

## 22 The International Criminal Court

### Origins, Challenges and Desirable Reforms to Strengthen It

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#### The Origins of the International Criminal Court

Before the end of World War II, there were only desultory attempts at establishing international criminal courts. In 1870, at the conclusion of the Franco-Prussian War, Gustave Moynier, a Swiss jurist and one of the co-founders of the International Committee of the Red Cross (ICRC), made a public proposal for the creation of an international court to investigate breaches of the Geneva Convention of 1864. He also called for appropriate international laws making it possible to punish those who committed such violations (Durand n.d.). No such tribunal was established, and no such laws were enacted. The Geneva Convention continued to bind the nations that ratified it, but there were no criminal sanctions for transgressions of its provisions.

During World War I, there were mutual allegations by Germany and Britain that the other was guilty of international crimes. The British Prime Minister, David Lloyd George, vowed to bring the German Kaiser to trial for ‘waging an aggressive war’ (‘Lloyd George Plan to Punish Ex-Kaiser’ 1918). Articles 227 to 230 of the Treaty of Versailles provided for a special international tribunal, as well as national and multinational military tribunals. However, the Dutch Government, which was holding Kaiser Wilhelm II, refused to surrender him for trial and in the absence of political will, the special international tribunal did not become operational. Domestic war crimes trials in Germany were perfunctory and ultimately failed. The efforts of the Allied Powers to have Turkish troops charged with crimes relating to the Armenian genocide also failed (Goldstone and Smith 2015: 40–46).

Towards the end of World War II, the governments of the Allied Nations, Britain, France, the Soviet Union, and the United States, decided that the German and Japanese war leaders should be prosecuted before respective multinational courts. The jurisdiction of such courts would be achieved by pooling the domestic jurisdictions of each of those states. That decision gave birth to the Nuremberg and Tokyo Trials. Both trials represented victors’ justice—the victorious nations were not held accountable for the war crimes committed, and the judges and prosecutors came from the four victorious nations. However, by the standards of the middle of the 20th century, the defendants were given fair trials. The Nuremberg and Tokyo courts were given jurisdiction over the crimes of aggression (‘crimes against peace’), crimes against humanity and war crimes.

In the aftermath of World War II and especially given the high incidence of war crimes that were committed, the Geneva Convention was updated at a meeting called in 1949 by the ICRC. Four updated Geneva Conventions were agreed at that meeting. For the first time, the most serious violations of their provisions were designated as war crimes. They were called ‘the grave breaches of the Geneva Conventions’. They were applicable

only to international armed conflicts. Too many governments were not prepared to agree to the criminalisation of civil conflicts which fell within the sovereign rights of governments to fight by any means they considered necessary. The outcome was the so-called Common Article 3 of the Geneva Conventions (which appeared in each of the four conventions of 1949) and which obliges parties to non-international armed conflicts to treat humanely all persons in enemy hands; to care for the wounded, sick and shipwrecked; and to allow the ICRC to offer its services to the parties to the conflict.

The Nuremberg and Tokyo Trials were sufficiently successful to encourage politicians and jurists to call for the establishment of a permanent international criminal court based on the consent of sovereign states: in other words, a treaty-based court. This is reflected in Article 6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It is there provided that

[p]ersons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

However, the Cold War intervened, and the establishment of an international criminal court was placed on the back burner. That notwithstanding, in the early 1950s, the International Law Commission of the United Nations (ILC) began to draft a treaty for a permanent international criminal court. And the development of international criminal law did not cease. There were conventions that outlawed the hijacking of aircraft (United Nations and the Rule of Law 1970), hostage-taking (United Nations 1979), torture (United Nations Human Rights 1984), attacks on diplomats (United Nations 1973), and the security of ships on the high seas (International Maritime Organization 1974).

The end of the Cold War in 1989 created the political space for renewed efforts to establish an international criminal court. In that same year, Trinidad and Tobago, in the General Assembly of the United Nations, requested that the ILC should continue to work on a treaty to establish the International Criminal Court (ICC) and should make provisions for the prosecution of drug trafficking. The General Assembly requested the ILC to do so. Ironically, no provision relating to drug-related crimes was included in the draft treaty.

The end of the Cold War also enabled the Security Council, in 1993, to establish the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY). The ethnic cleansing perpetrated in the former Yugoslavia led Western European nations, together with the United States, to conclude that establishing an international war crimes court was less expensive, in political and financial terms, than armed intervention. In the face of the genocide committed there, in the middle of 1994, Rwanda requested a similar international criminal tribunal. Having established one for the former Yugoslavia, the Security Council was hardly in a position to deny the request from an African member state. The two tribunals are commonly referred to as the *ad hoc* tribunals.

The *ad hoc* tribunals were established by the Security Council exercising its peremptory powers under Chapter VII of the Charter of the United Nations. This meant that the provisions of their statutes establishing the tribunals were legally binding on all members of the United Nations. The tribunals were given jurisdiction over what are generally referred to as ‘atrocious crimes’—namely, genocide, crimes against humanity and war crimes. The ICTY, which was initially concerned with an international armed conflict, was also given jurisdiction over the grave breaches of the Geneva Conventions. As the crimes committed

in Rwanda related to a non-international armed conflict, the ICTR was given jurisdiction pursuant to the provisions of Common Article 3 of the Geneva Conventions.

