

## REFORMING THE INTERNATIONAL CRIMINAL COURT: “LEAN IN” OR “LEAVE”

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### INTRODUCTION

The adoption of the International Criminal Court (ICC) Statute by 120 States on July 17, 1998, marked an uneasy revolution in international law and practice.<sup>1</sup> A response to the devastation wrought by two world wars and countless regional and national conflicts,<sup>2</sup> it was negotiated just after the collapse of the Soviet Union in 1989, but still in the shadow of possible nuclear war. The hopes the Statute embodied exemplified faith and optimism in the capacity of international law and international institutions to help human society create organizing structures and principles to contain violence and create a more peaceful world. During what was essentially a constitutional convention to establish the Court, the negotiators decided that the Court would have inherent—and universal—jurisdiction over three

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1. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381 (2000); see also LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM (2002) [hereinafter JUSTICE FOR THE NEW MILLENNIUM].

2. An estimated 170 million people died in more than 250 conflicts that took place after World War II. M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 199, 203 (1998).

crimes: genocide, crimes against humanity, and serious war crimes.<sup>3</sup> Overlaid upon that “inherent jurisdiction” would be important limits, however: in situations referred to the Court by States or the Prosecutor, either the State of the accused’s nationality or the State on the territory in which the crimes were committed would have to be parties to the Statute or otherwise consent to the Court’s jurisdiction.<sup>4</sup> (They imposed no jurisdictional preconditions for referrals made by the UN Security Council<sup>5</sup>). Moreover, even in cases in which jurisdiction is present, the principle of complementarity they inserted into the Statute means that the Court will be a court of last, not first, resort. If any State with jurisdiction—whether a party to the treaty or not—is investigating or prosecuting the same individual for the same conduct, that case becomes inadmissible before the Court.<sup>6</sup> Finally, they gave the Prosecutor a *proprio motu* power to refer situations to the Court on her or his own initiative, subject to a decision of the Pretrial Chamber that the statutory criteria were met.<sup>7</sup>

At the time of the Court’s creation, euphoria and skepticism about both the utility and the ability of the Court to be successful were present in equal measure. Many of my peers and colleagues thought it could take decades to achieve the sixty ratifications necessary to bring the treaty into force, and were surprised when that goal was achieved after only four years.

The NGO Coalition for the International Criminal Court (CICC), which began campaigning for the Court in 1995, set as its goals for the treaty a fair, effective and independent Court. As I wrote in an essay last summer, twenty years after Rome, the Court has become operational and these objectives can now be assessed and measured rather than speculated upon, although it is difficult to predict the long-term impact of the Court’s activity at this early stage.<sup>8</sup> With more than nine hundred staff hailing from one

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3. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

4. *Id.* art. 12.

5. *Id.* art. 13(b).

6. *Id.* art. 17; see also Prosecutor v. Gaddafi, ICC-01/11-01/11-565, Judgment on the Appeal of Al-Senussi on Admissibility (July 24, 2014).

7. Rome Statute art. 17.

8. Leila Nadya Sadat, *Politics, Procedure, and Law: Three Continuing Challenges for the ICC in its Third Decade*, ICC FORUM (June 28, 2018), <https://iccforum.com/anniversary#Sadat> [https://perma.cc/7J22-TBD2].

hundred different countries<sup>9</sup> and 123 States Parties,<sup>10</sup> the Court has grown considerably faster than experts predicted. It now has eleven situations under investigation, twenty-seven cases pending or complete, and ten preliminary examinations under way.

As a “justice start up,”<sup>11</sup> tasked with investigating and prosecuting the “most serious crimes of concern to the international community as a whole,”<sup>12</sup> the ICC is, by definition, an institution charged with bringing the rule of law into some of the most difficult and dangerous situations in the world. This mission requires it to confront State power on an ongoing basis. Transforming the complex and heavily negotiated provisions of the Statute into a blueprint for a functioning international institution has been both exhilarating and exhausting for those involved.

The Court has had some significant successes, including convictions of individuals for serious crimes. These include enlistment, recruitment, and use of child soldiers (*Prosecutor v. Lubanga*)<sup>13</sup> and attacks upon cultural property and heritage (*Prosecutor v. al-Mahdi*).<sup>14</sup> The recent acquittals of Jean-Pierre Bemba Gombo<sup>15</sup> and Laurent Gbagbo,<sup>16</sup> however, meant that the Court had yet to successfully prosecute anyone for sexual violence until the 2019 Trial Chamber judgment in *Prosecutor v. Ntaganda*.<sup>17</sup> The creation of the Trust Fund for Victims and a reparations process is also a

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9. *About the Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> [<https://perma.cc/8JVP-VCSE>]. Of these, and not including elected officials and language staff, the Court had 432 Professional Staff with ninety-three nationalities as of July 31, 2018. International Criminal Court 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, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP17/ICC-ASP-17-36-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-36-ENG.pdf) [<https://perma.cc/6DKB-RGVT>]. These figures include fifty-nine nationals from non-States Parties, representing approximately twelve percent of the Court's staff. *Id.* at ¶ 21.

10. *About the Court*, *supra* note 9.

11. Interview with Christine Chung, former ICC Prosecutor, in *THE RECKONING: THE BATTLE FOR THE INTERNATIONAL CRIMINAL COURT* (Public Broadcasting Service 2009).

12. Rome Statute Preamble, cl.4.

13. *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Art. 74 of the Statute (Mar. 14, 2012).

14. *Prosecutor v. al-Mahdi*, ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016).

15. *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Judgment Pursuant to Art. 74 of the Statute (Mar. 21, 2016).

16. *Prosecutor v. Gbagbo*, ICC-02/11-01/15-1263, Reasons for Oral Decision of 15 January 2019 (July 16, 2019).

17. *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Judgment (July 8, 2019).

plus, as well as the Court's focus on victim participation, but even these positive innovations had difficult starts.<sup>18</sup>

From its inception, the International Criminal Court has had its critics. The Court's challenges have included critiques of its legitimacy from States and non-States Parties alike, difficulties apprehending defendants (fifteen of whom are at large as of this writing<sup>19</sup>), lengthy trials involving difficulties of proof, and problematic jurisprudence and jurisprudential methodologies in several areas of the law. Critics have alleged that the Court is both too strong and too weak;<sup>20</sup> that it has targeted Africa because it is a tool of the West,<sup>21</sup> or, alternatively, that it has brought politically motivated prosecutions against Western states;<sup>22</sup> that the Prosecutor has targeted defendants who are too high-ranking to be brought before the Court,<sup>23</sup> or has, conversely, only brought cases against low-level accused.<sup>24</sup> As Darryl Robinson has observed, it seems that no matter what it does, "the ICC cannot win."<sup>25</sup> The Court occupies—to paraphrase the late Judge Patricia Wald, who served at the International Criminal Tribunal for the former Yugoslavia (ICTY)—“a small center in a whirling international vortex” in

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18. See, e.g., Stephen Lamony, *What are the Benefits and Difficulties of Victim Participation at the International Criminal Court?*, HUMANITY UNITED (May 4, 2015), <https://humanityunited.org/what-are-the-benefits-and-difficulties-of-victim-participation-at-the-international-criminal-court-icc/> [<https://perma.cc/U5CR-DPW8>].

19. *Defendants at Large*, INT'L CRIM. CT., <https://www.icc-cpi.int/defendants?k=At%20large> [<https://perma.cc/GX9G-YUFR>].

20. See Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

21. See, e.g., Adam Taylor, *Why So Many African Leaders Hate the International Criminal Court*, WASH. POST (June 15, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?utm\\_term=.6c8454353aab](https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?utm_term=.6c8454353aab) [<https://perma.cc/6ZTR-M59V>].

