

# LACKING CONVICTION: IS THE INTERNATIONAL CRIMINAL COURT BROKEN? AN ORGANISATIONAL FAILURE ANALYSIS

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*There is a widespread sense that something in the International Criminal Court ('ICC') needs fixing. This prompts questions including: is it broken, who is responsible, and how is it to be fixed? This article avoids the discourse of a 'crisis in international criminal law' in favour of the literature on organisational failure. This literature focuses on the role of environment, structure and leadership in organisational performance. In particular, this paper posits that the ICC is embroiled in a fiasco, defined as a situation in which a public organisation's policy choices result in unintended political consequences. As a fiasco unfolds, the organisation at its centre, and its defenders, may seek to ascribe responsibility or displace blame. This article thus: examines the case that the ICC is failing in its core mission and assesses whether common defences of the Court fairly ascribe responsibility or constitute blame-displacement; and examines the extent to which the ICC's leadership is responsible for the present fiasco. It then considers whether the ICC Assembly of States Parties can rehabilitate its supervisory function to assist in fixing the Court. Finally, it cautions against the use of managerialist techniques in fixing the Court and proposes instead the cultivation of an ethic of modesty.*

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## I INTRODUCTION

In April 2019, the first four presidents of the Assembly of States Parties ('ASP') to the *Rome Statute of the International Criminal Court*<sup>1</sup> ('*Rome Statute*') called for the Court to 'clarify the legal standards it applies to its criminal proceedings, work on the basis of clear prosecutorial strategies and policies, end its endless internal squabbles, and address its management issues head-on'.<sup>2</sup> The title of their piece drove home their point: 'the International Criminal Court Needs Fixing'. The immediate trigger appears to have been the controversial decision of International Criminal Court ('ICC') Pre-Trial Chamber II to not authorise the opening of a formal investigation into the situation in Afghanistan.<sup>3</sup> (This was widely interpreted as involving a capitulation to United States pressure given the express reference to the low likelihood of state cooperation and the 'changes within the relevant political landscape'.<sup>4</sup>) However, its stridency and urgency is undoubtedly informed by the Court's *annus horribilis* of June 2018 – June 2019. June 2018 saw the acquittal on appeal of former Vice President of the Democratic Republic of the Congo ('DRC'), Jean-Pierre Bemba, in an Appeals Chamber decision that was scathing of the quality of the Trial Chamber's legal reasoning

<sup>1</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>2</sup> Zeid Raad Al Hussein et al, 'The International Criminal Court Needs Fixing', *Atlantic Council* (Blog Post, 24 April 2019) <<https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing>>, archived at <<https://perma.cc/9A75-MEL9>>. See similar comments in Andrew Murdoch, 'UK Statement to ICC Assembly of States Parties 17<sup>th</sup> Session' (Speech, ICC Assembly of States Parties, 5 December 2018) <<https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session>>, archived at <<https://perma.cc/88DP-NJ7L>>.

<sup>3</sup> *Situation in the Islamic Republic of Afghanistan (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/17, 12 April 2019) ('*Afghanistan Decision*').

<sup>4</sup> Ibid [94]. See Christian De Vos, 'No ICC Investigation in Afghanistan: A Bad Decision with Big Implications', *International Justice Monitor* (Blog Post, 15 April 2019) <<https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/>>, archived at <<https://perma.cc/T2TT-DHCE>>; Mark Kersten, 'The ICC Was Wrong to Deny Prosecution Request for Afghan Probe', *Al Jazeera* (online, 13 April 2019) <<https://www.aljazeera.com/indepth/opinion/icc-wrong-deny-prosecution-request-afghan-probe-190412101757533.html>>, archived at <<https://perma.cc/Z4EC-F2KA>>; Sergey Vasiliev, 'Not Just Another "Crisis": Could the Blocking of the Afghanistan Investigation Spell the End of the ICC? (Part II)', *EJIL:Talk!* (Blog Post, 20 April 2019) <<https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-ii/#more-17119>>, archived at <<https://perma.cc/Y62M-TSDY>>.

and fact-finding<sup>5</sup> and controversial for its introduction of a new standard of appellate review.<sup>6</sup> The 2019 year commenced with former Côte d'Ivoire President Laurent Gbagbo being acquitted on all charges on a no case to answer motion.<sup>7</sup> This result was first delivered, peculiarly, in an oral decision on 16 January.<sup>8</sup> The subsequently released majority decisions were highly critical of the Office of the Prosecutor's ('OTP') process of investigation and evidence collection, its evidence and case theory, and its courtroom conduct of the case.<sup>9</sup> A better day for the Prosecutor came on 8 July 2019 with the OTP's fourth successful conviction: that in *Prosecutor v Ntaganda* ('*Ntaganda*') (discussed below).<sup>10</sup>

The Court's troubles in this period were not, however, confined to the Trial Chambers. On 6 September 2018, Pre-Trial Chamber I ruled, for the first time, in respect of the forced deportation of Rohingya peoples from Myanmar into Bangladesh, that the Court had jurisdiction over events occurring in the territory of a non-state party (Myanmar) absent a Security Council referral, so long as at least one element of the crime occurred in the territory of a state party

<sup>5</sup> *Prosecutor v Bemba Gombo (Judgment on the Appeal against Trial Chamber III's 'Judgment Pursuant to Article 74 of the Statute')* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08 A, 8 June 2018) [189] ('*Bemba Appeal*'). See especially the separate opinion of Judges Christine Van den Wyngaert and Howard Morrison: at annex 2 [3]–[18] (Judges Van den Wyngaert and Morrison).

<sup>6</sup> The new standard is articulated as follows: '[t]he Appeals Chamber is of the opinion that it may interfere with the factual findings of the first-instance chamber whenever the failure to interfere may occasion a miscarriage of justice' and not only when an Appeals Chamber is unable to discern how a factual finding could reasonably have been reached: *Bemba Appeal* (n 5) [40]. For criticism, see Leila N Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v Jean-Pierre Bemba Gombo', *EJIL:Talk!* (Blog Post, 12 June 2018) <<https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>>, archived at <<https://perma.cc/XV5G-V3T3>>.

<sup>7</sup> See the transcript: 'Delivery of Decision', *Prosecutor v Gbagbo* (International Criminal Court, Trial Chamber I, Case No ICC-02/11-01/15, 16 January 2019) <[https://www.icc-cpi.int/Transcripts/CR2019\\_00134.PDF](https://www.icc-cpi.int/Transcripts/CR2019_00134.PDF)>, archived at <<https://perma.cc/MMB8-6BNB>> ('Delivery of Decision'). Written reasons were given on 16 July 2019: *Prosecutor v Gbagbo (Reasons for Oral Decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence No Case to Answer Motion)* (International Criminal Court, Trial Chamber I, Case No ICC-02/11-01/15, 16 July 2019) ('*Gbagbo Reasons for Oral Decision*').

<sup>8</sup> 'Delivery of Decision' (n 7). A written decision is required by the Statute: *Rome Statute* (n 1) art 74(5). A dissenting opinion was released in writing, although the Statute does not allow dissenting opinions at the Trial Chamber level: see at art 74(5). Cf at art 83(4), as discussed below in Part VI(B).

<sup>9</sup> See especially *Gbagbo Reasons for Oral Decision* (n 7) annex B [10], [34]–[35], [42], [54], [66]–[79], [81], [87], [91] (Judge Henderson) (technically Judge Tarfusser concurred in these reasons making them the reasons for the decision). See also at annex A [12]–[15], [40], [51], [55], [91]–[107] (Judge Tarfusser). For further discussion, see Douglas Guilfoyle, 'A Tale of Two Cases: Lessons for the Prosecutor of the International Criminal Court (Part II)', *EJIL:Talk!* (Blog Post, 29 August 2019) <<http://www.ejiltalk.org/a-tale-of-two-cases-lessons-for-the-prosecutor-of-the-international-criminal-court-part-ii/>>, archived at <<https://perma.cc/QY43-7KQA>>.

<sup>10</sup> *Prosecutor v Ntaganda (Judgment)* (International Criminal Court, Trial Chamber VI, Case No ICC-01/04-02/06, 8 July 2019) ('*Ntaganda Judgment*').

(Bangladesh).<sup>11</sup> While in one sense a straightforward application of territorial jurisdiction, the decision had the effect of extending the reach of an already over-stretched court. The decision also provided another opportunity for the Pre-Trial Chambers to attempt to micromanage OTP investigations (discussed below). As noted, on 12 April 2019, Pre-Trial Chamber II unanimously rejected the OTP's request to proceed with an investigation into alleged international crimes committed in Afghanistan.<sup>12</sup> Controversially, the judges decided that such an investigation would not serve the interests of justice, citing a range of practical or prudential considerations.<sup>13</sup> Then after 10 years of states pointedly failing to cooperate with the Court to surrender (now former) President Al-Bashir of Sudan to the Court, on 6 May 2019, the ICC Appeals Chamber ruled that he enjoyed no head of state immunity either before the Court or in any arrest and surrender proceedings to transfer him to the Court<sup>14</sup> (in a decision which surprised most commentators<sup>15</sup> and which was widely criticised as 'misguided', 'dangerous', a 'mess' and as stretching thin the Court's credibility).<sup>16</sup> Ironically, the decision was handed down only after Omar Al-Bashir was toppled from power in a military coup. These events must, of course, be read against the wider background of

<sup>11</sup> See *Request under Regulation 46(3) of the Regulations of the Court (Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-RoC46(3)-01/18-37, 6 September 2018) ('*Bangladesh Decision*') [72]; Douglas Guilfoyle, 'The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar' (2019) 73(1) *Australian Journal of International Affairs* 2; Payam Akhavan, 'The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute' (2019) 17(2) *Journal of International Criminal Justice* 325.

<sup>12</sup> *Afghanistan Decision* (n 3).

<sup>13</sup> Ibid [87]–[96]. At time of writing, this had been overturned on appeal: *Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (International Criminal Court, Appeals Chamber, Case No ICC-02/17 OA4, 5 March 2020) ('*Afghanistan Appeal*').

<sup>14</sup> *Prosecutor v Al-Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal)* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09 OA2, 6 May 2019) ('*Al-Bashir Appeal*') [1]–[7].

<sup>15</sup> Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 4<sup>th</sup> ed, 2019) 530.

<sup>16</sup> *Al-Bashir Appeal* (n 14). For criticism, see Dapo Akande, 'ICC Appeals Chamber Holds That Heads of State Have No Immunity under Customary International Law before International Tribunals', *EJIL:Talk!* (Blog Post, 6 May 2019) <<https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>>, archived at <<https://perma.cc/M6SQ-5L9W>> (the decision is 'deeply misguided ... very dangerous and unwise'); Ben Batros, 'A Confusing ICC Appeals Judgment on Head-of-State Immunity', *Just Security* (Blog Post, 7 May 2019) <<https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/>>, archived at <<https://perma.cc/3FRQ-KG6L>> ('confusing', 'frustrating' and a 'mess'); Dov Jacobs, 'You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case', *Spreading the Jam* (Blog Post, 6 May 2019) <<https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/>>, archived at <<https://perma.cc/5R36-5P36>>; Asad Kiyani, 'Elisions and Omissions: Questioning the ICC's Latest Bashir Immunity Ruling', *Just Security* (Blog Post, 8 May 2019) <<https://www.justsecurity.org/63973/elisions-and-omissions-questioning-the-iccs-latest-bashir-immunity-ruling/>>, archived at <<https://perma.cc/JP6Q-8L98>> ('the Chamber's arguments unfortunately stretch its credibility by either leaving important questions unanswered, omitting relevant detail, or at times veering into the disingenuous').

longstanding African Union dissatisfaction with the Court, especially as regards prosecution of serving heads of state.<sup>17</sup>

These setbacks could perhaps be seen as the result of state obstruction on the one hand, or the inevitable problems of a relatively new judicial institution attempting to establish a settled jurisprudence on the other. These difficulties, however, were compounded by further controversies of the Court's own making. In October 2017, *Der Spiegel* ran stories suggesting that the Court's first Prosecutor, Luis Moreno-Ocampo, had, since stepping down, assisted a Libyan billionaire to devise a legal strategy to shield him from prosecution, and that he had been assisted in these endeavours through leaks by a still-serving member of the OTP staff.<sup>18</sup> *Der Spiegel* further claimed that Ocampo had remained in touch with his successor (and former deputy), Prosecutor Fatou Bensouda, about the conduct of ongoing cases.<sup>19</sup>

Problems of legitimacy and credibility also extended to the ICC's judicial branch (the 'judges' or 'Chambers'). January 2019 saw a series of unprecedented public exchanges between Judge Ibáñez Carranza, Judge Hofmański (the President of the Appeals Division) and Judge Eboe-Osuji (the President of the Court) over whether Judge Ibáñez Carranza should have been assigned to preside on the appeal in *Prosecutor v Gbagbo* ('*Gbagbo*').<sup>20</sup> Worse, at least as a question of optics, it became apparent that the President of the Court and a group of other judges were litigating their near USD200,000 tax-free salaries before the International Labour Organization's ('ILO') Administrative Tribunal, arguing these needed to be raised

<sup>17</sup> Frederick Ruhindi, 'Statement by The Hon Frederick Ruhindi, Deputy Attorney General/Minister of State for Justice and Constitutional Affairs of the Republic of Uganda, on Behalf of the African Union' (Speech, The Hague, 21 November 2013); Assembly of the African Union, *Decision on the International Criminal Court*, Doc No Assembly/AU/Dec.590(XXVI), 26<sup>th</sup> ord sess, 30–31 January 2016; Namira Negm, 'Statement of the African Union' (Speech, The Hague, 3 December 2019).

<sup>18</sup> Sven Becker, Marian Blasberg and Dietmar Pieper, 'The Ocampo Affair: A Former ICC Chief's Dubious Links', *Spiegel Online* (online, 5 October 2017) <<https://www.spiegel.de/international/world/ocampo-affair-the-former-icc-chief-s-dubious-libyan-ties-a-1171195.html>>, archived at <<https://perma.cc/99FV-JTL4>>.

<sup>19</sup> Sven Becker and Dietmar Pieper, 'The Ocampo Affair: Current ICC Chief Prosecutor Weighed Down by Predecessor', *Spiegel Online* (online, 17 October 2017) <<https://www.spiegel.de/international/world/international-criminal-court-scandal-widens-a-1173156.html>>, archived at <<https://perma.cc/H8HJ-DW3P>>.

<sup>20</sup> See *Prosecutor v Gbagbo (Decision on the Presiding Judge of the Appeals Chamber in the Appeal of the Prosecutor against the Oral Decision of Trial Chamber I Taken Pursuant to Article 81(3)(c)(i) of the Statute)* (International Criminal Court, Appeals Chamber, Case No ICC-02/11-01/15 OA14, 18 January 2019). See also at annex 1 ('*Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza*'), annex 2 ('*Joint Declaration of Judge Eboe-Osuji and Judge Hofmański on the Procedure on the Election of Presiding Judges*'), annex 3 ('*Statement of Judge Ibáñez Carranza with Respect to the Joint Declaration of the President of the Court and the President of the Appeals Division on the Procedure on the Election of Presiding Judges, in Relation to Her Dissenting Vote*').

to parity with judges of the International Court of Justice.<sup>21</sup> (The ILO Administrative Tribunal has jurisdiction over ICC employment disputes.<sup>22</sup>) Such tone-deaf behaviour was compounded by the minor scandal surrounding Judge Ozaki. On 4 March 2019, the ICC judges ratified, in a 14:3 vote, a request by Judge Ozaki that she be allowed to continue on the Court part-time to finish work on the judgement in *Ntaganda* while simultaneously serving as Japan's ambassador to Estonia.<sup>23</sup> That 14 judges saw nothing in a fellow judge accepting an executive branch appointment that would 'affect confidence in [her judicial] independence' was startling.<sup>24</sup> Judicial impartiality requires, inter alia, that international judges must enjoy independence from 'their own states of nationality' and 'shall avoid ... being placed in a situation which might reasonably be perceived as giving rise to any conflict of interests'.<sup>25</sup> Judge Ozaki subsequently resigned her ambassadorship on 18 April 2019, thus implicitly acknowledging she was wrong to have accepted the post.<sup>26</sup> Her resignation may also be read as, extraordinarily, a vote of no confidence in her colleagues' vote in her favour. There was also the revealing episode in which the Court released an anonymous 'Q&A' document on the decision regarding the immunity of (now former) President Al-Bashir noted

<sup>21</sup> Marlise Simons, 'In the Hague's Lofty Judicial Halls, Judges Wrangle over Pay', *The New York Times* (online, 20 January 2019) <<https://www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html>>, archived at <<https://perma.cc/672G-MK5F>>; Janet Anderson, 'Money Matters at the ICC', *Justiceinfo.net* (online, 14 December 2018) <<https://www.justiceinfo.net/en/tribunals/icc/39771-money-matters-at-the-icc.html>>, archived at <<https://perma.cc/U6G7-FSXG>>; Janet H Anderson, 'Pass the Parcel at the ICC', *Justiceinfo.net* (online, 9 December 2019) <<https://www.justiceinfo.net/en/tribunals/icc/43178-pass-the-parcel-at-the-icc.html>>, archived at <<https://perma.cc/6DHC-FA7W>>.

