DEFENSE ISSUES AT THE INTERNATIONAL CRIMINAL COURT

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I am very grateful to Professor Diane Amann for the invitation to contribute to this symposium and, in particular, for being asked to focus on defense-related issues at the International Criminal Court (ICC or Court). Having heard from Peter Robinson regarding some of the things that the defense can do to help the Court, I hope to complement Peter's important contribution by highlighting some of the things that external observers—particularly those of us who research and write on international criminal justice—can do to assist ICC accused. Broadly speaking, I would like to highlight the compelling need for us to better monitor and critique ICC practice, especially procedural and evidentiary decision-making.

For this external contribution to benefit the defense, ICC observers must commit to unwavering fair trial expectations. Ensuring a just process for ICC suspects and accused persons needs to become a regular and prominent part of our discourse, and every bit as much the lens through which we view the ICC as other concerns, including the anti-impunity objective and the rights of victims. It also means that we need to become comparativists, as it is only through understanding the Court's "hybrid" framework that we can properly vet whether ICC practice is fair and just. This is critical because the Court's Statute and Rules tend not to dictate specific evidentiary and procedural choices, a fact that can lead to importing domestic mechanisms without careful thought as to whether their insertion into the Court's unique framework is fair to the accused. As I hope to convince you, this flexibility makes consistent external vetting vital.

Because the procedural and evidentiary decision-making that requires this more rigorous review sometimes relies on the principle of objectivity—the statutory requirement that the Court's prosecutor "establish the truth" by investigating incriminating and exonerating circumstances equally—I will first discuss this under-researched (and, in my view, unfulfilled) aspect of the ICC's procedural law. I hope you will then add this analysis to the lens through which you view Court practice. I will then provide a few examples of recent (and, again, under-researched) procedural and evidentiary choices that appear to overlook the import of predominantly adversarial trial model the Court has adopted to date in a way that undermines the fair trial rights of ICC accused. I hope that by briefly highlighting these limited examples you too

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will see the urgent need for the international community to keep a close watch on developing ICC practice.

As has been discussed at length elsewhere, the ICC's procedural law is neither wholly adversarial nor continental, but instead a mix of the two.[1] In fact, the Court's Statute affords sufficient flexibility for trials to be either adversarial in orientation *or* rather more aligned with the continental (single-case) model, in which the judges, rather than the parties, lead the taking of evidence.[2] Nevertheless, and as will be important for later discussion, all the Court's trials to date have adhered to the adversarial model, with party-driven evidence collection and presentation, and with a distinct prosecution phase that is formally closed before hearing from the defense.[3] By contrast, the aforementioned principle of objectivity is decidedly continental in nature.

The principle of objectivity is set out in Article 54(1)(a) of the Rome Statute, a provision that obliges the Court's Prosecutor to investigate incriminating and exonerating circumstances equally.[4] This continental addition to the ICC Statute was initially lauded by many as a vast improvement over the common law-esque prosecutor at the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) and its sister court, the International Criminal Tribunal for Rwanda.[5] As explained by Judge May before the Court became operational "the prosecutor of the ICC will have duties of 'truth-seeking' beyond the adversarial framework, and must conduct investigations to find both incriminating and exonerating evidence. (Whereas the prosecutor of the ad hoc tribunals has been under a duty to disclose, rather than seek such evidence)."[6] As one continental delegate to the Rome Conference later explained to me, the neutral, truth-seeking investigations dictated by the Rome Statute—if properly applied—ought to yield only successful prosecutions.

By this benchmark, the fact that the ICC has thus far acquitted as many persons tried for core crimes as it has convicted suggests that objectivity in

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[1] On the Court's *sui generis* framework *see, e.g.,* Kai Ambos, *International Criminal Procedure: 'Adversarial,' 'Inquisitorial' or Mixed?, 3* INT'L CRIM. L. REV. 1 (2003).