22. See, e.g., Thierry Cruvellier, *Can the International Criminal Court Be Saved From Itself?*, N.Y. TIMES (Dec. 17, 2017), <https://www.nytimes.com/2017/12/17/opinion/icc-symbolic-migrants-europe.html> [<https://perma.cc/9W4B-WQ7Q>] (expressing doubt as to the likelihood of success of the Court's investigations into US actions in Afghanistan due to the probable lack of cooperation from the states involved, and contending that the primary reason for the investigations is to silence criticisms that the Court is only targeting Africa).

23. See, e.g., Simon Tisdall, *Bashir Slips out of Court's Grasp*, THE GUARDIAN (June 11, 2009), <https://www.theguardian.com/commentisfree/2009/jun/11/sudan-law> [<https://perma.cc/228P-9NZ8>] (recounting criticisms from African and Western officials alike).

24. See, e.g., William A. Schabas, *The Banality of International Justice*, 11 J. INT'L CRIM. JUST. 545, 550 (2013) (arguing that the ICC has found excuses to not go after harder cases, focusing instead on prosecuting "global pariahs").

25. Darryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 LEIDEN J. INT'L L. 323, 324 (2015).

which almost everything it does “has political implications.”<sup>26</sup> Thus a certain degree of criticism is inevitable, and given the many setbacks the Court has had recently, warranted.<sup>27</sup> Yet in the past two years the Court has faced an avalanche of criticism that seems different in both degree and kind from before. There is now the beginning of a “Leave” campaign regarding the ICC, rather like the “Leave” campaigns waged in regard to other international institutions, including the European Union.<sup>28</sup> In Part II, this Essay examines the fledgling ICC “Leave” campaign. In Part III, it suggests why the ICC remains important and how it can be reformed. Finally, the Essay notes that the criticisms of perversity, futility, and jeopardy currently levied against the Court ignore, as Albert Hirschman’s *Rhetoric of Reaction*<sup>29</sup> predicts, the potential positive impact of the ICC over the long term. For this reason, I conclude that given the continued need for the ICC and the probability of successful reform, the most appropriate course is to “Lean In” to ICC reform, continue to support the Court, and work hard to advance the human values that the Court’s establishment embodied.

#### I. THE ICC “LEAVE” CAMPAIGN

As noted earlier, the ICC currently has 123 States Parties and 139 signatories. As the Court has plunged into its work, some States that joined either fully or partially appear to have experienced buyer’s remorse. The current governments of some States that ratified the Statute clearly do not like being the targets—or potential targets—of ICC investigations. Burundi withdrew after investigations began of crimes allegedly committed in its territory,<sup>30</sup> and the Philippines withdrew following the Office of the

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26. Patricia A. Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 CARDOZO L. REV. 1559, 1581-82 (2006).

27. James A. Goldston, *Don't Give Up on the ICC*, FOREIGN POL’Y (Aug. 8, 2019), <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/> [<https://perma.cc/D6C7-C9K8>].

28. *Brexit: All You Need to Know About the UK Leaving the EU*, BBC (Sept. 16, 2019), <https://www.bbc.com/news/uk-politics-32810887> [<https://perma.cc/N5NH-6ES7>].

29. ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991).

30. INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 289 (2017), [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf) [<https://perma.cc/K2NV-TJZN>].

Prosecutor's (OTP) launch of a Preliminary Examination into its actions.<sup>31</sup> South Africa has periodically debated withdrawal for some time; as of this writing, however, it remains a state party.

Other States signed the Statute but subsequently sent letters indicating their intention not to ratify the Statute after experiencing a change of government or the possibility their nationals could be indicted. These include the United States,<sup>32</sup> Israel,<sup>33</sup> and the Russian Federation.<sup>34</sup> The situation involving the United States has been particularly fraught since the Statute's adoption. The Clinton administration was lukewarm about the idea prior to and during the Rome Conference, and the United States adopted a defensive and ultimately negative position towards the Court as the negotiations proceeded.<sup>35</sup> As is well known, the U.S. delegation demanded a vote on the Statute on the final day of the Rome Conference, a decision that resulted in its own humiliation as Statute was adopted by a vote of 120-7.<sup>36</sup> Although the United States ultimately signed the Statute on December 31, 2000, U.S. ambivalence turned to outright hostility during the presidency of George W. Bush. The Bush administration attempted to "unsign" the Statute,<sup>37</sup> and supported the adoption of federal legislation preventing the U.S. government from cooperating with the Court.<sup>38</sup> It also

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31. Press Release, Int'l Criminal Court, Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law (Mar. 20, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371> [<https://perma.cc/9XL6-YUCH>].

32. Letter from John R. Bolton, U.S. Under Sec'y of State for Arms Control & Int'l Sec., to Kofi Annan, United Nations Sec'y Gen. (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> [<https://perma.cc/NBW8-Q7MP>].

33. *Status of Treaties: Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en#3](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#3) [<https://perma.cc/U2E4-XQQR>].

34. *Id.*

35. See Sadat & Carden, *supra* note 1, at 447-52.

36. Press Release, United Nations, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Press Release L/2889 (July 20, 1998), <https://www.un.org/press/en/1998/19980720.l2889.html> [<https://perma.cc/NWZ7-A296>].

37. Leila Nadya Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court*, 21 WIS. INT'L L.J. 557, 557-58 (2003); see also Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2064-65 (2003).

38. Sadat, *supra* note 37, at 558-59, n.5 (referring to the American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, tit. II § 2004, 116 Stat. 820, 902 (2002) (codified at 22 U.S.C. § 7423 (2004))); see also John R. Bolton, U.S. Under Sec'y for Arms Control & Int'l Sec., Remarks at the American Enterprise Institute: American Justice and the International Criminal Court 3 (Nov. 3, 2003), [https://docs.wixstatic.com/ugd/e13974\\_d4d59ca7f35c4084b5781576cc3af76a.pdf](https://docs.wixstatic.com/ugd/e13974_d4d59ca7f35c4084b5781576cc3af76a.pdf) [<https://perma.cc/3Q2J-LJ6E>].

conducted a global campaign to immunize U.S. actions and persons from the jurisdiction of the Court, pursuant to which more than one hundred States signed bilateral immunity (Article 98) agreements with the United States guaranteeing that under no circumstances would they turn over a U.S. national to the Court.<sup>39</sup>

John Bolton, who held various posts in the Bush administration and was until recently the National Security Advisor for the Trump administration, spearheaded the U.S. campaign against the Court. Bolton has been one of the Court's most steadfast foes, objecting not only to its activities but to its existence.<sup>40</sup> On March 15, 2019, Secretary of State Mike Pompeo announced a policy of U.S. visa restrictions on individuals directly responsible for any ICC investigation of U.S. personnel,<sup>41</sup> including persons who take or have taken action to request or further such an investigation. Secretary Pompeo added, "you should know, if you're responsible for the proposed ICC investigation of U.S. personnel in connection with the situation in Afghanistan, you should not assume that you will still have or will get a visa, or that you will be permitted to . . . enter the United States."<sup>42</sup> Although he indicated that the United States would respect the U.N. Headquarters Agreement,<sup>43</sup> presumably allowing ICC personnel to travel there to make reports, he threatened not only "visa restrictions" but "additional steps, including economic sanctions if the ICC does not change its course."<sup>44</sup> In his view, "the ICC is attacking America's rule of law. It's

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39. Currently, the U.S. has concluded 103 agreements, with the final agreement concluded in April 2007 with Montenegro. See COAL. FOR THE INT'L CRIM. COURT, STATUS OF U.S. BILATERAL IMMUNITY AGREEMENTS (BIAS) [http://www.iccnw.org/documents/CICCFS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf) [<https://perma.cc/TA2Z-9SD6>]; U.S. DEP'T OF STATE, TREATY ACTIONS: APRIL 2007.

