

International Criminal Court

Achievements and challenges 20 years after the adoption of the Rome Statute

SUMMARY

Adopted on 17 July 1998, the Statute of Rome is the founding treaty of the International Criminal Court, which was set up to deal with the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. Its establishment has inspired much hope that the most horrendous crimes will no longer go unpunished and that its deterrent effect will significantly reduce their occurrence. The EU has been a strong supporter of the ICC system from the outset.

Since it began operating in 2003, the Court has conducted investigations and trials in connection with some of the world's most brutal conflicts and has not shied away from investigating individuals at the highest level of power, such as presidents in office. It has developed extensive tools to protect its most important asset – the witnesses, who in many cases have faced intimidation, violence and even death. However the Court has also encountered difficulties and inherent limitations. The atrocities committed by groups such as ISIL/Da'esh have been out of reach for the Court's jurisdiction, which is limited to states parties' territories and their nationals, unless the Security Council specifically asks it to investigate. The refusal by some major powers such as the US, China and Russia to join, the lack of cooperation by some states parties such as South Africa, as well as recent defections or the threat thereof have also put strains on its global authority.

The Court's effectiveness cannot be judged solely on the convictions it passes. The ICC is a court of last resort, and its impact on national judicial systems has also been significant. The Rome Statute itself has evolved. At the end of last year, the jurisdiction of the Court was extended to cover the crime of international aggression and new war crimes taking into account the latest technological developments.

This briefing updates a previous [briefing](#) on the International Criminal Court, from May 2017.



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Background

On [17 July 1998](#), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute, opening the way for signature by all UN States. The Statute was signed in the following years by [139 states](#), but as yet has only been ratified by 124. Of these, two countries have notified their decision to withdraw from the Rome Statute, with one decision becoming effective in 2017. At the moment when the Rome Statute was signed, there was much hope that the International Criminal Court (ICC) to be created under it would become the core of a universal criminal justice system to which gradually all states would commit. The crimes within its remit are to be universally proscribed and punished and its decisions are binding on its states parties and the individuals concerned. Many countries in the world – among them some of the most important, including China, Russia and the USA – are still not party to the Court, indicating that the Court still has some way to go to reach truly universal coverage. While it had initially signed the Rome Statute, the USA did not ratify it and subsequently 'unsigned' it under the President George W. Bush administration.

The USA has signed over 100 '[bilateral immunity agreements](#)' with third countries to ensure that its citizens cannot be extradited to the Court by these states. This is legally possible under the Rome Statute. Article 98 of the Rome Statute grants an exemption concerning the surrender of indicted persons to the jurisdiction of the Court to those states that have bilateral agreements prohibiting this. In response, the European Union (EU) drafted [guiding principles](#) on bilateral non-surrender agreements for its Member States in order to preserve the integrity of the Rome Statute. According to these, entering into US agreements as drafted at the time would have been inconsistent with the ICC Statute. Non-party states nevertheless have the possibility to cooperate with the Court. The USA [made use](#) of this under the Obama administration, delivering one suspect to the Court.

Russia, which also initially signed the Rome Statute, [announced](#) at the end of 2016 that it was withdrawing its signature.

Timeline of events

Date	Event
17 July 1998	The Rome Statute is adopted by the UN Diplomatic Conference and is opened for signature
17 July 1998 - 31 December 2000	138 states sign the Rome Statute
2 February 1999 - 3 March 2016	124 countries ratify the Rome Statute
6 May 2002	USA ' unsigned ' the Rome Statute
1 July 2002	Rome Statute enters into force in accordance with Article 126 – after the 60th country ratifies
11 March 2003	Inauguration of the Court – First meeting of the judges of the International Criminal Court in The Hague
10 November 2016	Gambia notified its decision to withdraw from the Rome Statute
16 November 2016	Russia withdraws its signature from the Rome Statute (the country had never ratified it)
10 February 2017	Following the election of a new president, Gambia notified the annulment of its former decision with immediate effect

27 October 2017	Burundi effectively withdraws from the Rome Statute – the first country to ever do so
17 March 2018	Philippines notifies the ICC of its intention to withdraw from the Rome Statute

Rome Statute

The [Rome Statute](#) of the International Criminal Court entered into force, four years after its adoption, on 1 July 2002, after ratification by the required number of states (60), leading to the formal establishment of the ICC. It is the first permanent international criminal tribunal. Today, [123 countries](#) are states parties to the Rome Statute. The ICC is based in The Hague.