[2] Rome Statute of the International Criminal Court art. 64(8)(b), July 17, 1998, 2187 U.N.T.S. 3; Robert Heinsch, *How to Achieve Fair and Expeditious Trial Proceedings Before the ICC: Is it Time for a More Judge-Dominated Approach?, in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 479, 490 (Carsten Stahn & Göran Sluiter eds., 2009).

[3] Megan A. Fairlie, The Unlikely Prospect of Non-Adversarial Trials at the International Criminal Court, 16 J. INT'L CRIM. JUST. 295, 295-96 (2018).

[4] Rome Statute of the International Criminal Court art. 54(1)(a), July 17, 1998, 2187 U.N.T.S. 3.

[5] Luc C̆ot´e, *Independence and Impartiality*, *in* INTERNATIONAL PROSECUTORS 319, 359 (Luc Reydams et al. eds., 2012).

[6] RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 330 (2002) (internal citations omitted).

practice is falling short of the mark.[7] More convincingly, this fact has been affirmatively recognized by a number of the Court's judges. Since the Court's earliest days, judicial opinions have catalogued numerous objectivity shortcomings, including the prosecution's intentional failure to collect known exculpatory evidence,[8] the use of interview techniques that were "utterly inappropriate" in light of the obligation to seek exonerating evidence,[9] and a "negligent attitude towards verifying the trustworthiness of its evidence."[10] Similarly, defense counsel have reported a consistent failure on the part of the prosecution to corroborate its witnesses' accounts,[11] leaving defense attorneys to pick up this slack.[12]

This apparent abdication of the prosecution's intended role as objective and impartial truth-seeker has very real consequences for the defense. In the best case scenario, the defense will be required to use its more limited investigatory resources to fill the void left by the prosecution's neglected 54(1)(a) obligations. More problematically, in cases wherein governments hinder defense investigations *in situ*,[13] evidentiary materials and witness statements beneficial to an ICC accused may never be accessed at all. In addition, although the principle of objectivity has yet to materialize in practice, the manner in which it is *meant* to enhance the fairness of ICC proceedings may be used (and, as I will explain, *has* been used) to justify the denial of other procedural

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[7] Until quite recently, acquittals for core crime cases (four) outnumbered convictions (three). Mark Ellis, *The Latest Crisis of the ICC: The Acquittal of Laurent Gbagbo*, OPINIO JURIS (Mar. 28, 2019), http://opiniojuris.org/2019/03/28/the-latest-crisis-of-the-icc-the-acquittal-of-laurent-gbagbo/. The Court's record is now even due to the July 2019 conviction of Bosco Ntaganda. Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment (July 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF.

[8] "The omission of the Prosecutor in this case to gather exculpatory evidence *of which he was aware* is another reason marking the failure of the Prosecutor to make disclosure of exculpatory evidence to the defence." Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together With Certain Other Issues Raised at the Status Conference on 10 June 2008," (Oct. 21, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05884.PDF.

[9] Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 51 (Dec. 16, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_22538.PDF.

[10] Prosecutor v. Kenyatta, ICC-01/09-02/11-728, Concurring Opinion of Judge Christine Van den Wyngaert, ¶ 4 (Apr. 26, 2013), https://www.icc-cpi.int/RelatedRecords/CR2013_03280.PDF (opining, in ¶1, that "the facts show that the Prosecution had not complied with its obligations under 54(1)(a) at the time when it sought confirmation….").

[11] Caroline Buisman, *The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality*, 27 LEIDEN J. INT'L L. 205, 215-16 (2014).

[12] Karim A.A. Khan & Anand A. Shah, *Defensive Practices: Representing Clients before the International Criminal Court*, 27 LAW & CONTEMP. PROBS. 191, 221 (2014).

[13] Buisman, *supra* note 7, at 208.

safeguards. In other words, a failure to adhere to the principle of objectivity may ultimately disadvantage the defense multiple times over.