Unlike the multinational Nuremberg and Tokyo courts, the ICTY and ICTR were truly international. Their judges were elected by the United Nations (both the Security Council and the General Assembly playing a role). The judges and prosecutors did not come from the countries where the alleged crimes were committed.

After the establishment of the ad hoc tribunals, the Security Council became 'tribunal fatigued'. When Sierra Leone requested another ad hoc tribunal, the Security Council authorised the Secretary-General to enter into an agreement with the Government of Sierra Leone to set up an international tribunal without reliance on the preemptory powers conferred by Chapter VII of the United Nations Charter. And, unlike the ad hoc tribunals, the Special Court for Sierra Leone (SCSL) was not to be at the cost of the United Nations. It was funded by the Government of Sierra Leone and from voluntary contributions from other states. Other similar hybrid tribunals were established for Cambodia, Kosovo and Lebanon. As of this writing and as discussed in this chapter, there is support for this kind of hybrid tribunal to be established with authority to investigate charges of aggression against the leaders of the Russian Federation arising out of the war in Ukraine that began in 2014. That crime cannot be investigated or prosecuted by the ICC against a state that is not a party to the Rome Statute.

The successes of the ad hoc tribunals and the SCSL were sufficient to encourage many members of the United Nations to support efforts to create a permanent international criminal court. In 1998, then Secretary-General of the United Nations, Kofi Annan, acting pursuant to a resolution of the General Assembly, called a diplomatic conference in Rome to consider the draft statute for the ICC that had been prepared by the ILC. The attendees at the Rome conference included 161 states, 33 inter-governmental organisations and 236 non-governmental organisations (NGOs). On July 17, 1998, by a vote of 120 in favour and seven against, with 21 countries abstaining, the Rome Statute was adopted. Those who voted against the adoption of the Statute included China and the United States. The other three permanent members of the Security Council, France, Russia and the United Kingdom, supported it.<sup>1</sup>

The Rome Statute required 60 states to ratify it before it would come into operation. This was an unusually high number of ratifications, and optimistic supporters of the Court anticipated that it would take many years for that to happen. Surprisingly, it took less than four years, and the treaty became operative on July 1, 2002, three months after its 60th ratification.

The Rome Statute reflects the structure and many of the features of the ICTY and ICTR. The administrative body is the Assembly of States Parties (ASP) which is made up of representatives of each of the states parties. It meets once a year, usually alternating between The Hague and New York. The ASP elects the judges and the Prosecutor and the Deputy Prosecutor/s. They each have terms of nine years. The expenses of the Court are paid by the members of the ASP in accordance with assessments made by the ASP (United Nations 1988: art. 115). The amounts are assessed in accordance with an agreed scale of assessment based on that adopted by the United Nations for its regular budget (*ibid.*: art. 117).

The ICC was given jurisdiction over four types of crimes: genocide, crimes against humanity, war crimes, and aggression. The first three are defined in the Rome Statute (United Nations 1988: arts. 5–8). The Rome conference was unable to reach agreement on the definition of aggression, and it was left for decision at the first review conference to be held ten years after the Statute became operative. In 2010, a review conference held

in Kampala agreed on the definition of aggression, and that is to be found in art. 8bis of the Rome Statute. The Prosecutor's own powers with regard to the crime of aggression are constrained, and member states are given a right to opt out of the provisions. They do not have application to aggression committed in the territory of a non-member state. As mentioned earlier, it is these constraints that preclude the ICC from investigating the crime of aggression allegedly perpetrated by Russia in Ukraine.

### **The First Two Decades of the ICC**

It was widely assumed that the first situations to be investigated by the ICC would come about in consequence of the Prosecutor exercising the *proprio motu* powers conferred by art. 15.1 of the Rome Statute. It was considered highly unlikely that the Security Council would refer situations under the powers contained in art. 13.b of the Rome Statute. It is there provided that the Security Council, using its Chapter VII powers, may refer a situation to the Prosecutor in which one or more crimes defined in the Statute appears to have been committed. China, Russia and the United States were likely to veto any such referral. States Parties themselves were unlikely to self-refer their own situations to the Court. Those assumptions all turned out to be incorrect.

During its first ten years, nine situations came before the ICC. Of those, four were self-referrals from governments: the Democratic Republic of the Congo, Uganda, Central African Republic, and Mali; two were referred by the Security Council: Sudan and Libya; and three were initiated by the Prosecutor: Kenya, Côte d'Ivoire and Georgia. Since 2016, the Prosecutor has initiated a further five situations: Georgia, Burundi, Bangladesh/Myanmar, Afghanistan, and Philippines. One further situation was a self-referral: Palestine, and two were referred by states parties: Venezuela and Ukraine.

The foregoing analysis of the situations before the ICC refutes the allegations that were made during the first decade of the existence of the ICC by the African Union and many African states that it was a 'colonial' institution established by Western states to bring African states before the Court. The Court could hardly be blamed for the selection of situations if the majority of them were not the result of the exercise of the *proprio motu* powers of the Prosecutor.