Precursor jurisdictions

The ICC was preceded by ad hoc tribunals that addressed war crimes and other related crimes. Such tribunals were temporary and their investigations were limited in space and time. Questions surrounded their legitimacy, since they were created through ad hoc decisions taken either by winners in war or by the UN Security Council. After the Nuremberg and Tokyo tribunals were established in the aftermath of the Second World War to prosecute high-ranking officials for war crimes and other atrocities, several decades passed without any similar institution being set up. In the 1990s, two international ad hoc tribunals were established to deal with atrocities committed during civil wars: the [International Criminal Tribunal for the former Yugoslavia](#) (ICTY), (1993), and the [International Criminal Tribunal for Rwanda](#) (ICTR), (1994). They were the first to be established by decisions of the United Nations (UN) Security Council on the basis of the UN Charter. Other [tribunals](#) having a similar jurisdiction have been hybrid in nature, being established jointly by national governments and the United Nations: the Special Panels and Serious Crimes Unit in East-Timor (2000), the [Special Court for Sierra Leone](#) and [the Extraordinary Chambers in the Courts of Cambodia](#), and Regulation 64 Panels in the Courts of Kosovo. The effectiveness of these hybrid courts has varied: for example, two of them (the East Timor Tribunal and the Kosovo Tribunal) have been severely affected by a lack of capacity and resources. The former was also prevented from fulfilling its tasks by lack of cooperation from Indonesia (most indicted persons were Indonesian nationals).

Types of crime under ICC jurisdiction

Unlike previous international tribunals, the ICC is a permanent tribunal and its jurisdiction, although not universal, is wider reaching in space and time. The ICC exercises [jurisdiction](#) over four types of crime: genocide, crimes against humanity, war crimes and, more recently, the crime of international aggression. The limitation to these crimes was justified by the fact that these have been enshrined in international law for a long time – via the Geneva Conventions and the UN Convention on the Prevention and Punishment of Genocide, as well as the UN Charter – and are therefore universally recognised as crimes of a very serious nature.

The Rome Statute takes over the definition of **genocide** from the [UN Genocide Convention](#), which includes a range of crimes committed with the intention to destroy 'in whole or in part, a national, ethnical, racial or religious group'.

The **crimes against humanity** class covers the most wide-ranging list of crimes, including for the first time sexual and gender-based crimes committed against a civil population. The respective acts have to be committed as 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.

As far as **war crimes** are concerned, the jurisdiction of the Court distinguishes four categories: grave breaches of the Geneva Conventions; other serious violations of the laws and customs applicable in international conflicts; serious violations of common Article 3 of the Geneva Conventions in conflicts not of an international character; and serious violations of the laws and customs applicable in armed

conflicts not of an international character. Situations of internal disturbance and tension, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, are not covered by the relevant articles concerning war crimes. A [resolution](#) adopted in December 2017 added three war crimes to the jurisdiction of the Court: employing microbial, biological or toxin weapons; employing weapons that injure by fragments undetectable by X-rays; and employing laser weapons. State parties are free to accept these amendments wholly or in part.

The **crime of aggression** was part of the original Rome Statute, but the Court could not exercise jurisdiction until a provision was adopted defining the crime and setting out the conditions under which it could do so. The [2010 Kampala review conference](#) adopted amendments to the Statute, granting the Court jurisdiction over the crime of aggression, subject to a decision to be taken after 1 January 2017 by a majority of states parties. The Assembly of States Parties to the Rome Statute of the International Criminal Court, at its sixteenth session, in December 2017, [decided](#) by consensus that the jurisdiction of the Court over the [crime of aggression](#) would be activated as of 17 July 2018. Current Article 8bis defines the Crime of Aggression as an 'act which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. There is however some [criticism](#) of the largely voluntary nature of the new legal provisions, as the ICC states parties are free to opt in (by ratifying the amendments to the Rome Statute) and, once they have done so, they can make a declaration to opt out. Moreover the jurisdiction of the court in this case has been [very narrowly defined](#).

There are also [demands](#) to include the crime of international terrorism under the jurisdiction of the Court.