Despite these important consequences, the prosecution's non-compliance with 54(1)(a) has thus far generated insufficient external attention. Perhaps this is because the idea of an objective prosecutorial investigation is, at least for common law lawyers, somewhat akin to a unicorn—so fantastical a notion that its failure to exist is not worthy of remark. Whatever the reason, this relative silence harms both the Court and the defense. Without a robust call for the prosecution to take its objectivity obligation seriously, it likely will not. And, without clear and cogent critiques on the topic, we can likewise expect for judicial decisions to continue to cite to the provision as a safeguard that makes other protections unnecessary. So, one of the opportunities for renewal called for by this conference lies in an affirmative decision to call attention to this issue: to incorporate it into our discourse, to read and cite to what defense attorneys are saying about this prosecutorial failure, and to make sure to include the defense in the brainstorming required to effectuate meaningful change.

Another critical issue that has been flagged by several of the Court's judges, but has thus far garnered almost no scholarly attention, is the recent trend amongst ICC Trial Chambers to permit the submission of "evidence" in the absence of a contemporaneous ruling on its admissibility.[14] This submission in lieu of admission approach hinges on the language of Article 69(4), which provides that a Chamber "*may* rule on the relevance or admissibility of any evidence," and was first endorsed by the ICC Appeals Chamber in 2011.[15] More recently, a majority of the Appeals Chamber again addressed the matter, confirming that Trial Chambers may refrain from ruling on admissibility entirely and, instead, simply consider the relevance and probative value of submitted material "when deciding on the guilt or innocence of the accused."[16]

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[14] *See e.g.* Prosecutor v. Ongwen, ICC-02/04-01/15-497, Initial Directions on the Conduct of the Proceedings, ¶ 24 (July 13, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04979.PDF (providing that "[a]s a general rule, this Chamber will defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute").

[15] Prosecutor v. Bemba, ICC-01/05-01/08-1386 OA5 OA6, Judgment on the Appeals of Bemba et al. against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence" , ¶ 37, (May 3, 2011), http://www.worldcourts.com/icc/eng/decisions/2011.05.03_Prosecutor_v_Bemba.pdf (noting that "the Trial Chamber must balance its discretion to defer consideration" of admissibility with its obligation to a fair and expeditious trial and that Trial Chambers must "consider the relevance, probative value and the potential prejudice of each item of evidence *at some point* in the proceedings").

[16] Prosecutor v. Bemba et. al., ICC-01/05-01/13-2275-Red, Judgment on the Appeals of Bemba et al. against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute," ¶ 598 (Mar. 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_01638.PDF.

The problems created by importing this continental evidentiary approach into the ICC's present practice are legion. At the Court, unlike in many continental systems, the collection of would-be evidence is not a highly regulated process nor, as we have seen, are these materials amassed by a neutral minister of justice. Moreover, as ICC judges act without the guidance of a neutral and comprehensive case-file, admissibility assessments conducted in the absence of party input may well amount to a "blind and blundering" affair, as the judges are liable to be "partially informed and innocent of details."[17] More to the issue at hand, the approach further directly and negatively impacts the defense because of the Court's adversarial trial orientation. If the defense is left unaware as to whether the material proffered by the prosecution is in fact admissible, this necessitates that counsel respond to all materials submitted, a course of action that dilutes limited defense resources and hinders the accused's ability to successfully counter the prosecution's case.

For more than three years, these and other problems associated with submission in lieu of admission have been affirmatively raised in a series of separate and dissenting Court opinions. In 2016, for example, Judge Henderson warned that an accused cannot make an informed decision regarding whether to put on a defense if, at the close of the prosecution's case, it is unclear which of the prosecution's proffered material the Chamber will consider.[18] In other words, the decision to defer admissibility decisions pointedly disadvantages the defense's role within the Trial Chamber's chosen adversarial model. Judge Henderson has likewise explained the dangers of importing the approach, untethered from the attendant procedural protections found in continental systems, into the Court's adversarial trial model.[19] And, more than two years after his initial objection to submission in lieu of admission in *Gbagbo* and *Blé Goudé*, Henderson described the practice as an "extravagant failure."[20] Among other problems, Judge Henderson noted that the prosecution's failure

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[17] Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 850 (1997) (discussing the dangers of ill-informed judges leading evidence).