The political attack came to a head with a resolution in 2017 by the African Union, which called upon its members to withdraw from the Rome Statute. Initially, three states, Burundi, Gambia and South Africa, signalled their intention to follow the non-binding resolution of the African Union. In the end, the latter two did not do so, and it was only Burundi that withdrew from the ICC. Its withdrawal was designed to protect its own leaders who feared war crimes prosecutions against themselves. With the ICC having launched investigations into non-African states, the opposition from Africa has defused. Other political challenges facing the ICC are referred to in the following section.

### **Political Challenges to International Criminal Justice**

The most serious challenge faced by all international courts, whether criminal or civil, is that in order for them to be effective, the cooperation of relevant governments is indispensable. This challenge lies at the heart of the politics of international law. In the case of international criminal courts, the cooperation of governments is crucial with regard to the collection of evidence, contact with witnesses and, in the case of the issue of a warrant of arrest, the apprehension of the defendant.

Even though the ad hoc tribunals were established by the Security Council in the exercise of its peremptory Chapter VII powers, it did not follow that all members of the United Nations adhered to their Charter obligations and cooperated with them. Serbia refused to recognise the legitimacy of the ICTY and refused my request, as its first Chief Prosecutor, to open a liaison office in Budapest. The government of Croatia paid lip service to its responsibilities towards the ICTY but did not substantially comply with requests from the Court and did not facilitate the work of our investigators. In its earliest years, the Government of Kenya refused to allow ICTR investigators into the country. Unfortunately, the Security Council remained silent in the face of these and other blatant violations of its own peremptory resolutions. On the other hand, many members of the United Nations did regard themselves as bound by the Security Council Statutes. In particular, the United States furnished the ad hoc tribunals, subject to strict confidentiality agreements, with classified intelligence information. Permission was granted by the United States for some of that information to be used in court. In that way, for example, intercepted telephone conversations between President Milosevic of Serbia and Radovan Karadzic, the self-appointed President of Republika Srpska, played an important role in the successful prosecution of both Karadzic and his army chief, Ratko Mladic.

The ICC, as a treaty-created institution, does not have the benefit of a binding Security Council Statute to support its work. The only governments that are obliged to assist the Court are those of states that have ratified the Rome Statute. And even then, some of those governments do not live up to their treaty obligations. President Omar Al-Bashir of Sudan, who was subject to an arrest warrant issued by the ICC, was not arrested by some member states when he visited their countries. This included South Africa, where state officials hurried him out of the country from a military airport after the High Court ruled that state officials were acting unlawfully by not arresting him (The Supreme Court of Appeal of South Africa 2016).

The unpleasant reality is that some states ratify international human rights statutes with no intention of complying with their terms (Hathaway 2007). According to Professor Oona Hathaway of Yale Law School,

[S]tates with less democratic institutions will be no less likely to commit to human rights treaties if they have poor human rights records; there is little prospect that the treaties will be enforced. Conversely, states with more democratic institutions will be less likely to commit to human rights treaties if they have poor human rights records—precisely because the treaties are more likely to lead to changes in behaviour. The same reality applies to a number of the states that are parties to the Rome Statute.

The policies of the United States with regard to the ICC have been ambivalent and inconsistent. At the very end of the Clinton administration, the United States signed the Rome Statute but did not submit it to the Senate for ratification. Since then, the United States has taken active steps against the ICC, some apparently designed to bring its operations to an end. One of the first acts of the administration of President George W. Bush was to ‘withdraw’ the signature by the United States of the Rome Statute. It did so in anticipation of taking steps to thwart the work of the Court. The American Service-Members Protection Act of 2002 was intended to intimidate countries that ratify the Rome Statute. Provision is made for the withdrawal of U.S. military assistance from countries ratifying the Rome Statute. It also restricts U.S. participation in United Nations peacekeeping

operations unless the United States obtains immunity for its nationals from prosecution by the ICC. It authorises the use of military force to ‘liberate’ any American or citizen of a U.S.-allied country being held by the Court. This provision became known as ‘The Hague invasion clause’. The President was given authority to waive those provisions on the grounds of ‘national interest’.

The second administration of President George W. Bush changed tack and decided to assist the Office of the Prosecutor in cases that were consistent with the foreign policy of the United States. That cooperation continued during the presidency of President Barack Obama. The policy of the United States took another 180-degree turn under the Trump administration. In June 2020, the Office of Prosecutor announced that its investigations into war crimes committed in Afghanistan would include allegations against U.S. nationals. In response, it was announced by Secretary of State Mike Pompeo that the United States would sanction ICC officials involved in investigations against the United States or its allies. It imposed visa restrictions and economic sanctions against the Prosecutor and a senior member of her office. According to the Attorney-General, William Barr, the measures were the beginning of a sustained campaign to ‘hold the ICC accountable for exceeding its mandate and violating the sovereignty of the United States’. This statement was based on the incorrect theory that crimes committed by U.S. nationals abroad were beyond the jurisdiction of the ICC because the United States was not a party to the Rome Statute. In any event, the measures taken by the Trump administration were repealed by President Joe Biden in 2021.

