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The Path Forward for the International Criminal Court: Questions Searching for Answers

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THE PATH FORWARD FOR THE INTERNATIONAL CRIMINAL COURT: QUESTIONS SEARCHING FOR ANSWERS

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In the face of growing dissatisfaction with the performance of the International Criminal Court, the four former Presidents of the ICC Assembly of States Parties published an open letter in April 2019 calling for an "independent assessment of the Court's functioning by a small group of international experts."[2] The stated goal is to use the assessment to help close the "growing gap between the unique vision captured by the Rome Statute . . . and some of the daily work of the Court."[3]

The letter is eloquent and worth reading in full. Among other things, the four Presidents state--

> We have all committed ourselves to the ICC, driven by a belief in the central role of accountability for the most serious crimes of international concern and the conviction that the ICC offers a unique opportunity to fill the impunity gap.

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1. Professorial Lecturer in Law, George Washington University Law School. Formerly Ambassador and Special Coordinator for Global Criminal Justice, United States Department of State; and Assistant Legal Adviser for United Nations Affairs and Assistant Legal Adviser for Political-Military Affairs, United States Department of State. This essay is adopted from a presentation prepared for the Frederick K. Cox International Law Center Conference. "Law and Atrocity Prevention," at Case Western University School of Law on September 20, 2019.

2. Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser & Tiina Intelmann, *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/4ZF2-LAXV].

3. *Id.*

> We have never needed the Court more than today. At a time of erosion of the rule of law, attempts to undermine the international order, and challenges to multilateral solutions when it is clear that other approaches fail, an effective ICC is more important than ever. From Syria to Myanmar, from Yemen to South Sudan, we are witnessing conflicts fought with cynical disregard for human dignity and international law. This has devastating consequences for the prospects of sustainable peace.
>
> The sheer existence of the ICC has had a strong positive impact . . . . Perpetrators all around the globe have been put on notice that they may face justice, sooner or later. Public calls for accountability, with the ICC as its beacon, have enabled important innovation, such as the accountability mechanisms for Syria and Myanmar, where the Court's reach did not extend. Victims around the world, sadly millions of them, look to the Court as their best, and often only, hope.[4]

A review has begun. The Secretariat of the Assembly of States Parties produced an extensive matrix of issues – under the heading "Meeting the challenges of today for a stronger Court tomorrow" -- as a basis for discussions.[5] It attempts to break down the many issues into workable topics, and to identify ways to address them.[6] Much work remains to be done but the openness to identifying and addressing problems is to be commended.

The review is focused on improving the workings of the Court from a technical perspective. This is reflected in the wording of the letter itself, which notes the exasperation of the authors with "the management deficiencies that prevent the Court from living up to its full potential," and the Terms of Reference for the review, which specifically provide that the experts shall fulfill their mandate through a "review of a *technical* nature of processes, procedures, practice, and the organization of and framework for the Court's operations."[7] The fact that the call is for a review of the Court's functioning by independent "experts" further underscores the contemplated "technical nature" of the undertaking.

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4. *Id.*

5. *See* ASP Bureau, *Draft Working Paper Meeting the challenges of today for a stronger Court tomorrow Matrix over possible areas of strengthening the Court and Rome Statute system* (Nov. 27, 2017), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-review-Matrix-v2-27Nov19-1740.pdf [https://perma.cc/WA2S-8Y6B].

6. *Id.*

7. ICC-ASP/18/Res.7, Review of the International Criminal Court and the Rome Statute System, Annex I (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://perma.cc/Q67A-8ZE2].

The desire for such a review is not surprising. The Court's performance has disappointed even staunch supporters. There are widespread perceptions that the Prosecutor and the judges have worked at cross-purposes, that there is dissension and dissatisfaction among the judges themselves, and that many of the public wounds suffered by the Court have been self-inflicted.[8]

The first section below briefly recalls some of the events that have fed these perceptions, and how they fit into the present calls for review. These are the kinds of missteps that the present review appears intent on addressing, with an objective of eliminating or at least minimizing similar missteps in the future.