Applicability of the Court's jurisdiction

Structure of the Court

The main ICC bodies are its three chambers (the Pre-Trial, Trial and Appeals Divisions) and the Office of the Prosecutor. The Assembly of States Parties is the management, oversight and legislative body and is composed of representatives of the states that have ratified the Rome Statute. The 18 judges are elected by the Assembly of States Parties on the basis of their qualifications, impartiality and integrity, and serve nine-year, non-renewable terms. They have to be citizens of states parties and are nominated for election by their states. The Office of the Prosecutor is responsible for examining situations under the jurisdiction of the Court and carrying out investigations and prosecutions against the individuals responsible. The current Prosecutor is Fatou Bensouda from Gambia. The Prosecutor and Deputy Prosecutor are elected by the assembly for a non-renewable mandate of nine years.

The Court can conduct trials only on crimes committed on the territory or by nationals of states parties, unless the UN Security Council empowers it to investigate situations beyond these criteria. The competence of the Court is also limited by the principle of **complementarity**: the ICC is competent to conduct investigations only when states are unable or unwilling to prosecute the crimes themselves. There are three ways an investigation can be launched. **Firstly**, states parties to the Rome Statute can refer the situation to the Court themselves, if they consider that they do not have the capacity to conduct appropriate investigations. **Secondly**, after having completed a preliminary investigation, the ICC prosecutor can launch an investigation into crimes committed on the territory or by nationals of countries that have ratified the Statute, providing the pre-trial chamber has given its consent. **The third way** is referral of a situation in a state that is not party to the ICC by the UN Security Council. A very important aspect of the Court is that its jurisdiction applies to all. Heads of state and government are not exempt from the jurisdiction of the Court, according to Article 27. Immunities attached to the official capacity of a person, whether under national or international law, do not bar the Court from exercising its jurisdiction over that person.

Until now, of the 11 [situations under investigation](#), five have been investigated at the request of states parties (in the Democratic Republic of the Congo (DRC), Uganda, Central African Republic (CAR) twice, and Mali); two at the request of the UN Security Council (in Darfur – Sudan and Libya); and four at the initiative of the Prosecutor (*proprio motu*) with the assent of the pre-trial chamber (in Burundi, Kenya, Côte d'Ivoire and Georgia).

There have thus far been [26 cases](#) brought before the Court, some of them involving more than one suspect. The Court has issued 32 arrest warrants, leading to the detention of nine persons, while 15 other persons remain at large; another three have died and consequently the charges against them have been dropped. The ICC has issued verdicts in six cases, some involving several persons: eight individuals have been found guilty and two have been acquitted.

Main challenges faced by the Court

The main objective of the Court, according to the preamble to the Rome Statute, is to end impunity for the perpetrators of the 'most serious crimes of concern to the international community as a whole'. This is tightly interlinked with the objective of preventing such crimes, which is mentioned in the preamble as well. The court has established a reputation as a strong institution. It has conducted investigations and trials in the most difficult situations, has indicted two heads of state and has made efforts to improve its working methods. However, it has also faced multiple criticisms and attacks from various quarters. Everything the Court has done has withstood the intense scrutiny of its supporters and opponents alike. A [coalition](#) of 2 500 NGOs committed to the cause of international justice has monitored the activity of the Court continuously.

Limitations of the Court's jurisdiction

The ICC has not been able to hold accountable those responsible for the horrific crimes committed in the civil wars in Syria and Iraq because neither of these two countries is party to the Rome Statute. Furthermore, the UN Security Council has so far [failed](#) to refer these situations to the Court. In the case of Syria this is because of a [veto](#) by China and Russia, while with respect to crimes committed by parties to the civil conflict in Iraq the UN Security Council [decided](#) to sidestep the ICC, dealing a [blow to its authority](#). On the other hand, the Prosecutor is conducting a [preliminary investigation](#) into possible war crimes committed by UK military personnel in Iraq. This is allowed by the Rome Statute, the UK being a state party. ISIL/Da'esh perpetrators are however out of the reach of the Court. The Court could only prosecute ISIL/Da'esh leaders guilty of war crimes if they were nationals of states parties. However, according to [evidence](#) gathered by the prosecutor, those in the highest chain of command, who would fall under the jurisdiction of the Court¹ given the gravity criterion, are not citizens of states parties. This paradoxical situation reflects the asymmetric treatment of citizens of different states that is made possible by the unequal ratification of the Rome statute. The [situation](#) is similar in Yemen where crimes against humanity and war crimes may have been committed, but neither the country itself nor the states participating in the regional coalition fighting the Houthi rebels are parties to the Rome Statute and so the ICC cannot investigate without UN Security Council authorisation.