Political challenges complicate the work of the Court and its officials and cannot but hinder the work it attempts to accomplish in an independent and robust manner.

### **The Independent Expert Review of the ICC**

In 2018 and 2019, there was considerable criticism by supporters of the ICC of its efficiency and procedures. This reached a climax with an article highly critical of the ICC that was published by the Atlantic Council on April 24, 2019 (al Hussein *et al.* 2019). Its authors were four previous presidents of the ASP, who wrote, ‘We are disappointed by the quality of some of its judicial proceedings, frustrated by some of the results, and exasperated by the management deficiencies that prevent the Court from living up to its full potential’. They called for an independent review of the ICC.

In response, the ASP established the Independent Expert Review of the ICC and the Rome Statute system (International Criminal Court 2019). The nine experts who comprised the IER Committee<sup>2</sup> heard and received evidence from some hundreds of witnesses. It received the full cooperation from all the organs of the ICC. Its final report was published at the end of September 2020 (Independent Expert Review Group of the ICC 2020, hereinafter referred to as ‘Report’). It contained 384 recommendations. The experts acknowledged that full implementation of the recommendations would require time, as well as joint effort and determination from the Court, the ASP and States Parties (*ibid.*: para. 23). Following receipt of the Report, the ASP set up a Review Mechanism to consider the implementation of the recommendations made by the IER. During 2021 and 2022, the Review Mechanism held public consultations with members of the ASP and representatives of civil society organisations. A number of the members of the IER participated in these consultations.

Given the length of the Report and the number of recommendations made, it is not possible to consider more than a fraction of the findings and recommendations made by

the IER. What follows is a discussion of those considered by the author to be among the most important facing the ICC. They are considered under the following headings: political challenges, financial challenges, human resource challenges, the judges, and the Office of the Prosecutor.

### *Political Challenges Facing the ICC*

With regard to political attacks on the ICC, the IER recommended,

The ASP and States Parties should develop a strategy for responding to attacks on the Court by non-States Parties, and should be prepared to speak up in the Court's defence, given that its dignity and political impartiality seriously inhibits its ability to defend itself against unsubstantiated and biased attacks. The ASP and States Parties could further conduct public information campaigns in their countries, with support from the Court's PIOS (Public Information and Outreach Section) in developing communication materials.

(Report: Recommendation 169: p. 129)

The Court fully endorsed the foregoing recommendation and added,

An active and enhanced role of States Parties in this regard is necessary, urgently needed and a crucial element in supporting the Court, not only during political attacks but also more broadly to defend and promote the Rome Statute system, the integrity of its proceedings, safeguard judicial and prosecutorial independence, as well as ensure the safety and security of ICC personnel. The Court is of the view that States Parties should prioritise the consideration and implementation of this recommendation and engage with the Court for this purpose.

(International Criminal Court 2021b—hereinafter referred to as 'Court's Response'—: para. 332)

### *Financial Challenges Facing the ICC*

All international criminal courts are, of necessity, dependent for their financial resources on the political processes and procedures of those countries that are responsible for their funding. The ad hoc tribunals were dependent for their funding on the United Nations General Assembly and its cumbersome budgeting procedures. The ICC, in turn, is dependent on the ASP, i.e., the states that have ratified the Rome Statute.<sup>3</sup> As the IER pointed out, there is a trust gap between the ICC and the ASP. It stated,

On the one hand, some States Parties believe that the Court could and should be able to deliver more with the resources it has available. On the other hand, there seems to be a perception within some quarters of the Court that States Parties are using the budget process to interfere with the Court's cases.

(Report: para. 330)

This is a problem that is inherent in the system. As was pointed out in the Report, any international court or tribunal has the dual role of being a judicial entity and an international organisation.

As a judicial entity, the Court must benefit from judicial independence. As an international organisation, States Parties reasonably expect to be able to guide and shape the institution. Contradictions can arise between these two attributes of the ICC, and in practice such differences have led to tension between the ICC and the ASP. Whereas the dual nature of the ICC cannot be changed, employing this distinction can improve the clarity of reporting lines and improve cooperation.

(Report: para. 26)

There is clearly a need to confront this dual structure with transparency and cooperation between the organs of the Court, between themselves and with the ASP.

As a cost saving device, the IER suggested, ‘States Parties should consider joint approaches with other international courts and tribunals housed in The Hague, such as organising joint trainings, pooling administrative services and exploring possibilities for joint procurement to obtain more advantageous rates’ (Report: Recommendation 143).

There is an inherent budget problem that has been experienced by all international criminal courts—namely, the inability to anticipate the situations and cases that will require funding in a future budget period. There are inevitably unanticipated events, such as the unexpected arrest of an accused person or the opportunity to access new evidence that becomes available. Such events—and there are many others—require funding that has not been included in the budget. To meet this type of eventuality, the IER recommended that the financial regulations of the Court should be amended to enable the Registrar to make transfers across major programmes and to make adaptations based on the workload (Report.: Recommendation 134).

