 July 2019. (online). Available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_03568](https://www.icc-cpi.int/CourtRecords/CR2019_03568). PDF. Accessed: 15.03.2021.

50 ICC. *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*. ICC-01/14-01/18. 03 March 2021. (online). Available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/14-01/18-723-Red>.

51 ICC. *ICC Pre-Trial Chamber I Issues its Decision on the Prosecutor's Request Related to Territorial Jurisdiction over Palestine*. 5 February 2021. (online). Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1566>. Accessed: 15.03.2021. On the issues concerning Palestine see ADEM, S.H., *Palestine and the International Criminal Court*. The Hague: T.M.C. Asser Press, 2019. See also HANSEN, T.O. Opportunities and Challenges Seeking Accountability for War Crimes in Palestine Under the International Criminal Court's Complementarity Regime. *Notre Dame Journal of International and Comparative Law*, 2019, Vol. 9, No. 2, pp. 1–32.

52 ICC. *Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine*. 3 March 2020. (online). Available at: <https://www.icc-cpi.int/Pages/item>.



with Israel, but also with the US,<sup>53</sup> partly because of its earlier decision allowing the Court to investigate matters in Afghanistan.<sup>54</sup> The Afghanistan case affects the US, but potentially also other Western states.

In another important 2021 development, the ICC and Sudan agreed to cooperate concerning a case against a Sudanese Janjaweed commander. The commander is alleged to have cooperated with the Sudanese government in committing atrocities against Darfur opposition groups. This is an important breakthrough, most importantly because state cooperation has been a massive problem for the Court, as will be discussed below. Sudan particularly has been a thorn in the side of the ICC. It indicates that state cooperation can be achieved even with states that are not usually willing to do so. What this means for state cooperation with Sudan as far as former President Al-Bashir remains to be seen, but hopefully the ICC will be able to get Sudan to cooperate on all the cases from the country. The ICC needs to ensure that cooperation with it by states is not selective and for some cases only. Thus, the Sudanese situation may be an important marker for state cooperation.

However, more needs to be done to promote state cooperation in general as this is an essential component to the Court's operation.<sup>55</sup> The Court is almost completely dependent on state cooperation, as it cannot enforce or even enter a state without that state's consent.<sup>56</sup> This has been an area of major weakness in

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aspx?name=210303-prosecutor-statement-investigation-palestine. Accessed: 15.03.2021.

- 53 On the position of the USA to the ICC see HAMEED, Haider Abdulrazaq, DAHLAN, Nuarrual Hilal bin Md. The Hague Invasion Act and International Criminal Justice: The Attitude of the United States Towards the International Criminal Court (ICC). *Journal of Law, Policy and Globalization*, Vol. 62, 2017, pp. 89–97. See also KILLINGSWORTH, Matt. America's Exceptionalist Tradition: From the Law of Nations to the International Criminal Court. *Global Society*, 2019, Vol. 33, No. 2, pp. 285–304. However, the change from the Trump to Biden administrations has seen a readjustment in the policies towards the Court and removal of sanctions against specific ICC personnel. On the view of the Trump administration see GALBRAITH, J. Trump Administration Expresses Strong Disapproval of the International Criminal Court. *American Journal of International Law*, 2019, Vol. 113, No. 1, pp. 169–173 and GALBRAITH, J. The Trump Administration Revokes the ICC Prosecutor's US Visa Shortly Before the ICC Pre-Trial Chamber Declines to Authorize an Investigation into War Crimes in Afghanistan. *American Journal of International Law*, 2019, Vol. 113, No. 3, pp. 625–630. On why the USA ought to support the ICC see STROMSETH, Jane. The United States and the International Criminal Court: Why Undermining the ICC Undercuts US Interests. *Georgia Journal of International and Comparative Law*, 2018, Vol. 47, pp. 639–657.
- 54 ICC. *Press Release, Afghanistan: ICC Appeals Chamber authorises the opening of an investigation*. 5 March 2021. (online). Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516>. Accessed: 07.04.2021.
- 55 BOCCHESI, Marco. Justice Denied: Making Sense of State Noncooperation with International Prosecutions. *Georgetown Journal of International Affairs*, 2020, Vol. 21, pp. 195–200.
- 56 BARNES, G.P. The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir. *Fordham International Law Journal*, 2010, Vol. 34, pp. 1584–1619.

the past and, as noted above, has been the cause of a good number of defendants not being apprehended and handed over to the Court. In fact, the issue of state non-cooperation is a crosscutting one with tremendous effects for the Court in a number of ways.<sup>57</sup> The reputation of the Court is a key aspect of state cooperation and needs to be constantly worked on. However, there also needs to be active engagement with individual states to promote greater cooperation in the years to come.

Thus, the Court is making rapid progress, particularly over the last year or so, in some areas where reform is sorely needed. It is taking on new cases from all parts of the world, including from states previously seen to be immune from the reach of the ICC. It has also been finalising more cases. This suggests that positive steps have been taken to deal with a range of the Court's problem areas.

#### 4 Criticisms of the Court

Despite the reforms that have occurred, or are in the pipeline, the criticisms have continued and will continue. However, it is important to bear in mind that not all the Court's perceived problems are in fact real tribulations. Some of the criticism of the Court has been because of which states it has investigated and which not. Thus, there has been to some extent a lack of understanding about the constraints which have guided the Court as far as its investigation and prosecution choices are concerned, and a lack of clarity about why certain choices were made.

Some of the criticisms levelled at the Court are also aimed at undermining the institution for political purposes,<sup>58</sup> because there are actors who fear the Court and wish to negate the role that it plays. They have therefore gone out of their way to undermine the Court in public opinion. This includes states such as the US, which has used a number of strategies including sanctions and travel bans on ICC personnel, to weaken the Court and limit its role. Another argument levelled for political reasons is that the Court is biased,<sup>59</sup> or a tool in the hands of imperialists<sup>60</sup> who are using it for their own purposes.<sup>61</sup> These positions

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57 HILLEBRECHT, Courtney, and STRAUS, Scott. Who Pursues the Perpetrators: State Cooperation with the ICC. *Human Right Quarterly*, 2017, Vol. 39, pp. 162–188.

58 On the political environment the court operates in see DANCY, Geoff, and MONTAL, Florencia. From Law Versus Politics to Law In Politics: A Pragmatist Assessment Of The ICC's Impact. *American University International Law Review*, 2016, Vol. 32, pp. 645–705.