But the Court faces an even more formidable set of challenges that go to the heart of what the Court is about. This set of challenges traces back to the fundamental mismatch between expectations about what the Court will take on and outcomes that an institution such as the Court – no matter how brilliantly its technical problems might be addressed – can realistically be expected to accomplish. These entail not just technical questions for review by technical experts, but fundamentally political questions about what the Court should consider to be within its mandate. One can sense -- in the letter, in the matrix produced by the Secretariat, and in conversations with those involved -- a desire to steer the exercise away from such questions, including in statements that suggest that the ambit of this exercise does not include "many issues [that] are within the remit of the Court itself to address as a matter of prosecutorial and judicial independence and administrative discretion."[9] But whether as part of this review or otherwise, these issues about how the provisions governing the jurisdiction of the Court should be interpreted and applied must be successfully addressed if the Court is to be sustainable.

1. MISSTEPS THAT HAVE MARRED THE HEADLINES

The recitation of problems facing the Court begins with the paucity of convictions. Even with the conviction of Bosco Ntaganda[10] in July 2019, in the now more than twenty years since the Rome Conference, and the more than seventeen years since the Rome Statute entered into force, there stand only four convictions for the crimes – genocide, crimes

8. *See* Douglas Guilfoyle, *Part II- This is not Fine: The International Criminal Court in Trouble*, EJIL: TALK! (Mar. 22, 2019), https://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/ [https://perma.cc/PA3H-LE7U].

9. ASP Bureau, Draft Non-Paper: Meeting the challenges of today for a stronger Court tomorrow, Introductory Note (15 July 2019).

10. Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Judgment (July 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF [https://perma.cc/WCH2-L6EX].

against humanity and war crimes – for which the drafters of the Rome Statute said they were acting to end impunity.[11] To be sure, we should be careful not to equate the fact of acquittals with the failure of criminal justice. At the same time, events like the reversal and acquittal by an ICC Appeals Chamber in June 2018 in the case of Jean-Pierre Bemba[12] – ten years after his arrest and transfer to The Hague, and the expenditure of untold resources consumed in the investigation of the situation -- was a stunning blow to observers of the Court, and an even more stunning blow to the victims of crimes against humanity and war crimes, including widespread sexual violence, in the Central African Republic that no one denies were committed.[13] Similarly stunning was the acquittal of former Côte d'Ivoire President Laurent Gbagbo and Charles Blé Goudé, who had served as a Minister in Gbagbo's government, on the basis of a "No Case to Answer" motion. Several years following the arrest of and transfer of the defendants to the Hague, and once again following the expenditure of untold ICC resources, ICC judges concluded that, even without rebuttal, the evidence that the Prosecutor had put forward did not provide a reasonable basis for a finding that the defendants were guilty – in the words of the Court, there was "no need for the defence to submit further evidence as the Prosecutor has not satisfied the burden of proof."[14] The

11. *Id.*; Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his conviction (Dec. 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09844.PDF [https://perma.cc/3TN9-UR2Z]; Prosecutor v. Katanga, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute (Mar. 7, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF [https://perma.cc/322X-VTPV]; Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF [https://perma.cc/W7JC-45ZJ]. It is worth noting that one of the four convictions was the result of a guilty plea, not a trial, Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016), and also worth noting that there have been additional convictions for charges relating to the administration of justice under Article 70 of the Rome Statute, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*], as opposed to the underlying atrocity crimes as defined under Article 6, 7 and 8 of the Rome Statute.

12. Prosecutor v. Bemba, Judgment on the Appeal (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF [https://perma.cc/PPP3-Q8E4].

13. *See, e.g.*, Oumar Ba, *What Jean-Pierre Bemba's acquittal by the ICC means*, AL JAZEERA (June 13, 2018), https://www.aljazeera.com/indepth/opinion/jean-pierre-bemba-acquittal-icc-means-180612121012078.html [https://perma.cc/WPB4-QZ8V].

14. Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, ICC-02/11-01/15, Reasons for oral decision on 15 January 2019 (July 16, 2019), https://www.legal-tools.org/doc/440017/pdf/ [https://perma.cc/N753-J9VN]. The arrest warrants against both men had been issued in late

collapse of the cases against President Kenyatta and Vice President Ruto of Kenya were similarly dispiriting for observers and victims, and the widespread belief that the defendants were responsible for witness tampering that had led to the result did little to stem the erosion of confidence in the Court as an institution upon which the international community could count for providing justice.