40. See John Bolton, *The Hague Aims for U.S. Soldiers*, WALL STREET J. (Nov. 20, 2017), <https://www.wsj.com/Articles/the-hague-tiptoes-toward-u-s-soldiers-1511217136> [<https://perma.cc/NX2C-9NS3>] (arguing that "the ICC constitutes a direct assault on the concept of national sovereignty" and that "America should welcome the opportunity . . . to strangle the ICC in its cradle.").

41. Mike Pompeo, *Secretary Pompeo Remarks at State Department*, C-SPAN (Mar. 15, 2019), <https://www.c-span.org/video/?458825-1/secretary-pompeo-announces-visa-restrictions-international-criminal-court-probes-us-military> [<https://perma.cc/7BYB-DEWK>].

42. *Id.* Pompeo added that "[t]hese visa restrictions may also be used to deter ICC efforts to pursue allied personnel, including Israelis, without allies' consent." *Id.*

43. See Agreement Regarding the Headquarters of the United Nations, U.N.-U.S., art. IV, June 26, 1947, 61 Stat. 3416 (requiring the United States to refrain from impos[ing] any impediments" to certain individuals travelling to the UN headquarters in New York).

44. Pompeo, *supra* note 41.

not too late for [the court] to change course and we urge them to do so immediately.”<sup>45</sup>

Academics have also become increasingly critical of the Court over the past year or two. This includes Douglas Guilfoyle (an Australian academic now serving as a fellow with the Australian Department of Foreign Affairs) who recently wrote on *EJILTalk!*: “I am tempted by the idea that the ICC should not have been established as a permanent standing court with a seat in The Hague, but primarily as a mechanism for assisting the creation of special chambers in national legal systems with international elements.”<sup>46</sup>

Guilfoyle’s thinking parallels the arguments levied against the European Union in the United Kingdom, which position national sovereignty and local decision making as fundamentally incompatible with participation in international institutions. Rather than reform, these assertions, whether proposed by academics like Guilfoyle or politicians like Bolton, suggest that “Exit” or “Leave” is the remedy to the perceived—and real—problems of international institutions like the ICC.

The “Leave” argument goes well beyond the critique of international justice advanced by nuanced scholarship urging greater sensitivity to domestic processes—particularly non-traditional processes—and less emphasis on the criminal justice system as the appropriate response to atrocity crimes.<sup>47</sup> It is also quite different than criticisms of specific cases or procedures that many scholars have mounted against the recent acquittals

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45. *Id.* The Pretrial Chamber’s decision was praised by conservatives in the United States. See Bret Schaefer & Cully Stimson, Opinion, *U.S. Must Remain Wary of International Criminal Court Even After Decision to Not Target Americans*, DAILY SIGNAL (Apr. 12, 2019), <https://www.dailysignal.com/2019/04/12/us-must-remain-wary-of-international-criminal-court-even-after-decision-to-not-target-americans/> [<https://perma.cc/YSG6-R6YF>].

46. Douglas Guilfoyle, *Reforming the International Criminal Court: Is it Time for the Assembly of State Parties to be the Adults in the Room?*, EJIL: TALK! (May 8, 2019) <https://www.ejiltalk.org/reforming-the-international-criminal-court-is-it-time-for-the-assembly-of-state-parties-to-be-the-adults-in-the-room/> [<https://perma.cc/664Z-CHVQ>].

47. For an example of such nuanced scholarship, see MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).

of Jean-Pierre Bemba Gombo,<sup>48</sup> Laurent Gbagbo<sup>49</sup> or the decision of Pre-Trial Chamber II not to permit the prosecutor to begin an investigation into alleged crimes committed on the territory of Afghanistan since 2002.<sup>50</sup> That is because, at its core, the “Leave” agenda is not a reform agenda. Although it promises an eventual return to the abandoned institution in some cases, it seems fairly clear that the institution in question, whether the International Criminal Court, the United Nations Human Rights Council, or the European Union itself, will never be able to satisfy the leaver—the objections run too strong and too deep. This is because the driver of the “Leave” campaign is ideology, as opposed to practicalities. Although many factors contributed to Brexit, the essence of the Brexit campaign was not about economics but about yearning for a lost era of “British” (narrowly defined) sovereignty and superiority.<sup>51</sup> Likewise, the anti-ICC campaign (in the West, and particularly in the United States) often seems to be based upon a belief in the moral superiority of the United States and its entitlement to operate on the battlefield free of legal constraints that might bind other “lesser” nations.

That said, there is undoubtedly a spectrum of views within the “Leave” camp. Some, like John Bolton, have attacked international institutions, and with respect to the International Criminal Court has argued that the goal should be causing it to “wither and collapse.”<sup>52</sup> Others, like U.S. Secretary of State Mike Pompeo seem, like many Brexiteers, to assume that the institutions do not need to be abolished, so long as their State is not subject to their jurisdiction or control. The remainder of this Essay suggests why

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48. See Prosecutor v. Bemba, ICC-01/05-01/08-3636-Red, Judgment on the Appeal of Mr. Bemba Against Trial Chamber III’s “Judgment Pursuant to Article 74 of the Statute” (June 8, 2018); Leila Nadya Sadat, “*Judicial-Speculation-Made-Law: More Thoughts about the Acquittal of Jean-Pierre Bemba Gombo by the ICC Appeals Chamber and the Question of Superior Responsibility under the Rome Statute*,” ICC F. (May 27, 2019), <https://iccforum.com/responsibility#Sadat> [<https://perma.cc/93HL-ZMWW>].

49. See Prosecutor v. Gbagbo, ICC-02/11-01/15-1263, Reasons for Oral Decision of 15 January 2019 (July 16, 2019).

50. See Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Art.15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019).

51. See generally, e.g., HAROLD D. CLARKE, MATTHEW GOODWIN & PAUL WHITELEY, BREXIT: WHY BRITAIN VOTED TO LEAVE THE EUROPEAN UNION (2017).

52. *Is a U.N. International Criminal Court in the U.S. Interest?: Hearing before the Subcomm. on Int’l Operations of the S. Comm. on Foreign Relations*, 105th Cong. 28-31 (1998) (statement of Hon. John Bolton, Former Assistant Secretary of State for International Organization Affairs; Senior Vice President, American Enterprise Institute), <https://www.govinfo.gov/content/pkg/CHRG-105shrg50976/html/CHRG-105shrg50976.htm> [<https://perma.cc/QKE7-R7R9>].

the ICC remains important, and argues that, as opposed to a “Leave” campaign, academics, politicians and civil society need to “Lean In”<sup>53</sup> to ICC reform, to allow the Court to become the successful and important international institution it can be, and that the founders hoped it would become.

## II. WHY THE ICC REMAINS IMPORTANT AND HOW IT CAN BE REFORMED

Given the avalanche of criticism recently directed at the Court, it is easy to lose sight of the objectives that animated the delegates to the Rome Diplomatic Conference in 1998. Additionally, the rise of global authoritarianism makes it tempting to conclude that even if the need for the Court remains the same as it did in the 1990s, the project is just too difficult to undertake in the current political climate.