59 DANCY, Geoff, DUTTON, Yvonne Marie, ALLEBLAS, Tessa, ALOYO, Eamon. What Determines Perceptions of Bias toward the International Criminal Court? Evidence from Kenya. *Journal of Conflict Resolution*, 2020, Vol. 64, No. 7–8, pp. 1443–1469.

60 See further COWELL, Frederick. Inherent Imperialism: Understanding the Legal Roots of Anti-Imperialist Criticism of the International Criminal Court. *Journal of International Criminal Justice*, 2017, Vol. 15, No. 4, pp. 667–687.

61 SCHNEIDER, Lea. The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa? *Journal of International Criminal Law (JICL)*, 2020, Vol. 1, no. 1, pp. 90–109.

need to be countered clearly and widely as having no basis in fact. The criticism that the Court has achieved very little over its lifespan should also receive some pushback. It needs to be shown how much the Court has achieved in the places where it works and that it has been successful in giving victims a voice which they would otherwise not have had. The role of the Court in providing reparations to many victims should also be made more widely known.<sup>62</sup>

## 5 The need for a better communication strategy

One area where the Court has been deficient is in responding to criticisms: it has not always responded or reacted adequately. Likewise, its supporters have not come to the defence of the Court often or robustly enough. This seems to be changing to some extent and there was swift defence of the Court when the US targeted it and some of its personnel for sanctions. This saw many, including a huge number of states, responding strongly against the US's actions. These sanctions were however dropped in April 2021 by the Biden administration, who are not as opposed to the Court as the previous administration was.

Thus, part of the problem that the Court needs to address, as noted throughout this article, is messaging. More needs to be done to demystify the role of the Court<sup>63</sup> and allow the public<sup>64</sup> to better understand what it does and the potential role it could play if it were given all the support it needs. Part of that can be achieved by better and bolder outreach activities that engage with a wider audience.<sup>65</sup>

What also needs to be made clear is the failure in general of the UN and others to deal with the rampant human rights abuses around the world<sup>66</sup> – in other words, that it is not merely the ICC that is unable to do more to address these

62 ICC. Press Release: *Ntaganda* Case: TFV Welcomes Reparations Order for Victims by ICC Trial Chamber VI. 8 March 2021. (online). Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=210308-trust-fund-for-victims-pr-ntaganda-reparations>. Accessed: 31.03.2021. On criticisms concerning a general assistance role for the Trust Fund see RAUXLOH, Regina E. Good Intentions and Bad Consequences: The General Assistance Mandate of the Trust Fund for Victims of the ICC. *Leiden Journal of International Law*, 2020, pp. 1–20.

63 MUDE, Torque. Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric. *Open Journal of Political Science*, 2017, Vol. 7, No. 01, pp. 178–188.

64 Nerlich notes that there are various audiences for the ICC. See NERLICH, Volker. Audiences of the International Criminal Court. *International Criminal Law Review*, 2019, Vol. 19, no. 6, pp. 1046–1056.

65 VINCK, P, PHAM, P.N. Outreach Evaluation: The International Criminal Court in the Central African Republic. *International Journal of Transitional Justice*, 2010, Vol. 4, No. 3, pp. 421–442.

66 RAPANYANE, Makhura Benjamin, SETHOLE, Florence Ramasela, and TIRIVANGASI, Happy Mathew. The United Nations, International Criminal Court and African Union's Delayed Response to the Prolonged Dictatorship in Sudan. *Journal of African Union Studies*, 2020, Vol. 9, No. 3 pp. 47–69.

abuses. In addition, because the Court's supporters have had high expectations about what it can achieve,<sup>67</sup> its messaging needs to involve dampening expectations<sup>68</sup> and ensuring a more realistic view about what it is really capable of delivering on.

At the same time, the Court's successes need to be better communicated to those who are sceptical of its role and mission. In particular, its effectiveness<sup>69</sup> and efficiency,<sup>70</sup> which often remain outside, or not that visible to, the public eye, should be highlighted.

Thus, major reform is therefore needed in terms of how the Court deals with the public, states and other actors. The criticisms it faces are often overblown or made by actors who wish to see the Court fail. The Court needs to push back at times on the criticisms made, and sometimes should contextualise them to show the real reasons for such disapproval. However, there are also valid criticisms, which need to be explained and addressed. Therefore, the Court needs to engage in dialogue more often and in ways that ensure better cooperation and greater understanding with states and others. It also needs better communications strategies and campaigns. Taken together, this should enhance the reputation of the Court.

## 6 Better and wider engagement with role players, including states

While messaging is important, so too is engagement with various role players, especially states. State cooperation will be enhanced if more states are engaged with in better ways. However, it must be realised at the same time that the criticisms of the Court will not evaporate. This is because many have been highly critical of the development of international criminal justice in general,

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67 BUCHWALD, Todd F. The Path Forward for the International Criminal Court: Questions Searching for Answers." *Case Western Reserve Journal of International Law*, 2020, Vol. 52, pp. 417–431. An interesting article addressing what the author, a judge of the ICC at the time, terms non-traditional expectations, in other words perceptions that the Court ought to have a role beyond simply prosecutions see PANGALANGAN, Raul C. The International Criminal Court and the Burdens of Non-Traditional Expectations. *Gonzaga. Law Review*, 2019, Vol. 55, pp. 237–248.

68 DE HOON, Marieke. The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy. *International Criminal Law Review*, 2017, Vol. 17, No. 4, pp. 591–614.

69 For a critical analysis on the effectiveness of the ICC see GONZALEZ-RUIZ, Cristian D., and MIJARES, Victor M. The Strong Do What They Can: Unveiling the International Criminal Court Limitations. *Brazilian Journal of International Law*, 2020, Vol. 17, pp. 406–416.