<sup>22</sup> Assembly of States Parties, International Criminal Court, *Staff Regulations for the International Criminal Court*, Res ICC-ASP/2/Res.2, Official Records, 2<sup>nd</sup> sess, 5<sup>th</sup> plen mtg, Doc No ICC-ASP/2/10 (12 September 2003) annex, art XI reg 11.2.

<sup>23</sup> *Prosecutor v Ntaganda (Notification of the Decision of the Plenary of Judges Pursuant to Article 40 of the Rome Statute)* (International Criminal Court, Presidency, Case No ICC-01/04-02/06, 22 March 2019) annex 1 ('*Internal Memorandum*'), archived at <<https://perma.cc/W8RT-T2TS>>. For background, see Kevin Jon Heller, 'Judge Ozaki Must Resign — or Be Removed', *Opinio Juris* (Blog Post, 29 March 2019) <<https://opiniojuris.org/2019/03/29/judge-ozaki-must-resign-or-be-removed/>>, archived at <<https://perma.cc/8Y4Z-87LH>>.

<sup>24</sup> *Rome Statute* (n 1) art 40(2). See also International Criminal Court, *Code of Judicial Ethics*, Doc No ICC-BD/02-01-05 (adopted 9 March 2005) art 10(2) ('Judges shall not exercise any political function'). See also Keith Raynor, 'International Criminal Justice: Where Does It Go from Here?' (Speech, Lincoln's Inn, 22 May 2019) [81] <[https://opiniojuris.org/wp-content/uploads/Lincolns-22-May\\_ForKevinJonHeller-2.pdf](https://opiniojuris.org/wp-content/uploads/Lincolns-22-May_ForKevinJonHeller-2.pdf)>, archived at <<https://perma.cc/X58U-S857>> (observing 'even the most junior barristers ... would see an obvious problem' with a person 'acting in a judicial and executive role at the same time').

<sup>25</sup> Philippe Sands, Campbell McLachlan and Ruth Mackenzie, 'The Burgh House Principles on the Independence of the International Judiciary' (2005) 4(2) *Law and Practice of International Courts and Tribunals* 247, 251 (emphasis added).

<sup>26</sup> *Prosecutor v Ntaganda (Notification concerning Judge Kuniko Ozaki)* (International Criminal Court, Case No ICC-01/04-02/06, 1 May 2019) [3]; Wairagala Wakabi, 'Judge Ozaki Resigns Ambassadorial Post to Stay on Ntaganda Trial', *International Justice Monitor* (online, 6 May 2019) <<https://www.ijmonitor.org/2019/05/judge-ozaki-resigns-ambassadorial-post-to-stay-on-ntaganda-trial/>>, archived at <<https://perma.cc/QAV4-JUT8>>.

above.<sup>27</sup> This document was trenchant in its rebuttal of early academic criticism of the decision. It suggested there had been a failure ‘to appreciate the totality and nuances of the Court’s reasoning’, and reminded lawyers that ‘the rules of professional ethics in most legal systems impose special caution on criticism of judges and courts’, which include an ‘ethical obligation’ to offer such criticism ‘accurately and fairly’.<sup>28</sup> Other than appearing quite thin-skinned, the document — rather than confining itself to summarising the key findings of the decision — peculiarly chose to expand both on the Appeal Chamber’s view of the relevant legal questions and why the judges involved considered it necessary to address them.

The discourse of a ‘crisis’ at the ICC, or in international criminal law generally, is overstated and potentially counterproductive.<sup>29</sup> Once crisis is ‘normalized’, it loses its power as a catalyst for change and becomes ‘replaced with a defensive posture from the [international criminal justice] project’s supporters’.<sup>30</sup> Instead, this paper proceeds on the basis that the ICC is, first and foremost, an international organisation. In particular, it engages with the concept of a ‘fiasco’ — in which a public-sector organisation’s policy failures may become a political liability — and the efforts to ascribe responsibility or displace blame that then usually follow (Part III). There is a developed literature on organisational failure, leadership and change management with which international criminal lawyers have largely failed to engage. At one level, this is unsurprising. Lawyers often engage in debates about the successes or failures of the ICC, both at a normative level that resists engagement with the empirical or political, and also in conflicting doctrinal registers which resist engagement with each other. The remainder of this paper thus, first, briefly establishes a prima facie case that the ICC is failing in its core mission (Part II); secondly, lays out the framework for an organisational failure analysis, highlighting the role of both environmental challenges (both external and structural) and leadership in organisational failure (Part III); thirdly, considers the role of external and structural factors challenging the Court (Part IV); fourthly, examines the role of the Court’s leadership in responding both to such challenges and to the fiasco in which the institution is now embroiled (Part V); fifthly, considers the often-neglected potential role of the ICC ASP in any reform efforts (Part VI); and, finally, concludes with a call, not for greater managerialism within the Court, but for a guiding ethic of modesty (Part VII). Conducting such a multifaceted examination fairly within the space of this article will necessarily involve covering a wide terrain thinly and relegating matters of detail to

<sup>27</sup> International Criminal Court, *Q&A regarding Appeals Chamber’s 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal* (Doc No ICC-PIOS-Q&A-SUD-02-01/19\_Eng, May 2019) <<https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf>>, archived at <<https://perma.cc/X7GP-4ZUU>> (*‘Q&A regarding Al-Bashir’*).

<sup>28</sup> *Ibid* 2.

<sup>29</sup> Vasiliev sees the language of crisis as a ‘cliché’, used more ‘as a click-bait rather than an analytical lens’: Sergey Vasiliev, ‘The Crises and Critiques of International Criminal Justice’ in Kevin Jon Heller et al (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 626, 630.

<sup>30</sup> Joseph Powderly, ‘International Criminal Justice in an Age of Perpetual Crisis’ (2019) 32(1) *Leiden Journal of International Law* 1, 5.

footnotes.<sup>31</sup> Many of the points made and critiques offered in this article are not necessarily new. The contribution it seeks to make is in attempting to assess the Court in the round and in how that analysis is framed.

## II IS THERE A CASE TO ANSWER? ASSESSING THE INTERNATIONAL CRIMINAL COURT AGAINST ITS CORE MISSION

If we accept as our starting position the claim by four former ASP presidents that the Court needs fixing, the clear implication is that the Court is either broken or malfunctioning. This case is not especially difficult to make out. In terms of concrete achievements in its 20-year life, and in the 17 years since its first Prosecutor was sworn in, the Court has secured only four convictions for ‘core crimes’ (see further Table 1):

- Germain Katanga (Situation in the Democratic Republic of the Congo): sentenced to 12 years and transferred back to DRC custody with ‘sentence served’ after eight years;<sup>32</sup>
- Thomas Lubanga (Situation in the DRC): sentenced to 14 years;<sup>33</sup>
- Ahmad Al Mahdi (Situation in Mali): sentenced to nine years on guilty plea;<sup>34</sup> and
- Bosco Ntaganda (Situation in the DRC): sentenced to 30 years.<sup>35</sup>

While ‘[a]cquittals are part of a healthy system of criminal justice, ... the low rate of successful prosecutions suggests systemic dysfunctions’.<sup>36</sup> The Court’s very limited successes on this front are further marred by the considerable disquiet expressed regarding the *Prosecutor v Katanga* (‘*Katanga*’) conviction, which

<sup>31</sup> Kieran Healy argues that ‘demands for more nuanced approaches to problems, in the form of calls for a more fine-grained view ... [may] inhibit the process of abstraction that makes theory valuable’: Kieran Healy, ‘Fuck Nuance’ (2017) 35(2) *Sociological Theory* 118, 126. I would argue the same applies to the form of analysis attempted here. On the need for wide-ranging and multifaceted evaluations of international criminal tribunals, see Cryer, Robinson and Vasiliev (n 15) 552.

<sup>32</sup> *Prosecutor v Katanga (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) (‘*Katanga Judgment*’); *Prosecutor v Katanga (Decision on Sentence Pursuant to Article 76 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 23 May 2014); *Prosecutor v Katanga (Decision on the Review concerning Reduction of Sentence)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07, 13 November 2015).

<sup>33</sup> *Prosecutor v Lubanga (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 5 April 2012); *Prosecutor v Lubanga (Decision on Sentence Pursuant to Article 76 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 10 July 2012).

<sup>34</sup> *Prosecutor v Al Mahdi (Judgment and Sentence)* (International Criminal Court, Trial Chamber VIII, Case No ICC-01/12-01/15, 27 September 2016).

<sup>35</sup> *Ntaganda Judgment* (n 10); *Prosecutor v Ntaganda (Sentencing Judgment)* (International Criminal Court, Trial Chamber VI, Case No ICC-01/04-02/06, 7 November 2019).

<sup>36</sup> Cryer, Robinson and Vasiliev (n 15) 169.

involved judicial recharacterisation of the relevant mode of liability after the close of proceedings.<sup>37</sup>

Put simply, the core *raison d'être* of the ICC is expressive or retributive justice, of which it has delivered very little.<sup>38</sup> While the Court may be said to serve numerous objectives,<sup>39</sup> the 'key rationale for creating the ICC is to eradicate impunity for the gravest crimes'; this cannot be achieved without convictions.<sup>40</sup> The Preamble to the *Rome Statute* itself articulates the object and purpose of the Court as being 'to contribute [both] to the prevention' of international crimes and to their 'effective prosecution ... at the national level' on the basis that 'such grave crimes threaten the peace, security and well-being of the world'.<sup>41</sup> One may thus claim that the Court can be successful if it 'has a catalysing effect' on national justice mechanisms,<sup>42</sup> or contributes to international peace and security more generally. Such arguments involve counterfactuals, which are hard to test in practice,<sup>43</sup> and claims that the Court has had such an effect in specific contexts,

<sup>37</sup> While the defence was given the opportunity to present submissions on 'recharacterisation', the criticism that this impacted Mr Katanga's right to know the case against him and prejudiced his defence has weight: see Sophie Rigney, "'The Words Don't Fit You': Recharacterisation of the Charges, Trial Fairness, and *Katanga*' (2014) 15(2) *Melbourne Journal of International Law* 515; Kevin Jon Heller, "'A Stick to Hit the Accused with': The Legal Recharacterization of Facts under Regulation 55' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 981; Carsten Stahn, 'Justice Delivered or Justice Denied? The Legacy of the *Katanga* Judgment' (2014) 12(4) *Journal of International Criminal Justice* 809; Talita de Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18(5) *International Criminal Law Review* 788; Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016) 65–6.

<sup>38</sup> Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014) chs 1, 3. See especially at 227–38. On measuring organisational dysfunction by comparing an organisation's performance against its 'publicly proclaimed mission', see Michael N Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53(4) *International Organization* 699, 716.

<sup>39</sup> See especially Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83(1) *Chicago-Kent Law Review* 329, 331. On the tendency of international criminal lawyers to use these various goals to 'jump' between different defensive strategies when pressed on hard questions, see Sarah MH Nouwen, 'Justifying Justice' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 327, 338–9. See also Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2018) 25 ('*Distant Justice*') (making the argument that the diversity of contradictory goals invoked in international criminal law discourse means not that the Court cannot win but that it cannot be judged to lose).

<sup>40</sup> Frédéric Mégret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project' (2001) 12 *Finnish Yearbook of International Law* 193, 215. See also International Criminal Court, *Strategic Plan 2019–2021* (Report, 17 July 2019) 5 [9] <<https://www.icc-cpi.int/itemsDocuments/20190717-icc-strategic-plan-eng.pdf>>, archived at <<https://perma.cc/7BNX-XRS7>>.

<sup>41</sup> *Rome Statute* (n 1) Preamble paras 3–5.

<sup>42</sup> Sarah MH Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013) 20 n 46, 27–8 ('*Complementarity in the Line of Fire*').

<sup>43</sup> Close examination usually reveals very complex interactions between the Court and local politics and actors: see Nouwen, *Complementarity in the Line of Fire* (n 42). See especially at 284–8. See also Phil Clark, *Distant Justice* (n 39) 51–99.

such as Colombia, are contested.<sup>44</sup> Irrespectively, such arguments involve claims about behaviour changing in the ‘shadow’ of the Court,<sup>45</sup> and to have such an effect the Court must first cast a shadow. It must have a demonstrated capacity to reliably build strong cases and secure fair convictions. Four substantive convictions in 20 years puts that capacity legitimately in doubt.

Further, the ICC has only indicted 37 suspects (Table 1). As Richard Goldstone has noted, this record compares unfavourably with the achievements of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) over 22 years, which ‘indicted 161 individuals of whom 99 were sentenced, 19 acquitted and 13 referred to domestic courts’.<sup>46</sup> (The question as to whether a fair comparison can be made between different tribunals is addressed below.)

Table 1: *The International Criminal Court’s Core Crimes Record*<sup>47</sup>

ICC Core Crime Statistics	Number	Individuals	Situation
Arrest Warrant Issued (awaiting arrest/transfer to ICC)	11	Mudacumura	DRC
		Kony	Uganda
		Otti ( <i>reportedly deceased</i> )	Uganda
		Al-Bashir	Sudan
		Harun	Sudan
		Kushayb	Sudan
		Hussein	Sudan
		S Gbagbo	Côte d’Ivoire
		S Gaddafi	Libya
		Al-Tuhamy	Libya
		Al-Werfalli	Libya
Case Inadmissible	1	Al-Senusi	Libya

<sup>44</sup> Jennifer Easterday, ‘Beyond the “Shadow” of the ICC: Struggles over Control of the Conflict Narrative in Colombia’ in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 432; René Uruena, ‘Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003–2017’ (2017) 111(1) *American Journal of International Law* 104.

<sup>45</sup> The leading article on the Court’s potential deterrent effect is Hyeran Jo and Beth A Simmons, ‘Can the International Criminal Court Deter Atrocity?’ (2016) 70(3) *International Organization* 443. See at 449, finding an impact on some governments and some rebel actors which seek legitimacy. For a sceptical analysis, see Kate Cronin-Furman, ‘Can We Tell If the ICC Can Deter Atrocity?’, *jamesgstewart.com* (Blog Post, 21 March 2016) <<http://jamesgstewart.com/can-we-tell-if-the-icc-can-deter-atrocity/>>, archived at <<https://perma.cc/SZ78-BEDF>>.

<sup>46</sup> Richard Goldstone, ‘Acquittals by the International Criminal Court’, *EJIL:Talk!* (Blog Post, 18 January 2019) <<https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/>>, archived at <<https://perma.cc/Y7ZK-RVEL>>.

<sup>47</sup> Originally prepared by Barrie Sander (Fundação Getulio Vargas, Center for International Relations, São Paulo, Brazil): @Barrie\_Sander (Twitter, 20 May 2019, 7:09pm AEDT) <[https://twitter.com/barrie\\_sander/status/1130400027350904833](https://twitter.com/barrie_sander/status/1130400027350904833)>, archived at <<https://perma.cc/MSR5-2DFX>>. Reproduced with permission and updated by the author. Based on public records. Accurate as at 19 December 2019.