An assessment was made in 1998 that one of the factors contributing to the extraordinary number of civilian deaths and atrocity crimes committed since World War II was the impunity with which those crimes could be committed. While international criminal justice was never envisaged as a panacea to war in the commission of atrocities, its absence was seen as a “green light” to would-be perpetrators. As former High Commissioner for Human Rights José Ayala Lasso observed in 1996, following the war in the

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53. SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013). It seems particularly appropriate to employ the term “lean in” in a volume celebrating 150 years of women at Washington University School of Law. Much of Sandberg’s work is directed towards external and internal forces that hold women back in the workplace. This is also true of the ICC, which faces both internal and external difficulties. In addition, it would be difficult not to notice that many of the most scathing criticisms of the ICC, particularly in the blogosphere, have been leveled by men. See Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EURO. J. OF INT’L L., EJIL: TALK! (May 6, 2019), <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> [https://perma.cc/BMB2-MSTG]; Kevin Jon Heller, *What Happens to the Acquitted?*, 21 LEIDEN J. INT’L L. 663 (2008); Dov Jacobs, *ICC Pre-Trial Chamber Rejects OTP Request to Open an Investigation in Afghanistan: Some Preliminary Thoughts on an Ultra Vires Decision*, SPREADING THE JAM (Apr. 12, 2019), <https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/> [https://perma.cc/F7FF-YYW5]. While this might simply be an unhappy coincidence, there is extensive research on the blogosphere and Twitter as “gendered” spaces in which women may feel less comfortable than men. At a minimum, women typically write and post in the spaces less often. Jane Murphy & Solangel Maldonado, *Reproducing Gender and Race Inequality in the Blawgosphere*, 41 HARV. J.L. & GENDER 239, 246-47 (2018).

former Yugoslavia and the Rwandan genocide, “we must rid this planet of the obscenity that a person stands a better chance of being tried and judged for killing one human being than for killing 100,000.”<sup>54</sup>

Although the ICC has had difficulties fulfilling the expectations of its founders, the institution is still relatively young, and the atrocities it was intended to combat result from centuries-old ways of thinking about state power. Although the Court’s performance may be subpar in some respects, the recent conviction of Bosco Ntaganda,<sup>55</sup> the Court’s successful potential intervention into the situation of the Rohingya in Bangladesh<sup>56</sup>, and the Appeals Chamber’s decision on immunities in the al-Bashir case<sup>57</sup> are all recent positive developments. There are also serious and concrete efforts at reform being made within the ICC itself, and by outsiders hoping for its success. This suggests that abandoning the effort is the wrong strategy. At a time of rising authoritarianism, during which some world leaders appear to be countenancing high levels of civilian casualties in wartime, acts of aggression, and life tenure for themselves, and evoking nationalist and sovereigntist arguments to justify the commission of crimes,<sup>58</sup> abandoning the ICC sends the wrong signal. As James Goldston recently wrote,

[L]etting [the ICC] 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>59</sup>

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54. *Rupp Urges Focus on “Common Ground”*: 8,600 Graduate under Sunny Skies, COLUM. UNIV. REC. (May 24, 1996), [http://www.columbia.edu/cu/record/archives/vol21/vol21\\_iss28/record2128.13.html](http://www.columbia.edu/cu/record/archives/vol21/vol21_iss28/record2128.13.html) [https://perma.cc/AK7K-4U7E].

55. See *supra* note 17 and accompanying text.

56. See *Bangladesh/Myanmar*, INT’L CRIM. CT., <https://www.icc-cpi.int/bangladesh-myanmar> [https://perma.cc/TW5K-BP5B].

57. See *Prosecutor v. al Bashir*, ICC-02/05-01/09, Decision on Hashemite Kingdom of Jordan’s Appeal (May 6, 2019).

58. *The Takeaway: Trump Administration Moves Ahead with Major Foreign Policy Overhauls amid Impeachment Inquiry*, NPR (Oct. 7, 2019), <https://www.npr.org/podcasts/381444253/pri-the-takeaway> [https://perma.cc/D8L2-JHUF].

59. Goldston, *supra* note 27.

*A. What Reforms Might be Useful*  
*1. Procedural Reforms*

The difficult political climate within which the Court operates requires it to be scrupulous about its trial processes to demonstrate that it is indeed fair, effective, and impartial, and able to perform the core tasks assigned to it by its Statute. This has, to date, been a real weakness of the institution. Trials are too slow, evidence is often insufficiently robust, and the Pretrial Chambers, in particular, often issue confusing rulings that are difficult to understand and have created difficulties for both the prosecution and the defense. During the Preparatory Committee discussions that preceded the Rome Conference, the view was often expressed that the *ad hoc* international criminal tribunals relied too heavily on common-law procedures for their functioning and had become too adversarial.<sup>60</sup> This, it was thought, was leading to long trial times and delays, problems with evidence and excessively lengthy judicial opinions with verbose majority and dissenting opinions. There was also considerable concern about having an “independent prosecutor” that could bring cases on his or her own initiative. As one U.S. State Department official quipped, no one wanted an “independent counsel for the universe.”<sup>61</sup>

Responding to these and other concerns, during the negotiations, the French government introduced a new draft for the Statute that relied much more heavily on civil-law procedure. By the time that 165 States and 250 NGOs had finished with the text on July 17, 1998, the Rome Statute had become a curious blend of common- and civil-law procedures that was very unlike the Statutes of earlier *ad hoc* international criminal tribunals. It seemed to rely more upon civil-law than common-law ideas, imposing on the Prosecutor an obligation to pursue the truth and investigate “incrimination and exonerating circumstances equally,”<sup>62</sup> allowing the defendant to make an *unsworn* statement to the Court, and allowing all evidence that is relevant to the case, excluding only evidence that might be unduly prejudicial to the accused’s right to a fair trial.<sup>63</sup>

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60. See, e.g., Silvia A. Fernandez de Gurmendi, *The Process of Negotiations*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 217, 220-24 (Roy S. Lee, ed., 1999).

61. JUSTICE FOR THE NEW MILLENNIUM, *supra* note 1, at 229 n. 12 (2002) (referencing the then ongoing investigation of U.S. President Bill Clinton by Independent Counsel Kenneth Starr).

62. Rome Statute art. 54(1)(a).

63. *Id.* arts. 67(1)(h), 69(4).

The drafters of the Rome Statute sought to provide a bulwark against frivolous or insufficient cases moving forward, as well as streamline and make proceedings more efficient. They thought that increasing the Court's reliance upon civil-law criminal procedure and creating a new Pretrial Chamber and pre-trial phase of the proceedings would be useful in this regard. That has not been the case thus far. For example, the pretrial phase of the *Lubanga* case lasted nearly three years, from March 2006 until the opening of the trial in January 2009. The trial then took another three years, and the appeal took an additional two-and-a-half years after that, meaning that the case was not “over” until December 1, 2014, eight years after *Lubanga*'s transfer to The Hague.<sup>64</sup> In contrast, the ICTY's first case against Duško Tadić took half that time—two years from arrest and transfer to the Tribunal to the issuance of the Trial Chamber's judgment; and an additional two years for the appeal.<sup>65</sup>

Thus, the addition of the Pretrial Chambers seems to have complicated and lengthened proceedings considerably, adding another layer of judicial “bureaucracy” to the proceedings. Moreover, because the ICC's procedure is unlike that of predecessor institutions and national courts, practice at the ICC is very different from the procedure at the *ad hoc* tribunals, making it difficult to draw upon the “best practices” of those institutions as a shortcut for helping the Court become operational and efficient quickly.

The Pretrial Chambers, for example, initially rejected the notion that the prosecution could plead modes of liability in the alternative, requiring the case to rest on one theory, even though the use of alternative theories was permitted at the *ad hoc* tribunals (and is now permitted at the ICC).<sup>66</sup> This then caused the Trial Chambers to rely upon Regulation 55 to “recharacterize” the charges, a methodology that was inefficient and subject to critique.<sup>67</sup> Pretrial Chambers also constructed complicated theories of

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64. See *Lubanga Case: Timeline*, INT'L CRIM. CT., <https://www.icc-cpi.int/drc/lubanga> [<https://perma.cc/C3QF-DTR6>].

65. See *Tadić (IT-94-1): Case Information Sheet*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/case/tadic> [<https://perma.cc/GD5B-ERZU>].