70 GOODMAN, Sarah J. The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations. *Inquiries Journal*, 2020, Vol. 12, No. 09. (online). Available at: <http://www.inquiriesjournal.com/a?id=1806> Accessed at: 04.04.2021

and the ICC specifically.<sup>71</sup> While it has been argued that these developments are significant for their deterrent value,<sup>72</sup> it has also been suggested by some that the Court has had limited, if any, such effect.<sup>73</sup> As Payam Akhavan has stated however: “beyond vindicating the suffering of victims”, the retributive justice paradigm has a deterrent effect on political and military leaders.<sup>74</sup> He believes that “criminal accusations increasingly constitute a serious political impediment to the ambitions of existing or aspiring leaders”.<sup>75</sup>

Despite this, states where people who are investigated and prosecuted come from will continue, and in some cases ramp up, their denunciations of the ICC. Ensuring greater understanding of the Court and what it does should have an important effect on enhancing state cooperation. While some inroads seem to have been made, there is a long way to go on this front. Greater state cooperation will only be achieved, however, if the Court is seen to be overcoming some of its problems and solving the issues where states see difficulties with its role.<sup>76</sup> Thus, the ICC must engage more with individual states, particularly those where it is investigating or has cases. This is crucial as the Court has, as noted above, had difficulties with getting states to cooperate.<sup>77</sup>

The Court should also engage with other role players, including the Security Council.<sup>78</sup> This UN organ has a tremendous influence on the ICC. The way the Security Council refers, or does not refer, cases to the Court causes the ICC to

71 See for example ZACKLIN, Ralph. The Failings of Ad Hoc International Tribunals, *Journal of International Criminal Justice*, 2004, Vol. 2, pp. 541–545.

72 APPEL, Benjamin J. In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations? *Journal of Conflict Resolution*, 2018, Vol. 62, No. 1, pp. 3–28.

73 See further ALEXANDER, James F. The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact, *Villanova Law Review*, 2009, Vol 54, No. 1, pp. 1–55, 27 and DAMASKA, Mirjan, What is the Point of International Criminal Justice? *Chicago-Kent Law Review*, 2008, Vol. 83, pp. 329–365.

74 AKHAVAN, Payam. Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? *American Journal of International Law*, 2001, Vol. 95, pp. 7–31, 8. See also SHILAH, Westen K. The International Criminal Court and the African Union: Is the ICC a Bulwark Against Impunity or an Imperial Trojan Horse? *African Journal on Conflict Resolution*, 2018, Vol. 18, No. 1, pp. 119–146.

75 AKHAVAN, Payam. Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? *American Journal of International Law*, 2001, Vol. 95, pp. 7–31, 9.

76 See BOCCHESI, Marco. Justice Denied: Making Sense of State Noncooperation with International Prosecutions. *Georgetown Journal of International Affairs*, 2020, Vol. 21, pp. 195–200.

77 See BABAIAN, Sarah. The International Criminal Court—An International Criminal World Court?: *Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. Cham, Switzerland: Springer, 2018.

78 HEHIR, Aidan, and LANG, Anthony. The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect. *Criminal Law Forum*, 2015, Vol. 26, No. 1, pp. 153–179.

be the subject of intense scrutiny and extreme criticism.<sup>79</sup> The ills of the international governance system are often dumped on the ICC as a result of the way the Council operates when dealing with massive human rights abuses. To try and ameliorate the role the Council plays, the ICC needs to engage more often with the Council. It must also cooperate with the UN as a whole, to try and ensure that the roles that the Council and the UN play are far more useful when addressing issues of mutual concern.

In addition, the ICC should take steps to improve its engagement with other actors, such as regional and intergovernmental organisations, like the African Union.<sup>80</sup> It ought also to engage more regularly with regional courts.<sup>81</sup> Many African states and the African Union have criticised the Court as targeting Africa solely and having a totally African focus.<sup>82</sup> This resulted in a few African countries beginning to withdraw<sup>83</sup> from the Court, to the detriment of international justice.<sup>84</sup> In 2016, three African countries (South Africa, the Gambia, and Burundi) began the process to leave the Court,<sup>85</sup> and several others (including Uganda, Namibia and Kenya) were believed to be moving in that direction. Eventually only Burundi withdrew. However, this was the culmination of a process of confrontation between the Court and African countries<sup>86</sup> which began

79 See generally LENTNER, Gabriel M. The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism. *International Criminal Law Review*, 2020, Vol. 20, No. 2, pp. 251–284. See also LENTNER, Gabriel M. *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice*. Cheltenham, UK: Edward Elgar Publishing, 2018.

80 OKPE, Samuel Okpe. Anti-Impunity Norm of the International Criminal Court: A Curse or Blessing for Africa? *Journal of Asian and African Studies*, 2020, Vol. 55, No. 7, pp. 1077–1090.

81 SAINATI, Tatiana E. “Divided We Fall: How the International Criminal Court Can Promote Compliance With International Law by Working With Regional Courts. *Vanderbilt Journal of Transnational Law*, 2016, Vol. 49, pp. 191–243.

82 BENYERA, Everisto. Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States. *Politeia*, 2018, Vol. 37, No. 1, pp. 1–30. See also FISHER, Kirsten J. Africa’s Role in the Progression of International Criminal Justice: A Moral and Political Argument. *The Journal of Modern African Studies*, 2018, Vol. 56, No. 4, pp. 541–568.

83 See NEL, Michelle, and SIBIYA, Vukile Ezrom. Withdrawal from the International Criminal Court: Does Africa Have an Alternative? *African Journal on Conflict Resolution*, 2017, Vol. 17, No. 1, pp. 79–103.

84 SALEHI, Javad. A Critique of Opposition of the African Union and its Member States with the Criminal Court and its Effects on International Jurisprudence. *Public Law Studies Quarterly*, 2020, Vol. 50, No. Summer, pp. 793–807.

85 SSENYONJO, Manisuli. State Withdrawal Notifications From the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia.” *Criminal Law Forum*, 2018, Vol. 29, No. 1, pp. 63–119.

86 SARKIN, Jeremy. Understanding South Africa’s Changing Positions on International Criminal Justice: Why the Country Wanted to Withdraw From the ICC and Why It May Remain in the ICC For the Time Being. *Cadernos de Estudos Africanos*, 2020, Vol. 40, pp. 85–108.



formally in 2009 when the AU began to get African countries not to cooperate with the Court.<sup>87</sup>

This situation had transpired because the role of the ICC on the African continent had become very contentious over a number of years.<sup>88</sup> The tensions that existed between the Court and African states were however completely at odds with the view of African states when the Court was being formed and in the years that followed the Court coming into being. At that time, the biggest number of states that advocated for the Court and joined it after the Rome Statute was agreed to in 1998 came from Africa. Many African countries fervently supported the ICC. They saw the Court as an important vehicle to address the situations of mass human rights violations in their countries. Thus, in its 2004–2007 Strategic Plan, the African Union committed to get all African countries to join the Rome Statute. However, the AU subsequently became a very vociferous opponent of the Court. There was an upsurge in criticism when the President of Sudan and the President and Deputy President of Kenya were indicted.<sup>89</sup> The case from Sudan was seen to be a major affront to African states<sup>90</sup> as Sudan had not ratified the Rome Statute, but rather the country was referred to the Court by the Security Council. This situation was exacerbated when the Security Council did not address a request by African states for the cases against Kenyans<sup>91</sup> to be deferred by the Security Council,<sup>92</sup> which was in its remit.<sup>93</sup>

A backlash<sup>94</sup> to this situation from the AU saw the creation of the Malabo Protocol,<sup>95</sup> which will, when implemented, give the combined African Court of

87 MILLS, Kurt, and BLOOMFIELD, Alan. African Resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm. *Review of International Studies*, 2018, Vol. 44, No. 1, pp. 101–127.