ICC Core Crime Statistics	Number	Individuals	Situation
Charges Not Confirmed	4	Mbarushimana	DRC
		Abu Garda	Sudan
		Ali	Kenya
		Kosgey	Kenya
Charges Confirmed ( <i>trial not yet initiated</i> )	2	Al Hassan	Mali
		Banda ( <i>not yet transferred to ICC</i> )	Sudan
		Yekatom	CAR II
		Ngaissona	CAR II
Trial Phase	1	Ongwen	Uganda
Charges Withdrawn ( <i>during trial</i> )	2	Muthaura	Kenya
		Kenyatta	Kenya
Charges Vacated ( <i>during trial</i> )	2	Ruto	Kenya
		Sang	Kenya
Convictions ( <i>on all charges</i> )	3	Lubanga ( <i>upheld on appeal</i> )	DRC
		Al Mahdi ( <i>guilty plea</i> )	Mali
		Ntaganda ( <i>appeal pending</i> )	DRC
Convictions ( <i>on some charges</i> )	1	Katanga ( <i>no appeal</i> )	DRC
Acquittals ( <i>on all charges</i> )	4	Ngudjolo ( <i>upheld on appeal</i> )	DRC
		Bemba ( <i>acquitted on appeal</i> )	CAR I
		L Gbagbo ( <i>OTP appeal filed</i> )	Côte d'Ivoire
		Blé Goudé ( <i>OTP appeal filed</i> )	Côte d'Ivoire
Proceedings Ended	4	M Gaddafi ( <i>deceased</i> )	Libya
		Odhiambo ( <i>deceased</i> )	Uganda
		Lukwiya ( <i>deceased</i> )	Uganda
		Jerbo ( <i>deceased</i> )	Sudan

As noted, if one accepts the Court is broken or failing to perform, several questions follow. These are addressed below in terms of organisational failure analysis and an attempt to assess whether arguments defending the Court's track record are fairly made.

First, however, I must offer a brief comment on the manner in which lawyers tend to debate the Court. Most discussion of the Court occurs within a reasonably narrow frame. Its critics and defenders alike tend to see it as both part of a larger

justice project as well as a criminal tribunal.<sup>48</sup> The line of argumentation one takes in critique or defence will depend largely on which of those two attributes one prioritises.<sup>49</sup> It is sufficient for present purposes to characterise the two dominant lines of argumentation as being either universalist or positivist. Universalists tend to see the Court as operating on behalf of the ‘international community’ and as part of a project to discipline politics to the constraints of the law.<sup>50</sup> Universalism requires that the Court transcend both the states and political power that created it.<sup>51</sup> Universalist arguments may, therefore, tend to adopt teleological interpretations of the law supporting these commitments.<sup>52</sup> For positivists, the ICC has its origins in treaty law and state consent: it cannot bootstrap itself to a plane above states. A positivist will thus typically frame their arguments on the basis that the ICC exercises delegated jurisdiction and can be in no better position than national courts (*nemo dat quod non habet*).<sup>53</sup> These competing lines of argumentation lead to a potential legitimacy problem:

[T]he Court has various ‘audiences,’ including states, international organization, victims, and accused persons. Certain features that will enhance its legitimacy in the eyes of one relevant audience may, simultaneously, reduce its legitimacy in the eyes of another audience.<sup>54</sup>

Put crudely, legal arguments which appeal to supporters of ‘liberal international criminal justice’<sup>55</sup> may alienate many state governments and vice versa. On either

<sup>48</sup> Joseph Powderly uses the term ‘international criminal justice project’ to encompass both support for the International Criminal Court (‘ICC’) and international criminal law more widely (with the former being crucial to the latter): Powderly (n 30).

<sup>49</sup> I borrow the term ‘lines of argumentation’ from Barrie Sander, ‘Unveiling the Historical Function of International Criminal Courts: Between Adjudicative and Sociopolitical Justice’ (2018) 12(2) *International Journal of Transitional Justice* 334, 336.

<sup>50</sup> See David Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 569, 576 (on the mission of international criminal law ‘to assert the realm of law against the claims of politics’); Leila Nadya Sadat and S Richard Carden, ‘The New International Criminal Court: An Uneasy Revolution’ (1999) 88(3) *The Georgetown Law Journal* 381; Claus Kreß, ‘The International Criminal Court and Immunities under International Law for States Not Party to the Court’s Statute’ in Morten Bergsmo and Ling Yan (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher, 2012) 223, 246–50; Kai Ambos, ‘Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law’ (2013) 33(2) *Oxford Journal of Legal Studies* 293, 304–15.

<sup>51</sup> Mégret (n 40); Barrie Sander, ‘The Expressive Turn in International Criminal Justice: A Field in Search of Meaning’ (2019) 32(4) *Leiden Journal of International Law* 851, 855–62; Vasiliev, ‘The Crises and Critiques of International Criminal Justice’ (n 29); Michelle Burgis-Kasthala, ‘Scholarship as Dialogue? TWAAIL and the Politics of Methodology’ (2016) 14(4) *Journal of International Criminal Justice* 921, 928 (noting there is often not a distinction between scholarship on international criminal law and scholarship in support of the field itself).

<sup>52</sup> Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21(4) *Leiden Journal of International Law* 925, 928–9.

<sup>53</sup> By way of example, see Roger O’Keefe, *International Criminal Law* (Oxford University Press, 2015) 106–7.

<sup>54</sup> Shany (n 38) 242. For an overview of the literature on legitimacy of international courts: Harlan Grant Cohen et al, ‘Legitimacy and International Courts: A Framework’ in Nienke Grossman et al (eds), *Legitimacy and International Courts* (Cambridge University Press, 2018) 1, 9–14.

<sup>55</sup> Mégret (n 40) 195–6.

approach, and despite a rich and growing critical literature,<sup>56</sup> law's self-image as a domain of autonomous knowledge separate from politics tends to insulate doctrinal international criminal law scholarship from taking into account the political, the empirical and the interdisciplinary.<sup>57</sup>

As noted, this paper has a different starting assumption: that the ICC is first and foremost an intergovernmental organisation accountable to its member states. This approach obviously embodies a certain sympathy for positivism. Nonetheless, for the reasons outlined above, a purely positivist approach lends itself to the policy-oriented liberal 'efficiency critique' of international institutions.<sup>58</sup> Such a technocratic and incrementalistic approach, however, will of itself be unable to address the ICC's problems to the extent they may result from its structure, environment or leadership as discussed below.

### III FRAMING THE EXAMINATION: MOVING FROM CRISIS DISCOURSE TO ORGANISATIONAL FAILURE ANALYSIS

Three insights from the literature on organisational failure are relevant to this article. The first is 'ambiguity of responsibility': we are least likely to learn from our mistakes when poor outcomes can be attributed to the actions of others or complex environmental factors.<sup>59</sup> Secondly, such ambiguity invites effort to ascribe responsibility or, potentially, to displace blame. In this context, public sector leaders may find that their policy failures become a political liability (a 'fiasco').<sup>60</sup> The case for accepting that the Court presently faces a series of challenges that may constitute a fiasco was outlined in Part II. A fiasco has four typical phases: early assessment or scrutiny; seeking out responsible agents; a calling to account; and final evaluation in the court of public opinion.<sup>61</sup> Embroiled leaders may at each phase seek to: first, *deny* the failure or *reframe* the criteria for success; secondly, *combat causation* when it seems likely they may be identified as responsible; thirdly, plead they lacked *capacity* to act otherwise or seek to *disqualify the analyst*, claiming criticism has been made unfairly or unprofessionally; and, fourthly, claim their actions were *justified* (as right or inevitable) or appear to concede the argument by engaging in token *symbolic*

<sup>56</sup> Elies van Sliedregt, 'International Criminal Law: Over-Studied and Underachieving?' (2016) 29(1) *Leiden Journal of International Law* 1. On the ICC as a complex assemblage embedded in 'structures of power, history, and contingencies', see Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press, 2019) 6.

<sup>57</sup> Shirley V Scott, *International Law in World Politics: An Introduction* (Lynne Rienner Publishers, 3<sup>rd</sup> ed, 2017) ch 6; van Sliedregt (n 56) 5.

<sup>58</sup> See generally Pádraig McAuliffe and Christine Schwöbel-Patel, 'Disciplinary Matchmaking: Critics of International Criminal Law Meet Critics of Liberal Peacebuilding' (2018) 16(5) *Journal of International Criminal Justice* 985.

<sup>59</sup> Gretchen Gavett, 'When We Learn from Failure (and When We Don't)', *Harvard Business Review* (online, 28 May 2014) <<https://hbr.org/2014/05/when-we-learn-from-failure-and-when-we-dont>>, archived at <<https://perma.cc/3KZ6-7JK2>>. See also Per Lægveid, 'Accountability and New Public Management' in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 324, 331–2.

<sup>60</sup> Mark Bovens et al, 'The Politics of Blame Avoidance: Defensive Tactics in a Dutch Crime-Fighting Fiasco' in Helmut K Anheier (ed), *When Things Go Wrong: Organizational Failures and Breakdowns* (Sage Publications, 1999) 123, 140–5.

<sup>61</sup> *Ibid* 142.

reform.<sup>62</sup> When such arguments or efforts are made, we must ask: do they accurately ascribe responsibility or do they displace blame?

A third basic insight from the literature is that when organisations fail it is usually the result of a combination of both environmental and internal factors.<sup>63</sup> Typically, ‘sustained organizational decline is ... associated with a lack of managerial foresight and failure of the top management team ... to respond to changes in the external environment’.<sup>64</sup> Many organisations face challenging external environments; how they respond to them is crucial. However, some organisations face particular challenges in receiving and responding to feedback from their environment. Highly professionalised international organisations, such as a court staffed by lawyers, tend to filter out information that does not correspond to their professional worldview.<sup>65</sup> Thus, an OTP that insists that it is not for it to accommodate politics but rather that ‘[i]t is time for political actors to adjust to the law’<sup>66</sup> risks being captured by *volontarisme* or a self-created simulacrum in which one either believes that will can reshape reality or mistakes one’s normative commitments as a map of the way the world functions.<sup>67</sup> Feedback about actual conditions (‘local actors think amnesties would be better than prosecutions’) risks being ignored on normative grounds (‘that’s illegal’). Organisations which are primarily ‘valued for what they represent’ and which do not directly ‘compete’ with other organisations are often insulated from environmental feedback that would ‘allow the organization to evaluate its efforts and use new information to correct established’ practices.<sup>68</sup> Public organisations may thus be less likely to be self-correcting and ‘more likely to fail if they have weak political and managerial leadership’.<sup>69</sup> For the purposes of this article, it will be assumed the key leaders of the ICC are the Prosecutor and the judges. (The Registrar also has an important

<sup>62</sup> Ibid 140–5. See also Barnett and Finnemore (n 38) 723–4.

<sup>63</sup> Surveying the literature: Joseph Amankwah-Amoah and Yaw A Debrah, ‘The Protracted Collapse of Ghana Airways: Lessons in Organizational Failure’ (2010) 35(5) *Group and Organization Management* 636, 640–1. See also Barnett and Finnemore (n 38) 725.

<sup>64</sup> Amankwah-Amoah and Debrah (n 63) 640–1.

<sup>65</sup> Barnett and Finnemore (n 38) 722. Cf McAuliffe and Schwöbel-Patel (n 58) 995–6 (on ‘naive technicism’); Sander’s account of ideological legalism in Barrie Sander, ‘International Criminal Justice as Progress: From Faith to Critique’ in Morten Bergsmo et al (eds), *Historical Origins of International Criminal Law* (Torkel Opsahl Academic EPublisher, 2014–17) vol 4, 756–7 (‘International Criminal Justice as Progress’), citing Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1964) 112.

<sup>66</sup> Luis Moreno-Ocampo, ‘The International Criminal Court: Seeking Global Justice’ (2008) 40(1–2) *Case Western Reserve Journal of International Law* 215, 224.

<sup>67</sup> *Volontarisme* may be defined as the belief of a person or a group that the course of events can be altered by their will alone: *Larousse* (online at 27 October 2019) ‘volontarisme’ (def 1) (‘[a]ttitude de quelqu’un, d’un groupe qui pense modifier le cours des événements par la seule volonté’). For an introduction to Jean Baudrillard’s concepts of the simulacrum and hyperreality, see Ian Buchanan, *A Dictionary of Critical Theory* (Oxford University Press, 2010) (‘hyperreality’ and ‘simulacrum’); Douglas Kellner, ‘Jean Baudrillard’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, online at 18 December 2019) <<https://plato.stanford.edu/entries/ baudrillard/>>, archived at <<https://perma.cc/6NLD-6TA7>>. Applications of Baudrillard’s work to law and crime have been limited: Bruce A Arrigo, Dragan Milovanovic and Robert Carl Schehr, *The French Connection in Criminology: Rediscovering Crime, Law, and Social Change* (State University of New York Press, 2005) 21. See also Mégret (n 40) 194 (on misplaced faith in the categorical imperative).

<sup>68</sup> Barnett and Finnemore (n 38) 723.

<sup>69</sup> Amankwah-Amoah and Debrah (n 63) 641.

leadership function, which has been dealt with in the context of organisational failure elsewhere.<sup>70</sup>)

The following sections of this article are structured around these three basic insights. As a first step, in Part IV, the article will attempt to assess the external and structural challenges facing the Court. It will do this through a typology of arguments about *ascription of responsibility*. This essentially asks whether common defences mounted regarding the Court's disappointing performance are valid. Again, this necessitates painting on a broad canvas: unless the Court is viewed in the round and in context, unmeritorious buck-passing may be accepted or meritorious excuses may be dismissed as self-serving. This exercise also clarifies the environment in which the Court's leaders are operating. The competence with which the Court's leaders have navigated that environment, and the extent to which they have bolstered or damaged the Court's legitimacy, is then explored in Part V.

#### IV ASCRIBING RESPONSIBILITY: EXTERNAL AND STRUCTURAL CHALLENGES

In assigning responsibility for the Court's failure, potential argumentative defences that need close examination are fivefold and point to different elements of the Court's environment, structure and leadership. We must examine efforts to:

- *disqualify the analysis*: defending the Court on the basis that comparisons with other institutions such as the ICTY are unfair, or through alleging that criticism is unfair or unprofessional (as in the Q&A document affair);
- *justify* the performance of judges (ascribing responsibility to the OTP) by arguing that a run of acquittals and case collapses demonstrates that they are upholding a fair system;
- defend the OTP through *combatting causation* (and ascribing responsibility to the judges) on the basis that judges keep moving the goalposts through changing applicable standards of evidence or appellate review;
- defend either or both the judges and the OTP on the basis that they lack *capacity* and need further resources (ascribing responsibility instead to states party); and
- engage in *denial* or mount *capacity*-based arguments that all 'new' institutions have growing pains or that actors within the Court are simply doing as the *Rome Statute* requires.

I address the first and fourth of these defensive strategies under the heading of *external challenges* and take the fifth as going to *structural challenges* (the Court's legal architecture), both of which are addressed in this section. The remainder I treat as questions of *leadership competence* in Part V.

##### A *External Challenges*

Here I will address defensive arguments going to the Court's operating environment and resourcing. Goldstone has argued that it is unfair to compare the

<sup>70</sup> Richard Clements, 'ReVisiting the ICC Registry's ReVision Project' (2019) 17(2) *Journal of International Criminal Justice* 259.

results at the ICC with the ICTY as was done in Part I. He makes this argument on the basis that the ICTY had a restricted geographical remit (while the ICC has territorial jurisdiction over 123 member states), was empowered by a Security Council Resolution binding upon all states and had the active support of the US.<sup>71</sup> Conversely, we can ask whether these are real points of comparative difference or actually an articulation of some of the criteria for success for any international criminal tribunal. First, territorial access is plainly critical in gathering evidence and building a case.<sup>72</sup> Secondly, international criminal tribunals need powerful patrons to operate successfully. The Nuremberg Tribunal was operated by occupying powers.<sup>73</sup> The ICTY only really gathered pace when, along with pressure from the US and the World Bank, the European Union made cooperation with it (and surrendering suspects to it) a precondition for financial assistance and accession talks with the successor states of the former Yugoslavia.<sup>74</sup> The International Criminal Tribunal for Rwanda ('ICTR') was transparently dependent on the cooperation of Rwanda.<sup>75</sup> The establishment of the hybrid courts in Sierra Leone and Cambodia required a political settlement to be reached between the national governments and the UN, and even then faced practical difficulties in their operation.<sup>76</sup> One might further note that, in each of these cases, international criminal tribunals — other than the ICTY in the period up to 2001 — were essentially operating in post-conflict environments and not seeking to mount cases while crimes continued or to prosecute those still in power. International criminal tribunals work most effectively when they follow political settlements, not when they precede them. Defending the Court on Goldstone's basis simply lays the foundations for a claim that the Court is, in fact, unworkable.