[18] Prosecutor v. Gbagbo, ICC-02/11-01/15-405-Anx, Decision on the submission and admission of evidence, Dissenting Opinion of Judge Henderson, ¶ 9 (Feb. 1, 2016), https://www.legal-tools.org/doc/6fbd2c/pdf/.

[19] Prosecutor v. Bemba et. al., ICC-01/05-01/13-2275-Anx, Judgment on the Appeals of Bemba et. al. against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute," Separate Opinion of Judge Geoffrey Henderson, ¶¶ 45 & 51 (Mar. 8, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_01633.PDF (comparing judge-driven trial proceedings and "the safeguard of an independent nonpartisan investigating judicial officer and a central dossier" with adversarial evidence-gathering and presentation).

[20] Prosecutor v. Gbagbo, ICC-02/11-01/15-1172-Anx, Decision concerning the Prosecutor's submission of documentary evidence, Dissenting Opinion of Judge Geoffrey Henderson, ¶ 1 (June 1, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_02846.PDF.

to explain the import of the items it submitted "place[d] an unfair and impermissible burden on the defense requiring them to justify that the evidence is not relevant."[21]

Further, fair trial problems associated with submission in lieu of admission were also raised in Bemba's recent acquittal on appeal. In that matter, Judges Van den Wyngaert and Morrison opined that the approach was wholly unacceptable in a core crimes prosecution, maintaining instead that not only ought admissibility assessments be made at the time of submission, but that this exercise should be "sufficiently rigorous[] to avoid crowding the case with evidence of inferior quality."[22] The pair also joined Judge Eboe-Osuji in his concern that "the undifferentiated receipt of all evidence 'submitted' at [Bemba's] trial may have resulted in the adulteration of admissible evidence with inadmissible ones, hence possibly alleviating the prosecution's burden of proof."[23]

Much more needs to be said on this practice, particularly its negative impact on fair and expeditious trials, both because the approach has garnered insufficient external attention to date[24] and because submission in lieu of admission continues to be both employed and challenged at the Court.[25] Relevant critiques must expressly reject the thinly reasoned evidentiary decision-making produced under this approach. Chambers ought not to be able to dismiss the call for contemporaneous admissibility determinations as "unhelpful

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[21] *Id.* ¶ 4.

[22] Prosecutor v. Bemba, ICC-01/05-01/08-3636-Anx2, Judgment on the Appeal of Jean Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute," Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ¶ 18 (June 8, 2018), https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-3636-Anx2.

[23] Prosecutor v. Bemba, ICC-01/05-01/08-3636-Anx3, Judgment on the Appeal of Jean Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute," Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 85 (June 14, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_03077.PDF.

[24] These limited critiques nevertheless benefit from internal perspective. Amnesty International's two posts on the issue—*Admitting mistakes on admitting evidence – It's Not Too Late for the ICC to Get it Right* (May 4, 2018) (available at https://hrij.amnesty.nl/icc-bemba-et-al-judgment-admitting-mistakes-on-admitting-evidence/) and *Time to Clarify ICC Rules on Admission of Evidence*, AMNESTY INT'L (Oct. 5, 2018), https://hrij.amnesty.nl/time-to-clarify-icc-rules-admission-evidence/—were both authored by Chiara Loiero, who served as (pro bono) legal assistant on Bemba (Main Case) during the sentencing and appeal phase. The issue is also covered in a recent chapter authored by a practcing international criminal defense attorney. *See* Colleen Rohan, *The Hybrid System of International Criminal Law: A Work in Progress or Just a Noble Experiment?, in* BREAKING THE CYCLE OF MASS ATROCITIES: CRIMINOLOGICAL AND SOCIO-LEGAL APPROACHES IN INTERNATIONAL CRIMINAL LAW (Aksenova, van Sliedregt & Parmentier eds., 2019).