88 GARCÍA IOMMI, Lucrecia. Whose Justice? The ICC 'Africa Problem'. *International Relations*, 2020, Vol. 34, No. 1, pp. 105–129.

89 CACCIATORI, Mattia. When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents. *International Journal of Transitional Justice*, 2018, Vol. 12, No. 3, pp. 386–406.

90 BOWER, Adam. "Contesting the International Criminal Court: Bashir, Kenyatta, and the Status of the Nonimpunity Norm in World Politics. *Journal of Global Security Studies*, 2019, Vol. 4, No. 1, pp. 88–104.

91 See further LUGANO, Geoffrey. Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya. *International Journal of Transitional Justice*, 2017, Vol. 11, No. 1, pp. 9–29.

92 ASAALA, Evelyn Owiye. "Rule of Law or Realpolitik? The Role of the United Nations Security Council in the International Criminal Court Processes in Africa. *African Human Rights Law Journal*, 2017, Vol. 17, No. 1, pp. 265–293.

93 VAN DER VYVER, Johan D. Deferrals of Investigations and Prosecutions in the International Criminal Court. *Comparative and International Law Journal of Southern Africa*, 2018, Vol. 51, No. 1, pp. 1–18.

94 See OLOKA-ONYANGO, Joe. Unpacking the African Backlash to the International Criminal Court (ICC): The Case of Uganda and Kenya. *Strathmore Law Journal*, 2020, Vol. 4, pp. 41–67.

95 ABEBE, Zekarias Beshah. The African Court With a Criminal Jurisdiction and the ICC: A Case For Overlapping Jurisdiction? *African Journal of International and Comparative Law*, 2017, Vol. 25, No. 3, pp. 418–429.



Justice and Human Rights criminal jurisdiction.<sup>96</sup> While the AU argues that the process of giving such jurisdiction to the African Court indicates a commitment to accountability, the fact that the Protocol excludes prosecuting heads of states and other senior state officials<sup>97</sup> indicates that this is not the case.<sup>98</sup>

The Court is however trying to address the negative attitudes on the part of African states and others by examining a range of other places where it can bring cases from.<sup>99</sup> These include, as mentioned above, Afghanistan and Palestine, as well as others. However, it is crucial that the Court develops a better relationship with the AU<sup>100</sup> and various African states.<sup>101</sup> Victims in those states need the Court to be able to work in their countries in ways that meet their need for justice.<sup>102</sup> Only with good working relationships can cooperation between the Court and the various role players occur.

### 7 Widening the pool of defendant states

At present, 123 states are members of the Court. Therefore about 80 states are not part of the ICC process, including large and powerful states such as the US, Russia, China and India.<sup>103</sup> This has meant that there has been much criticism that the Court is meant to deal only with weaker states. Therefore, the Court has been labelled as imperialist and inequitably orientated towards only those states

96 SARKIN, Jeremy. Understanding South Africa's Changing Positions on International Criminal Justice: Why the Country Wanted to Withdraw From the ICC and Why It May Remain in the ICC For the Time Being. *Cadernos de Estudos Africanos*, 2020, Vol. 40, pp. 85–108.

97 On developments around head of state immunity see SINGHI, Yash. Head of State Immunity: The ICC's Biggest Impediment. *Indian Journal of International Law*, 2020, Vol. 59, No. 1–4, pp. 1–20.

98 SARKIN, Jeremy. Is the African Union's Position on Non-Indifference Making a Difference?: The Implementation of The Responsibility to Protect (R2P) in Africa in Theory and Practice. 5(1) (2016) *Journal of African Union Studies*, Vol. 5, No. 1, pp. 5–37 and SARKIN, Jeremy. The Role of the International Criminal Court in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies. *Studies in Ethnicity and Nationalism*, 2011, Vol. 11, No. 1, pp. 130–142.

99 SARKIN, Jeremy. Reforming the International Criminal Court (ICC) to Achieve Increased State Cooperation in Investigations and Prosecutions of International Crimes. *International Human Rights Law Review*, 2020, Vol. 9, no. 1, pp. 27–61.

100 ELIS, R.J and LIU, Y. The Techniques for Appeasing the Tension between the International Criminal Court (ICC) and the African Union (AU). *Open Journal of Political Science*, 2019, Vol. 9, No. 4, pp. 703–715.

101 JALLOH, Charles Chernor, and BANTEKAS, Ilias (eds.) *The International Criminal Court and Africa*. Oxford: Oxford University Press, 2017.

102 SARKIN, Jeremy. Reforming the International Criminal Court (ICC) to Achieve Increased State Cooperation in Investigations and Prosecutions of International Crimes. *International Human Rights Law Review*, 2020, Vol. 9, no. 1, pp. 27–61.

103 CHRISTIANO, Thomas. The Arbitrary Circumscription of the Jurisdiction of the International Criminal Court. *Critical Review of International Social and Political Philosophy*, 2019, Vol. 23, No. 3, pp. 352–370

that are not powerful. This criticism is compounded by the fact that where a state has not ratified the Rome Statute, the Security Council can refer a state to the Court.<sup>104</sup> This is the situation even though many of the members of the Permanent Five, who can take such action, are not state parties to the Rome Statute.<sup>105</sup> The process of deferring cases, which is also within the purview of the Security Council, is also seen to be fraught because of the fact that it is again strongly influenced by states that are not subject to the jurisdiction of the Court.

The reach of Court is also deeply affected by the fact that most of the pariah or rogue states that regularly commit crimes within the purview of the Court are not subject to the Court. Thus, the Court is trying to find ways to extend its reach. By taking up the cases from Afghanistan and Palestine, as well as from other parts of the world that it is investigating, the ICC is trying to show that it can also target powerful states.<sup>106</sup> Thus, because it may see defendants from the US and some other Western states, as well as from Israel because of cases that may emerge from Palestine, the Court is trying to indicate that even the most powerful states are not immune from ICC accountability. As noted above, this lack of accountability for powerful states has been a key criticism of the Court. Thus, the Court seems to recognise that it needs to reform which states it targets. However, it is likely that one of the effects of this will be that such states become more robust in their criticism of the Court and in all probability ramp up their strategies against the ICC. Thus, the Court will need to be mindful of this type of pressure and work to counter it.