Impartial selection of cases for investigation – a complex task

The Court is supposed to embody the principle of global and impartial justice for crimes under its jurisdiction, but as a court of last resort it can only focus on a limited number of cases of the utmost gravity. One of the most serious criticisms expressed against the Court refers to its alleged political bias. Such accusations of political bias often point to the Prosecutor's selectivity. The Office of the Prosecutor is an independent organ of the Court and is supposed to select situations for investigation independently and impartially. According to Article 15 of the Rome Statute, the Court can receive information, called 'communications', from individuals and organisations regarding crimes under its jurisdiction. The Prosecutor² must review 'the seriousness of the information received'. Most of these communications are usually dismissed as being manifestly outside the

jurisdiction of the Court. The Prosecutor needs the backing of the pre-trial chamber prior to deciding that a situation requires an investigation. The role of the Prosecutor is thus crucial, but not unchecked, in determining whether a situation is admissible to the Court.

In order to determine the admissibility of an investigation, the Office of the Prosecutor must do a series of checks, namely to [determine](#) whether there is **sufficient evidence** of crimes of **sufficient gravity** under the Court's jurisdiction, whether there are **proceedings by national courts** respecting due justice principles (the principle of complementarity), and whether opening an investigation would serve the **interests of justice and of the victims**. The ICC is an international judicial authority able to interpret its own statute. According to Article 17(1)(d) of the Rome Statute, a case is inadmissible if it 'is not of sufficient gravity to justify further action by the Court'.³ According to the jurisprudence of the Court, the Prosecutor does not have any discretion when deciding which situations are sufficiently grave, being instead constrained by 'exact legal requirements'.⁴ The Prosecutor's only discretion is in determining whether an investigation is not in the 'interests of justice'.

Concerning the gravity aspect, paragraph 2 of [Regulation 29](#) of the Office of the Prosecutor, adopted in 2009, provides guidelines for assessing the gravity of a situation, namely: 'In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact'. The Prosecutor should focus its investigations on the most serious crimes within a given situation that are of concern to the international community as a whole.

The interests of justice, on the other hand, are defined as including 'the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime' (Article 53(2)(c) of the Rome Statute). The interests of victims include the victims' interest in seeing justice done, but also other essential interests such as their protection.

When assessing whether the complementarity principle is fulfilled, the Prosecutor or Court must assess whether due process principles have been upheld by national courts. More specifically, to fulfil the principle, at the national level, persons concerned should not be shielded from criminal responsibility; there should have been no unjustified delay; and the proceedings should have been conducted independently and impartially.

While the above-mentioned criteria are used to select situations that deserve an investigation by the ICC, sometimes prioritisation among these is needed owing to the limited resources of the Court. Situations that otherwise qualify but are not considered a priority can be investigated at a later moment. The September 2016 [policy paper on case selection and prioritisation](#) published by the Prosecutor's Office mentions certain strategic case criteria such as 'the impact of investigations and prosecutions on the victims of the crimes and affected communities', 'the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes', as well as 'operational criteria' to be used for deciding whether to prioritise a situation for investigation or not, such as 'international cooperation and juridical assistance to support the Office's activities', 'the Office's capacity to effectively conduct the necessary investigations within a reasonable period of time', and 'the potential to secure the appearance of suspects before the Court'.

Moreover, the decision of the prosecutor is subject to judicial oversight: the pre-trial chamber has to approve the launching of an investigation. On the other hand, if the Prosecutor considers a referral by a state or the UN Security Council to be inadmissible, the requesting state or the Security Council can ask the pre-trial chamber to review this decision. Sometimes a divergence between the Prosecutor and chamber can be persistent, such as in the [investigation into the vessels of Comoros](#). This case refers to the Israeli raid on 31 May 2010 on the humanitarian aid flotilla bound for the Gaza Strip. The Prosecutor received a communication asking for an investigation into the alleged crimes committed within the Court's jurisdiction. While the Prosecutor decided the investigation was inadmissible, the pre-trial chamber asked her to reconsider her decision, a position upheld by the appeals chamber. However, in the end the Prosecutor remained of the view that the information

available did not provide a reasonable basis to proceed with an investigation and the case was closed.