#### *Human Resource Challenges Facing the ICC*

The IER made serious findings concerning the working culture at the ICC. It labelled it as ‘distrust (interorganisational, as well as between staff and senior/higher management) and a culture of fear’ (Report: para. 62). The Report states further that ‘[i]t appears from the Experts’ consultations that the Court is widely perceived from within as too bureaucratic, too inflexible, and lacking in leadership and accountability’ (ibid.: para. 63). The IER also commented on an insufficient commitment to achieving gender equality with regard to all persons affiliated with the Court (ibid.: para. 64). The IER recommended, ‘Decisive action needs to follow the ASP’s and the Court’s commitment to achieving gender equality and ensuring the dignity, well-being, safety and inclusion of all individuals affiliated with the Court, regardless of gender or sexual orientation’ (ibid.: Recommendation 15).

The IER was not the first investigation into the ICC to find widespread discontent among many members of staff. Most of the current complaints came from the Chambers and the Office of the Prosecutor (OTP):

The IER heard many accounts of bullying behaviour amounting to harassment in all Organs of the Court, and particularly in the Office of the Prosecutor (OTP). They also heard frequent complaints that the culture of the Court’s workplace was adversarial and implicitly discriminatory against women. There were a number of accounts of sexual harassment, notably uninvited and unwanted sexual advances from more senior male staff to their female subordinates.

(Report)



The IER also suggested that this type of conduct ‘frequently has more to do with power relationships than with mutual attraction’ (Report: para 209). It suggested that the situation could only be improved if the leadership of the Court made it clear that there was zero tolerance for such behaviour and that efficient mechanisms were in place for victims to safely and transparently make complaints (ibid.: para. 211).

In the Court’s response to the IER Report, it stated, ‘The Court agrees with the Experts that these are fundamentally important issues and the Court’s leadership has prioritised efforts towards reinforcing the Court’s work environment and institutional culture of leadership and accountability at all levels’ (Court’s Response: para. 197). The Court went on to state,

Concretely, a comprehensive strategy should: reflect the high-level commitment of the Court’s leadership to the issue of gender equality and organisational culture, identify gaps and propel the review, as appropriate, of disciplinary policies and processes, assess ways to strengthen the roles and responsibility of managers in addressing these challenges, provide clear information on processes and support staff who want to file a complaint, strengthen informal/early on conflict resolution mechanisms, aim at increasing transparency on sanctions and incidents/reporting without compromising due process rights or confidentiality obligations, and identify ways to make formal disciplinary processes more efficient.

(ibid.: para. 199)

Active steps have been taken at the Court in consequence of the recommendations made by the IER. In its report, the Court states,

In developing such a comprehensive strategy, the Court will consider how the different elements of the system can present a cohesive and coordinated solution to address the challenges identified by the Experts. Such elements include the adoption of a revised and updated policy on harassment and sexual harassment (work on the revised policy is well advanced at the time of writing), a policy on investigation and disciplinary measures, a policy on sexual exploitation and abuse, as well as the recent appointment of a Focal Point for Gender Equality and considerations into the establishment of an Ombudsperson, in addition to any training initiatives and communication campaigns that may be developed to this end.

(Court’s Response: para. 200)

It cannot be doubted that these steps will lead to a better working environment and culture at the ICC.

The IER referred to the long tenure of a number of senior members of staff of the ICC. It suggested that this is not healthy and blunts the benefits of fresh thinking and changes in management style. It also prevents a diffusion of power in the different organs. In this context, the IER recommended,

In order to encourage fresh thinking and bring more dynamism to the Court, a system of tenure should be adopted by the Court, applicable to all positions of P-5 and above. ... For reasons of procedural fairness, the limitations should not be applied to those occupying these positions currently and would only apply to those newly appointed to the positions. Nonetheless, long serving officers of P-5 or Director level might be encouraged to retire early to allow the new system to be established as quickly as possible.

(Report: Recommendation 105)

The IER acknowledged that a certain amount of disruption would accompany the introduction of such a system but considered that that would be outweighed by the advantages.

Notwithstanding some opposition to the introduction of a tenure system from some quarters in the ICC, and especially the OTP, after consideration by the Review Mechanism, the recommendation was adopted in principle. The Registrar has been requested to prepare a draft proposal for the introduction of tenure at the level of P-5 and above.

The experts found that the then-current framework of the Court with regard to ethics was fragmented and had no common principles and minimum standards applicable to the officers and staff of the Court, whether elected officials, staff, whether internal or external. This leads to inconsistent implementation of standards of conduct across the Court. It also resulted in unacceptable behaviour being left unaddressed when coming from certain individuals affiliated with the Court. An example is the Registrar of the Court, who is not covered by any specific code of conduct (Report: para. 261). Support staff of external defence and victims' counsel<sup>4</sup> 'though working daily from headquarters for a significant number of years, are not covered by any code of conduct, and are also often excluded from the protection granted by Court policies' (Report: para. 263).

The IER recommended that the Court should develop a single Court-wide Ethics Charter, laying down the minimum professional standards expected of all individuals working with the Court (staff, elected officials, interns and visiting professionals, external counsel and their support staff, consultants) (Report: Recommendation 106). In its response, the Court expressed appreciation for this recommendation and undertook to 'engage in inter-Organ consultations, as well as in consultations with the diverse group of stakeholders representing individuals affiliated with the Court, to advance the consideration of these matters' (Court's Response: Recommendation 134: para. 246).