As an example, issues of case selection and its methodology are likely to be even more scrutinised and subject to more criticism.<sup>107</sup> Usefully, the ICC reports quite transparently on the case selection process. It regularly issues a report on where cases are being examined.<sup>108</sup> It is transparent on where it is examining the

104 As occurred with Sudan. See CONDORELLI, L. and CIAMPI, A. Comments on the Security Council Referral of the Situation in Darfur to the ICC. *Journal of International Criminal Justice*, 2005, Vol. 3, No. 3, pp. 590–599. See further SARKIN, Jeremy. Understanding South Africa's Changing Positions on International Criminal Justice: Why the Country Wanted to Withdraw From the ICC and Why It May Remain in the ICC For the Time Being. *Cadernos de Estudos Africanos*, 2020, Vol. 40, pp. 85–108.

105 ZHU, Dan. The Security Council and the ICC. In *China and the International Criminal Court*, Singapore: Palgrave, 2018, pp. 187–264.

106 ROBB, Kevin S. PATEL, Shan. The United States, the International Criminal Court, and Afghanistan: The Rupturing of Mutual Accommodation. *International Criminal Law Review*, 2020, Vol. 20, No. 6, pp. 1068–1107.

107 See further HAFETZ, Jonathan. Fairness, Legitimacy, and Selection Decisions in International Criminal Law. *Vanderbilt Journal of Transnational Law*, 2017, Vol. 50, pp. 1133–1171.

108 ICC. Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation. 16 September 2016. (Online). Available at: [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf). Accessed: 02.04.2021. On the choice of cases see SCHABAS, William. Victor's Justice: Selecting "Situations" at the International Criminal Court. *John Marshall Law Review*, 2010, Vol. 43, No. 3, pp. 535–552.

situations to determine whether to bring cases or not.<sup>109</sup> However, some argue for even greater openness on this issue.<sup>110</sup> The Court needs to be more attentive to the denigrations made in this regard and must be mindful of the need to ensure that case selections, and the prioritisation that are made, are done with a deep understanding of the political sensitivities involved,<sup>111</sup> as well as the need to reduce impunity around the world.<sup>112</sup>

## 8 Leadership issues

As noted above, leadership of the Court has been a challenge. Thus, having a person as Prosecutor who can help the Court weather the storm of criticism is vital. Thus, it was useful that a new chief prosecutor was appointed at the beginning of 2021. After a lengthy process, Karim Khan,<sup>113</sup> a British barrister who headed up UNITAD (the Investigative Team to Promote Accountability for Crimes Committed by Daesh/ISIL),<sup>114</sup> was appointed the ICC's new Chief Prosecutor at the beginning of 2021, for a nine-year term. Since the role of Chief Prosecutor is so vital to the ICC as a whole,<sup>115</sup> the long and extensive process it took to get him to this position should be seen as a boon rather than setback for the Court to ensure the right person was chosen. The Prosecutor has tremen-

109 STAHN, Carsten. Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC. *Journal of International Criminal Justice*, 2017, Vol. 15, No. 3, pp. 413–434.

110 GOLDSTON, James A. More Candour About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court. *Journal of International Criminal Justice*, 2010, Vol. 8, No. 2, pp. 383–406.

111 The prosecution policy needs to be situated within a political context see WEINER, A.S. Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence. *Washington University Global Studies Law Review*, 2013, Vol. 12, No. 3, pp. 545–562. See also LEVI, Ron, HAGAN, John, and DEZALAY, Sara. International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law. *Law and Contemporary Problems*, 2016, Vol. 79, No. 1, pp. 289–314.

112 On the issues involved see GUARIGLIA, Fabricio and ROGIER, Emeric (2015). The Selection of Situations and Cases by the OTP of the ICC. In STAHN, Carsten (ed). *The Law and Practice of the International Criminal Court*, Oxford: Oxford University Press, 2015, pp. 350–364.

113 ICC. Press Release International Women's Day 2021. *ICC appoints Focal Point for Gender Equality*. (online). Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1573>. Accessed: 15.03.2021.

114 BARBOUR, Stephanie. Supporting Accountability for Sexual Violence in the Syria and Iraq Conflicts: Innovations, Good Practices, and Lessons Learned through Private Criminal Investigations. *Journal of International Criminal Justice*, 2020, Vol. 18, No. 2, pp. 397–423. See also AKHAVAN, Payam, ASHRAPH, Sareta BARZANI, Barzan, and MATYAS, David. What Justice for the Yazidi Genocide?: Voices from Below. *Human Rights Quarterly*, 2020, Vol. 42, No. 1, pp. 1–47.

115 DOBSON, Jillian, and STOLK, Sofia. The Prosecutor's Important Announcements; the Communication of Moral Authority at the International Criminal Court. *Law, Culture and the Humanities*, 2020, Vol. 16, no. 3 pp. 391–410.

dous discretion.<sup>116</sup> That discretion is however not unfettered,<sup>117</sup> and is subject to review by the judges in certain instances<sup>118</sup>; nevertheless, most decisions remain within the purview of the office holder alone.<sup>119</sup>

The choice of Prosecutor<sup>120</sup> thus is crucial to the way the Court operates.<sup>121</sup> How the new Prosecutor operates will be central to the role the Court plays over the next decade and to whether the Court is able to overcome many of its challenges. The choice of Karim Khan should help in this regard, as he has a background which should be helpful for that role. More generally, there is a need for a greater understanding within the Court that it operates in a highly politicised environment.<sup>122</sup> Greater sensitivity to the operating environment is essential and the Court needs to plod carefully but deliberately. This is not to argue that Court decisions need to be made politically, but rather that how the Court operates, what it says, how it says it, in which fora, at what times, etc., are all seen through a political lens, which the Court needs to be attuned to and be influenced by. Thus, the Court needs to better operate in the world in which it functions and make decisions more attuned to the realities of the situation.