Nonetheless, the argument may be made that if the Court is going to succeed in such a challenging political environment it needs more funding. That is, if we would like to see better cases put up, the OTP will need to widen its investigations. Building cases against a variety of mid-level leaders first, the argument goes, provides a better foundation for pursuing high-level leaders later.<sup>77</sup> This could be done, but not cheaply. Thus, states party should provide more funding and must take responsibility if the Court is not succeeding. The argument merits close examination before, once again, inverting the proposition.

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<sup>71</sup> Goldstone (n 46). See also John Hagan and Ron Levi, 'Crimes of War and the Force of Law' (2005) 83(4) *Social Forces* 1499, 1527.

<sup>72</sup> Christian M De Vos, 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26(4) *Leiden Journal of International Law* 1009.

<sup>73</sup> Cryer, Robinson and Vasiliev (n 15) 116–20.

<sup>74</sup> Hagan and Levi (n 71) 1526–7.

<sup>75</sup> Cedric Ryngaert, 'State Cooperation with the International Criminal Tribunal for Rwanda' (2013) 13(1) *International Criminal Law Review* 125, 129–32.

<sup>76</sup> Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 2019) 199–200, 202–4.

<sup>77</sup> Ben Batros, 'The ICC Acquittal of Gbagbo: What Next for Crimes against Humanity?', *Just Security* (Blog Post, 18 January 2019) <<https://www.justsecurity.org/62295/icc-acquittal-gbagbo-crimes-humanity/>>, archived at <<https://perma.cc/AUA2-ULKJ>> ('The ICC Acquittal of Gbagbo'). Cf Fatou Bensouda, 'Address to the Assembly of States Parties: Twelfth Session of the Assembly of States Parties' (Speech, World Forum, 20 November 2013) [5] <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ASP12-OP-Statement-PROS-ENG-FRA.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ASP12-OP-Statement-PROS-ENG-FRA.pdf)>, archived at <<https://perma.cc/W3S7-TASM>>. See also below Part V(A)(2), discussing the Office of the Prosecutor ('OTP') *Strategic Plan 2019–2021*.

First, close scrutiny of the proposition that the Court is underfunded may lead to some sympathy for the resources argument. The headline figures for the Court look impressive: it has an annual budget for 2019 of over €150 million, has spent €1.5 billion over its lifetime, and has over 900 employees.<sup>78</sup> However, total annual expenditure on the Australian Federal Court system is \$345 million (approximately €214 million)<sup>79</sup> and it has 1,000 employees.<sup>80</sup> It is thus not hard to find better resourced national court systems.<sup>81</sup> More money could presumably be found for the Court if states were willing.

But what should we expect of the ICC within its existing resource envelope? At the height of its activities in 2007 the ICTY had a *biennial* budget of approximately USD300 million, equivalent to €311 million in 2018 (adjusted for inflation).<sup>82</sup> In 2018 the ICC had an *annual* budget of €147.43 million.<sup>83</sup> Thus, annually, the ICTY had a comparable budget to that which the ICC has now. Stuart Ford has attempted an ‘apples to apples’ comparison of budget expenditures between the two courts.<sup>84</sup> He concludes that the ICC’s ‘outputs’, in terms of trials and court proceedings, are roughly half that of the ICTY; the ICC spends less of its budget on trials and investigations and more on administration; and even adjusted for inflation, the ICC spends 64% more per staff post than the ICTY (a figure which likely reflects the ICC’s greater dependence on outside contractors and intermediaries).<sup>85</sup> These calculations suggest the ICC is underperforming.

<sup>78</sup> Assembly of States Parties, International Criminal Court, Official Records, vol II, 17<sup>th</sup> sess, Doc No ICC-ASP/17/20 (5–12 December 2018) 10 tbl 1 (2019 budget), 18 tbl 6 (approved staffing) (*‘Official Records of the 17<sup>th</sup> Session’*). Cf Assembly of States Parties, International Criminal Court, *Report of the Committee on Budget and Finance on the Work of its Thirtieth Session*, Official Records, vol II, 17<sup>th</sup> sess, Doc No ICC-ASP/17/5 (31 May 2018) 15 [65] (2018 budget), annex II (*‘Human Resources Tables’*) 45 (actual employees). On lifetime budget expenditure, see Murdoch (n 2).

<sup>79</sup> ‘Australian Dollars (AUD) to Euros (EUR) Exchange Rate for June 1, 2019’, *Exchange-Rates.org* (Web Page) <<https://www.exchange-rates.org/Rate/AUD/EUR/6-01-2019>>, archived at <<https://perma.cc/G4JD-Z667>>.

<sup>80</sup> See Federal Court of Australia, *Annual Report 2017–18* (Report, 5 September 2018) 4–5 tbls 1.1–1.4 <[https://www.fedcourt.gov.au/\\_\\_data/assets/pdf\\_file/0003/52716/AR-2017-18.pdf](https://www.fedcourt.gov.au/__data/assets/pdf_file/0003/52716/AR-2017-18.pdf)>, archived at <<https://perma.cc/8VXG-3P29>>.

<sup>81</sup> Although, as Sarah Nouwen notes, the claim can also be made that international criminal tribunals with budgets over \$100 million have, in fact, greater resources ‘than most states’ entire justice systems’: Sarah MH Nouwen, “‘Hybrid Courts’: The Hybrid Category of a New Type of International Crimes Courts” (2006) 2(2) *Utrecht Law Review* 190, 191.

<sup>82</sup> *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN GAOR, 62<sup>nd</sup> sess, Agenda Item 77; UN SCOR, 62<sup>nd</sup> sess, UN Docs A/62/172 and S/2007/469 (1 August 2007) para 114. The method adopted was to convert the United States dollar figure for 2007 to 2018 dollars using the US Bureau of Labor Statistics’ Consumer Price Index. This was then converted to 2018 euros using the average euro to dollar exchange rate for 2018.

<sup>83</sup> Assembly of States Parties, International Criminal Court, *Report of the Committee on Budget and Finance on the Work of its Thirtieth Session*, Official Records, vol II, 17<sup>th</sup> sess, Doc No ICC-ASP/17/5 (31 May 2018) 15 [65].

<sup>84</sup> Stuart Ford, ‘How Much Money Does the ICC Need?’ in Carsten Stahn (eds), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 84, 98.

<sup>85</sup> *Ibid* 98–103.

Such a comparison may, again, be challenged as unfair based on the width of the ICC's geographic remit.<sup>86</sup> A single-jurisdiction tribunal should benefit from efficiencies of scale and a depth of local knowledge which will support more effective prosecutions.<sup>87</sup> One may thus have to discount somewhat one's expectations of a multi-jurisdiction tribunal. The point, however, remains that had the Prosecutor chosen to focus on one or two situations in detail, there should have been sufficient resources to perform in terms broadly comparable to the ICTY. Nothing forced the Court into a position where, in 2019, it is concurrently active in 11 situations and carrying out a further nine preliminary investigations,<sup>88</sup> other than decisions of the OTP. Moreover, as Ford notes, the 'data does not support [the] hypothesis' that multiple geographically dispersed investigations are disproportionately expensive: 'If this were true, one would expect the result to be higher investigation and analysis costs at the ICC than at the ICTY, but in reality the ICC spends a smaller percentage of its budget on investigations and analysis than the ICTY did.'<sup>89</sup>

Further, of the ICC's 900 employees in 2018, 516 were employed by the Court's administrative arm, the Registry, while 299 were employed by the OTP.<sup>90</sup> As at 2015, the OTP Investigations Division had a 'headcount' of only 165 staff, of whom only 53 were investigators.<sup>91</sup> Certainly, the Registry's workload is vast.<sup>92</sup> But this is a function of the number and complexity of cases brought by the OTP and the number of victims recognised in proceedings. The administratively demanding nature of long, complex international trials acts as a budgetary force-multiplier. Paradoxically, but predictably, the more cases the OTP brings the more this will divert resources from front-end investigations and case-building towards case administration.<sup>93</sup> These outcomes were not, however, inevitable. In its first budget, the ICC proposed it would focus on major perpetrators and promoting a complementarity regime which would 'limit [its] judicial activities' and budget; it

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<sup>86</sup> See, eg, the statement: 'However, the sheer number of missions needed to support and progress with investigative and prosecutorial activities, as well as the increased number of situations ... requires more resources than ... approved by the Assembly in recent budgets': *Official Records of the 17<sup>th</sup> Session*, Doc No ICC-ASP/17/20 (n 78) 41 [161].

<sup>87</sup> Notably the smoothest run of the ICC cases, *Ntaganda Judgment* (n 10) benefitted from the OTP's 14 years of experience in Ituri: Phil Clark, *Distant Justice* (n 39) 60 (on the Democratic Republic of Congo's self-referral in 2004), 66–9 (investigative methods), 73–80 (cooperation of the UN Mission in Democratic Republic of Congo (MONUC) and the Democratic Republic of the Congo).

<sup>88</sup> *Official Records of the 17<sup>th</sup> Session*, Doc No ICC-ASP/17/20 (n 78) 9 [3]. Although, in fairness, it must be noted that, taken literally, the Prosecutor is obliged by *Rome Statute* (n 1) art 53(1) to open investigations based on information received unless 'there is no reasonable basis to proceed'.

<sup>89</sup> Ford (n 84) 101.

<sup>90</sup> *Human Resources Tables*, Doc No ICC-ASP/17/5 (n 78) 45.

<sup>91</sup> Assembly of States Parties, International Criminal Court, *Report of the Court on the Basic Size of the Office of the Prosecutor*, 14<sup>th</sup> sess, Doc No ICC-ASP/14/21\* (17 September 2015) 17–18. However, 'headcount' is not the same measure as full-time employees and also included vacant posts.

<sup>92</sup> See Clements, 'ReVisiting the ICC Registry's ReVision Project' (n 70) 261–3.

<sup>93</sup> As Prosecutor Bensouda has noted, '[e]xperience has taught us that heavy reliance on witness testimony prolongs the length of trials and increases costs': Fatou Bensouda, 'Address to the Assembly of States Parties: Thirteenth Session of the Assembly of States Parties' (Speech, UN Secretariat Building, 8 December 2014) 5 <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP13/ASP13-OP-Statement-Prosecutor-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/ASP13-OP-Statement-Prosecutor-ENG.pdf)>, archived at <<https://perma.cc/R3ZF-JUUQ>>.

was to be a ‘flexible and scalable institution’ with a budget driven by activities, not organisational structure.<sup>94</sup> This has not come about. The Court has instead ‘focussed both its activities and budget requests primarily on its own investigations and prosecutions’<sup>95</sup> and the Court’s budget, while notionally organised around ‘major programmes’, strongly follows institutional structure (judiciary, OTP, Registry etc).<sup>96</sup>

It is therefore not unreasonable to suggest that the Court has under-performed within the envelope of available resources. Realistically, there is no appetite to give the Court any substantial increases in its operating budget. The Court has done itself no favours in this regard. States party seem increasingly exasperated at the expensive employment litigation brought before the ILO against the Court by its employees.<sup>97</sup> Space prohibits discussing the poor (and expensive) track record of the ICC Registry in being successfully sued by its own employees for unfair dismissal following Registry reform efforts, or the judicial salary litigation noted above.<sup>98</sup> (Notably, if the latter is successful it will inevitably reduce the resources available to the Court’s other functions.) The body with jurisdiction over such claims, the Administrative Tribunal of the ILO, is now at risk of deciding more cases about the ICC than the ICC resolves cases of its own. Such facts only add to the argument that if additional funds were to be found for international justice projects, the ICC would not necessarily be the best way to spend them.

Secondly, we can invert the point again. If it is true that the Court can only succeed with more resources, and it is quite clear that states party will not provide them: is the Court’s job possible at all? As Batros has put it,

recent setbacks ... may lead to a vicious cycle: States Parties may become more reluctant to provide the additional resources required to conduct the more extensive investigations ... that, in turn, may be required to address the underlying problems.<sup>99</sup>

Overall, this is perhaps too negative a conclusion. Yes, the ICC’s budget is modest compared to the scale of international criminality falling within its jurisdiction. However, it was notoriously intended as a ‘court of last resort’.<sup>100</sup> It was never intended, nor would it ever be possible for it to prosecute all crimes

<sup>94</sup> Jonathan O’Donohue, ‘Financing the International Criminal Court’ in Dawn L Rothe, James Meernik and Thórdís Ingadóttir (eds), *The Realities of International Criminal Justice* (Martinus Nijhoff Publishers, 2013) 269, 275.

<sup>95</sup> Ibid.

<sup>96</sup> See, eg, the ‘Programme Budget for 2019’ in Assembly of States Parties, International Criminal Court, *Resolution of the Assembly of States Parties on the Proposed Programme Budget for 2019, the Working Capital Fund for 2019, the Scale of Assessment for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2019 and the Contingency Fund*, Res ICC-ASP/17/Res.4, Official Records, vol I, 17<sup>th</sup> sess, 13<sup>th</sup> plen mtg, Doc No ICC-ASP/17/20 (12 December 2018) para 1.

<sup>97</sup> Murdoch (n 2); Stef Blok, ‘The International Criminal Court Must Do Better: Reforms Are Urgently Needed’, *The Washington Post* (online, 3 December 2019) <<https://www.washingtonpost.com/opinions/2019/12/02/international-criminal-court-must-do-better-reforms-are-urgently-needed/>>, archived at <<https://perma.cc/6WRD-FT99>>.

<sup>98</sup> See Clements, ‘ReVisiting the ICC Registry’s ReVision Project’ (n 70) 278–9; Simons (n 21); Anderson, ‘Money Matters at the ICC’ (n 21).

<sup>99</sup> Batros, ‘The ICC Acquittal of Gbagbo’ (n 77).

<sup>100</sup> ‘About’, *International Criminal Court* (Web Page) <<https://www.icc-cpi.int/about>>, archived at <<https://perma.cc/8JR9-JNVA>>. See also International Criminal Court, *Strategic Plan 2019–2021* (n 40) 5 [9].

within its jurisdiction. The tragedy of international criminal justice is that it is necessarily selective.<sup>101</sup> The Court has had adequate resources to ‘concentrate on the prosecution of prominent perpetrators of ... a few well-chosen episodes of mass atrocity for which the strongest evidence exists’ but instead has spread itself thin.<sup>102</sup> In sum, resources are a constraint for the Court but they are not the source of its problems. Further, the effectiveness of a better funded Court presumes that the existing institution is built to succeed and is competently led.

### B *Structural Constraints: Mistakes in the Legal Architecture?*

The Court is constrained by elements of its institutional design. In particular, numerous difficult political or policy considerations were swept under the carpet of prosecutorial independence.<sup>103</sup> These are returned to below.<sup>104</sup> This section will focus instead on problems created by establishing the Pre-Trial Chamber (‘PTC’) division of the Court and the process of victim participation.

First, it is a widespread observation that the PTC has added time and expense but little additional value to ICC proceedings. Former ICC Judge Christine Van den Wyngaert has referred to the PTC as a mistake in the Court’s legal architecture.<sup>105</sup> In particular she sees it as having failed to ensure only strong cases went to trial and weak cases were weeded out, and as having generally delayed proceedings, not expedited them as intended.<sup>106</sup> The *Gbagbo* case can be seen as a failure of the PTC concept. Instead of excluding a weak case, the PTC granted the Prosecutor a series of second chances.<sup>107</sup> This resulted in nothing but delay and a trial commencing on a flawed case theory and backed by some 80 or so witnesses who were collectively unable to provide evidence linking the crimes committed to the defendant.<sup>108</sup>

Secondly, while victim participation at the ICC was seen as an important step forward at the time, it has not proven a boon to the Court or, necessarily, victims themselves.<sup>109</sup> The principle that victims should have a right of access to a remedy

<sup>101</sup> The classic work remains: Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005) ch 4.

<sup>102</sup> Mirjan Damaška, ‘The International Criminal Court between Aspiration and Achievement’ (2009) 14(1) *UCLA Journal of International Law and Foreign Affairs* 19, 32.

<sup>103</sup> Mégret (n 40) 212–13, 219–22.

<sup>104</sup> See below Part V(A).

<sup>105</sup> In Dutch: ‘fout in de juridische architectuur’. See Ine Roon and Bart Beirlant, ‘Het Strafhof Moet Dringend in de Spiegel Kijken’ [The Criminal Court Must Urgently Look in the Mirror], *De Standaard* [The Standard] (online, 26 January 2019) <[https://www.standaard.be/cnt/dmf20190125\\_04131754](https://www.standaard.be/cnt/dmf20190125_04131754)>.