The IER recommended that procedures should be adopted to enable investigations into alleged misconduct by former elected officials and staff. In this regard, there is a lacuna in the powers conferred on the Independent Oversight Mechanism (IOM). The OTP has previously suggested that the ASP should consider expanding the powers of the IOM, enabling it to investigate the conduct of former elected officials and staff, both in and after they were in office. In 2020, the ASP did indeed address this gap by extending the mandate of the IOM (Court's Response: Recommendation 134: para. 248).

The IER found that notwithstanding the official languages of the ICC being English and French, the working language had become English. This applies particularly in the OTP. The IER stated in its Report, 'This is unfortunate since it encourages the recruitment of predominantly English speakers, which is a disadvantage when a significant number of situation countries are francophone and Court officials need to interact with national officials in French' (Report: para. 234). The IER recommended that sustained effort should be directed at remedying this problem 'through targeted recruitment, French language classes and incentives for staff to improve their French'. This was especially important when recruiting for staff working in a situation country that requires relevant language skills (*ibid.*: Recommendation 100). The Court accepted that the implementation of this recommendation was an important objective (Court's Response: para. 221).

### *The Judges*

There were a number of issues relating to the judges of the ICC that raised the concerns of the IER. Two of them are now considered: (a) nomination and election of judges and (b) the Code of Judicial Ethics.

*Nomination and Election of the Judges*

The Rome Statute requires that a candidate for election as a judge shall (a) have competence in criminal law and procedure and relevant experience, whether as a judge, prosecutor, advocate, or similar capacity, in criminal proceedings, or (b) have competence in relevant areas of international law such as international humanitarian law and the law of human rights (United Nations 1988: art. 36.3(b)). The latter qualification has become a topic of much debate. Many international criminal lawyers are of the view that academic experience is not as important as a qualification for a judge of a court that is primarily concerned with trials and appeals from them.

The suitability of some of the judges elected by the ASP has been questioned over many years. Initially, the ASP did not vet the nominations made by states parties for the election of judges. In 2011, the ASP established the Advisory Committee on Nominations, which examines and reports to the ASP on the qualification of nominees of states parties for election as judges.

In their Report, the IER suggested that ‘the ability and experience of some of the judges who have been elected has not marked them out as judges or jurists of the highest calibre sought by the Court’ (Report: para. 961). The experts referred to the allegation that some of the judges were appointed in consequences of political horse-trading rather than their competence. That was consistent with the personal experience of some of the experts of the campaigning and voting practices surrounding the UN elections in which they had been involved (*ibid.*: para. 961). The IER stated,

It is disturbing to discover that the practice of trading votes out of political self-interest, unrelated to the calibre of the candidate for election to a leading, international judicial post, is so well-entrenched that some States Parties still to this day find it politically expedient and acceptable to adhere to it. The remainder appear to tolerate it at a time of widespread, grave concern that the Court is proving to be less effective and efficient in the global fight against impunity than was hoped by its many supporters.  
(*ibid.*: para 963)

The IER emphasised the importance of the interviews of candidates carried out by the Advisory Committee on Nominations of Judges (ACN). Yet, the nomination procedure prescribed by the ASP does not insist on personal attendance by candidates at such interviews. States parties are required only to ‘endeavour’ to ensure such attendance. The IER has recommended that such attendance, save in exceptional circumstances, should be obligatory and that a candidate who does not attend such an interview should be disqualified (*ibid.*: Recommendation 371). Other detailed recommendations were aimed at making the nomination process more thorough and effective (*ibid.*). The response from the Court is that these issues are matters for consideration by the ASP (Court’s Response: para. 690).

*The Code of Judicial Ethics*

The IER pointed out that the Code of Judicial Ethics was outdated and in need of review. One of the issues raised was that former judges are not bound by the code after leaving the ICC (Report: para. 458). The chambers agreed with this recommendation, and important amendments came into force on January 27, 2021. It is now provided that the

terms of the Code ‘apply to the judges at all times and continue to apply to former judges, where relevant, for instance in respecting the secrecy of deliberations or maintaining confidentiality’ (Court’s Response: para. 249).

### *The OTP*

Many recommendations made by the IER relate to the OTP. A number have already been implemented. Important issues include the following:

#### *Civil Society Organisations*

The Report emphasises that ‘NGOs in the development, human rights, humanitarian, legal and other fields, are a force multiplier for the Court in promoting and carrying out its work’ (Report: para 380). Indeed, without the role played by NGOs from many countries, it is unlikely that the Rome meeting in 1998 would have been called and proceeded so successfully. NGOs also played a pivotal role in ensuring that gender issues and, especially gender-related crimes, were so holistically dealt with in the Rome Statute. It was also pointed out by the IER that NGOs ‘are also a very useful ally in blunting local press and propaganda campaigns, often conducted by authoritarian leaders that misrepresent the purpose and activities of the Court’ (ibid.: para. 380).