However, it does need to be noted that besides changes in the Office of the Prosecutor, changes also need to be made to the defence at the ICC.<sup>123</sup> This is often not the subject of attention.<sup>124</sup> If the defence processes were also subject to

116 MOHAMMED RASHID, Farid. The Hidden Discretionary Capacity of the ICC Prosecutor: Revisiting the Analysis of Legal and Relative Gravity. *The International Journal of Human Rights*, 2020, Vol. 24, No. 6, pp. 773–795.

117 ZAKERHOSSEIN, Mohammad Hadi. Thematic Prosecution Doctrine as a Factor in the Gravity Assessment at the International Criminal Court. *Criminal Law and Criminology Studies*, 2018, Vol. 48, No. 1, pp. 85–106.

118 PUES, Anni. *Prosecutorial Discretion at the International Criminal Court*. London: Bloomsbury Publishing, 2020. See also MOHAMMED RASHID, Farid. The Hidden Discretionary Capacity of the ICC Prosecutor: Revisiting the Analysis of Legal and Relative Gravity. *The International Journal of Human Rights*, 2020, Vol. 24, No. 6, pp. 773–795.

119 On how the role of the prosecutor can affect state behaviour, in this case the USA, see ROBB, Kevin S. PATEL, Shan. The United States, the International Criminal Court, and Afghanistan: The Rupturing of Mutual Accommodation. *International Criminal Law Review*, 2020, Vol. 20, No. 6 pp. 1068–1107.

120 On the issues concerning a new prosecutor see WHITING, Alex. A Program for the Next ICC Prosecutor. *Case Western Reserve Journal of International Law*, 2020, Vol. 52, pp. 479–489.

121 WHITING, Alex. A Program for the Next ICC Prosecutor. *Case Western Reserve Journal of International Law*, 2020, Vol. 52, pp. 479–489.

122 See ROACH, S.C. How Political is the ICC: Pressing Challenges and the Need for Diplomatic Efficacy. *Global Governance*, 2013, Vol. 19, No. 4, 507–524.

123 ST-MICHEL, William, GRANDON, Chloé, YAHYA HAAGE, Marlene. Strengthening the Role of Defence at the International Criminal Court: Reflections on How Defence is and Can Be Supported for Greater Effectiveness and Efficiencies.” *International Criminal Law Review*, 2018, Vol. 18, No. 3, pp. 517–539.

124 However, see MUHAMMAD, Samaria, HOLÁ, Barbora, DIRKZWAGER, Anja. Reimagining the ICC: Exploring Practitioners’ Perspectives on the Effectiveness of the Interna-

greater scrutiny and attention, the Court could run more efficiently<sup>125</sup> and savings could be made.<sup>126</sup> However, this should not affect the independence of these processes.

Another area of leadership where reform is needed concerns the judges. There is a lot of criticism about how the judges are elected, their roles and how they work. There has also been discord between the judges.<sup>127</sup> In addition, the judges took a case about their salary to a dispute mechanism, which created much rancour.

The ICC review process outcome document<sup>128</sup> has made many useful suggestions in this regard. The report recognises that issues of internal processes, coordination, accountability and oversight in many respects limit the ability of Court to do its work, and thus need to be addressed to ensure better and quicker decision-making, while at the same recognising the independence of the Court, and the roles of the President, the Prosecutor and the Registrar. The internal culture of the Court also needs improvement as it is very bureaucratic and very inflexible.

While usefully the Court welcomed six new judges from around the world on 10 March 2021, more needs to be done to ensure that in the future there is greater diversity on the Court.<sup>129</sup> The best judges need to be appointed from

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tional Criminal Court.” *International Criminal Law Review*, 2021, Vol. 1, pp. 1–28.

125 On some other ways to achieve greater efficiency see DELAGRANGE, Mikel. The Path Towards Greater Efficiency and Effectiveness in the Victim Application Processes of the International Criminal Court. *International Criminal Law Review*, 2018, Vol. 18, No. 3, pp. 540–562. See also JONES, A. A Quiet Transformation? Efficiency Building in the “Fall” of International Criminal Justice. *International Criminal Law Review*, 2019, Vol. 1, pp. 1–30.

126 For a very critical article on the role of defence counsel see, CATALLO, Matthew. Fixing the Problem of Incompetent Defense Counsel Before the International Criminal Court. *Michigan Journal of International Law*, 2020, Vol. 41, pp. 417–453. See also NEWTON, Michael A. Evolving Equality: The Development of the International Defense Bar. *Stanford Journal of International Law*, 2011, Vol. 47, pp. 379–439.

127 STERIO, Milena. The International Criminal Court: Current Challenges and Prospect of Future Success. *Case Western Reserve Journal of International Law*, 2020, Vol. 52, pp. 467–478. Some see the tensions between the judges as a result of differing legal cultures. See REVEILLERE, Charles. “Is Criticism Possible at the International Criminal Court? A Grammatical Analysis of a Weak Institution. *Droit et Societe*, 2020, Vol. 2, pp. 289–307. On the differing cultures at the Court see SWIGART, Leigh. “Now You See It, Now You Don’t: Culture at the International Criminal Court. In *Intersections of Law and Culture at the International Criminal Court*. Cheltenham, UK: Edward Elgar Publishing, 2020.

128 ICC ASSEMBLY OF STATES PARTIES Resolution No. 19. *Independent Expert Review of the International Criminal Court and the Rome Statute System*. (online). Available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf). Accessed: 15.03.2021.

129 ICC ASSEMBLY OF STATES PARTIES. *Report of the Bureau on Equitable Geographical Representation and Gender Balance in the Recruitment of Staff of the International Criminal Court*, ICC-ASP/17/36, 7 December 2018 11, 19. (online). Available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-26-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-26-ENG.pdf). Accessed: 17.03.2021

across the state parties<sup>130</sup> to ensure that greater legitimacy of the Court ensues. However, an attempt to promote diversity can be seen in the elections of a new President of the Court and two Vice-Presidents on 11 March 2021 for three-year terms. The new President is the first President of the Court from Eastern Europe. In his acceptance speech he noted that the Court is “currently facing many challenges and the best way to meet those challenges is to refocus on doing all that we can do to deliver justice. I intend to continue the efforts undertaken by the judiciary to increase the efficiency of its work and to harmonise practices.”<sup>131</sup> Thus, the judges are cognisant that reforms are needed and seem willing to take steps in the right direction. Beyond just indicating their rhetorical commitment to reform the Court, the judges released in January 2021 a revised of the Code of Judicial Ethics of the International Criminal Court (ICC),<sup>132</sup> which imposes various commitments on them in this regard.