There has been a litany of other problems as well, including criticism of remarks made by one of the ICC judges, Marc Perrin de Brichambaut, about some of the inner workings of the ICC and the attitude of some of the judges;[15] the circumstances surrounding the acceptance of the resignation of one of the judges in an ongoing case to allow her to assume a diplomatic post, notwithstanding the risk to the Court's ability to continue its work to render a final verdict;[16] the submission of a lawsuit by several of the ICC judges arguing that they are being underpaid;[17] and widespread reports of the lack of collegiality among the judges generally.[18]

It is not my point here to condemn the Court for these events – indeed, in each case there is another side to the story that needs to be considered – but simply to note the adverse effect such events have had on the overall level of confidence in the ability of the Court to navigate successfully in the very complicated world in which it must operate.

2. Problems of a More Conceptual Nature

Underneath the problems described above is the mismatch between expectations about the Court's "promises" and its capabilities to deliver justice. The mismatch is the source of disappointment from constituencies whose support should be the life-blood of the Court. This

2011, and they had been transferred to The Hague in November 2011 and March 2014, respectively. The Court had decided to join the two cases in March 2015, and the trials had opened in January 2016.

15. Marc Perrin de Brichambaut, Transcription écrite de l'intervention de Monsieur le Juge Marc Perrin de Brichambaut à la Peking University Law School (Beijing) du 17 Mai 2017, ICC-01/04-01/06-3451-Anx1, Lecture Transcript (Apr. 10, 2019), https://www.icc-cpi.int/RelatedRecords/CR2019_02039.PDF [https://perma.cc/ME5U-W7KC].

16. Tjitske Lingsma, *ICC Judges at Centre of Controversy*, JUSTICEINFO.NET (May 16, 2019), https://www.justiceinfo.net/en/tribunals/icc/41447-icc-judges-at-centre-of-controversy.html [https://perma.cc/ZN7D-AV79].

17. Marlise Simons, *In The Hague's Lofty Judicial Halls, Judges Wrangle Over Pay*, N.Y. TIMES (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html [https://perma.cc/66FY-WLHK].

18. Hemi Mistry, *The Significance of Institutional Culture in Enhancing the Validity of the International Criminal Court*, 17 INT'L CRIM. L. REV. 703 (2017).

includes disappointment among victims, who feel their hopes for justice being abandoned; disappointment among justice advocates, who tire of feeling the need to apologize for the shortfall; and the disempowerment of those within states who would otherwise be expected to champion the Court's cause within governments, with the inevitable result that support for the Court takes on a lower priority in the diplomatic and political agenda of those states. Whatever course the Court charts, it needs to take head-on the problem that the promise that the ICC is perceived to have made – that the crimes with which it deals are of a kind that "must not go unpunished"[19] -- is not achievable if the Court remains on its present course.

But it is easier to describe the mismatch between expectations and capabilities than to agree on ways to deal with it. The sources of the "over-bite" – the difference between what the Court promises and what it can realistically be expected to deliver -- are deeply ingrained. They grow largely out of the inability of the Court to more aggressively filter those situations and cases in which it should play a role, and those in which it should not. That inability springs not from the Rome Statute as such, but from the ways in which Court actors have chosen to interpret and apply it, and the meaning they have ascribed to the notion that the ICC is a court of last resort. These are not simply technical questions, inevitably to be decided upon by technical experts, but fundamentally political issues that states must decide to resolve for themselves or live with the consequences of leaving them to experts for resolution.

Within the Rome Statute, the main burden of ensuring the necessary filtering of situations and cases was intended to be borne by the Statute's provisions on admissibility.[20] But twenty years of experience have demonstrated that the treaty left much to be worked out. Its provisions on complementarity, gravity and interests of justice all speak to critical elements of how Court actors should go about filtering, and how they should go about allocating the Court's resources, but they do so with imprecision.

It has thus in practice been left for Court actors to elaborate the rules. In important ways they have done so in a manner that errs on the side of broader jurisdiction and thereby serves to minimize the amount of filtering. The result of the filters doing too little filtering has effectively meant that too many situations have been deemed to fall within the Court's mandate. Implicitly this represents a decision that the burden of filtering will instead need to be based upon the exercise of prosecutorial discretion: judgments by the Prosecutor about how to choose among the too-many situations and cases that have been deemed to fit within the ambit of the Court's jurisdiction. The fact that the

19. *Rome Statute*, *supra* note 11, preamble.

20. *Id.* art. 17, 53.

high number of situations and cases outstrips the Court's resources means that the Prosecutor is left having to triage decisions on purportedly objective, but self-evidently practical and political, bases.[21] But this itself runs into a problem created by the mood of our times, in which states are not particularly willing to trust in the discretion of an independent international prosecutor to make judgments that are essentially of such a political nature.