<sup>106</sup> *Ibid.* Of 19 cases put forward for confirmation, only four have not had charges confirmed; and of 15 individuals sent to trial, eight have been acquitted or had charges withdrawn: Table 1.

<sup>107</sup> Roon and Beirlant (n 105).

<sup>108</sup> Thijs Bouwknegt, ‘Gbagbo: An Acquittal Foretold’, *Justiceinfo.net* (News Post, 31 January 2019) <<https://www.justiceinfo.net/en/tribunals/icc/40156-gbagbo-an-acquittal-foretold.html>>, archived at <<https://perma.cc/G9LJ-5MVK>>. See also *Gbagbo Reasons for Oral Decision* (n 7) annex B [78], [87], [91] (Judge Henderson), annex A [15], [51] (Judge Tarfusser).

<sup>109</sup> On the difficulties of delivering restorative justice ‘through a historically punitive legal field’, see Sara Kendall, ‘Beyond the Restorative Turn: The Limits of Legal Humanitarianism’ in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 352, 353.

is obviously fundamental;<sup>110</sup> however, a right to participate in criminal proceedings against perpetrators, while perhaps desirable, is not the only means to give expression to that principle.<sup>111</sup> Such direct participation is also extremely challenging to deliver at the international level where resources are limited and justice selective. There is thus a distinct risk that the ICC may unrealistically raise the expectations of victims regarding their (ultimately limited) ability to participate in proceedings or obtain reparations through court processes.<sup>112</sup>

On the first point, victim participation in ICC proceedings has proven complex and difficult.<sup>113</sup> While, inevitably, one can raise the ‘teething problems’ defence, the *Prosecutor v Lubanga* (‘*Lubanga*’) proceedings were obviously slowed down significantly by interlocutory appeals on victims’ participation questions.<sup>114</sup> Further, the very process by which victims apply for that status — court proceedings under r 89 of the ICC’s *Rules of Procedure and Evidence* (‘*ICC Rules*’) — is problematic and labour-intensive. Under this rule, not only must *each* application be individually reviewed by a judicial officer, *each* application can be challenged by either the defence or prosecution.<sup>115</sup> Practices diverged among different Chambers as to how best to deal with this administrative burden.<sup>116</sup> In *Katanga* ‘a very small group’ of 341 applications for victims status were processed over two years within the office of Judge Perrin de Brichambaut and this required the assistance of approximately 12 interns.<sup>117</sup> Rule 89 has thus created substantial inefficiencies for no obvious gain. The situation has been simplified somewhat by the 2016 Chambers Practice Manual which now requires the Registry to assess whether an application is complete and falls within the scope of the case, and ‘requires the Chamber to take decisions on individual applications only where the Defence or the Prosecution object to the Registry’s assessment of the

<sup>110</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60<sup>th</sup> sess, Agenda Item 71(a), Supp No 49, UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) Preamble para 3.

<sup>111</sup> For alternative mechanisms, see *ibid* annex, para 12.

<sup>112</sup> Raynor (n 24) [70]. The outrage, for example, of victims at the dropping of charges against Uhuru Muigai Kenyatta is palpable in *Prosecutor v Kenyatta (Victims’ Response to the Prosecution’s Notice of Withdrawal of the Charges)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 9 December 2014). See also at annex.

<sup>113</sup> Phil Clark, *Distant Justice* (n 39) 144–7; Lucia Catani, ‘Victims at the International Criminal Court: Some Lessons Learned from the *Lubanga* Case’ (2012) 10(4) *Journal of International Criminal Justice* 905; Carsten Stahn, Héctor Olásolo and Kate Gibson, ‘Participation of Victims in Pre-Trial Proceedings of the ICC’ (2006) 4(2) *Journal of International Criminal Justice* 219; Håkan Friman, ‘The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?’ (2009) 22(3) *Leiden Journal of International Law* 485.

<sup>114</sup> See above n 113. Although, ICC Judge Bertram Schmitt has contested this conclusion: Bertram Schmitt, ‘ICC Judge Schmitt Counsels Resilience to Preserve International Justice’, *Just Security* (Blog Post, 13 February 2019) <<https://www.justsecurity.org/62577/icc-judge-schmitt-counsels-resilience-preserve-international-justice/>>, archived at <<https://perma.cc/K434-DQXL>>.

<sup>115</sup> International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 89 (‘*ICC Rules*’). On the interpretation of r 89 in practice, see Stahn, *A Critical Introduction to International Criminal Law* (n 76) 310.

<sup>116</sup> Stahn, *A Critical Introduction to International Criminal Law* (n 76) 310–11.

<sup>117</sup> *Prosecutor v Thomas Lubanga (Version publique expurgée de la ‘Requête urgente de la Défense aux fins de récusation de M le Juge Marc Perrin de Brichambaut’ déposée le 10 avril 2019)* (International Criminal Court, Presidency, Case No ICC-01/04-01/06, 10 April 2019) annex 1 (‘*Transcription écrite de l’intervention de Monsieur le Juge Marc Perrin de Brichambaut à la Peking University Law School (Beijing) du 17 mai 2017*’) 11–12.

application'.<sup>118</sup> However, this procedure simply ignores r 89 or presumes the judicial function established under it can be delegated. There is also the problem of — in Sara Kendall and Sarah Nouwen's memorable phrase — the 'narrowing of the pyramid' of victimhood under the ICC scheme.<sup>119</sup> That is, the result of layers of process is that only a small number of actual victims (those affected by the crimes finally charged against a particular accused) out of a very large pool (all victims of a particular conflict) will legally be 'victims' in relation to a particular case. Further, to the extent that the victim participation system has become more efficient and more focused on 'aggregat[ing] victim perspectives', this has occurred at the expense of 'giving individual victims a voice in the courtroom' as occurred in early cases.<sup>120</sup> Present arrangements may be the worst of both worlds.

Secondly, there are substantial inefficiencies in the reparations system. Reparations under the ICC Trust Fund for Victims are not, of course, limited to those who participate as victims in a particular case. The Trust Fund for Victims already has a dual mandate. It is both the mechanism by which court ordered reparations are implemented regarding the final 'legal' victims in a given case and it may also provide assistance more broadly to victims and communities funded through voluntary donor contributions.<sup>121</sup> It has been observed that the second mandate is a more efficient and potentially fairer use of resources.<sup>122</sup> This leads to the sensible suggestion that the question of assistance to victims should be decoupled entirely from criminal proceedings.<sup>123</sup>

To suggest reform to the PTC system and the representation of victims is not to suggest recreating the ICC in the image of the ICTY or a common law criminal court for the sake of it. There is an obvious risk in the present system that a differently composed Trial Chamber will unpick many decisions made at the PTC level and it is not obvious that the PTC functions of investigatory supervision and confirmation of charges could not be conducted by a Trial Chamber. Suggesting that the present system of victim participation should be simplified is not to suggest victims should have no voice. At the least, reforming r 89 and revisiting the limitation of individualised reparation orders to those victims 'fortunate' enough to climb the narrowing pyramid of proceedings should be considered.

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<sup>118</sup> Stahn, *A Critical Introduction to International Criminal Law* (n 76) 311. See also International Criminal Court, *Chambers Practice Manual* (Manual, February 2016) 20–2 <[https://www.icc-cpi.int/iccdocs/other/Chambers\\_practice\\_manual--FEBRUARY\\_2016.pdf](https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf)>, archived at <<https://perma.cc/QLR2-3KZV>>.

<sup>119</sup> Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2013) 76(3–4) *Law and Contemporary Problems* 235, 243.

<sup>120</sup> Phil Clark, *Distant Justice* (n 39) 300.

<sup>121</sup> Assembly of States Parties, International Criminal Court, *Regulations of the Trust Fund for Victims*, Res ICC-ASP/4/Res.3, Official Records, 4<sup>th</sup> sess, 4<sup>th</sup> plen mtg, Doc No ICC-ASP/4/32 (3 December 2005) annex, regs 21(a), (c). See also *Rome Statute* (n 1) art 79; *ICC Rules*, Doc No ICC-ASP/1/3 (n 115) rr 98(1), (5).

<sup>122</sup> Damaška, 'The International Criminal Court between Aspiration and Achievement' (n 102) 31–4; Roos and Beirlant (n 105).

<sup>123</sup> Damaška, 'The International Criminal Court between Aspiration and Achievement' (n 102) 34.

## V LEADERSHIP COMPETENCE: THE PROSECUTOR AND THE JUDGES

Leadership in an organisation counts. Different types of leadership have measurable impacts on overall organisational performance. To simplify, the best styles of management in a short-term crisis are those classed as ‘coercive’ (‘do as I say!’) and ‘pacesetting’ (‘do as I do, now!’).<sup>124</sup> They also have the most destructive long-term impact on organisational performance across a range of accepted indicators.<sup>125</sup> The most effective style of leadership is usually one based on articulating an ‘authoritative’ vision but allowing skilled professional subordinates a high degree of flexibility and autonomy in how to pursue it.<sup>126</sup> However, the data tends to suggest that hierarchically structured legal-service organisations all too frequently have poor management and workplace cultures.<sup>127</sup>

Why do concepts of organisational leadership matter at the ICC? First, as Carsten Stahn notes, the Prosecutor is the engine of international criminal tribunal proceedings.<sup>128</sup> The ICC Prosecutor has ‘full authority over the management and administration of’ the OTP.<sup>129</sup> Their managerial competence and leadership style will have a measurable impact on the effectiveness of both the OTP and the Court. Responsibility for the proper administration of the ICC overall (with the exception of OTP functions) falls to the Presidency: three judges, elected as President and first and second Vice-Presidents by their fellow judges.<sup>130</sup> Again, the leadership style and managerial competence of the Presidency can be expected to have a significant impact. Beyond bureaucratic leadership, judges may also be assessed in their collective stewardship of the Court by reference to such principles as modesty, collegiality and impartiality (including avoidance of the appearance of bias as discussed above).<sup>131</sup>

<sup>124</sup> Daniel Goleman, ‘Leadership that Gets Results’ (2000) 78(2) *Harvard Business Review* 78, 80, 82–3, 86.

<sup>125</sup> *Ibid* 81–3.

<sup>126</sup> *Ibid* 84; Rob Goffee and Gareth Jones, ‘Leading Clever People’ (2007) 85(3) *Harvard Business Review* 72.

<sup>127</sup> Janet Chan, Suzanne Poynton and Jasmine Bruce, ‘Lawyering Stress and Work Culture: An Australian Study’ (2014) 37(3) *UNSW Law Journal* 1062. For similar results internationally, see The Law Society, *Resilience and Wellbeing Survey Report* (Report, April 2018) <<http://communities.lawsociety.org.uk/Uploads/p/d/i/jld-resilience-and-wellbeing-survey-report-2018.pdf>>, archived at <<https://perma.cc/QF2Z-NUWF>>; The Florida Bar, *Results of the Young Lawyers Division Mental Health & Wellness in the Legal Profession Survey* (Report, January 2019) <<https://www-media.floridabar.org/uploads/2019/04/Young-Lawyers-Division-Mental-Health-Wellness-Survey-Report-Final.pdf>>, archived at <<https://perma.cc/7DB7-7UF5>>.

<sup>128</sup> Stahn, *A Critical Introduction to International Criminal Law* (n 76) 281. See also Phil Clark, *Distant Justice* (n 39) 31.

<sup>129</sup> *Rome Statute* (n 1) art 42(2).

<sup>130</sup> *Ibid* art 38(1).

<sup>131</sup> On modesty as restraint in judicial law-making or as striking the ‘proper balance between the flexibility offered [by international legal sources] and the limits set by the principle of legality’, see Stahn, *A Critical Introduction to International Criminal Law* (n 76) 295–7. On collegiality, see Hemi Mistry, ‘The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals’ (2017) 17(4) *International Criminal Law Review* 703, 718–21. On impartiality generally, see James Crawford and Joe McIntyre, ‘The Independence and Impartiality of the “International Judiciary”’ in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) 189.

## A The Office of the Prosecutor

It is worth acknowledging both the enormous power of an international prosecutor, and the substantial difficulties in doing the job successfully. He or she conducts investigations, selects defendants and brings cases to trial. In doing so, it is common for prosecutors to say that they are only following the law or evidence, but in practice they have substantial discretion in situation, case and defendant selection.<sup>132</sup> Further, obtaining defendants and evidence requires, in practice, the cooperation of states.<sup>133</sup> Thus, prosecutors' work 'is inherently linked to politics due to the political context of crimes, the politics behind institutional engagement and their large degree of choice'.<sup>134</sup> International prosecutions are hard. Gathering evidence in conflict zones is hard. Operating in the face of government obstruction is hard. And the reality of selective justice at the international level means prosecutors will always be open to criticisms of partiality or lacking independence.<sup>135</sup>

In this context it is worth noting that substantial *political* discretion was vested in the ICC Prosecutor,<sup>136</sup> not least in the sense that highly complex resource-allocation decisions incapable of being determined by mechanical application of rules may be considered political.<sup>137</sup> Pursuit of a purely universalist strategy would inevitably lead to overreach: that is, attempting to be completely even-handed would lead to numerous geographically dispersed investigations into an enormously wide a range of crimes. Any publicly articulated strategy, however, of pursuing only a handful of cautiously assembled cases designed to have maximum expressivist impact would risk committing the heresy of being seen to act politically.<sup>138</sup> Navigating a course between this Scylla and Charybdis was never going to be easy. Finally, there was the inevitable catch-22: for the Court to

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<sup>132</sup> Stahn, *A Critical Introduction to International Criminal Law* (n 76) 279. See also Office of the Prosecutor, International Criminal Court, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) <[https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)>, archived at <<https://perma.cc/KU3E-K2PV>>; Office of the Prosecutor, International Criminal Court, *Policy Paper on Preliminary Examinations* (November 2013) <[https://www.icc-cpi.int/iccdocs/otp/otp-policy\\_paper\\_preliminary\\_examinations\\_2013-eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf)>, archived at <<https://perma.cc/CA45-CSWR>>.

<sup>133</sup> Cryer, Robinson and Vasiliev (n 15) 483–4; Douglas Guilfoyle, *International Criminal Law* (Oxford University Press, 2016) 91–2.

<sup>134</sup> Stahn, *A Critical Introduction to International Criminal Law* (n 76) 278. See also Sander, 'International Criminal Justice as Progress: From Faith to Critique' (n 65) 785.

<sup>135</sup> Luc Côté, 'Independence and Impartiality' in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (Oxford University Press, 2012) 319, 399, 413.

<sup>136</sup> Mégret (n 40) 212–15.

<sup>137</sup> Obviously, this draws on the idea of polycentric resource-allocation decisions: Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) *Harvard Law Review* 353, 394–404. On 're-casting political choices as formalised policies': Christian M De Vos, Sara Kendall and Carsten Stahn, 'Introduction' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 1, 6. See also Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 189, arguing that judicial decisions, in fact, frequently involve polycentric considerations.

<sup>138</sup> Sander, 'International Criminal Justice as Progress: From Faith to Critique' (n 65) 796. On the extent to which the OTP balances ideals and pragmatism in case selection in practice, see Mark Kersten, 'In the ICC's Interest: Between "Pragmatism" and "Idealism"?' , *Justice in Conflict* (Blog Post, 16 July 2013) <<https://justiceinconflict.org/2013/07/16/in-the-iccs-interest-between-pragmatism-and-idealism/>>, archived at <<https://perma.cc/M7C3-FAKF>>.

survive in the real world, it could not afford to antagonise intransigent great powers; for the Court to survive as an ideal, it could not afford not to. Much was going to depend on the ICC ASP's first choice of Prosecutor in 2003.

### 1 *The First Prosecutor*

During his tenure, the first Prosecutor of the ICC, Luis Moreno-Ocampo, bestrode the world like an Olympian figure.<sup>139</sup> While often invoking universalist rhetoric and arguments, he also appreciated the need for state consent and the geopolitical constraints he faced, even if he occasionally misjudged them. Attempting such a compromise approach in order to steer the Court through its early years was, arguably, necessary.<sup>140</sup> The question is how well it was managed.