However, much needs to be done internally and externally to address the concerns that have come to the fore. For example, more work is required to ensure that the judgements are written and researched in ways that promote understanding of the decisions and the role of the Court. There is a need to address the internal culture of the Court and deal with some of the concerns about how the Court functions and how the staff are treated.

## 9 The ICC's role beyond prosecutions

More broadly, prosecutions can only be one part of what the Court does to bolster its role and increase accountability for mass atrocities around the world.<sup>133</sup> If the Court wants to be truly successful and reduce the number of violations committed globally, it should use its complementarity powers<sup>134</sup> much more.<sup>135</sup> It ought to induce many more states to investigate and prosecute cases

130 AL HUSSEIN, Prince Zeid Raad, UGARTE, Bruno Stagno, WENAWESER, Christian, INTELMAN, Tiina. *The International Criminal Court Needs Fixing* (Atlantic Council 24 April 2019). (online.) Available at: <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/>. Accessed 21 March 2021.

131 ICC. *Press Release New ICC Presidency elected for 2021–2024*. 11 March 2021. (online). Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1576>. Accessed: 01.04.2021.

132 ICC. *Code of Judicial Ethics*. 19 January 2021. (online). Available at: <https://www.icc-cpi.int/Publications/Code-of-Judicial-Ethics.pdf>. Accessed: 28.02.2021

133 CAVALLARO, James L, O'CONNELL, Jamie. When Prosecution is Not Enough: How the International Criminal Court Can Prevent Atrocity and Advance Accountability by Emulating Regional Human Rights Institutions. *Yale Journal of International Law*, 2020, Vol. 45, pp. 1–67.

134 ADIGUN, Muiyiwa. “The Principle of Complementarity: A Reflection on Its Meaning, Origin and Types in International Criminal Law.” *African Journal of International and Comparative Law* 29, no. 1 (2021): pp. 82–94. See also ABDULHAK T. (2011). Complementarity of Procedures: How to Avoid Reinventing the Wheel, in STAHN Carsten and Mohamed M. EL ZEIDY (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge: Cambridge University Press.

135 On the criticisms of self-referrals by states see HOBBS, Patricia. “The Catalysing Effect of



themselves in their countries,<sup>136</sup> and should play an increased role supporting states in such endeavours. It should also assist more states to develop their own national capacities, or enhance them where necessary, to investigate and prosecute such cases more often and more effectively. This is because it is really at national level that impunity can truly be tackled. International criminal justice cannot be the panacea to halt mass atrocities and hold perpetrators accountable; it can play only a small part.

To promote greater legal knowledge of international criminal law, especially as it refers to the Court, in March 2021 the ICC launched a Case Law Database. It provides open and free access to the Court's jurisprudence on a range of matters.<sup>137</sup> It is part of the International Criminal Court's Legal Tools Database, which also provides information to promote knowledge and usage of international criminal law.<sup>138</sup>

As for addressing the number of violations and reducing the harm that occurs to civilians, one option has to be to prosecute the crime of aggression.<sup>139</sup> While the crime was part of the Rome Statute from 1998 it was not defined, and neither was the process of who could prosecute delineated. After protracted negotiations by member states, the crime of aggression was added to the Court's arsenal in 2017.<sup>140</sup> However, no case has been brought against anyone, nor is it likely that many, if any, cases will be brought,<sup>141</sup> despite the huge number of conflicts which are on the rise.<sup>142</sup> For the Court to impact the situation on the ground, and try and reduce the effects of such circumstances, it ought try and play a deterrent

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the Rome Statute in Africa: Positive Complementarity and Self-Referrals." *Criminal Law Forum*, vol. 31, pp. 345–376. (2020).

136 DANCY, Geoff, MONTAL, Florencia. Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions. *American Journal of International Law*, 2017, Vol. 111, pp. 689–723.

137 ICC. *Case Law Database*. (online). Available at: <https://legal-tools.org/cld>. Accessed: 23.04.2021

138 ICC. *Legal Tools Database*. (online). Available at: <https://www.legal-tools.org>. Accessed: 23.04.2021

139 NAJANDIMANESH, Heybatollah. Challenges to the Exercising of the Jurisdiction of the International Criminal Court over the Crime of Aggression. *Journal of International Criminal Law*, 2020, Vol. 1, No. 1, pp. 49–70.

140 AKANDE, Dapo, and TZANAKOPOULOS, Antonios. Treaty Law and ICC Jurisdiction Over the Crime of Aggression. *European Journal of International Law*, 2018, Vol. 29, No. 3, pp. 939–959.

141 SARKIN, Jeremy and ALMEIDA, Juliana. Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls. *Wisconsin International Law Journal*, 2018, Vol. 36, pp. 518–551.

142 See generally KERSTEN, M. *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*. Oxford: Oxford University Press, 2016.



role as far as aggression is concerned by prosecuting this offence at least sometimes but in fact regularly.<sup>143</sup>

### 10 Becoming more victim centred.

The ICC also has to be more victim-centred and victim-orientated.<sup>144</sup> While the Court has placed victims in a better position than previous tribunals have, there is still a need to enhance the role of victims within the Court's processes. This does not mean more victims should be involved in ICC cases, but rather that many more victims should be able to receive what they need from the Court process, including reparations.<sup>145</sup> While the Trust Fund performs a useful role in this regard, it can provide very little in the way of reparations<sup>146</sup> to all the victims in need<sup>147</sup> because it has been able to attract relatively few donors.

Victims also ought to be able to receive the information they need about what occurred to them or their family members.<sup>148</sup> The right to the truth must become more than a right in theory: it must be practically available to the millions of people who are victimised each year around the world. That is where the ICC can have a much bigger role than merely prosecuting a few cases.<sup>149</sup>

143 On the important role the court should play in promoting peace see SCHABAS, W.A. The Human Right to Peace. *Harvard International Law Journal*, 2017, Vol. 58, pp.28–32. See also GISSEL, Line. *The International Criminal Court and Peace Processes in Africa: Judicialising Peace*. New York: Routledge, 2018 and RODMAN, K.A. Justice as a Dialogue Between Law and Politics: Embedding the International Criminal Court Within Conflict Management and Peacebuilding. *Journal of International Criminal Justice*, 2014, Vol. 12, No. 3, pp. 437–469.

144 DELAGRANGE, Mikel. The Path Towards Greater Efficiency and Effectiveness in the Victim Application Processes of the International Criminal Court. *International Criminal Law Review*, 2018, Vol. 18, No. 3, pp. 540–562.