Some specific examples may help illustrate the point.

A. Gravity.

Under Article 17(1)(d) of the Rome Statute, a case is inadmissible – in other words, the Court cannot proceed to exercise jurisdiction over it – if it "is not of sufficient gravity to justify further action by the Court."[22] On its face, the language does not specify what level of gravity would be "sufficient".

As this is being sent to publication, there are twelve states in which the Court has ongoing situations under investigation,[23] and another eight situations that the Prosecutor has reported are under preliminary examination.[24] Thus, out of slightly more than 120 states that have become parties to the Rome Statute, approximately one out of every six is currently subject to the Court's scrutiny, and this is in addition to a number of other states that are aware or suspect the Prosecutor is reviewing them in a "pre-Preliminary Examination" phase. This seems a far cry from the notions that many supporters put forward about how the Court would operate in the period when it was taking root. For example, the Court's first President, Philippe Kirsch – speaking as part of an effort to assuage anxieties of the United States about the Court and the prospect of it coming after American servicemen – famously said that is not what this Court is about, and that it was rather designed to go after big-fish perpetrators of atrocities like Saddam

21. *See* William Schabas, "Feeding Time at the Office of the Prosecutor, INT'L CRIMINAL JUSTICE TODAY (Nov. 13, 2016), https://www.international-criminal-justice-today.org/arguendo/icc-prosecutors-perpetuation-of-the-fiction-of-objectivity/ [https://perma.cc/PUU2-VPW6].

22. *Id.* art. 17(1)(d).

23. They are: the Democratic Republic of the Congo, Uganda, Sudan (Darfur), Central African Republic (two separate investigations), Kenya, Libya, Côte d'Ivoire, Mali, Georgia, Burundi, Bangladesh/Myanmar and Afghanistan. *See* ICC Prosecutor, *Situations Under Investigation*, INT'L CRIM. CT., https://www.icc-cpi.int/pages/situation.aspx [https://perma.cc/5J4H-EHED].

24. The eight are the situations in The Philippines, Ukraine, Venezuela, Colombia, Guinea, Iraq/UK, Nigeria, and Palestine. *See Report on Preliminary Examination Activities 2019*, INT'L CRIM. CT.: THE OFF. OF THE PROSECUTOR (Dec. 5, 2019), https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf [https://perma.cc/5QNP-8EEC].

Hussein and Slobodan Milosevic – truly the worst-of-the-worst.[25] It is also in at least potential tension with the notion that the crimes that the Court should pursue are those that the international community truly considers "must not go unpunished."[26] A better match between the crimes for which the international community considers within the ICC's responsibility and those that it genuinely considers "must not go unpunished" would do much to cushion the ICC against allegations of over-reach. An obvious way for the Court to narrow its focus would be to use a higher threshold in determining whether a case or situation is sufficiently grave. If the Court's responsibility should be for "the worst-of-the-worst," use of a higher gravity threshold could help accomplish that.

That said, for its part, the Court has made the not-unreasonable point that the exclusion of perpetrators from the ambit of the Court "could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of [its] creation, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of jurisdiction by the Court."[27] Thus, there is a dilemma. On the one hand it may seem obvious that the gravity threshold needs to be raised if the Court is to limit the prospect of it being responsible for promises to deliver justice that it will never be able to fulfill, while on the other hand there is a risk that raising the threshold may undermine the Court's value to prevent or deter future crimes.

In addition to questions about the "amount" of gravity that should be required before the Court can exercise jurisdiction, there are related questions about the nature of the metric. For example, one possible metric turns on endemic factors such as the number of victims, the cruelty with which the crimes were committed, and the extent to which they were undertaken in a systematic fashion. Another possible metric, however, gives greater weight to external factors, such as the signal that investigation of a situation or the prosecution of a case would send that no person stands above justice, on the theory such an approach will increase the deterrent value of the Court's work. From the perspective of a large power, however, the prospect of such an approach inevitably raises alarm bells. What better way, such a power might fear, for the Prosecutor and the Court to establish that no one is above the

25. Siddharth Varadarajan, *Living up to the Legacy of Nuremberg: Interview with International Criminal Court (ICC) President Philippe Kirsch*, GLOBAL RES. (Dec. 13, 2005), https://www.globalresearch.ca/living-up-to-the-legacy-of-nuremberg/1479 [https://perma.cc/3J34-UG42].