In 2003, Ocampo was a plausible candidate. He had played a prominent role in prosecuting members of the Argentine junta.<sup>141</sup> The US had even proposed him once to be the ICTY Prosecutor, a fact which carried weight at a time of strident US opposition to the Court.<sup>142</sup> Overall, however, it is not clear that he conceived his role in conventional terms. As one journalist recounts:

The problem with courts, Moreno-Ocampo told me, is they 'believe the trials are the most important things. No. The most important thing is the prevention of crime.' He had set out to prevent future political violence in Kenya, and in this sense at least, the *Kenyatta* case was a success. 'The suspect became president. But there was no violence in the elections.'<sup>143</sup>

This remarkable statement follows a clear consequentialist logic (and notably reframes the criteria for success). Ocampo believed the 'shadow of the court' could be used to pre-empt atrocities.<sup>144</sup> If this assessment is correct, it may explain some of the problems of Ocampo's tenure. If one puts 'the message a case is going to send' first and treats the ICC as primarily an expressivist 'naming and shaming' body, then there is a risk that the forensic work required to sustain a conviction becomes a 'subsidiary' goal.<sup>145</sup>

Less than positive accounts of his handling of investigatory processes at the ICC have been given. Pascal Kambale provides a good account of Ocampo's policy of 'short and focused' investigations involving small teams spending a limited time on the ground, and heavy reliance on national government and United

<sup>139</sup> James Verini, 'The Prosecutor and the President' (22 June 2016) *The New York Times Magazine* <<https://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html>>, archived at <<https://perma.cc/WZ5Z-HP79>>.

<sup>140</sup> Kersten, 'In the ICC's Interest: Between "Pragmatism" and "Idealism"?' (n 138). On the need for the Prosecutor to be beyond politics but also respect the limitations of an 'emerging global system' or rule of law, see Mégret (n 40) 212–13.

<sup>141</sup> David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012) 31.

<sup>142</sup> *Ibid.*

<sup>143</sup> Verini (n 139). See similar statements in Judge Chile Eboe-Osuji, 'Remarks at the Opening of the 18<sup>th</sup> Session of the Assembly of States Parties to the Rome Statute' (Speech, The Hague, 2 December 2019), archived at <<https://perma.cc/M7KU-3N48>>.

<sup>144</sup> Verini (n 139).

<sup>145</sup> *Ibid.*

Nations cooperation and intelligence.<sup>146</sup> The aim, in Ocampo's own words, was to seek 'more evidence from States, less from witnesses' and to have 'short trials with few charges'.<sup>147</sup> Similarly, in 2006, former ICTY prosecutor Louise Arbour criticised him for attempting to conduct investigations into the situation in Sudan without sending anyone into Sudan, but instead gathering (in David Bosco's words) 'information primarily through interviews of refugee populations in neighbouring Chad, reports from aid agencies and others operating in Darfur, and even quiet interviews with select regime officials outside of Sudan'.<sup>148</sup> (Although, arguably, doing otherwise may have endangered witnesses that the ICC could not protect.) His practice of 'phased investigations',<sup>149</sup> seeking just enough evidence to succeed before a PTC in opening a case, has been criticised as allowing those under investigation ample time and warning to destroy evidence before trial.<sup>150</sup> (It also, logically, runs the risk of insufficient evidence later being found to proceed successfully to trial.)

Ocampo's evidence gathering strategy and his expansive interpretations of his own powers led to unfortunate clashes with the Chambers at trial. The worst of these concerned his approach to art 54(3)(e) confidentiality agreements under the *Rome Statute*, and his policy of relying on intelligence from UN agencies provided under conditions inconsistent with the statutory duty of disclosure to the defence.<sup>151</sup> This led to scathing criticism in *Lubanga* with the Trial Chamber in 2008 declaring: 'the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial'.<sup>152</sup> The indefinite stay of proceedings in *Lubanga* was lifted after waivers of confidentiality had been negotiated.<sup>153</sup> This didn't end matters: Ocampo had another run-in with the *Lubanga* Trial Chamber in 2010 over his refusal to disclose

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<sup>146</sup> Pascal Kalume Kambale, 'A Story of Missed Opportunities' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 171, 189–92.

<sup>147</sup> *Ibid* 190.

<sup>148</sup> David L Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) 127.

<sup>149</sup> Office of the Prosecutor, International Criminal Court, *Strategic Plan 2019–2021* (Report, 17 July 2019) 13 <<https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>>, archived at <<https://perma.cc/WRK5-DPDG>>.

<sup>150</sup> Verini (n 139).

<sup>151</sup> Cryer, Robinson and Vasiliev (n 15) 496–7; Guilfoyle, *International Criminal Law* (n 133) 144–5. Notably, the Prosecutors of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda had much wider powers to receive and act on confidential information: Gideon Boas et al, *International Criminal Procedure* (Cambridge University Press, 2011) 234–5.

<sup>152</sup> *Prosecutor v Lubanga (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)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 13 June 2008) [93].

<sup>153</sup> *Prosecutor v Lubanga (Reasons for Oral Decision Lifting the Stay of Proceedings)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 23 January 2009).

the identity of an ‘intermediary’ used to gather evidence which the Chamber found to be an abuse of process.<sup>154</sup>

Ocampo’s argument had been that the OTP was an equal branch of the Court and the execution of certain of his duties to witnesses was not subject to judicial direction.<sup>155</sup> Both Trial and Appeals Chambers saw in this an unacceptable assertion that the Prosecutor may decide whether or not to implement the Trial Chamber’s orders depending on his interpretation of his own obligations under the *Rome Statute*.<sup>156</sup> While a certain degree of struggle between the principal actors in a new judicial institution to determine who will control proceedings is to be expected,<sup>157</sup> there is a risk that these early disputes set a tone between the OTP and Chambers from which it was difficult to recover and which justified continuing efforts by PTCs to assert control over investigations (discussed below).<sup>158</sup>

One may also question Ocampo’s skill in managing the politics of his job. The first prosecutor was always going to have to engage in some creative diplomacy. Ocampo often said his only job was simply to apply the law and ‘follow the evidence’,<sup>159</sup> and challenges to the Court’s focus on Africa have often been deflected by pointing out that early cases had arrived through ‘self-referrals’.<sup>160</sup> But Ocampo himself invented the member state self-referral by suggesting that member states should consider referring themselves to avoid him having to use *proprio motu* powers.<sup>161</sup> Here he undoubtedly understood the importance of ‘optics’. Other questions of diplomacy were handled less deftly. Ocampo had the benefit of wide advice that the Al-Bashir indictment would be a mistake, but went ahead anyway with (what some called at the time) a ‘high stakes gamble — not only for the ICC but for global politics’ that has thus far paid no dividends for either.<sup>162</sup> He is also accused of providing ill-considered briefings on which individuals he would seek to prosecute in the Libya situation to the French foreign

<sup>154</sup> See *Prosecutor v Lubanga (Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 8 July 2010) [20]–[21], [27]–[28], [31] (*‘Lubanga Trial Chamber Decision’*); *Prosecutor v Lubanga (Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 Entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 18, 8 October 2010) [1]–[3], [32]–[33], [46]–[50], [55]–[62] (*‘Lubanga Appeals Chamber Decision’*).

<sup>155</sup> *Lubanga Trial Chamber Decision* (n 154) [14]–[15], [32]–[33].

<sup>156</sup> *Ibid* [27]. Cf *Lubanga Appeals Chamber Decision* (n 154) [48].

<sup>157</sup> Hagan and Levi (n 71) 1505.

<sup>158</sup> See Jean-François Manzoni and Jean-Louis Barsoux, ‘The Set-Up-To-Fail Syndrome’ (1998) 76(2) *Harvard Business Review* 101.

<sup>159</sup> Bosco (n 148) 143; Moreno-Ocampo (n 66) 222.

<sup>160</sup> Cryer, Robinson and Vasiliev (n 15) 165.

<sup>161</sup> Moreno-Ocampo (n 66) 220–1; Bosco (n 148) 96–7.

<sup>162</sup> Bosco (n 148) 144. Although he also appears to have had advice on this and other issues from an “‘inner court” of advisors including Hollywood glitterati, billionaire tech entrepreneurs, and philanthropists’: Stephanie Maupas, ‘Secrets of the ICC: Jolie, Clooney and the World-Fixer Psychosis’, *The Black Sea* (online, 9 October 2017) <<https://theblacksea.eu/stories/secrets-of-the-international-criminal-court-jolie-clooney-and-the-world-fixer-psychosis/>>, archived at <<https://perma.cc/8UVQ-ZA4Y>>.

ministry, giving the French the impression that ‘[he] conceives his function not as an independent prosecutor’s office, but as a judicial body [acting] in accordance with the instructions of the Security Council’.<sup>163</sup> (These are allegations that he denies.<sup>164</sup>)

Reports of Ocampo’s dealings with his subordinates indicate a coercive or dictatorial management style. Early OTP officers recall him shouting ‘[f]or you, I am the law!’ if challenged, and the development of a culture in which ‘working meetings were choreographed, to ensure that the Prosecutor ... would not be contradicted’.<sup>165</sup> Such a culture undermines ‘vigorous peer review’ of court documents<sup>166</sup> and is unlikely to furnish a leader with good advice. Results included his embarrassingly poorly-prepared examination of Uhuru Muigai Kenyatta.<sup>167</sup> Ocampo also summarily dismissed an employee who had brought a complaint of sexual misconduct against him, in a manner found by the ILO to be contrary to basic due process.<sup>168</sup> During his tenure, ‘22 of the top staff members in the OTP left’.<sup>169</sup> Ocampo himself describes the climate in the OTP under his tenure as ‘a mess’.<sup>170</sup>

While he still has passionate defenders, history’s final verdict on Ocampo is likely to be poor. By his own admission, he did not consider securing convictions his first priority; rather his goal was using ‘the shadow of the court’ to prevent crimes.<sup>171</sup> However, on his watch, cases were mounted following limited investigations and pursued without a staff that was prepared to give him fearless advice. It is thus unsurprising that in his nine years as Prosecutor he initiated more than a dozen cases and saw only one through to a successful conclusion. This is unfortunate. The first Prosecutor needed to be, like Goldstone at the ICTY, a big-picture diplomat capable of delegating the management of actual prosecutions to a skilled deputy.<sup>172</sup> Ocampo, however, gives one the impression of someone who perhaps lacked the skill to delegate and, more profoundly, the ability to appreciate

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<sup>163</sup> Becker, Blasberg and Pieper (n 18).

<sup>164</sup> Ibid.

<sup>165</sup> Morten Bergsmo et al, ‘A Prosecutor Falls, Time for the Court to Rise’ (FICHL Policy Brief Series No 86, 2017) 2 <<https://toaep.org/pbs-pdf/86-four-directors/>>, archived at <<https://perma.cc/C83L-CWN3>>. On his ‘angry, threatening’ and ‘autocratic’, style see Office of the Prosecutor, International Criminal Court, *Full Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn from the Kenya Situation* (Report, 26 November 2019) annex 1 (‘*ICC OTP Kenya Cases: Review and Recommendations*’) 2 <<https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf>>, archived at <<https://perma.cc/C4PF-2GAM>>.

<sup>166</sup> Bergsmo et al (n 165) 2. See also Office of the Prosecutor, International Criminal Court, *Full Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn from the Kenya Situation* (Report, 26 November 2019) 6 <<https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf>>, archived at <<https://perma.cc/C4PF-2GAM>> (‘*Full Statement of the Prosecutor*’).

<sup>167</sup> Verini (n 139) (‘His preparations were bafflingly scant. When I asked how long he took to learn about Mungiki, the crux of the case, Moreno-Ocampo replied breezily: “Me? Two hours.”’).

<sup>168</sup> Arman Sarvarian, *Professional Ethics at the International Bar* (Oxford University Press, 2013) 236–8.

<sup>169</sup> Bergsmo et al (n 165) 2.

<sup>170</sup> Verini (n 139).

<sup>171</sup> Ibid.

<sup>172</sup> Hagan and Levi (n 71) 1510.

his own limitations. Had he left the role mid-term, having secured the Court its first cases, he might be better remembered.

## 2 *The Second Prosecutor*

In mid-2012, Prosecutor Fatou Bensouda inherited an OTP needing a fresh approach. However, having been Ocampo's deputy, she seems more a continuity than change candidate. The convictions on her watch as Prosecutor have been *Prosecutor v Al-Mahdi*, a guilty plea; the controversial *Katanga* case; and *Ntaganda* (discussed below). Given the slowness of international proceedings and the expiry of her term in 2021, it is unlikely any other cases will be concluded during her tenure unless newly arrested suspects plead guilty. Even if the acquittal in *Gbagbo* is overturned on appeal, any re-trial is likely to take several years.

At first glance, and despite the discretion-denying rhetoric of her swearing-in speech,<sup>173</sup> Bensouda's approach appears to have been more cautious. Of 37 ICC defendants indicted for 'core crimes', only eight or so have been indicted during her term.<sup>174</sup> This could reflect a more measured approach to building cases. Indeed, Bensouda initiated the generally well-received shift from short and 'focused' to more 'in-depth' and 'open-ended' holistic preliminary examination investigations.<sup>175</sup> Her approach appears to have paid dividends in the conviction in *Ntaganda*. *Ntaganda*, however, was not a stand-alone success but the culmination of long efforts and hard-won experience.<sup>176</sup> It benefited from the OTP's having had 14 years of experience in gathering evidence and building cases arising out of the Ituri region in the DRC by the close of the trial.<sup>177</sup> It is notable that the only convictions (other than on a guilty plea) have come from the DRC situation. Further, while the case lead was more complex than *Lubanga* (involving a single charge of recruitment of child soldiers), the facts underlying the charges were contained to essentially two operations involving systemic attacks on civilians and subsequent sexual offences.<sup>178</sup> The OTP thus deserves credit for leading a successful case which was neither overly narrow nor too complex. On the other side of the ledger, it has been noted that only rebel leaders have been indicted during her term.<sup>179</sup>

<sup>173</sup> 'Justice, real justice, is not a pick-and-choose system. To be effective, ... to be a real deterrent, the ... [OTP's] decisions will continue to be based solely on the law and the evidence': Fatou Bensouda, 'Ceremony for the Solemn Undertaking of the Prosecutor of the International Criminal Court' (Speech, The Hague, 15 June 2012), archived at <<https://perma.cc/KL2U-B36K>>.

<sup>174</sup> See Table 2.

<sup>175</sup> Phil Clark, *Distant Justice* (n 39) 66–7.

<sup>176</sup> See also Douglas Guilfoyle, 'A Tale of Two Cases: Lessons for the Prosecutor of the International Criminal Court? (Part I)', *EJIL:Talk!* (Blog Post, 28 August 2019) <<http://www.ejiltalk.org/a-tale-of-two-cases-lessons-for-the-prosecutor-of-the-international-criminal-court/>>, archived at <<https://perma.cc/239B-U757>> ('A Tale of Two Cases (Part I)').

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> Kerstin Carlson, 'Gbagbo's Acquittal Suggests Confusion and Dysfunction at the ICC', *The Conversation* (online, 24 January 2019) <<https://theconversation.com/gbagbos-acquittal-suggests-confusion-and-dysfunction-at-the-icc-110200>>, archived at <<https://perma.cc/LYD7-MKKM>>, citing Mark Kersten, 'Some Quick Reflections on the Gbagbo Acquittal at the ICC', *Justice in Conflict* (Blog Post, 18 January 2019) <<https://justiceinconflict.org/2019/01/18/some-quick-reflections-on-the-gbagbo-acquittal-at-the-icc/>>, archived at <<https://perma.cc/V2GH-Y6R6>>.