All these elements that the Court and its Prosecutor must take into account in order to establish the admissibility of an investigation create an important margin of discretion that has been used by critics to underpin their conviction that the Court has acted in a biased manner. Various accusations of political bias⁵ have been made concerning decisions taken by prosecutor and endorsed by the Court for launching investigations:

- [Links](#) between the former prosecutor and the US administration raised doubts as to his independence.
- Several cases have allegedly been selectively picked up by the Court at the instigation of powerful member states. Although most African cases have been referred by national governments, there was sometimes said to have been external pressure on them.
- The investigations have almost always focused on one side of a conflict: rebel militias ([Uganda](#), CAR, DRC) or government forces (Sudan, Côte d'Ivoire); whereas according to critics, there was sufficient evidence that both sides had been involved in crimes falling under the jurisdiction of the Court. Where the investigations have covered both sides, as in the case concerning Kenya for example, exactly three persons from each side were investigated, raising suspicions that the Court tried on purpose to preserve the balance for political reasons.⁶
- The persons put under investigation were generally not among those in the highest command position. This accusation concerns investigations into crimes committed in the DRC in particular. The accused have been militia chiefs, while the ultimate responsibility may have resided with those in power in the country and neighbouring states. In defence of the Court, it can be mentioned that it did begin investigations against three heads of state (Sudan's president, Kenya's president and Libya's president).
- Politically more influential states are believed to have been able to thwart investigations against them.
- The Court's reliance on funding from the EU and other Western donors has been [interpreted](#) as exposing its vulnerability to political pressure from them, although no evidence in this sense has been produced.⁷ EU Member States' funding for the ICC remains crucial for its functioning and existence.

In general, there is not much evidence to substantiate these criticisms of bias. It all remains a matter of speculation and comes down in the end to putting together the desired puzzle from disparate pieces of information. The outcome of more systematic research⁸ is that referrals by states parties and the UN Security Council are more likely to result in 'one-sided prosecutions that reflect the preferences of those who refer the situation, and result in dangerous impunity gaps' while investigations initiated by the ICC prosecutor are more likely to result in impartial prosecutions.

By contrast, some voices defend the politicisation of the Court as something that is both inevitable and desirable. One former international prosecutor⁹ points out that an international criminal court such as the ICC should inevitably take into account the political ramifications and consequences of its prosecutorial decisions; otherwise it risks undermining itself.

State withdrawals

A state party can withdraw one year after it makes an announcement to the Court in this sense. Three African countries (Burundi, Gambia and South Africa) and the Philippines have recently announced their intention to withdraw from the Court, with one decision having already become effective. There have been [allegations](#) that the Court has targeted the African continent specifically, as 10 out of the 11 situations investigated have been in Africa. Such allegations do not take however into account the fact that in most African cases the Court has acted at the request of African states

themselves or that of the Security Council. Only in three cases, has the prosecutor has acted on his or her own initiative.

Burundi became the first country to withdraw from the Court on 27 October 2017, one year after it notified its withdrawal decision. However, according to [the ICC Prosecutor](#), the preliminary investigation launched by the prosecutor in April 2016 into possible crimes against humanity committed in the country in the context of political instability will continue. Even after the withdrawal, Burundi is legally obliged to cooperate with the ICC in its investigation on the period when it was an ICC member. The ICC jurisdiction retroactively covers the period when a country was a member.¹⁰

Gambia had formally announced its [decision](#) to withdraw from the Court in October 2016, under former president Jammeh, but the new president has cancelled this declaration. The decision to withdraw was based on the claim that the Court was pursuing 'the [persecution](#) of Africans, and especially their leaders'. Such accusations were all the more surprising since the Court's Prosecutor is a former justice minister from Gambia.

South Africa's government also announced its intention to leave the court in 2016, but had to temporarily backtrack after its High Court declared this decision 'unconstitutional and invalid' on the grounds that it required the approval of the Parliament. The country appears to be continuing to move towards exit, despite [calls](#) from former UN General Secretary Kofi Annan for it to remain an ICC member, and the government recently introduced a [bill](#) to Parliament to this end. South Africa was one of the staunchest supporters of the Court at its beginning. The crisis began after South Africa's government did not abide by the ICC's request that it arrest Sudan's President al Bashir, who had been indicted by the ICC but was taking part in an African Union summit in South Africa. The official [reason](#) invoked for the withdrawal is that ICC membership is incompatible with South Africa's role in the peaceful resolution of conflicts on the African continent and with its obligations under other international treaties, which requires immunity to be provided for other states' officials. In June 2017, the ICC determined that South Africa had failed to comply with its international obligations when it refused to arrest al-Bashir. The ICC stopped short however of referring South Africa to the UN Security Council or its States Assembly, leading some [commentators](#) to consider this decision a pragmatically motivated approach.