26. *Rome Statute*, *supra* note 11, preamble.

27. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-169, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," ¶ 75 (Jul. 13, 2006), http://www.legal-tools.org/doc/8c20eb/pdf/ [https://perma.cc/NW52-RFYY].

law than to prioritize cases against its leaders and personnel. There is thus again a dilemma, as an approach that is based on the signaling effect may on the one hand enhance deterrence but on the other hand make enemies out of large states that fear being unfairly targeted, and in the process deprive the Court of support that it ultimately needs in order to be successful.

On each of these questions, the words of the Rome Statute, and even the *travaux préparatoires*, do not provide clear guidance. It is as if, in agreeing to the Rome Statute, the states delegated to the Court's actors the task of figuring out what the gravity standard actually meant. Things have changed since 1998, however, and states appear to have less appetite for delegations of this type of authority, and less willingness to simply accept whatever answers the Court works out. A question for the Court – indeed, one of its important challenges – is whether and how it should account for this as it interprets and applies these provisions going forward.

B. Interests of Justice.

Article 53 of the Rome Statute provides that, in her decisions whether to commence an investigation, the Prosecutor shall consider whether there are "substantial reasons to believe that an investigation would not serve the interests of justice."[28] As with gravity, there was no real agreement at Rome on what the phrase "interests of justice" was intended to encompass.[29] Might the interests of a state and its people in promoting peace and reconciliation outweigh its interests -- and those of the international community -- in a more standard brand of criminal accountability? Should the ICC Prosecutor and the Court defer to a decision within a society to pursue such alternatives and, if so, under what conditions?

Indeed, in the years after Rome, there was a healthy literature regarding how the phrase "interests of justice" should be interpreted. The argument was sometimes framed around the then-recent experience of South Africa following the dark days of apartheid, and the use of truth and reconciliation commissions as an alternative to traditional notions of criminal accountability as a way to come to terms with the past.[30] Thus, some wanted to exclude situations like those faced in South Africa in which there might be a need for political forbearance

28. *Rome Statute*, *supra* note 11, art. 53(1)(c) and art. 53(2)(c).

29. *See* MICHAEL P. SCHARF, *Justice Versus Peace*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 179 (Sarah B. Sewall & Carl Kaysen, eds., 2000) [hereinafter SCHARF].

30. *See* Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 HARV. INT'L L. J. 1, 19 (2019).

in the interests of securing peace and reconciliation. Others strongly opposed the codification of any such forbearance on the grounds that it would undermine the essential commitment that they believed states parties should make to the principle that atrocity crimes must not go unpunished in becoming parties to the Rome Statute, and because it was inconsistent with their view that it was neither appropriate nor effective to set aside criminal justice in favor of "peace."[31]

In the end, it was felt that "agreement would likely have been impossible, given the sharply clashing views on the matter."[32] The solution – credited to the chairman of the Rome Conference, Philippe Kirsch – was found in the deliberate ambiguity of the phrase "interests of justice," with the parties essentially leaving it to the Prosecutor and the Court to figure it out for themselves.[33] This remained a lively topic of debate when the Office of the Prosecutor released a strategy paper in 2007 that sharply curtailed -- and that might in fact be viewed as eliminating -- the prospect for the Prosecutor to defer to decisions to pursue paths that did not entail sufficient criminal accountability of a traditional nature.[34] It was not denied that the Court's activities might complicate ongoing peace efforts, but the argument was that this was an issue for other institutions to consider and address.[35] Thus, in a situation that posed unacceptable risks for peace and reconciliation efforts, the United Nations Security Council might step in under Article 16 of the Rome Statute by adopting a resolution under chapter VII of the United Nations Charter to block an investigation or prosecution, but these type of considerations were not properly part of the calculations for Court actors in deciding whether to pursue investigations or prosecutions.[36]

As with gravity, the issue presents dilemmas. On the one hand, making the Prosecutor and the Court responsible for decisions about ongoing peace negotiations would cast them in political roles for which they are ill-suited. What would be the source of legitimacy, skeptics

31. *See id.* at 16, n.84.

32. Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 483 (2003).

33. *Id. See also* SCHARF, *supra* note 29, at 186 ("According to the chairman of the Rome Diplomatic Conference, Philippe Kirsch, the adopted provisions reflect 'creative ambiguity' that potentially could allow the ICC Prosecutor and Judges to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the Court.").