[25] *See* Prosecutor v. Ongwen, ICC-02/04-01/15-1519-Red, Public Redacted Version of 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime' (May 21, 2019), https://www.legal-tools.org/doc/39912a/pdf/.

and unwarranted",[26] while wholly sidestepping any meaningful discussion regarding how its alternative choice operates within the Court's system of partisan evidence-gathering and submission. Without this call for better reasoned decision-making, Trial Chambers may continue to make abstract references to the Statute's permissive language, in conjunction with the old chestnut of being "professional judges," to justify submission in lieu of admission. To borrow from Justice Harlan, these decontextualized observations amount to the substitution of words for analysis.[27]

Before closing, let me briefly mention some of the Court's recent jurisprudence regarding no case to answer (NCTA) motions as a final example of decontextualized procedural decision-making that disadvantages the defense. As is well-known, there is no express ICC authority for the defense to request a verdict of acquittal after the prosecution has closed its case. T\Notably, this , "lacuna" stems from the fact that a decisive trial model was not agreed upon before the Court became operational.[28] rather than any affirmative decision to exclude the practice. Accordingly, as Trial Chambers have since adopted a party-driven process that mandates the sequential presentation of evidence by the parties, NCTA motions have (unsurprisingly) made their way into ICC practice. Critically, however, silence in the Court's procedural law on the issue has been interpreted to mean that whether an accused may avail of this "judicial guarantee of the presumption of innocence"[29] is a matter of judicial discretion. This fact alone is enough to give one pause. Moreover, in exercising that discretion so as to preclude the NCTA option, ICC decisions tend to wholly avoid any meaningful discussion regarding the critical role that the NCTA option plays in ensuring the fairness of adversarial trial proceedings.

For example, in exercising its discretion regarding the permissibility of NCTA motions, the Ntaganda Trial Chamber failed to consider how the availability of the motion—or its absence—might impact the fairness of the proceedings, other than recognizing that allowing such a motion might impact the length of the trial.[30] In effect, the Chamber's (quite limited) "analysis" focused exclusively on whether an NCTA motion would expedite the trial proceedings. It then used the uncertainty regarding this issue as its basis for

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[26] Prosecutor v. Ongwen, ICC-02/04-01/15-615, Decision on Prosecution Request to Submit Interception Related Evidence, ¶ 7 (Dec. 1, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_25513.PDF.

[27] United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

[28] Hakan Friman et. al., *Charges*, *in* INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 382, 450 (Sluiter et. al., eds., 2013) (describing this lack of consensus as "regrettable").

[29] Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 316 (1998).

[30] Prosecutor v. Ntaganda, ICC-01/04-02/06-1931, Decision on Defence request for leave to file a 'no case to answer' motion, ¶ 26 (June 1, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_03545.PDF.

denying the motion, even going so far as to suggest a *partially successful* motion might not pay its way if insufficiently expeditious.[31] This suggests a failure to appreciate the depth of protection that NCTA motions provide in party-led proceedings. Irrespective of whether a partially successful motion would hasten the end of a trial, what is critical is that even partial success ensures that an accused is not made to answer a charge for which the presumption of innocence has not been rebutted.

Case law on this topic seems unlikely to improve, in particular due to the judgment rendered in response to Ntaganda's appeal. Not only did the Appeals Chamber confirm that Trial Chambers have broad discretion with respect to NCTA motions, but it also offered a questionable explanation for why the failure to hear such motions is consistent with a fair trial.[32] Specifically, the Chamber pointed to two, continental-oriented safeguards found in the Court's procedural law—one of which being the aforementioned (and, as demonstrated, unfulfilled) principle of objectivity—in an apparent attempt to demonstrate that the presence of these "bonus" (not found in adversarial systems) protections eliminate the need for the ICC to replicate every adversarial-oriented safeguard.[33] This argument was hardly convincing as applied, however, as neither of the mechanisms noted shield the accused from having to answer charges for which the prosecution has failed to rebut the presumption of innocence. [34]