66. Compare *Prosecutor v. Ruto*, ICC-01/09-01/11-1, Decision on Summons to Appear, ¶ 36 (Mar. 8, 2011) (declining to make findings on both principal and accessory liability in the alternative) *with, e.g.*, *Prosecutor v. Ongwen*, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 149 (Mar. 23, 2016) (retaining an alternative mode of liability in the charges as requested by the Prosecutor).

67. See, e.g., *Prosecutor v. Katanga*, ICC-01/04-01/07-3339, Defence's Document in Support of Appeal Against the Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons (Jan. 10, 2013); see also Dov Jacobs, *A Shifting*

liability in the Court's early cases, decisions that were often lightly footnoted explorations of untested legal theories. Chambers have also rejected the practice of "witness proofing"<sup>68</sup> and at the same time have demanded high levels of corroboration in the proof adduced by the prosecution both at the Pretrial and Trial phases.<sup>69</sup> They have thus endeavored to exercise much more control over the shaping of the case (consistent with an inquisitorial style procedure), a shift that may not be supported by the Rome Statute itself.<sup>70</sup> Most recently, a Pretrial Chamber asserted that it—and not the Prosecutor—could decide whether the interests of justice warranted the opening of an investigation even in a case involving serious allegations of crimes meeting the statutory criteria.<sup>71</sup>

It is vital that the ICC become more successful at managing its trial and pretrial process so that cases proceed more efficiently. This is a burden shared by the Prosecutor, the Judiciary and, to a lesser extent, the Registry. The Office of the Prosecutor (OTP), which was heavily criticized especially in the Court's early days, has been responsible for some of the procedural and evidentiary problems that have arisen to date, such as the difficulties stemming from the Prosecutor's reliance upon intermediaries in the

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*Scale of Power: Who is in Charge of the Charges at the International Criminal Court?*, in THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW 205 (William A. Schabas, Yvonne McDermott & Niamh Hayes, eds., 2013).

68. The Pre-Trial Chamber ruled against the practice of "witness proofing" in *Prosecutor v. Lubanga*, ICC-01/04-01/06-679, *Decision on the Practices of Witness Familiarisation and Witness Proofing* (Nov. 8, 2006). The Trial Chamber followed suit. *Prosecutor v. Lubanga*, ICC-01/04-01/06-1049, *Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial*, ¶ 5 (Nov. 30, 2007). These decisions have been criticized. See, e.g., SUSANA SÁCOUTO & KATHERINE CLEARY, WAR CRIMES RESEARCH OFFICE, AM. UNIV. WASH. COLL. OF LAW, WITNESS PROOFING AT THE INTERNATIONAL CRIMINAL COURT 20 (2009) (recommending that the ICC re-examine its witness proofing policy).

69. See, e.g., *Prosecutor v. Ruto*, ICC-01/09-01/11-2027-Red-Corr, *Decision on Defense Applications for Judgments of Acquittal*, ¶ 56 (Apr. 5, 2016) (finding that the uncorroborated testimony of a witness central to the case could not serve as a basis for proper conviction); *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, *Decision on the Confirmation of Charges*, ¶ 119 (Dec. 16, 2011) (noting the lack of corroboration of the testimonies of several witnesses); *Prosecutor v. Gbagbo*, ICC-02/11-01/11-432, *Decision Adjourning the Hearing on the Confirmation of Charges*, ¶ 30 (June 3, 2013) (explaining the Chamber's approach to evidence and, notably, the Chamber's reluctance to accept anonymous hearsay from different documentary evidence as corroborating each other).

70. Jacobs, *supra* note 67, at 214, 218-19.

71. *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, *Decision Pursuant to Art.15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (Apr. 12, 2019).

*Lubanga* case,<sup>72</sup> and indicting defendants without sufficiently comprehensive investigations and evidence.<sup>73</sup> At the same time, the judicial chambers of the Court must increase the speed and consistency with which they apply the Statute. While a return to a more adversarial approach may not be the solution, the Court needs to operate as a criminal court, not as an international bureaucracy. Defendants have the right to be tried in a reasonably short period of time, victims need redress sooner rather than later, and it is expensive and inefficient for trials to drag on for years. During a 2019 retreat, the judges finally adopted time-frames for the rendering of key decisions.<sup>74</sup>

The Prosecutor has also responded to many of the legitimate criticisms directed at the office by adopting policies and strategies to guide its activities, including policies on case selection and prioritization,<sup>75</sup> on victims' participation,<sup>76</sup> on children,<sup>77</sup> on sexual and gender-based violence,<sup>78</sup> and on the interests of justice.<sup>79</sup> In 2013, OTP also adopted a code of conduct for the office, two reports on prosecutorial strategy, and a

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72. Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Judgment Pursuant to Art. 74 of the Statute (Mar. 14, 2012).

73. *Id.*

74. ICC Judges update Chambers Practice Manual to include timeframes for the rendering of key decisions, <https://www.icc-cpi.int/test-new-master/Pages/pr-new.aspx?name=PR1502> [<https://perma.cc/3THY-DH4Q>].

75. INT'L CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION (2016) [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) [<https://perma.cc/UUL4-5MVK>].

76. INT'L CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON VICTIMS' PARTICIPATION (2010) [https://www.icc-cpi.int/iccdocs/otp/Policy\\_Paper\\_on\\_Victims\\_Participation\\_April\\_2010.pdf](https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Victims_Participation_April_2010.pdf) [<https://perma.cc/T9EU-7UFK>].

77. INT'L CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY ON CHILDREN (2016) [https://www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF) [<https://perma.cc/T224-7MZE>].

78. INT'L CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES (2014) [https://www.icc-cpi.int/iccdocs/otp/Policy\\_Paper\\_on\\_Sexual\\_and\\_Gender-Based\\_Crimes-20\\_June\\_2014-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf) [<https://perma.cc/ZG2A-QXBW>].

79. INT'L CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON THE INTERESTS OF JUSTICE (2007) <https://www.icc-cpi.int/NR/ronlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> [<https://perma.cc/E3XC-B4SM>].

strategic plan,<sup>80</sup> which was updated recently.<sup>81</sup> That said, the Office has acknowledged the need to conduct better and more comprehensive investigations before moving cases to the confirmation stage.

## *2. Improving the Quality of the Court's judgments and its Jurisprudence*

As I noted in a recent posting about the Appeals Chamber's decision in the *Bemba* case in 2019,<sup>82</sup> some of the Court's recent judgments exhibit what the late Antonin Scalia called "judicial-speculation-made-law."<sup>83</sup> Rather than heavily footnoted and methodologically consistent approaches to the solution of legal problems, some judgments have been thinly footnoted or unfootnoted discussions of the law which are seemingly bereft of clear and coherent methodology. The three-two split in the *Bemba* case was particularly problematic in this regard, not just because of the revised standard of review the Appeals Chamber seemed to adopt, but because of the insertion of the concept of remoteness into the doctrine of command responsibility at the ICC. Although the remoteness standard only garnered two votes,<sup>84</sup> it introduced ambiguity into a core principle of international humanitarian law. Although *Bemba* may not be decisive to future cases on the meaning of Article 28, the fact that two judges "discovered" this suddenly dispositive factor on appeal could have a chilling effect on future cases. It incentivizes defense lawyers to raise every conceivable argument, hoping to convince judges to accept them even if they represent novel or unprecedented theories; it could render trials longer as the law of the ICC becomes increasingly unsettled; it may upset victim communities (as was the case in *Bemba*); and the presence of thinly footnoted judicial opinions raises legitimacy questions about the Court's jurisprudence. Judgments that

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80. *Policies and Strategies*, INT'L CRIM. CT. <https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx> [<https://perma.cc/MHV6-DCKJ>].

81. INT'L CRIMINAL COURT OFFICE OF THE PROSECUTOR, STRATEGIC PLAN 2019-2021 (July 17, 2019) <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> [<https://perma.cc/VMJ8-M7WF>].