Nonetheless, the *Gbagbo* acquittal on a ‘no case to answer’ motion makes it unlikely that Bensouda will be remembered as the Prosecutor who righted the ship. It is highly unusual in international criminal law for a ‘no case to answer’ motion to result in an acquittal at the end of the Prosecution’s presentation of its evidence. This is because entry of such an acquittal does not require an assessment of whether the prosecution has made out its case beyond reasonable doubt, but rather requires a finding that the evidence is such that *no reasonable trier of fact* could convict.<sup>180</sup> Granting a ‘no case to answer’ motion may thus be read as a statement that the Prosecutor has failed to present a coherent case backed by adequate evidence.<sup>181</sup> At the PTC level in *Prosecutor v Blé Goudé* (*‘Blé Goudé’*), Judge Van den Wyngaert anticipated a key issue: that in relation to two of five key ‘incidents’ there was no evidence to tie the defendant to the crimes.<sup>182</sup> That the Trial Chamber had substantial misgivings about the case theory was clearly signalled in its request that the Prosecutor file a ‘mid-trial brief’ summarising how the evidence presented related to the charges.<sup>183</sup> This view has been confirmed, at time of writing, by the scathing majority reasons given for granting the motion.<sup>184</sup>

That said, Bensouda deserves praise for her apparent willingness to step back from her early universalist rhetoric, learn from failure and confront some of the political aspects of her role. An early positive signal was that the OTP 2016 *Policy Paper on Case Selection and Prioritisation* implicitly acknowledged the expressivist function of international prosecution.<sup>185</sup> Acknowledging that choices have to be made, the Paper declares that cases should be brought which involve, inter alia, ‘a representative sample of the main types of victimisation’ in a situation.<sup>186</sup> This signals a pragmatic move beyond the OTP’s historical ‘we only

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<sup>180</sup> Stahn, *A Critical Introduction to International Criminal Law* (n 76) 371.

<sup>181</sup> *Gbagbo Reasons for Oral Decision* (n 7) annex B, [78]–[79] (Judge Henderson). The dissenting opinion is highly critical: at annex C (Judge Herrera Carbuca).

<sup>182</sup> *Prosecutor v Blé Goudé (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-02/11, 11 December 2014) annex (Judge Christine Van den Wyngaert) [1]–[14].

<sup>183</sup> Abraham Kouassi, ‘Gbagbo and Blé Goudé Trial: Fatou Bensouda Submits Mid-Trial Brief’, *International Justice Monitor* (online, 20 March 2018) <<https://www.ijmonitor.org/2018/03/gbagbo-and-ble-goude-trial-fatou-bensouda-submits-mid-trial-brief/>>, archived at <<https://perma.cc/3EER-8ZLT>>; *Prosecutor v Gbagbo (Order on the Further Conduct of the Proceedings)* (International Criminal Court, Trial Chamber I, Case No ICC-02/11-01/15, 9 February 2018).

<sup>184</sup> See *Gbagbo Reasons for Oral Decision* (n 7) annex B (Judge Henderson).

<sup>185</sup> *Policy Paper on Case Selection and Prioritisation* (n 132) 14–15 [44].

<sup>186</sup> *Ibid* 15 [45].

follow the law’ discretion-denying rhetoric.<sup>187</sup> The OTP *Strategic Plan 2019–2021* is even more important.<sup>188</sup> It engages in some blame displacement, attributing substantial ‘setbacks’ in part to: OTP strategy under Ocampo; ‘[state] cooperation and security challenges’; and a ‘conflicting jurisprudence’.<sup>189</sup> Nonetheless, it expresses a willingness to learn from failure and to assess what practical measures can be taken. Such measures include developing a strategy for closing preliminary examinations (which has never been done to date) and preparing ‘narrower cases’ targeting first mid-level perpetrators and subsequently building towards prosecuting ‘higher-level accused’.<sup>190</sup> The document also acknowledges that the OTP will need to achieve these reforms within existing resources.<sup>191</sup> These are important, if late, steps in the right direction and will need to be accompanied by a corresponding communications strategy which sets more modest expectations among victim communities.<sup>192</sup>

At time of writing, the second Prosecutor had also released a response to an independent expert review of the collapse of cases in the Kenya situation. It is a curious document, constituting a 20-page response to a six-page executive summary (the rest of the report not being made available), with a note in reply from the first Prosecutor attached. Its general tenor is to suggest that — while the report made valuable recommendations regarding leadership, decision-making, staffing practices, OTP office structure, the process by which the cases developed, witness issues and external actors — effectively, ‘current [OTP] practice meets all of the suggestions made in the report’ or that needed reforms were well underway before it was delivered.<sup>193</sup> The impression left is less of reflection and lessons learned than ruling a line under mistakes made during the first Prosecutor’s tenure.

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<sup>187</sup> Such pragmatism may also perhaps be seen in efforts to secure an indefinite stay in *Prosecutor v Kenyatta* following obstruction of evidence collection (and eventually conceding to withdrawing the charges without prejudice): *Prosecutor v Kenyatta (Decision on Prosecution’s Application for a Further Adjournment)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 3 December 2014) [25]; *Prosecutor v Kenyatta (Decision on the Withdrawal of Charges against Mr Kenyatta)* (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 13 March 2015). Pragmatic retrenchment of the Kenyan cases was made more plain in *Situation in the Republic of Kenya (Decision on the ‘Victims’ Request for Review of Prosecution’s Decision to Cease Active Investigation)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09, 5 November 2015). Here, the Pre-Trial Chamber (‘PTC’) found, irrespective of apparent duties of investigation under art 54(1) of the *Rome Statute*, that the Prosecutor’s decision to cease active investigations for now was ‘not a result of the Prosecutor’s conclusion that a prosecution is not in the interests of justice, but it is due to an objective circumstance of temporary nature, namely the absence of genuine cooperation from Kenya’: at [25]. I am grateful to Talita de Souza Dias for drawing this history to my attention.

<sup>188</sup> Office of the Prosecutor, *Strategic Plan 2019–2021* (n 149).

<sup>189</sup> *Ibid* 4, 11.

<sup>190</sup> *Ibid* 17, 19–20. One should note, however, that the Prosecutor spoke of such matters as early as 2013: Bensouda, ‘Address to the Assembly of States Parties: Twelfth Session of the Assembly of States Parties’ (n 77) [5] (‘it may be necessary to build cases upward gradually by investigating and prosecuting a limited number of lower- or mid-level perpetrators, with a view to reaching those allegedly most responsible for the crimes’).

<sup>191</sup> *Policy Paper on Case Selection and Prioritisation* (n 132) 6 [12], 16 [49].

<sup>192</sup> Sander, ‘International Criminal Justice as Progress: From Faith to Critique’ (n 65) 827–8.

<sup>193</sup> Office of the Prosecutor, *Full Statement of the Prosecutor* (n 166) 6, 15. See also at 7–8, 10, 12, 14, 16.

## B The Judiciary

The extent to which the public behaviour of the ICC judges risks becoming corrosive to the Court's legitimacy was noted in the introduction. Three themes will be addressed in this section: collegiality; fundamental disagreements over the law of evidence; and a lack of judicial modesty resulting in overreach.

### 1 Collegiality

Lamentably, there is not only a visible lack of trust and collegiality between the OTP and Chambers, but there are worrying signs of a lack of collegiality within the ICC Judiciary itself. Quite remarkable public exchanges arising from apparent internal disagreement over the constitution of the Appeals Chamber in *Gbagbo* were noted in the introduction.<sup>194</sup> Airing this intra-mural disagreement would be bad enough if it were an isolated incident. It is not. Hemi Mistry highlights powerful reasons to be alarmed about the state of collegiality in the Court.<sup>195</sup> In the *Prosecutor v Ruto* ('*Ruto*') 'no case to answer' decision, the view of the Trial Chamber majority was conveyed through a bald reference to separate opinions that gave different reasons for decision.<sup>196</sup> As a formal matter, the appending of separate opinions at the Trial Chamber level is inconsistent with art 74(5) of the *Rome Statute* requiring a single reasoned decision of the Chamber (albeit one which also conveys the views of both the majority and minority). Substantively, as Mistry points out, it appears to signal a breakdown of the deliberative process if those who agreed on the outcome could not agree on a common set of reasons.<sup>197</sup> It is also, obviously, unhelpful for the Court in establishing a *jurisprudence constante* if Chambers circumvent the requirement to at least give reasons for a decision agreed by a majority.

Mistry also draws attention to several scathing dissenting opinions.<sup>198</sup> While dissent is not a sign of a lack of collegiality per se, directly accusing colleagues of having acted unfairly or ultra vires may be.<sup>199</sup> Mistry argues that the maintenance of both formal and substantive forms of collegiality is necessary to the quality of the Court's deliberative processes internally and its perceived legitimacy externally.<sup>200</sup> It is hard to disagree. Further examples, should any be needed, come from the separate opinion of Judge Van den Wyngaert and Judge Morrison in the

<sup>194</sup> See above n 20.

<sup>195</sup> Mistry (n 131).

<sup>196</sup> *Prosecutor v Ruto (Decision on Defence Applications for Judgments of Acquittal)* (International Criminal Court, Trial Chamber V(A), Case No ICC-01/09-01/11, 5 April 2016) [3] (Judge Eboe-Osuji).

<sup>197</sup> Mistry (n 131).

<sup>198</sup> Including the 'dissenting opinion of Judge van den Wyngaert from the Trial Chamber judgment in *Katanga* (and the response of Judges Cotte and Diarra in their joint separate opinion) and the joint dissenting opinion of Judges Tarfusser and Trendafilova from the Appeals Chamber judgment in *Ngudjolo and Chui*': Mistry (n 131) 717. See *Katanga Judgment* (n 32); *Katanga Judgment* (n 32) annex I (Judge Van den Wyngaert), annex II (Judges Diarra and Cotte); *Prosecutor v Ngudjolo Chui (Judgment on the Prosecutor's Appeal against the Decision of Trial Chamber II Entitled 'Judgment Pursuant to Article 74 of the Statute')* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-02/12 A, 27 February 2015) annex A (Judge Trendafilova and Judge Tarfusser). See especially at annex A, [69] (Judge Trendafilova and Judge Tarfusser).

<sup>199</sup> Mistry (n 131) 718–21.

<sup>200</sup> *Ibid.*

*Prosecutor v Bemba Gombo* appeal (‘*Bemba*’) and Judge Perrin de Brichambaut’s written observations on the motion to have him disqualified in *Lubanga*.<sup>201</sup> The *Bemba* appeal turned in part on whether the Trial Chamber’s fact-finding was so bad as to constitute a miscarriage of justice. Having noted that ‘it is a fact of judicial life that judges do not always agree’ Judges Van den Wyngaert and Morrison go on to state that, while they respect the views of the minority,

it is important to recognise that the strong divergence in how we evaluate the Conviction Decision is not just a ... difference of opinion, but appears to be a fundamental difference in the way we look at our mandates as international judges. We seem to start from different premises ... it is probably fair to say that we attach more importance to the strict application of the burden and standard of proof. We also seem to put more emphasis on compliance with due process norms that are essential to protecting the rights of the accused ...<sup>202</sup>

The implicit, and public, suggestion that colleagues do not place a high priority on ‘strict application’ of the burden of proof or ‘protecting the rights of the accused’ is striking. Questions of evidence are returned to below. In *Lubanga* a question has arisen as to whether Judge Perrin de Brichambaut made comments indicating he had pre-judged the guilt of the defendant in a speech in Beijing.<sup>203</sup> The question of whether he should continue to sit on the case is an administrative matter dealt with by the Presidency. In his written observations as to whether the video of that speech should be reviewed or only the transcript Judge Perrin de Brichambaut accused the Presidency, inter alia, of adopting a procedure ‘incompatible with any rational notion of fairness’.<sup>204</sup>

In one sense, the Appeals Chamber decision in *Prosecutor v Al-Bashir* (‘*Al-Bashir*’) (noted in the introduction) could be considered a step in the right direction. It acknowledges the need for a clear majority judgement on a major issue, delivering its finding that (now former) President Al-Bashir enjoyed no immunity from arrest and surrender to the Court in a unanimous decision of five judges.<sup>205</sup> Eccentrically, however, four of the judges appended a concurring separate opinion to which the judgment itself frequently cross-references.<sup>206</sup> The logic of such a move is difficult to follow. If the material was sufficiently important to command the support of a four-judge majority, surely it should have been included in the judgement; if it was not, why place it in a separate concurrence at all?<sup>207</sup> The content of the separate concurrence is also frequently of limited relevance: including, as it does, a 25-page history of proposals for the arraignment of the Kaiser at the end of World War I and not a paragraph on the

<sup>201</sup> *Bemba Appeal* (n 5) annex 2 (Judges Van den Wyngaert and Morrison). See also *Gbagbo Reasons for Oral Decision* (n 7) annex C (Judge Herrera Carbuca).

<sup>202</sup> *Bemba Appeal* (n 5) annex 2 [4] (Judges Van den Wyngaert and Morrison).

<sup>203</sup> See *Transcription écrite de l’intervention de Monsieur le Juge Marc Perrin de Brichambaut à la Peking University Law School (Beijing) du 17 mai 2017* (n 117) 10 (referring to the capacity of Mr Lubanga’s ‘tribal members’ and ‘henchmen’ to ‘[create] a lot of trouble’ for potential witnesses resident in the Democratic Republic of the Congo).

<sup>204</sup> *Prosecutor v Lubanga (Additional Observations by Judge Perrin de Brichambaut)* (International Criminal Court, Presidency, Case No ICC-01/04-01/06, 14 June 2019) 4.

<sup>205</sup> See *Al-Bashir Appeal* (n 14) [1]–[7].

<sup>206</sup> *Ibid* annex I (Judges Eboe-Osuji, Morrison, Hofmański and Bossa).

<sup>207</sup> Dov Jacobs, ‘Q&A regarding the “Q&A regarding Appeals Chamber’s 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal”’, *Spreading the Jam* (Blog Post, 17 May 2019) <<https://dovjacobs.com/2019/05/17/>>, archived at <<https://perma.cc/552E-W63X>>.

state practice of the African Union regarding head of state immunity in 2009–19.<sup>208</sup>

The problems with collegiality in Chambers matter. For disagreements to spill out in an increasingly public and combative way is self-evidently damaging to the Court's legitimacy. The seeming lack of an internal culture of striving for consensus is also damaging to the Court's ability to develop a jurisprudence capable of meaningfully guiding the work of the Trial Chambers and Prosecutor. Mistry suggests that collegiality is perhaps easiest to achieve in settings where judges share a pre-existing common culture.<sup>209</sup> Collegiality may be harder to foster amidst the diversity of legal traditions, professional backgrounds, nationalities and genders represented on the ICC bench.<sup>210</sup> Nonetheless, striving for consensus and collegiality remains a basic judicial duty as a matter both of general principle and under the *Rome Statute*. At time of writing, the ICC had just held its first judges retreat in October 2019 to 'adopt guidelines on the judgment drafting process and on the timeframe for issuance of key judicial decisions'.<sup>211</sup>

## 2 Fundamental Disagreements as to the Assessment of Evidence

A fundamental disagreement which appears to run through ICC judicial decision making is the correct approach to the assessment of evidence. Yvonne McDermott has identified a division between 'atomists' and 'holists': those who think that each piece of evidence relevant to the case theory that would support that conviction should be individually assessed and weighed (before coming to a conclusion about whether the evidence as a whole makes out a case beyond reasonable doubt); and those who consider such an approach a form of salami-slicing which may obscure conclusions which can fairly be drawn from the record

<sup>208</sup> *Al-Bashir Appeal* (n 14) annex I, 31–55 (Judges Eboe-Osuji, Morrison, Hofmański and Bossa). As is notorious, art 227 of the *Treaty of Versailles* did not make provision for a criminal trial before a court, but rather for the Kaiser to be 'publicly arraigned' before a 'tribunal' to judge questions of 'international morality': Guilfoyle, *International Criminal Law* (n 133) 60. (For a counter-argument, however, see William A Schabas, *The Trial of the Kaiser* (Oxford University Press, 2018) ch 13. Schabas argues that the omission of proposed language in art 227 of the *Treaty of Versailles*, to the effect that the Kaiser was to be tried 'not for an offence against criminal law but ...', means that the envisaged trial was necessarily a criminal one: at 198–200. The argument is not obviously correct: deleting a negative phrase in a drafting process, where the remaining consensus language is open to multiple interpretations, does not prove a positive either as a matter of history or treaty interpretation.) The concurring opinion also does not discuss the express provision for head of state immunity in the proposed criminal jurisdiction of the African Court of Justice and Human Rights: *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, opened for signature 27 June 2014 (not yet in force) art 46A bis.

<sup>209</sup> Mistry (n 131) 711. Cf Stahn, *A Critical Introduction to International Criminal Law* (n 76) 292.

<sup>210</sup> *Rome Statute* (n 1) art 36(8)(a).