These critiques aside, the decision to preclude NCTA motions at the ICC—first in Ntaganda and, more recently, in the Ongwen case[35]—reflects poorly on the Court's perceived commitment to ensuring fair proceedings. It also suggests either an unwillingness or inability to learn from relevant ICTY precedent. The Tribunal considered its first NCTA motion before the practice was affirmatively incorporated into the ICTY's procedural law, a move that drew praise for demonstrating "great concern for the rights of the accused and, in particular, the presumption of innocence."[36] Over the years, the process was both codified and amended, most notably by requiring oral arguments instead

[31] *Id*. ("permitting such a motion may …. not necessarily positively affect the expeditiousness of the trial, even if successful in part").

[32] Prosecutor v. Ntaganda, ICC-01/04-02/06-2026, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion," ¶ 52 (Sept. 5, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05424.PDF.

[33] *Id*.

[34] In addition to the principle of objectivity, the Chamber highlighted the ICC's confirmation of charges stage, which requires the prosecution to satisfy the Pre-Trial Chamber that there is "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged" before proceeding to trial. *Id.*

[35] Prosecutor v. Ongwen, ICC-02/04-01/15-1309, Decision on Defence Request for Leave to File a No Case to Answer Motion (July 18, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_03771.PDF.

[36] SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 91 (2003).

of written briefs, a change that bore immediate efficiency rewards for ICTY accused and the Tribunal alike.[37] Had the ICC chosen to draw from and improve upon this experience, it could have advanced its sociological legitimacy while simultaneously contributing to the twin goals of fairness and efficiency.

In presenting this handful of examples, I hope I have convinced you of the need for more robust vetting of ICC practice so as to better protect the rights of the defense. In case more convincing is required, let me close by quoting from a notably persuasive and profoundly respected source. As Judge Pat Wald observed after her impactful stint at the ICTY, those accused internationally often lack the full support of the international community "because the scope and nature of [international] crimes are so repellent, some victim witnesses so fragile, and the voices of NGO observers so vocal in their desire for individual accountability."[38] As a result, Judge Wald emphasized the need for judicial vigilance, "lest the persistent cry of victims that 'someone should pay' be transformed into a demand for punishment against whomever is in the dock."[39] For Judge Wald, however, judicial vigilance was not enough. Instead, she recognized that outside observers played a critical role in ensuring the fairness of international criminal prosecutions, and called upon them to "watch carefully to see that [the judges] do not go past rational stopping points too quickly."[40]

Remarkably, Judge Wald's observations apply with equal force to the ICC in 2019 as they did to the ICTY in 2003. Like the ICTY before it, the Court needs "evidentiary mavens"[41] and comparativsts to keep the development of its hybrid practice in check, for its benefit and that of the defense. This exercise has only scratched the surface when it comes to identifying aspects of ICC practice that would benefit from robust external critique. For this endeavor to be comprehensive, we need the insight of internal actors. This means working as closely with defense counsel as the prosecution in our attempts to identify the best path forward for the Court. As with this conference, the defense needs to have a seat at the table whenever we meet to discuss the present and future of the ICC. Likewise, we should commit to reading and citing defense-oriented critiques, and to encouraging members of the defense bar in all

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[37] *Twelfth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991,* ¶ 29, U.N. Doc. A/60/267 S/2005/532 (2005) (noting, at ¶ 95, how this revised approach resulted in a prompt, oral NCTA decision).

[38] Patricia M. Wald, *Rules of Evidence in the Yugoslav War Tribunal*, 21 QUINNIPIAC L. REV. 761, 775 (2003).

[39] *Id*.

[40] *Id.* at 771.

[41] *Id*.

their scholarly endeavors, from blogging to book chapters and law review articles. To paraphrase Judge Wald, the long-term credibility of the ICC might well depend on it.[42]

[42] *Id*. at 776.