82. See Leila N. Sadat, *Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo*, EJIL: TALK! (June 12, 2018), <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/> [<https://perma.cc/526B-VNFJ>].

83. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010).

84. See *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Judgment Pursuant to Art. 74 of the Statute (Mar. 21, 2016).

read more like personal opinions—as opposed to carefully reasoned opinions resting upon legal precedent—raise the concern that the judges are engaging in unwarranted judicial activism rather than undertaking a careful exegesis of the *travaux préparatoires* of the Rome Statute, a systemic examination of existing legal precedent, and the sources of law set out in Article 21 of the Statute.

This has been a concern of many close readers of the ICC’s judgments for some time. It seems to have been the approach taken by Chambers deciding to import the “control of the crime” theory into Article 25(3) of the Statute, which was both unprecedented and problematic, as I have written elsewhere.<sup>85</sup> It is also evidenced by the controversy regarding the acquittal of Laurent Gbagbo, which resulted once again in a fractured decision (of a Trial Chamber)<sup>86</sup> and, because the standard of review for a “no case to answer” decision is not clear—and for more than twenty-six weeks after the acquittal, no judgment had been issued—it offers little guidance to other Chambers or the Prosecutor regarding the appropriate standard to be applied.<sup>87</sup> It also seems apparent in even a superficial reading of Pretrial Chamber II’s recent decision not to allow the Prosecutor to open an investigation into the situation in Afghanistan, relying for the first time on a novel—and once again unfootnoted—analysis of the “interests of justice” in Article 53(1) of the Rome Statute.<sup>88</sup> One commentator has described the Afghan decision (which was later reversed on appeal) as a “judicial meltdown”<sup>89</sup> and four distinguished supporters and leaders of the Court

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85. Leila N. Sadat & Jarrod M. Jolly, *Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25’s Rorschach Blot*, 27 LEIDEN J. INT’L L. 755 (2014).

86. See Prosecutor v. Gbagbo, ICC-02/11-01/15-1263, Reasons for Oral Decision of 15 January 2019 (July 16, 2019); see also text accompanying *supra* note 16.

87. *Gbagbo*, ICC-02/11-01/15-1263. The oral decision was rendered on January 15, 2019; the written reasons followed on July 16, 2019. *Id.*

88. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Art.15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶¶ 87-96 (Apr. 12, 2019). The only source cited in those four pages is the Prosecutor’s Policy Paper on the Interests of Justice. *Id.*

89. Sergey Vasiliev, *Not Just Another ‘Crisis’: Could the Blocking of the Afghanistan Investigation Spell the End of the ICC? (Part I)*, EJIL: TALK! (Apr. 19, 2019), <https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-i/> [https://perma.cc/8F5T-K6CS].

concluded shortly after its issuance that the ICC “needs fixing,” due in part to the poor quality of some of the Court’s judgements.<sup>90</sup>

Legal realists may not find this surprising. They may assume that politics is at play, or perhaps that “what the judge had for breakfast” explains more about the outcome of a particular case than an analysis of the law.<sup>91</sup> While a well-established court can probably weather criticism of the kind now being directed at the ICC, a young court cannot. In a world in which it is struggling to gain a foothold, establish its legitimacy, and win the trust of States and civil society, recent missteps suggest that the Court’s judiciary should reconsider its approach. In particular, Chambers could refrain from issuing decisions seriatim and with so many dissents. Chief Justice Marshall of the United States Supreme Court offers a useful model. He helped that once-frail institution into the powerhouse it is today by insisting upon unity and collegiality on the part of his brethren.<sup>92</sup> He also insisted that the Court pay attention to the norm of *stare decisis*.<sup>93</sup> As with the United States Constitution, or the Treaty of Rome establishing the European Economic Community in 1957, the ICC Statute is complex, and its interpretation difficult, presenting the ICC’s judges with many challenges. However, like the judges of the European Court of Justice and the United States Supreme Court, the judges of the International Criminal Court must find a way to navigate these complexities to build trust and confidence in their institution.

### 3. *Striving for Universality of Ratification, and Increased State Support*

The world of 2020 is not the world of 1998. The 1990s were a time of conflict, but also of hope following the end of the Cold War, seeing a new emphasis on human rights and international law.<sup>94</sup> Twenty years later, the cold war seems resurgent as the Security Council is paralyzed by bitter

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90. Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser & Tiina Intelman, *The International Criminal Court Needs Fixing*, ATLANTIC COUNCIL (Apr. 24, 2019), <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing> [https://perma.cc/FV3F-2V3D].

91. This quote is often attributed to Jerome Frank, although scholars dispute the likelihood of him actually making this claim. See FREDERICK F. SCHAUER, *THINKING LIKE A LAWYER* (2009) 129, n. 15.

92. Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421 (2006).

93. Lee Epstein & Jack Knight, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996).

94. G.A. Res. 44/23 (Nov. 17, 1989).

disagreements between the great powers, particularly the Russian Federation, China, and the United States. This has made action on some of the worst atrocity situations in the world (Syria, for example) impossible, leading to establishment of other mechanisms by the General Assembly like the International, Impartial and Independent Mechanism for Syria.<sup>95</sup> Ratifications of the Rome Statute have slowed considerably, leaving seventy States and many major powers outside the Rome Statute system, a situation that is unlikely to dramatically improve soon. As noted above, two States that have been the subject of preliminary examinations have withdrawn from the Statute in response,<sup>96</sup> which is their sovereign right, but worrying. Talk of a “mass exodus” of African Union members has punctuated discussions about the Court at its annual Assembly of States Parties meetings for the past few years,<sup>97</sup> sparked by indictments of African leaders who fought their battles both in and outside the courtroom,<sup>98</sup> attacking the Court politically as well as the specific cases against them, and even, as discussed below, attempting to amend or reinterpret key Rome Statute provisions in their favor to preserve their immunity from the Court’s jurisdiction.<sup>99</sup>

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95. Established on December 21, 2016, by G.A. Res. 71/248. See INT’L, IMPARTIAL & INDEP. MECHANISM, <https://iiim.un.org/> [<https://perma.cc/UW7S-GMQC>].

96. Burundi notified the UN Secretary-General of its withdrawal on October 27, 2016, which came into effect on October 27, 2017. INT’L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 289 (2017), [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf) [<https://perma.cc/EVY4-4HKJ>]. The Philippines deposited a written notification of withdrawal on March 17, 2018. Int’l Criminal Court, *supra* note 31.

97. See, e.g., Memorandum from Civil Soc’y Orgs. to Afr. States Parties of the Int’l Crim. Ct. for the Assembly of States Parties 14th Session 2 (Nov. 17, 2015) (“In January [2015, then] African Union Chair President Robert Mugabe of Zimbabwe threatened to push for ICC withdrawal by African states.”); Sidiki Kaba, President, Assembly of States Parties, Speech at the Fifteenth Session of the Assembly of States Parties (Nov. 16, 2016), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ASP15-Opening-Statement-PASP-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ASP15-Opening-Statement-PASP-ENG.pdf) [<https://perma.cc/6Z8J-UPKS>].

98. See, e.g., John Mukum Mbaku, *Africa and the International Criminal Court: Is There Room for Cooperation?*, GEO. J. INT’L AFF. (Apr. 26, 2017), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/africa-and-the-international-criminal-court-is-there-room-for-cooperation> [<https://perma.cc/UQ9M-XS8B>] (noting that the ICC faces difficulty enforcing arrest warrants due to lack of cooperation of many African countries, and that South Africa notably refused to turn in Sudanese President Omar al-Bashir following his indictment).

