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Evert Elzinga/EPA

What next for the troubled International Criminal Court?

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The International Criminal Court (ICC) was set up by international agreement in 2002 to prosecute individuals accused of war crimes and crimes against humanity. It was intended to complement, not replace, national criminal systems, prosecuting only when states are unwilling or unable to do so.

At the time, some lauded it as the cornerstone of the emerging system of international justice, but not all countries were keen on the idea of an international war crimes court.

Notably, the US signed and then “unsigned” the Rome Statute that brought the court into existence. It even passed legislation to protect any US military personnel from prosecution by the ICC. Other countries including Russia have been equally sceptical about the court’s work, and criticism has intensified over the past few years.

From its failure to secure custody of Sudanese dictator Omar al-Bashir to the withdrawal of states which fear becoming the subject of potential investigations, the ICC has struggled to assert its authority. It has also been perceived as biased against African states, because of the number of

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Africans tried. The US has continued to rail against potential prosecutions of US personnel by the court.



Displaced Sudanese children from Darfur, where alleged genocide is being investigated by the ICC. Khaled Elfiqi/EPA

This year's milestones

In December 2019, the annual meeting of the Assembly of States Parties – the body which oversees the ICC – looked at ways of improving the ICC. The assembly was created to provide a forum for the supervision and management of the court. It remains a significant meeting for the member states, allowing them to discuss problems and progress. It has also amended the Rome Statute over the past few years, most notably when it secured a definition of the crime of aggression in 2017.

The key developments from this meeting included a minor budgetary raise, an amendment to include starvation as a war crime during times of civil war, and a commitment to convene a panel of independent experts to review the ICC.

This year's assembly agreed to a slight raise in the budget of the court from €144.5 million for 2019 to €145 million, bolstered slightly by a surplus from 2017. As proposed in its justification for the budget, the ICC intends to continue to investigate 11 situations in 2020, including persecution against the

Rohingya in Myanmar and alleged genocide in Darfur.

Even with the increase, the budget is smaller than that of other international organisations. For example, the World Trade Organisation's budget was just over €178 million in 2017. This small, arguably negligible, increase in the ICC's budget is likely to mean fewer resources to carry out its mandate, while complaints have already been made by judges about their salaries. The ICC will continue to struggle to investigate and prosecute effectively if it remains underfunded in comparison to other international organisations, while carrying out a more complex and politically fragile mandate.

Independent review

After a critical op-ed piece was published earlier this year by four former presidents of the assembly, support for an independent review of the ICC grew. The assembly responded by pledging to establish an Independent Expert Review of the ICC's functions.

Prior to the meeting, a document was circulated which proposed ways of strengthening the ICC. An expert panel consisting of lawyers, barristers and former judges will be handed this document and expected to submit their review in 2020.



The ICC is also investigating the persecution of the Rohingya people in Myanmar. Abir Abdullah/EPA

The document highlights a number of issues that the experts should examine. These include the selection of situations to investigate and how to deal with non-cooperative States. All of this speaks to

the ICC becoming more focused. But if this is the case, the court may need to drop certain investigations and take a more targeted approach to some situations. It may also need to focus singularly on investigations which cannot be pursued at the domestic level. The test of a state being “unable or unwilling” to prosecute may need to serve as a threshold rather than an afterthought.

Amending the Rome Statute

The Working Group on Amendments to the Statute has had success in the past few years. Where the original drafters failed to agree on a definition of aggression which could be prosecuted by the ICC, the working group stepped in and secured approval for their definition in 2017.

It secured approval, again, this year of the crime of deliberate starvation during civil wars. Interestingly, the success of this proposal, put forward by the Swiss representatives, was contingent on two other proposals being postponed: the Mexican delegation’s efforts to include the use of nuclear weapons as a crime, and the inclusion of antipersonnel mines on the list of banned weapons by Belgium.

Arguably, it is much easier to secure agreement against forced starvation than against nuclear weapons, so the delegations agreed to support the Swiss proposal, which had been a feature of academic and policy debate for some time. But as some noted, the amendment must still be ratified by the rest of the member states for it to take effect. Amendments are not necessarily applicable to all states until they agree to be bound by them.

The ICC’s progress is not determined by the assembly, but the agreements made at the meeting identify a potential future direction for the court. The current focus is clearly to review the practice of the ICC, to see if anything can be done to augment its authority.

Crucially, the ICC needs to be properly funded and to be supported by domestic regimes, to which the court should defer whenever domestic prosecution is possible. It may be time to rethink the International Criminal Court as a guiding light for international criminal justice, rather than as the engine driving it forward.



Britain for crimes in Iraq can save the International Criminal Court

How investigating

How the International Criminal Court can survive Russian and African scorn

By not investigating the U.S. for war crimes, the International Criminal Court shows colonialism still thrives in international law