34. *Policy Paper on the Interests of Justice*, INT'L CRIM. CT.: THE OFF. OF THE PROSECUTOR (Sept. 2, 2007), https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf [https://perma.cc/H5WX-4XKB].

35. *Id.*

36. *Id.*

would surely ask, for Court actors playing such a role? On the other hand, the resulting inability of the Court to filter cases better left to alternative outcomes risks contributing further to the "over-bite" that is in tension with the need for the Court to marshal its energy and resources on a narrower universe of cases and situations.

C. Complementarity.

Article 17 of the Rome Statute also addresses the concept of complementarity. The fundamental idea is that a case shall not be admissible where:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3 . . . .[37]

The wording of these provisions raises important questions of many different types. One illustrative question warranting mention here concerns treatment of cases where there is no investigation or prosecution. For example, should the fact that national authorities have not pursued a case mean automatically that the Court can exercise jurisdiction (as the Prosecutor has indicated is her view),[38] or should it also be necessary to demonstrate that the reason they failed to pursue the case was to shield the accused?

In practice, there may be any number of reasons that a state's investigators or prosecutors might choose not to pursue particular cases, and those reasons are not all equally worthy of the Court's intervention. For example, the desire of a domestic prosecutor not to pursue a case may result from tactical choices by the state's Prosecutor, who must make choices about how to marshal her resources and energy (just as the ICC's Prosecutor must make such choices); a well-founded

37. *Rome Statute*, *supra* note 11, at art. 17(1)(a)–(c).

38. *See Policy Paper on Preliminary Examinations*, INT'L CRIM. CT.: THE OFF. OF THE PROSECUTOR ¶ 47 (Nov. 2013), https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf [https://perma.cc/YA8S-UL5E] ("The absence of national proceedings, *i.e.* domestic inactivity, is sufficient to make the case admissible.") (citing Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-1497, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009), https://www.legal-tools.org/doc/ba82b5/pdf/ [perma.cc/C2RN-Y3KU]).

conclusion that the chances of securing a conviction are too remote, even where there is a view that the person may well have committed the offense; a general provision of law that has been put in place for reasons having nothing to do with any desire to shield those who are responsible for the particular crimes in question (for example, a rule blocking the use of hearsay evidence that would be necessary to secure a conviction); or a decision to prosecute those responsible for seemingly lesser but more readily provable crimes (like when the U.S. federal government prosecution of Al Capone for tax evasion).

The decision not to prosecute may in fact be subject to, and even deserve, criticism. Perhaps the domestic prosecutor is making the wrong tactical choice, or the Prosecutor should be willing to devote greater resources and energy to the case, or the rule that is blocking the Prosecutor from moving forward should be made inapplicable to the type of crimes in question, or the Prosecutor has given insufficient weight to the value of pursuing charges of Rome Statute as opposed to other, more seemingly "mundane" crimes. But the question whether the ICC should assert itself as the court of last resort is different than the question whether the prosecutor deserves criticism. In particular, in the absence of some demonstration that the domestic prosecutor in an otherwise well-functioning judicial system is "shielding" persons responsible for the crimes in question, the conclusion that the Court should intervene becomes less than obvious, and it sits in evident tension with the view that the underlying premise of the ICC's complementarity regime was to ensure that the Court not interfere "except in the most obvious cases."[39] It may well be that the domestic Prosecutor's decision to, for example, pursue "mundane" rather than Rome Statute charges is part of a broader effort to shield those accused of the crimes. What is not obvious, however, is that this should be presumed, and that there should be no requirement to demonstrate the existence of such "shielding." Indeed, the ICC Prosecutor may herself make decisions of the type described above that result in not pursuing seemingly worthy cases, and such a failure to act can hardly be taken as a signal of bad-faith that warrants intervention by a higher-level court.[40]

39. John Holmes, *Complementarity: National Courts versus the ICC*, *in* 3 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 675 (Oxford University Press, 2002).

40. There are of course related questions of burden of proof. The case law has indicated that it is the state that bears the burden of establishing that the ICC should defer to the decisions of its prosecutors. Such a rule reflects that the state will be better-positioned with evidence and information about the steps that it has taken, and that it is fair to draw inferences against states that elect not to provide evidence of their good faith to the ICC Prosecutor. But such a rule can easily be in tension with a presumption of deferral to the sovereign decisions of states. The burden of proof issue may be most relevant when it comes to assessing the

But the question whether there needs to be a demonstration of shielding with respect to cases that have not been pursued is a two-edged sword. The need to demonstrate shielding would at once help ensure that the Court more narrowly focuses on the most egregious cases – cases in which the role of a court of last resort would appear most essential – while at the same time complicating the ability of the Prosecutor and the Court to proceed, rendering successful prosecutions dependent on demonstration of an element that may often be difficult to demonstrate. Thus, once again, it is simpler to recognize the problem than to fix it.