A number of NGOs reported to the IER that they felt neglected by the OTP and that it was more concerned with politicians and civil society representatives, especially in situation countries (Report: para. 380). The relationship between the OTP and NGOs can often be complex, especially with regard to approaches made to victims and witnesses. Best practices have to be clearly defined and made operational. In this regard, the IER stated that ‘it would be helpful if the Court and CSOs could establish channels of communicating and sharing their best practices and expertise’ (ibid.: para. 383).

The IER recommended that there was need for improvement in communications with NGOs both from the OTP itself and in the field. With regard to the latter, it recommended that there is a need for coordination between the Registry’s Outreach staff and the OTP. The IER recommended that the OTP should appoint a field staff member to be responsible for this coordination (ibid.: Recommendation 34). In general, the Court, including the OTP, shared the views and concerns expressed by the IER and seeks to improve its relationships and cooperation with NGOs (Court’s Response: paras. 311–19).

#### *Preparatory Examinations (PEs)*

The IER devoted much attention to the conduct of PEs.<sup>5</sup> They have been of some concern to stakeholders for many years. As indicated in the Report, the length of PEs has varied between 2 months (Libya) to 144 months (Colombia).<sup>6</sup> There is also a disparity between the OTP resources and the high number of PEs. The IER recommended that to address this disparity, the Prosecutor should consider adopting a higher threshold for the gravity of crimes alleged to have been perpetrated.<sup>7</sup> This recommendation was left for consideration by the new Prosecutor (Court’s Response: para. 413).

The IER further recommended that the OTP should consider adopting an overall strategy plan for each PE, with benchmarks and provisional timelines for all its phases and activities, including its closure and, if relevant, re-opening. Upon authorisation of an investigation, the strategy plan should provide the foundation on which to build the

OTP's targets and strategies for the investigation (Report Recommendations: 255/6, 258). It further recommended that PEs should last no longer than two years, save in exceptional and justified circumstances (*ibid.*: Recommendation 257). This recommendation was also referred for attention by the new Prosecutor (Court's Response: para. 479).

#### *Evidence Reviews*

The IER found that the OTP had consistently failed in the implementation of

its internal mechanisms aimed at ensuring adequate quality control as the cases are prepared for warrants of arrest, pre-trial, and trial proceedings. These mechanisms include peer evidence reviews, reviews of critical submissions, testing of critical oral submissions, the development of internal guidelines standardising the work of each Division, and a lessons learnt policy.

(Report: para. 791)

It was also found that its 'lessons learnt' programme was poorly implemented and was inadequate (Report: para. 792).

The IER made the following recommendations:

The OTP should consider increased monitoring of the evidence reviews, which should be obligatory for every investigation and trial preparation, and appropriately regulated. Practices employed by OTP teams to monitor trials should be reviewed, and a comprehensive and consistent approach to preparations for witness examinations, presentations of complex evidence, and oral arguments should be ensured. Further, the OTP should review the guidelines relating to lessons learnt, and consider making adherence to the process mandatory and/or part of the performance appraisal of managers.

(Report: Recommendations 305, 311 and 313)

It advised the OTP to 'appoint a senior staff member of the OTP management to be responsible for monitoring compliance with lessons learnt' (Report: Recommendation 314).

For the most part, the Court accepted the foregoing recommendations, indicating that they had either been implemented already or were under consideration (Court's Response: paras. 596, 606/7, 615/6).

#### **The Future of the ICC**

The ICC is the only permanent international criminal court in existence.<sup>8</sup> At present, it has the support of the 123 states that have ratified the Rome Statute. There have been very few accessions to the Statute in the past decade. If the ICC is to retain the support of the States Parties to the Rome Statute, it is essential that it provides justice to the victims of atrocity crimes in a more efficient and timely manner. Many of the recommendations made in the IER Report were designed to achieve those goals. It is gratifying that the Report has been received positively by the ASP and the Court. Many of the recommendations made by the IER have been implemented, and others are currently being considered by organs of the Court and the ASP Review Mechanism.

At the same time, the politics of international criminal justice cautions against optimism with regard to achieving substantial additional support for the ICC. There is little prospect, in the foreseeable future, of China, Russia or the United States (all permanent members of the Security Council) or of India or Pakistan acceding to the Rome Statute. This absence of universality detracts from the fairness of the Rome Statute system. It is not morally or politically justifiable that weaker nations are held accountable for serious war crimes while the powerful are given effective impunity. The answer is not that the Rome Statute system should be abandoned but that more nations, and especially powerful nations, should become members and supporters of it.

Calls for international justice continue to be made in the face of new atrocity crimes. There is wide support for a special court to be established to prosecute Russian leaders for the crimes of aggression committed in Ukraine since 2014. Since the invasion by Russia of Ukraine in February 2022, the ICC has been investigating crimes against humanity and war crimes allegedly committed by the Russian military since the invasion began. Within weeks of becoming seized with the situation in the Ukraine, the Prosecutor sent over 40 investigators to investigate those alleged crimes. In that endeavour, the Court has received the explicit support of a substantial majority of the members of the United Nations. On March 17, 2023, the ICC issued arrest warrants for President Vladimir Putin, the President of Russia, and Maria Lvova-Belova, Russian Commissioner for Children's Rights, alleging their personal responsibility for the unlawful deportation and transfer of children from Ukraine to Russia during the Russian invasion of Ukraine.