Other potential [exiters](#) include Namibia, Kenya and Uganda: Namibia's cabinet has voted to withdraw; Kenya's parliament has voted twice to withdraw; and Ugandan ministers have suggested that the country could exit.

By contrast, a significant number of African states as well as civil society organisations from the continent have expressed [their strong support](#) for the Court, among them: Burkina Faso, DRC, Côte d'Ivoire, Ghana, Nigeria, Tanzania and Tunisia. Some countries such as Kenya, Lesotho and South Africa, have expressed a wish for a reform of the Court.

The African Union has sided in the past with those rejecting the Court. At its summit in January 2017, it adopted a recommendation calling for a collective withdrawal of African nations from the ICC. This recommendation is not binding and several African countries have opposed it. In 2009, after the ICC issued the arrest warrant against Sudan's President Al Bashir, the African Union forbade its member states from cooperating with the Court in respect of this case and threatened those that did cooperate with sanctions.

The strategy favoured by the African Union and a number of African states is to set up their own regional penal institution to try crimes of ICC jurisdiction. To this end, the existing African Court on Human and Peoples' Rights, which has interim status, will be transformed into the African Court of Justice and Human Rights, dealing also with the trial of individuals who have committed transnational crimes (genocide, crimes against humanity, corruption, money laundering, human and drug trafficking and piracy). Heads of state and government and other senior officials will be excluded from its jurisdiction as long as they are in power. Amendments extending the jurisdiction of the future Court to crimes within ICC remit were adopted in 2014 by the African Union, but [no](#)

[country](#) has yet ratified the corresponding Protocol, while only 11 have signed so far. 15 ratifications are needed for entry into force.

Outside Africa, on 16 March 2018, the Philippines was the first country to notify the ICC of its [intention](#) to withdraw. The notification came after it became known that the ICC prosecutor office was conducting a preliminary examination into accusations that the president and top officials had committed crimes against humanity during a deadly war on drugs. No other non-African country is considering a similar decision at the time being.

Protecting witnesses

Witness interference has represented a major problem for the Court in many of its trials with consequences for both the perception of political bias and the Court's effectiveness. [Witness interference](#) is 'the act of perverting, or attempting to pervert, the course of justice by altering the content of a witness's (potential) testimony and/or preventing them from testifying'. It severely constrains the fair dispensation of justice.

Several trials have been marred by instances of witness interference. In the first trial (the *Lubanga* case), the testimonies of all former child soldiers but one invited by the prosecution to testify against the indicted proved to be unreliable (according to the [trial judgment](#) of the trial chamber itself), having been influenced or manipulated. ICC judges¹¹ have admitted that witness interference may have been committed in almost all cases tried. The termination of the case against Kenya's president and vice-president owing to insufficient evidence was due in part to witness interference, according to some sources.¹² Instances of witness interference include: murder at least in one case, intimidation, bribery, coaching,¹³ and disclosure and publicising of the identities of protected witnesses. Moreover, witness interference has been well coordinated and systematic, involving broad networks of perpetrators. In response to this, the Court has taken measures to protect witnesses, by hiding their identity during proceedings, by relocating them to a different country and also by prosecuting those responsible for witness interference in accordance with Article 30 of the Rome Statute. The main responsibility however falls upon states to investigate and prosecute witness interference.

Securing cooperation from member states

As for any multilateral international organisation, cooperation from member states is crucial. Since the ICC does not have its own police force, it relies wholly on member states to arrest suspects, and it needs their cooperation to conduct investigations. Many of the Court's investigations refer to places with very precarious security situations, impacting negatively on the work of the Prosecutor.

The non-implementation of arrest pending against Sudan's president in Chad, Kenya, South Africa (in the latter country, the national High Court issued a judgment that he should have been arrested) has showcased the limits of state cooperation and the problems it poses for the Court to fulfil its mandate. However, this type of situation may represent the exception more than the rule. African states, which have received the highest number of formal requests for cooperation by the Court, have in the majority of cases, complied. According to [research](#), in a two-sided conflict, victors are more likely to cooperate with the ICC if they can ensure that the Court tries their opponents first. When pressure mounts on those in power, they tend to reduce their cooperation (e.g. Côte d'Ivoire).