99. See generally Yvonne M. Dutton, *Bridging the Legitimacy Divide: The International Criminal Court’s Domestic Perception Challenge*, 56 COLUM. J. TRANSNAT’L L. 71, 109 (2017); Int’l Criminal Court Assembly of State Parties, Rep. of the Working Group on Amendments on its Thirteenth Session, ICC-ASP/13/31, at ¶ 12 (2014) (introducing Kenya’s proposal to amend Article 27 of the Rome Statute to provide immunity to heads of state).

The hostility of the United States has also posed a major challenge for the Court, as noted above.<sup>100</sup> Although instrumental in the establishment of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) in the 1990s, and relatively supportive in terms of funding, intelligence sharing, and the secondment of personnel, the U.S. government has historically been on the fence about the establishment of a *permanent* international criminal court.<sup>101</sup> While a lack of U.S. support may not be fatal to the Court, it has weakened it. It has jeopardized the ability of countries to cooperate with the Court (due in part to the Article 98 Agreement campaign, which targeted both State and non-States Parties). It also deprived the Court of financial and logistical support. Some argue that the Court is not evenhanded because it cannot compel U.S. persons to appear before it even though the United States has participated in Security Council referrals to the Court in three cases involving non-States Parties (while exempting or attempting to exempt its own nationals from the Court's jurisdiction): Sudan,<sup>102</sup> Libya<sup>103</sup> and Syria.<sup>104</sup> This gives rise to the appearance—and perhaps the reality—of double standards, which erodes the Court's perceived legitimacy.

The Prosecutor's request to open an investigation into the situation in Afghanistan, which implicated U.S. persons and policies, obviated some of the critique directed towards the ICC itself, but led to other difficulties as the Court found itself on the receiving end (again) of blistering attacks from the U.S. government.<sup>105</sup> There is also speculation that the Pretrial Chamber's decision finding that the investigation could not be opened "in the interests of justice" was a direct result of U.S. pressure, undermining the Court's legitimacy and independence. The U.S. attacks on the Court harm not only the ICC, but the United Nations more generally, given the Rome

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100. See, e.g., Göran Sluiter, *The International Criminal Court*, 23 NETH. Q. HUM. RTS. 480, 480-82 (2005).

101. See *supra* notes 35-42 and accompanying text.

102. S.C. Res. 1593 (Mar. 31, 2005) (voting to refer the situation in Darfur to the ICC; the United States abstained).

103. S.C. Res. 1970 (Feb. 26, 2011) (voting unanimously to refer the situation in Libya to the ICC).

104. On May 22, 2014, a resolution was introduced by France to refer the situation in Syria to the ICC. The United States voted in favor, along with twelve other members of the Security Council. China and the Russian Federation, both permanent members, voted against the resolution, thereby preventing its adoption. U.N. SCOR, 69th Sess., 7180th mtg., U.N. Doc. S/PV.7180 (May 22, 2014).

105. See, e.g., Bolton, *supra* note 40 (arguing that "the ICC constitutes a direct assault on the concept of national sovereignty" and that "America should welcome the opportunity . . . to strangle the ICC in its cradle.").

Statute's importance within the United Nations system. It also divides the United States from some of its closest allies, nearly all of whom are States Parties, including Britain, Canada, France, Japan, and South Korea.

The absence of Russia, China, and India is equally problematic, but for different reasons; these are populous, powerful and influential States, they are nuclear-armed, and, like the United States, two can refer situations to the Court and, under Article 16 of the Rome Statute, suspend an investigation in their capacity as members of the U.N. Security Council.<sup>106</sup> Unlike the United States, their opposition has not included an aggressive campaign against the Court for the most part, but in non-ratification of the Statute. The Russian Federation took this a step further, however, by repudiating its signature (like the United States<sup>107</sup>) on November 16, 2016, following the publication of a report by the Prosecutor referring to Russia's annexation of Crimea as an occupation.<sup>108</sup>

Following the indictment of President Omar al-Bashir of Sudan in 2009, members of the African Union (AU), angered by the perception that the Court was "targeting Africa," invoked some of the arguments the United States had offered at Rome, as well as their own concerns, and launched a new campaign against the Court. Sudan asserted that the Court was a "political organ of the EU . . . built to indict Africans," and that it would not comply (even though the Security Council had referred the situation) since Sudan was not a "party to the Rome treaty."<sup>109</sup> The AU campaign involved a refusal to arrest Omar al-Bashir during his international travels (including to ICC States Parties);<sup>110</sup> an effort to persuade the Security Council to defer the Sudan case (and later the Kenya cases, which also involved indictments of a head of state); attempting to amend the Statute to permit the General Assembly (as opposed to the Security Council) to suspend an investigation

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106. See Rome Statute art. 16.

107. See *supra* notes 37-38 and accompanying text.

108. See, e.g., Shaun Walker & Owen Bowcott, *Russia Withdraws Signature from International Criminal Court Statute*, THE GUARDIAN (Nov. 16, 2016), <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-what-are-you-signature-from-international-criminal-court-statute> [https://perma.cc/L9KX-PUQA].

109. *Sudan's FM: "ICC is a Court Built to Indict Africans,"* AL JAZEERA (Oct. 29, 2016), <https://www.aljazeera.com/programmes/talktojazeera/2016/10/sudan-fm-icc-court-built-indict-africans-161027112211288.html> [https://perma.cc/88EH-5WJE].

110. Al-Bashir made diplomatic visits to South Africa, Saudi Arabia, and Egypt despite the international travel ban. *Sudan's Omar al-Bashir*, BBC NEWS (Apr. 6, 2016), <http://www.bbc.com/news/world-africa-16010445> [https://perma.cc/AF68-7Y7E].

or prosecution;<sup>111</sup> long sessions at the ICC Assembly of States Parties on “Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation”<sup>112</sup> (and similar topics such as “Africa and the ICC” in subsequent years); the adoption of Rule of Procedure and Evidence 134 *quater* to permit heads of state to be excused from trial and represented by counsel only;<sup>113</sup> and the adoption of a new treaty, the Malabo Protocol,<sup>114</sup> providing for immunity for heads of state in contravention of customary international law and the Rome Statute. In a recent decision, the ICC Appeals Chamber found that States are required to arrest al-Bashir and to cooperate with the Court, rejecting his claims for immunity.<sup>115</sup> Yet that, too, has generated significant dissent.<sup>116</sup>

Given the difficult political environment that the Court faces, which is not likely to improve any time soon, the Court must endeavor to nonetheless satisfy its supporters and win over its detractors. The Court alone cannot change the political framework within which it operates, and much of the blowback is due to the fact that, as Bill Pace, convener of the CICC, noted at the opening of the Court’s permanent premises, “the Court is working.” At the same time, the Court *can* engage in much more extensive outreach to explain its activities and do the kind of “public diplomacy” necessary for an institution to earn public support and trust. It can do more to educate the public about its work, make its website much more user friendly, work with others to produce books and videos explaining its importance, and engage

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111. Hanibal Goitom, *African Union: Amendment to Rome Statute of International Criminal Court Sought*, LIBR. CONG.: GLOBAL LEGAL MONITOR (Feb. 16, 2010), <http://www.loc.gov/law/foreign-news/Article/african-union-amendment-to-rome-statute-of-international-criminal-court-sought/> [<https://perma.cc/KY2F-64F8>].

112. Int’l Criminal Court Assembly of State Parties, Special Segment as Requested by the African Union on its Twelfth Session, ICC-ASP/12/61 (2013), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/asp12/icc-asp-12-61-eng.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/asp12/icc-asp-12-61-eng.pdf); Beth Van Schaack, *ICC Assembly of States Parties Rundown*, JUST SECURITY (Nov. 27, 2013), <https://www.justsecurity.org/3862/icc-assembly-states-parties-rundown/> [<https://perma.cc/G336-KLHW>].

