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## **Challenging times for the International Criminal Court by Yasmina Gourchane**

The International Criminal Court (ICC) has faced a number of challenges of late: threats from officials of the United States government; questionable judicial decisions; imminent changes to its leadership. Coming off a year of 20<sup>th</sup> anniversary celebrations and commemorations in 2018, supporters of the Court have more recently been looking critically at the past two decades of international justice, with an eye towards improving the Rome Statute system to better carry out its mandate.

The judicial year kicked off in January 2019 with the acquittal of Laurent Gbagbo and Charles Blé Goudé of all charges of crimes against humanity allegedly committed in Cote D'Ivoire in 2010-11. Beginning in 2016, the trial focused on allegations that Gbagbo, former president of Côte d'Ivoire, and members of his inner circle including former youth leader Blé Goudé, created and executed a common plan to hold on to power after losing the country's 2010 presidential election by encouraging attacks against supporters of rival candidate, Alassane Ouattara. Following this year's acquittal, Gbagbo and Blé Goudé were both "conditionally released." The decision to acquit the two was delivered orally by the judges of the trial chamber, and to date, has not yet been followed by a reasoned, written decision. The Prosecutor retains the right to appeal the decision, but may do so only after the submission of a written decision by the judges.

In March, the withdrawal of the Philippines from the Rome Statute was eclipsed by news of Malaysia joining the Court, which came after many years of strong civil society campaigning. The Philippine President expressed his government's intent to withdraw from the Court in 2018, which, as stipulated in the Statute, became effective one year later. The Philippine withdrawal became effective as of 15 May, dropping the total number of states parties to the ICC to 122.

The accession of the newest State Party was cause for celebration. But, just one month later, in an unprecedented move the government of Malaysia backtracked on its

decision, and announced the rescission of its instruments of accession to the Court, citing political criticism and opposition from the Royal family, but not necessarily a lack of confidence in the Rome Statute system of international justice. Malaysia's accession was slated to enter into force on 1 June, meaning they were never officially party to the treaty.

On the heels of the withdrawal news came a decision by the judges of Pre-Trial Chamber II regarding the situation in Afghanistan, in which they rejected the Prosecutor's request to open an investigation into alleged war crimes and crimes against humanity committed by the Taliban and other armed groups, Afghan military forces, and United States military forces and the Central Intelligence Agency (CIA). The judges reasoned that an investigation "would not serve the interests of justice", citing limited prospects for a successful investigation and prosecution. These limited prospects include the length of time between the commission of the alleged times and the Prosecutor's request, the complex political situation in the relevant States, which would prevent meaningful cooperation with the Court, and the significant amount of resources such an investigation would require.

The decision was met with much shock and outrage from civil society, including members of our NGO Coalition for the ICC. Many members claim the Judges gave in to political pressure from the US administration by refusing to open an investigation, a decision which impacts the lives of thousands of victims, and puts into question the prospects of meaningful justice for the Afghan people. However, the case is not yet closed—the Prosecutor may choose to appeal the decision as soon as the final concurring opinion of the presiding judge is made available.

In May, the ICC Appeals Chamber confirmed that Jordan did not properly comply with its obligations under the Rome Statute by failing to arrest Omar al-Bashir, the former President of Sudan. Bashir attended the League of Arab States Summit in 2017 in Jordan, a State Party to the ICC. By not arresting Bashir, who was and still is wanted by the ICC, Jordan failed to comply with its obligations under the Rome Statute. Importantly, the decision also notes that there is no Head of State immunity under customary international law vis-à-vis an international court. Since then, following months of civilian protests, Bashir was removed from power by the Sudanese military, and is allegedly in detention in Sudan.

As the Court looks towards its next generation of leadership, with the election of the next Chief Prosecutor to take place in late 2020, the ICC's Assembly of States Parties (ASP) decided to establish a committee on the election of the next Prosecutor, in an effort to ensure a transparent and fair process to name the most highly qualified candidate for this important position. With strong leadership from the CICC and key Coalition members, the committee will not only be composed of five members, one per regional group, but also a panel of five independent experts. These experts would have extensive background in national or international investigations or prosecutions, thereby informing the process to ensure a highly qualified candidate to fill the role of Chief Prosecutor.

Most recently, in response to a strong belief in the need for a better-functioning Rome Statute system, supporters of the ICC have called for an independent assessment of the Court. Many stakeholders have joined this call for an independent review, including former ASP Presidents, members of civil society, and even Court officials. Many in the Coalition believe that an assessment could serve to reify trust in the credibility of the institution, which has diminished with these recent instances of questionable jurisprudence and external criticisms. The time for change is now, as many powerful states pose a serious threat to the rule of law, and the voices of victims continue to fall on deaf ears. The Court was established to end impunity for the worst crimes which shake the conscience of humanity: a meaningful review, with support from all key actors, could go a long way to help the ICC succeed in this mission.

*Yasmina Gourchane is the Membership and Outreach Associate at the Coalition for the ICC, New York*