As the Office of the Prosecutor has been conducting preliminary investigations in [Afghanistan](#) and [Palestine](#), regarding possible crimes under the ICC's remit committed by the [US](#) and [Israeli](#) militaries respectively, some analysts fear the ICC is on a collision course with these countries, which have so far refused to join it and reject any international jurisdiction over their militaries. In the case of Afghanistan, the prosecutor has taken the initiative to ask the Pre-trial chamber for authorisation to start an investigation, while in Palestine, the Palestinian government has asked the ICC to investigate. According to certain [commentators](#), prosecution of cases in non-cooperating powerful states, which are not party to the Rome Statute, has low chances of success and the Court has the

means to avoid dealing with such cases. Russia may be drawn into possible investigations over [Ukraine](#), which is not party to the Rome Statute, but whose government has lodged declarations accepting the ICC's jurisdiction for clearly defined periods of time and events.

The Court's effectiveness

The number of convictions made by the Court – [three final](#) to date – is very low given the financial resources it has used (almost [€1.5 billion](#) from 2004 to 2018). The current ICC budget for 2018 is [€147.4 million](#), roughly 2% more than in the previous year. The ICC's expenses are however comparable to those of other similar tribunals, such as the ICTY or the ICTR, both of which had a budget of over [€90 million](#) per year. The ICC budget has risen, from €53 million in 2004 to €140 million in 2016, because of an increased workload. As a result, [11 states](#), including some EU Member States (Canada, Colombia, Ecuador, France, Germany, Italy, Japan, Poland, Spain, the UK and Venezuela) have proposed restricting the Court's funding. However, this may not be [the right course](#) of action since the limited resources available to the Court are considered one of the [main obstacles](#) preventing it from enforcing the Rome Statute on a larger scale.

The [recent acquittal](#) of J.P. Bemba, former Congolese vice-president tried for his responsibility for war crimes and crimes against humanity committed by his troops in the Central African Republic in 2002 and 2003, has been a major [disappointment](#) to victims and ICC supporters in general. The final judgement of the Appeal Chamber confirmed that Bemba's troops had committed grave crimes but found that not enough evidence was available to confirm his 'command responsibility'. [Commentators](#) have raised questions about the way the prosecutor presented the case, about the review standards of the Appeals chambers and the long time needed by the Court to deal with the case – 10 years.

The Court's effectiveness should not, however, be assessed solely on the basis of its number of convictions. The Office of the Prosecutor receives a high number of 'communications', of which only a small number are declared admissible for a preliminary investigation. The investigations conducted often require extensive efforts, since they are carried out under the most difficult conditions.

More importantly, the ICC is supposed to intervene only when national jurisdictions fail to dispense justice on crimes of ICC jurisdiction. The mere existence of the ICC has been an [encouragement](#) for countries to strengthen their judicial systems, also in order to avoid investigation by the ICC. This has come to be known as 'positive complementarity' or '[proactive complementarity](#)'. Following the difficulties the Court has faced in prosecuting heads of state, there has been a [shift](#) towards this 'positive complementarity', underpinned by the understanding that the Court could do better its task of ending impunity by encouraging states to prosecute perpetrators themselves. This reorientation was epitomised in the declaration by the former prosecutor: 'this Court is designed to have almost no cases. This Court is helping countries to really take seriously their own obligations'. Setting consistent standards for national jurisdictions remains a task to be accomplished. The ICC has been [criticised](#) for not having a 'consistent and clear vision of its relations with domestic jurisdictions'.

European Union support for the Court

The EU is a staunch [supporter](#) of the Rome Statute and the ICC, and its Member States taken together are the biggest contributor to the Court's budget.

EU policy with respect to the Court is based on a [2011 Council Decision](#) and [action plan](#) on its implementation. The EU has expressed support for the objective of attaining universal acceptance for the Court. According to the 2011 action plan, the EU's primary objective is to maximise 'political will for the ratification, accession and implementation of the Statute in order to achieve the desired universality', using means such as political dialogue, demarches, clauses in agreements, letters from the High Representative or other bilateral means, statements, including at the UN and other

multilateral bodies, and support for dissemination of the ICC principles and rules. In order to attain this objective, the EU has included an ICC clause in several of its cooperation agreements with partner countries, for example the association agreements with Eastern Partnership countries ([Georgia](#), [Moldova](#) and [Ukraine](#)) and the Cotonou Agreement ('The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instrument', Article 11(7) of the revised [Cotonou Agreement](#)). The EU has been providing assistance for countries that encounter difficulties in ratifying, accessing and implementing the Rome Statute, including expert assistance, financial support or access to relevant information.