It must be recognised that the majority of African states have distanced themselves from condemning Russian aggression against Ukraine. They are concerned that far more attention is being given by Western states to a war in Europe than to even worse war situations on the African continent. The obvious illustration is the war that has taken the lives of hundreds of thousands of civilian lives in Somalia. And, at the time of this writing, there are serious war crimes being committed in Sudan that are receiving comparatively little attention from Western nations in comparison to the situation in Ukraine.

The inability of the ICC to investigate and prosecute Russia for the crime of aggression has given rise to many calls for a partnership between Ukraine and the United Nations General Assembly to establish a Special Court for Aggression in Ukraine. It is assumed that most of the 141 states that supported the resolution condemning the attack by Russia (United Nations General Assembly 2022) would support such a special court. An alternative route, strongly supported by former British Prime Minister Gordon Brown, is for a court to be established by a group of nations that recognise aggression as an offence in their domestic law. That was the way in which the Nuremberg Tribunal was established in 1945. There is also a call from a few states, including the United States, for an internationalised Ukraine domestic court with the authority to prosecute the crime of aggression. One of a number of problems with this last-mentioned approach is that Putin and his senior officials would enjoy head-of-state immunity in a domestic court that would not apply in an international tribunal (International Court of Justice 2002). The United Nations route would also be far more efficient and expeditious. Thus far, Ukraine has not called upon the General Assembly to join it in establishing such a court. Whatever the outcome may be, it is clear that the wide calls for a special court for Ukraine demonstrate the necessity of enabling the ICC to investigate and prosecute atrocity crimes as well as aggression wherever committed and subject to the principle of complementarity.

The ICC has understandably been criticised by victims in other situations for their comparative neglect in the face of the Court's vigorous action to investigate war crimes in Ukraine. In particular, those complaints come from Palestine and Myanmar. In the case of Palestine, a formal investigation was opened in March 2021, since when there has been silence from The Hague. In February 2021, the democratically elected government of Myanmar, the National Unity Government of Myanmar (NUG), was unlawfully ousted by a military coup. In December 2021, the General Assembly of the United Nations refused to recognise the military regime, and the NUG remains the lawfully elected government. In August 2021, the NUG made a declaration, under Article 12(3) of the Rome Statute, accepting the jurisdiction of the ICC with respect to all international crimes in Myanmar since 2002. For over a year, the Court has not responded in any way to that declaration. Again, it is the politics of international criminal justice that is attracting criticism.

No doubt it would be a safer world if the ICC were to achieve universal support and thereby make the system of complementarity a reality. Potential criminal leaders would be put on notice that if they commit or actively support the perpetration of international crimes, they will not be able to hide and would not be able to travel beyond the borders of their own states. In the modern world, that would make it almost impossible to act effectively as a head of state or government. The deterrent effect would become a reality. At this time, such an extensive reach of the Court appears to be a distant prospect.

The future existence of the ICC as an institution is assured. That it will continue to be criticised both by its friends and detractors is also inevitable. The depth of support for it will depend on its efficiency, the credibility of its investigations and prosecutions and, above all, transparency in the proceedings of all of its organs. That credibility will determine the funding it receives from the States Parties to the Rome Statute. The ICC remains a work in progress and, at the same time, an essential institution within the global architecture of international cooperation. The war in Ukraine has focused attention on the fact that the end of the Cold War did not usher in a new phase of peace and security in the world. The world today is, instead, characterised by rising superpower tensions. The threat of armed conflicts remains one among many global catastrophic risks confronting humanity; this suggests that the commission of atrocity crimes that the Court was created to address is likely, for the foreseeable future, to remain a feature of the international political landscape. Over time, this is likely to increase the importance of the Court and the support for it among many people who are becoming increasingly impatient with a culture of conflict and violence which is so destructive of human welfare.

## Notes

- 1 Russia has not ratified the Rome Statute (United Nations 1988).
- 2 The author was the chair of the IER.
- 3 The annual budget approved by the ASP for 2022 amounted to Euros €151,269,900. The five largest contributors are Japan, Germany, France, United Kingdom, and Brazil. They account for almost half of the total contributions received by the Court. The latest assessments (as at December 31, 2020) can be found at International Criminal Court 2021a, pp. 45–46. The 2022 total budget approved by the ASP can be found at International Criminal Court 2021c: 4.
- 4 In order to ensure their independence, Defence and Victims' counsel are independent legal practitioners not employed by the Court.
- 5 The Office of the Prosecutor must determine whether a situation meets the legal criteria established by the Rome Statute. For that purpose, a preliminary examination is conducted by the Prosecutor based on information available to the Office of the Prosecutor.

- 6 See the table in Report: para. 709.
- 7 Report: Recommendation 227. The alternative would be for the ASP to vote additional funds for the conduct of preparatory examinations. For the foreseeable future, this is highly unlikely.
- 8 The UN International Residual Mechanism for Criminal Tribunals (MICT) was established by the United Nations to complete any residual proceedings of the ICTY and ICTR.

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