113. Int’l Criminal Court Assembly of States Parties, Amendments to the Rules of Procedure and Evidence, ICC-ASP/12/Res.7 (Nov. 27, 2013). The rule is probably in contravention of Rome Statute Article 63(1), requiring the accused to be present during the trial, and Article 27’s admonition that the “Statute shall apply equally to all persons without any distinction based on official capacity.”

114. African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 46A *bis* (2014).

115. See Leila Nadya Sadat, *Why the ICC’s Judgement in the al-Bashir Case Wasn’t So Surprising*, JUST SECURITY (July 12, 2019), <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/> [<https://perma.cc/BY4D-RMH3>].

116. *Id.*

in more victim-centered activities that underscore the importance of justice and reparations for afflicted communities.

#### 4. *Adjusting Outside Expectations and Reactions*

Another important point about ICC reform is that external stakeholders need to be both more exacting, and, at the same time, more patient and practical with respect to the Court. Anecdotal evidence suggests that the Court and the idea of potential prosecution looms large in the minds of many leaders.<sup>117</sup> Likewise, interviews with victims of atrocity crimes suggest that victims have unrealistic expectations of the International Criminal Court and its power.<sup>118</sup> This was also true with respect to the *ad hoc* international criminal tribunals, where victim communities in the former Yugoslavia and Rwanda believed that those tribunals had much more power than they did.<sup>119</sup> It is probably worth observing that national criminal justice systems also tend to disappoint victims, with their clinical approach to criminal justice, and their emphasis on conviction rather than rehabilitation of the offender or restoration of the community.<sup>120</sup> These problems are magnified at the international level. International criminal justice is harsh medicine, and is only part of a response that must be much broader and holistic especially in cases of mass atrocities. Removing perpetrators from communities so those communities are safe is important, but the ICC can only take a handful of cases. National systems must be able to act to pick up the slack, or, in some cases, perhaps regional or hybrid tribunals may be required. In addition to addressing the problems of perpetrators, the need for truth may require the establishment of a truth commission in addition to formal criminal accountability. Reparations need to be sufficient, but the Trust Fund for

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117. See Nick Grono & Anna de Courcy Wheeler, *The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders*, INT'L CRISIS GRP. (Oct. 6, 2012), <https://www.crisisgroup.org/global/deterrent-effect-icc-commission-international-crimes-government-leaders> [https://perma.cc/VA9K-M3YP].

118. See UNIV. OF CAL. BERKELEY SCH. OF LAW HUMAN RIGHTS CENTER, *THE VICTIMS' COURT? A STUDY OF 622 VICTIM PARTICIPANTS AT THE INTERNATIONAL CRIMINAL COURT* 3-4, <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf> [https://perma.cc/4FBB-BLFC].

119. See *id.* at 12.

120. See generally Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement> [https://perma.cc/2NU6-WDFU].

Victims may not have the resources. Communities must be rebuilt, and survivors will need medical treatment, adequate food, clean water, and psychological counseling in order to heal. David Luban once referred to crimes against humanity as “politics gone cancerous.”<sup>121</sup> If international criminal justice is necessary to stopping the spread of the cancer, other healing modalities must accompany justice mechanisms to address the deep wounds of a community afflicted by trauma and violence.

*5. Continuing to Build National and Regional Infrastructure for the Prosecution of International Crime*

It bears repeating that the International Criminal Court Statute is premised on the doctrine of complementarity, meaning that national systems need to take up the task of international criminal justice for it to be effective. Only when national systems are unable or unwilling to act is a case admissible before the International Criminal Court. Although it is not the ICC’s job to reinforce national systems, States can and should do so, and the Court can certainly be a partner in those important outreach and legacy activities. One important lesson drawn from the experience of the Yugoslavia Tribunal was its profound catalytic effect on national systems in the former Yugoslavia. As Diane Orentlicher recently wrote in *Some Kind of Justice*, “one of the Tribunal’s signal achievements[was] its role in catalyzing domestic war crimes prosecutions, a function no one anticipated when the ICTY was launched.”<sup>122</sup>

CONCLUSION

The shadow of the International Criminal Court looms large in the mind of victim groups, civil society advocates, governmental officials, rebel leaders, the media, and even in the decisions of national courts. The annual meeting of the Court’s Assembly of States Parties provides an opportunity to bring together States, NGOs and other stakeholders to discuss not only matters of importance to the ICC itself, but global justice, peace and security more generally. At the international level, an institution focused upon

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121. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 90 (2004).

122. DIANE ORENTLICHER, *SOME KIND OF JUSTICE: THE ICTY’S IMPACT IN BOSNIA AND SERBIA* 6 (2018).

global justice with a seat at the table when discussing conflicts or human rights abuses has changed the equation in a way that is hard to quantify, but is deeply significant. At the domestic level, the ICC has inspired national systems to create courts and bring cases—an example of “positive complementarity” catalyzed by the Rome Statute system as well.

The international community establishes institutions like the ICC to fulfill specific societal needs. There is no evidence that the needs that the ICC was established to meet—the needs of victims for justice; the need of peace and security and the moral imperative of an international legal order that is both just and fair—are less pressing than they were in 1998. Indeed, recent events and the ICC’s burgeoning docket suggest the ICC is needed more than ever. Nor is it at all clear that the ICC cannot be an important institutional player in helping to achieve these goals. What the evidence does suggest is that the Assembly of States Parties and other internal and external stakeholders should undertake targeted reforms to help the Court achieve these objectives. For this reason, this Article argues that the “Leave” campaign, with its emphasis on sovereigntist concerns, misses the point. Instead, scholars and political leaders should *Lean In* to the work needed to bring about these reforms, and do so in a constructive manner that has the potential to strengthen the institution in both the short and long term. The establishment of the Court traversed seventy-five years of history, from Versailles to Nuremberg and finally to Rome, enduring along the way two world wars, two atomic bombs, and untold death and misery. The road from Rome to The Hague was shorter, but the ultimate success of the institution is not yet assured.

As theorist and World War II survivor Albert Hirschman argues in *The Rhetoric of Reaction*, progressive movements for positive social change—and the institutions that embody them—will always be met with the rhetorical responses of perversity, futility, and jeopardy.<sup>123</sup> Each one of these arguments has been leveled against the ICC in some measure: it (like other international tribunals) has been accused of increasing conflict through the issuance of indictments (perversity); of being a “futile” institution that cannot achieve its stated objectives; and of jeopardizing existing arrangements (such as South African-style truth-and-reconciliation

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123. HIRSCHMAN, *supra* note 29.

commissions).<sup>124</sup> As Hirschman notes, the arguments of perversity, futility, and jeopardy ignore synergies that new reforms create, are insufficiently attentive to the imminence of danger, and ignore the arc of history,<sup>125</sup> which, to paraphrase the late Reverend Dr. Martin Luther King, Jr., bends towards justice.<sup>126</sup> During the Eighteenth Assembly of States Parties (ASP) held in The Hague in December 2019, the ASP created a committee of distinguished experts to examine the Court's record, and make recommendations for its improved performance in the areas of governance, the judiciary, and prosecution and investigations.<sup>127</sup> Their report, which will be submitted by September 30, 2020, will hopefully help the Court to "*Lean In*" to the challenges currently facing it.

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124. *Id.*

125. *Id.*

126. See Martin Luther King, Jr., Address at the National Cathedral: Remaining Awake Through a Great Revolution (Mar. 31, 1968), <https://kinginstitute.stanford.edu/king-papers/publications/knock-midnight-inspiration-great-sermons-reverend-martin-luther-king-jr-10> [<https://perma.cc/4UNF-7YG5>].

127. Int'l Criminal Court Assembly of States Parties, Review of the International Criminal Court and the Rome Statute System, ICC-ASP/18/ Res.7 (Dec. 6, 2019), [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).