The EU recognises the [importance](#) of the complementarity principle, prioritising accountability and justice at the national level, which presupposes that the justice system of each State functions effectively and independently.

The EU has provided funding for various actions relating to the Court, for example through the European Instrument for Democracy and Human Rights, which has supported [measures](#) such as building legal expertise and fostering cooperation of ICC states parties.

Position of the European Parliament

The European Parliament has expressed its support for the ICC in numerous resolutions: it has expressed support for the principle of universality of the Rome Statute and the inclusion of the [crime of aggression](#) under the jurisdiction of the Court. It has requested that all parties provide the ICC with diplomatic, financial and logistical [support](#). It has [called](#) on the Iraqi government to ratify the Rome Statute in order to enable the Court to prosecute crimes perpetrated by ISIL/Da'esh.

In a [2011 resolution on EU support for the International Criminal Court](#), the European Parliament called for the appointment of an EU Special Representative on International Humanitarian Law and International Justice 'with the mandate to promote, mainstream and represent the EU's commitment to the fight against impunity and [to] the ICC across EU foreign policies'. It reiterated this call in its most recent [annual human rights report](#) adopted in December 2017. The initiative has the strong support of a [group](#) of civil society organisations.

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ENDNOTES

- ¹ The ICC's jurisdiction is different from what is referred to as universal jurisdiction, which existed for example between 1993 and 2003 in Belgium, where it was adopted in reaction to the Rwandan genocide. This universal jurisdiction afforded the right to anyone to submit a war crime for prosecution in Belgian courts, irrespective of whether it was committed on Belgian territory, and whether a Belgian national was involved as either perpetrator or victim.
- ² At the time when the Rome Statute was drafted, the negotiating states had diverging views on the role of the Prosecutor and the Court, some preferring a broad and independent mandate, while others were in favour of a more limited role. The result was, in the view of critics, '[ambiguous statutory language](#)'.
- ³ For a detailed analysis of the Court's jurisprudence in this respect, see M. Ochi, '[Gravity threshold before the International Criminal Court: An overview of the Court's practice](#)', ICD Brief 19, January 2016.
- ⁴ M. M. de Guzman, '[What is the gravity threshold for an ICC investigation? Lessons from the pre-trial chamber decision in the Comoros situation](#)', *ASIL Insights*, August 2015.
- ⁵ In her article '[The International Criminal Court and the politics of prosecutions](#)' (*International Journal of Human Rights*, Vol. 18 (4-5) of May 2014), Alana Tiemessen attempts to expose some patterns of political bias, while recognising that 'Most critical analysis and accusations from scholars and human rights advocates (...) remain vague about how and why political agency is exercised with international judicial interventions, or have failed to identify the pattern of politicised prosecution across the ICC's cases'.
- ⁶ See S. Maupas, *Le Joker des puissants*, Éditions Don Quichotte, 2016.
- ⁷ According to a [European Parliament study](#) drafted by an external contractor: 'While little – if any – evidence has been adduced to establish a causative relationship between the source of ICC funding and the Court's activities and decisions, the mere suspicion (however substantiated) can itself be of damage both to the Court's credibility and that of the EU'.
- ⁸ A. Tiemessen, op. cit., note 5.
- ⁹ See [D. M. Crane, Fatal Attraction – The International Criminal Court and politics, November 2016](#) where the author, former Chief Prosecutor of the Special Court for Sierra Leone defends the stance that any prosecution plan should be 'deliberative, careful, balanced' taking in its political, diplomatic, cultural, practical and legal ramifications.
- ¹⁰ A withdrawal has no impact on on-going proceedings or any matter that was already under consideration by the Court prior to the date on which the withdrawal became effective; nor on the status of any judge already serving at the Court.
- ¹¹ 'Almost all cases in the confirmation of charges and trial phases have been or are confronted with incidents of obstruction of justice – in particular witness tampering', in Office of the Prosecutor, Strategic plan 2016 - 2018, July 2015.
- ¹² For a detailed analysis, see [Briefing paper: Witness interference in cases before the ICC, Open Society Foundations](#), November 2016.
- ¹³ Witness coaching involves giving advice to witnesses to provide false testimony, often in conjunction with promising bribes or other types of financial reward.

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