145 MOFFETT, Luke. Reparations for Victims at the International Criminal Court: A New Way Forward? *The International Journal of Human Rights*, 2017, Vol. 21, No. 9, pp 1204–1222. See also OWISO, Owiso. The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process? *International Criminal Law Review*, 2019, Vol. 19, No. 3, pp. 505–531.

146 For a comparative analysis of the role of various tribunals as far as reparations are concerned see BALTA, Alina, BAX, Manon, LETSCHERT, Rianne. Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia. *International Journal of Comparative and Applied Criminal Justice*, 2021, Vol. 45, No. 1, pp. 15–38.

147 See further MCCARTHY, C. The Rome Statute's Regime of Victim Redress – Challenges and Perspectives. In STAHN, C. (ed). *The Law and Practice of the International Criminal Court*, Oxford: Oxford University Press, 2015, pp. 1203–1225, 1215.

148 See further MINOW, M. Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court. *Harvard International Law Journal*, 2019, Vol. 60, pp. 1–45.

149 SARKIN, Jeremy. Enhancing the Legitimacy, Status, and Role of the International Criminal Court Globally by Using Transitional Justice and Restorative Justice Strategies. *Interdisciplinary Journal of Human Rights Law*, 2011–2012, Vol. 6, No. 1, pp. 83–101.

Overall, the Court has an important role to ensure that less people become victims and those who are victimised are able to receive some form of redress. The Court ought therefore play a far larger role in changing the accountability landscape around the world and in limiting the extent of impunity. It needs to do much more to ensure that many more people have their rights and needs met.

## 11 Conclusion

The ICC is the major international justice institution that deals with mass atrocities. As noted in the article, it has been heavily criticised on a range of fronts over the years by both its detractors and supporters. For it to really play the role it was established to play, much needs to be done to reform it. 2021 has already seen several initiatives to address a variety of concerns about the Court, including the setting up of a high-level review process, with prominent people from the criminal justice terrain, to review all the problems faced by the Court and its processes. The review has adequately determined what the problems are and how to address them. Since the review, the ICC has taken several steps to make progress on the challenges it faces.

As this article indicates, progress has been made in some areas to reform the Court, but much more still needs to be done. The Court needs to be much more prudent about which cases it takes up and how its cases are presented so that dismissals, withdrawals, or acquittals occur much more rarely.<sup>150</sup> However, if the ICC is to have a greater impact, it is also critical for the Court to investigate, prosecute and finalise more cases than it does presently. The ICC must also speed up its case process and the efficiency and speed of its machinery,<sup>151</sup> so that it may be perceived as a competent and reliable body.

The Court ought to fulfil its core prosecution mandate more widely and more effectively than in the past. However, prosecutions ought to be only part of a basket of roles that the Court plays in deterring human rights abuses and at the same time supporting the rights and needs of victims.

The ICC also needs to seek new ways of bolstering its legitimacy<sup>152</sup> and induce better state compliance. In particular, it needs to work on improving its fraught relationship with the AU bloc. It should also explore other avenues to

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<sup>150</sup> See generally DICKER, Richard. Improving Investigative, Arrest, and Prosecution Strategies. In *The International Criminal Court: Contemporary Challenges and Reform Proposals*, pp. 314–318. Leiden: Brill Nijhoff, 2020.

<sup>151</sup> BEKOU, Olympia. Dealing with Non-Cooperation at the ICC: Towards a More Holistic Approach. *International Criminal Law Review*, 2019, Vol. 19, No. 6, pp. 911–937.

<sup>152</sup> BUCHANAN, Allen. The Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court. *Temple International and Comparative Law Journal*, 2018, Vol. 33, pp. 323–339.

strengthen cooperation with<sup>153</sup> and gain greater support from African states.<sup>154</sup> More generally, the Court needs to reach new parts of the world. Indeed, its reach and impact need to be seen and experienced more widely if its deterrent value is truly to be felt.

The numerous victims around the world need a viable and effective Court to meet their need for justice. However, the role of the Court should not be confined to prosecutions alone. It has a vital role to play in a range of other areas, including trying to stop aggressive behaviour by states. It can also work to enhance what victims have a right to, and better provide for what they need. This must mean that Court enables victims' access to greater truth about what occurred to them or their loved ones, that more victims receive reparations, and that victims do not have the same violations committed against them because the Court has been able to play a role in promoting and enhancing their desires for guarantees of non-repetition.

What the Court does, how it does it and where it does it are critically important; therefore, the Court should address its weaknesses and implement changes so that it can play a more effective role. Much reform needs to occur.<sup>155</sup> There is a need, however, for all the necessary reforms to be taken up swiftly and effectively with sufficient support<sup>156</sup> and oversight by the Assembly of States Parties and a regular review by an independent panel to provide sufficient feedback on what has been achieved and where more progress can be made. However, care should be taken so as to not impinge on the independence of the Court as far as its cases are concerned.<sup>157</sup>

153 BOSCHIERO, Nerina. The ICC Judicial Finding on Non-Cooperation Against the DRC and no Immunity for Al-Bashir Based on UNSC Resolution 1593. *Journal of International Criminal Justice*, 2015, Vol. 13, No. 3, pp. 625–653.

154 DEGUZMAN, Margaret M., and Kelly, Timothy Lockwood. The International Criminal Court Is Legitimate Enough to Deserve Support." *Temple International and Comparative Law Journal*, 2018, Vol. 33, pp. 397–404.

155 A range of position papers emerged on what ICC reforms are needed. See for example, Al Hussein, Prince Zeid Raad, UGARTE, Bruno Stagno, WENAWESER, Christian, INTEL-MAN, Tiina. The International Criminal Court Needs Fixing' (Atlantic Council 24 April 2019). (online.) Available at: <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/>. Accessed 21 March 2021. See also IBA. *Priorities and Recommendations for the 18th Session of the International Criminal Court Assembly of States Parties*. December 2019, pp. 3. (online). Available at: [www.ibanet.org/](http://www.ibanet.org/). Accessed 12.03.2020 and INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (FIDH). *Recommendations for the 18th Session of the ICC Assembly of States Parties*. 2–7 December 2019. (online). Available at: <https://www.fidh.org/IMG/pdf/asp743aweb.pdf>. Accessed at 06.03.2020.

156 ELLIS, Mark. *International Bar Association Urges State Parties' cooperation and greater support for the International Criminal Court*. 9 December 2019. (online). Available at: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=aa216004-30b5-4981-9c05-9504932d796c>. Accessed 21.03.2021.

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