3. REFLECTIONS

As described above, much of the public debate about the need to reform the Court appears focused on addressing the kind of problems described in the first section of this reflection – the problems that I characterize above as having marred the headlines. These are widely conceived of as problems of execution, with the ICC being an institution with a fundamentally sound mandate but that is being let down by sub-standard performance of Court actors.

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behavior of non-state parties. States that have become parties to the Rome Statute have chosen to undertake an obligation to provide relevant information to the Prosecutor and the Court. In the course of this undertaking, they have presumably taken whatever steps are necessary under their domestic law to provide relevant information. Non-state parties are situated differently: it is not as self-evidently fair to draw adverse inferences where they in fact have no obligations to supply information, and non-parties may well face impediments under domestic law to sharing information about their criminal investigations and prosecutions based on domestic law restrictions that have nothing to do with the ICC.

To its credit, the Office of the Prosecutor has developed a robust list of considerations that would be relevant to a determination whether shielding has occurred. For example, in her words--

"Intent to shield a person from criminal responsibility may be assessed in light of such indicators as, manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel; irreconcilability of findings with evidence tendered; manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused; mistaken judicial findings arising from mistaken identification, flawed forensic examination, failures of disclosure, fabricated evidence, manipulated or coerced statements, and/or undue admission or non-admission of evidence; lack of resources allocated to the proceedings at hand as compared with overall capacities; and refusal to provide information or to cooperate with the ICC."

Policy Paper on the Interests of Justice, supra note 34.

But not all the problems are of a nature that can be addressed on a technical level. In this regard, the full transcript of Judge de Brichambaut's remarks, noted above, includes insightful comments about the origin and nature of some of the problems that the ICC now faces.[41] He recalls the very specific negotiating dynamic that existed at Rome – what he calls "the wave of convergence around a certain model of values" and the post-Cold War interest in multilateralism that had marked the 1990's – and concludes, "It is quite improbable . . . that something like the Rome Statute could be adopted in the international context nowadays."[42]

The implications of this observation are significant. At its heart, the International Criminal Court is an international organization. Like any other international organization, its constituent document – the Rome Statute – was at its inception a work-in-progress. Like constituent documents of other international organizations, it laid out basic principles designed to address core issues, knowing that experience and practice would inevitably bring to the surface additional issues that would need to be worked out. This was perhaps all the more so in the case of the Rome Statute because so much of the work that it would be called upon to perform was *terra nova*. Indeed, even in the immediate aftermath of Rome, recognition by the signatories of the need to fill in the gaps led to a whole series of negotiations and processes, including talks on such critical matters as the Rules of Procedure, the Elements of Crime, the Agreement on Privileges and Immunities, and the crime of aggression. The work on such issues was impressive, and much of it was of a technical nature. But some of the work was not. Nevertheless, fortunately, there remained enough commonality of interest among the range of states involved that solutions could be devised even on issues having significant political components.

The ICC is, by its nature, an institution that embodies lofty aspirations. It is directed, to transplant the words of Justice Jackson regarding Nuremberg and Nazi crimes, against wrongs "so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."[43] Yet experience and practice inevitably brings fissures to the surface. The fact that certain key issues were deliberately resolved via "creative ambiguity" made it inevitable that cleavages would emerge once real world cases arose.

What is the biggest set of challenges facing the ICC today? It may be that the most important issues confronting it are not simply questions of a technical nature, but rather are first-order political questions that were either left open or insufficiently recognized in what

41. *See* de Brichambaut, *supra* note 15.

42. *Id.*

43. Robert Jackson, Opening Address, *in* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, 99 (1947).

now serves as the constituent document of the ICC. The biggest challenge facing the Court would appear to be the need to find sustainably acceptable approaches to essentially political questions that eluded states even in the relatively euphoric period in which the original Rome Statute was concluded. The need to do so now, in a period when political common ground is maddeningly elusive, and in which there is a pervasive lack of confidence in the Court, means that it is far less likely for states simply to defer to responses that Court actors develop to meet these challenges.