<sup>211</sup> International Criminal Court, 'ICC Judges Hold Retreat, Adopt Guidelines on the Judgment Drafting Process and on the Timeframe for Issuance of Key Judicial Decisions' (Press Release ICC-CPI-20191007-PR1485, 7 October 2019) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1485>>, archived at <<https://perma.cc/TEA2-SCXT>>. As all veterans of organisational 'away days' know, however, implementation is not automatic and changing established practices can be hard.

as a whole.<sup>212</sup> I agree with McDermott that the holistic approach risks ‘paper[ing] over the cracks’ in a prosecution case and, moreover, appears incompatible with a system of proof beyond reasonable doubt.<sup>213</sup>

Nonetheless, some ICC judges plainly do consider a holistic approach to the evidence to be compatible with the *Rome Statute* and the *ICC Rules*.<sup>214</sup> Judges in both camps seem comfortable with labelling the other approach as risking either unfair convictions or displaying an ‘excessive rigidity’ incompatible with the judicial function.<sup>215</sup> Why? It is tempting to note that the ICC judges are drawn from diverse legal systems and traditions. In Zaibert’s words, law is generally a ‘parochial activity’, and criminal law only more so.<sup>216</sup> We are trained as national lawyers, not comparative lawyers. If we are taught that ‘our’ system of criminal law delivers fair results, this may result in a strong professional instinct that any departure from the standards with which we are familiar is unfair and this may in part account for passionate disagreements. Nonetheless, the ‘conflicting jurisprudence’ on point is plainly frustrating to the OTP and, increasingly, the ASP.<sup>217</sup> If the judges cannot resolve the issue, the ASP may have to do it for them (as discussed below).

In any event, successful case preparation by the Prosecutor will require greater agreement about how evidence is to be evaluated than presently exists within the Court. The risk of the ‘holistic approach’ is that it may encourage the OTP to submit everything, no matter how limited its probative value, in the hope that an overall picture may emerge.<sup>218</sup> This is, in essence, what happened in *Gbagbo*.<sup>219</sup> The ICC has made welcome moves in its practice towards requiring that detailed ‘pre-trial briefs’ be filed by the prosecution to indicate more precisely what

<sup>212</sup> Yvonne McDermott, ‘Strengthening the Evaluation of Evidence in International Criminal Trials’ (2017) 17(4) *International Criminal Law Review* 682, 687–9. Some, however, suggest that ICC judges are applying excessively strict, ‘unprecedented and problematic understandings’ of the law of evidence: Darryl Robinson, ‘The Other Poisoned Chalice: Unprecedented Evidentiary Standards in the Gbagbo Case? (Part 1)’ *EJIL:Talk!* (Blog Post, 5 November 2019) <<https://www.ejiltalk.org/the-other-poisoned-chalice-unprecedented-evidentiary-standards-in-the-gbagbo-case-part-1/>>, archived at <<https://perma.cc/HY26-WMT8>>. See also Cryer, Robinson and Vasiliev (n 15) 170.

<sup>213</sup> McDermott ‘Strengthening the Evaluation of Evidence in International Criminal Trials’ (n 212) 688. On the rules of evaluating evidence in international criminal law as ‘obscure’ and ‘unworkable’ at the ICTY and ICC: Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press, 2008) 394.

<sup>214</sup> Indeed, the Appeals Chamber has held: ‘the Trial Chamber is required to carry out a holistic evaluation and weighing of *all the evidence taken together*’: *Prosecutor v Lubanga (Judgment on the Appeal against Conviction)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 A 5, 1 December 2014) [22] (emphasis in original). But see McDermott, ‘Strengthening the Evaluation of Evidence in International Criminal Trials’ (n 212) 689 n 32 on the ‘mixed approach’ taken in practice.

<sup>215</sup> On holism as potentially leading to unfairness, see *Bemba Appeal* (n 5) annex 2 [14]–[15], [76]–[78] (Judges Van den Wyngaert and Morrison). On excessive rigidity, see *Katanga Judgment* (n 32) annex II [4]–[5] (Judges Diarra and Cotte).

<sup>216</sup> Leo Zaibert, ‘Why Compare? Comments on Kevin Jon Heller and Markus D Dubber’s *The Handbook of Comparative Criminal Law*’ (2012) 62(2) *University of Toronto Law Journal* 277, 277.

<sup>217</sup> Office of the Prosecutor, *Strategic Plan 2019–2021* (n 149) 11; Al Hussein et al (n 2).

<sup>218</sup> *Bemba Appeal* (n 5) annex 2, [15], [18] (Judges Van den Wyngaert and Morrison). See also McDermott, ‘Strengthening the Evaluation of Evidence in International Criminal Trials’ (n 212) 688.

<sup>219</sup> Bouwknecht (n 108). See also *Gbagbo Reasons for Oral Decision* (n 7) annex B (Judge Henderson), annex A (Judge Tarfusser).

evidence will be lead and how it relates to the charges.<sup>220</sup> Nonetheless, as in *Blé Goudé*, the initial ‘document containing the charges’ is sometimes drawn in very wide terms.<sup>221</sup> The ICTY and ICTR applied the doctrine of joint criminal enterprise, which imputed responsibility for crimes to a defendant based on their participation in the formation of criminal plan followed by the commission elsewhere and by other parties of crimes corresponding to the plan. Absent such a doctrine at the ICC, there is a need for clear evidence linking the defendant to the crimes at issue. Thus, a precise chain of causation needs to be articulated as early as possible both for fairness to the defence and to maximise the chances of a properly prepared prosecution case. One should certainly heed the note of caution struck by Niamh Hayes and Joseph Powderly about taking too absolutist and exhaustive an approach to the requirements of the Document Containing the Charges.<sup>222</sup> Nonetheless, present practice does not appear to require a sufficiently precise narrative of the alleged facts underlying the case theory until much too late in the process.

At time of writing, a positive development has been the approach of the Trial Chamber in *Ntaganda* to the assessment of evidence.<sup>223</sup> Briefly put, the Trial Chamber is commendably parsimonious in its use of evidence, discussing only as much as is needed to reach a conclusion. It lays out very clearly the approach taken to the evaluation of evidence,<sup>224</sup> including its assessment of the credibility of 16 key witnesses.<sup>225</sup> It also makes a series of factual findings which are very densely footnoted to the transcripts, with extensive footnote-level explanation of how evidence was weighed.<sup>226</sup> The reasoning appears designed with the criticisms of the *Bemba* Appeal Chamber in mind, and it is to be hoped that this becomes the model generally followed.

### 3 *Judicial Overreach*

Under this heading, three key examples of judicial overreach are discussed. The first is the approach taken to complementarity, the second is the approach taken to immunity *ratione personae*, and the third is the relationship between Chambers and the Prosecutor. The first of these can be disposed of briefly as it has been sufficiently discussed elsewhere.<sup>227</sup> Suffice to say that the narrowness and rigidity of the ‘same person’ and ‘substantially same conduct’ test the Court has developed in relation to admissibility proceedings has had the effect of inverting

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<sup>220</sup> International Criminal Court, *Chambers Practice Manual* (adopted May 2017) 21 <[https://www.icc-cpi.int/iccdocs/other/170512-icc-chambers-practice-manual\\_May\\_2017\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/other/170512-icc-chambers-practice-manual_May_2017_ENG.pdf)>, archived at <<https://perma.cc/W5RY-XQF6>>.

<sup>221</sup> See, eg, *Prosecutor v Blé Goudé (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-02/11, 11 December 2014) [183]–[194].

<sup>222</sup> Joseph Powderly and Niamh Hayes, ‘The Bemba Appeal: A Fragmented Appeals Chamber Destablises the Law and Practice of the ICC’, *PhD Studies in Human Rights* (Blog Post, 26 June 2018) <<http://humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html>>, archived at <<https://perma.cc/327B-A7R4>>.

<sup>223</sup> See Guilfoyle, ‘A Tale of Two Cases (Part I)’ (n 176).

<sup>224</sup> *Ntaganda Judgment* (n 10) [48]–[88].

<sup>225</sup> *Ibid* [89]–[262].

<sup>226</sup> *Ibid* [285]–[658].

<sup>227</sup> Kevin Jon Heller, ‘Radical Complementarity’ (2016) 14(3) *Journal of International Criminal Justice* 637.

complementarity.<sup>228</sup> Rather than honour the assumption in the *Rome Statute* that the Court should generally defer to national proceedings,<sup>229</sup> it is now for national jurisdictions to demonstrate they are prosecuting individuals not only in respect of the same conduct but are charging them with (effectively) the same offences as the OTP.<sup>230</sup> This hollows out complementarity and creates de facto primacy.<sup>231</sup> It also prioritises a vision of the Court as a universal institution standing above states rather than it being a court of last resort acting as a complement to national jurisdictions.

On the immunity *ratione personae* controversy, the Appeals Chamber in *Al-Bashir* made several unforced errors. While not necessarily compelling,<sup>232</sup> a respectable argument was available that art 27 of the *Rome Statute* must implicitly waive immunities as among states party (including in respect of arrest and transfer of suspects to the Court), and that the United Nations Security Council's *Resolution 1593*, referring the situation in Sudan to the Court,<sup>233</sup> placed Sudan in an analogous position to states party regarding available immunities and cooperation obligations.<sup>234</sup> This would have been sufficient to uphold a finding that Al-Bashir enjoyed no personal immunity barring his surrender to the Court. However, this was put forward only as a *subsidiary* argument by the Appeals Chamber.<sup>235</sup> The entire issue before it was disposed of in its earlier finding that art 27 reflects a customary international law rule that immunities do not apply before *any international criminal tribunal* and that a necessary corollary of this is that such immunities do not apply in related arrest and surrender proceedings.<sup>236</sup> The Court has subsequently attempted to clarify (by issuing the 'Q&A' document discussed above) that this principle only applies in respect of international tribunals in the exercise of their 'proper jurisdiction',<sup>237</sup> perhaps implying that this ruling does not adversely affect the position of non-parties or those not subject to a Security Council referral. This is plainly not the case. Crimes, including

<sup>228</sup> Ibid. See *Rome Statute* (n 1) art 17(1)(c).

<sup>229</sup> On the *Rome Statute* as containing such a textual presumption: Nouwen, *Complementarity in the Line of Fire* (n 42) 58.

<sup>230</sup> Heller, 'Radical Complementarity' (n 227) 648–9.

<sup>231</sup> Ibid.

<sup>232</sup> For cogent criticisms of the following argument, see Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7(2) *Journal of International Criminal Justice* 315, 322–5, 329–31.

<sup>233</sup> SC Res 1593, 5158<sup>th</sup> mtg, UN Doc S/RES/1593 (31 March 2005) para 1.

<sup>234</sup> Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7(2) *Journal of International Criminal Justice* 333, 337–42. See also Claus Kreß and Kimberly Prost, 'Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (CH Beck, 3<sup>rd</sup> ed, 2016) 2117, 2125; Dapo Akande and Talita de Souza Dias, 'Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2) of the Rome Statute', *EJIL:Talk!* (Blog Post, 12 November 2018) <<https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/>>, archived at <<https://perma.cc/Z6QP-AKNQ>>.

<sup>235</sup> *Al-Bashir Appeal* (n 14) [120]–[149].

<sup>236</sup> Ibid [113]–[115].

<sup>237</sup> *Q&A regarding Al-Bashir* (n 27). The *Al-Bashir Appeal* decision only refers to the concept once: at [127]. This cross-references to the Joint Concurrence: at [127] n 355, citing *Al-Bashir Appeal* (n 14) annex I [387]–[413] (Judges Eboe-Osuji, Morrison, Hofmański and Bossa). The result is not, perhaps, a model of clarity.

international crimes, may be committed on the territory of a state party by the national of a non-state party; or such crimes may have cross-border effects. On such a basis, a PTC has already ruled that it has jurisdiction over the entire course of conduct resulting in the forced deportation of Rohingya persons from Myanmar into Bangladesh.<sup>238</sup> No suspect in Myanmar may thus plead personal immunities before the ICC. The universalist logic at work is made plain when the *Al-Bashir* separate joint concurring opinion states that an international court's 'universal character remains undiminished by the mere fact that any of the States entitled to join it elected to stay out in the meantime, or declined to consent to the court's jurisdiction as the case may be'.<sup>239</sup> The International Court of Justice has consistently held that immunities both *ratione personae* and *ratione materiae* apply in national proceedings in respect of international crimes.<sup>240</sup> Positivists have been inclined to the view that this limitation on the exercise of state jurisdiction cannot be circumvented by delegation to an international court (*nemo dat quod non habet*).<sup>241</sup> Certainly, the universalist argument can be made that there is an international plane above states (complete with a *ius puniendi*); that international criminal tribunals sit upon that plane; and, therefore, whether the rules of state immunity apply before them must be worked out *de novo*.<sup>242</sup> Such an argument was not necessary, however, to resolve the point at hand and was unlikely to commend itself to those upon whom the Court depends: states.

Finally, in three moves the PTCs have substantially narrowed the discretion of the Prosecutor.<sup>243</sup> First, there has been the attempt to substantially eliminate prosecutorial discretion to *not* open an investigation on any grounds other than the interests of justice, a ground that is subject to review by a PTC.<sup>244</sup> The effect is the PTC now has an extensive ability to ask the Prosecutor to reconsider *any* decision not to open an investigation. This can only lead to an over-stretched court if the Prosecutor is not entitled to filter out situations based on, *inter alia*, gravity. Secondly, a PTC has sought to direct the OTP's conduct of investigations,

<sup>238</sup> *Bangladesh Decision* (n 11) [64].

<sup>239</sup> *Al-Bashir Appeal* (n 14) annex I [57] (Judges Eboe-Osuji, Morrison, Hofmański and Bossa).

<sup>240</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, 22 [54]; *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment) [2012] ICJ Rep 99.

<sup>241</sup> O'Keefe (n 53) 106–7; Guilfoyle, *International Criminal Law* (n 133) 404.

<sup>242</sup> *Al-Bashir Appeal* (n 14) [115]–[116]. See also Kreß (n 50) 244–8; *Prosecutor v Al-Bashir (Written Observations of Professor Claus Kreß as Amicus Curiae, with the Assistance of Ms Erin Pobjie, on the Merits of the Legal Questions Presented in the Hashemite Kingdom of Jordan's Appeal)* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09 OA2, 18 June 2018).

<sup>243</sup> See Raynor (n 24) [90].

<sup>244</sup> *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/13, 16 July 2015) [14], [21]–[26]. See also at annex, [7], [15], [19] (Judge Kovács). See discussion in Guilfoyle, *International Criminal Law* (n 133) 132–3. The Appeals Chamber has concluded that whether the OTP has made a 'final' determination not to open an investigation following a PTC request for reconsideration is to be determined by the PTC itself: *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia (Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of Comoros"')* (International Criminal Court, Appeals Chamber, Case No ICC-01/13 OA 2, 2 September 2019) [1], [59]–[61].

including what steps should be taken to collect and preserve evidence at an early stage.<sup>245</sup> Finally, the PTC reviewing the OTP's request to open an investigation in Afghanistan arrogated to itself the ability to *deny* such an application on the grounds that investigation would not be in the interests of justice, and considered a range of prudential, policy and resource-allocation concerns under that head.<sup>246</sup> While a reasonable argument can be made that a PTC may independently invoke the interest of justice criterion to reject such an application,<sup>247</sup> it was not a wise door to open. The *Rome Statute* appears to contemplate that it would normally be for the Prosecutor to make a decision not to open an investigation based on 'interests of justice' considerations and for the PTC to ask that such a decision be reconsidered.<sup>248</sup> Such resource-allocation questions are necessarily political (or at least non-judicial) and are left by the Statute to the Prosecutor and, to a lesser extent, the ASP; they are subject only to limited (and hopefully deferential) judicial oversight.<sup>249</sup> The decision also reveals a cleavage in judicial culture: it is hard to reconcile the deference of the reasoning here to external political realities with the universalism displayed in the *Al-Bashir* Appeals Chamber. Notably, however, in a welcome development at time of writing, the PTC decision regarding the OTP request to open an investigation in Afghanistan had been overturned on appeal.<sup>250</sup>

#### 4 *A Flawed Judicial Culture*

In conclusion, there seems a striking lack of commitment among the ICC judges to each other and to the institution more broadly. Kai Ambos has written: 'There is a climate of rivalry between the judges which also affects the legal officers [who work for them in Chambers]. Some of them, including very experienced ones,

<sup>245</sup> *Bangladesh Decision* (n 11) [80]–[88].

<sup>246</sup> *Afghanistan Decision* (n 3) [87]–[96].

<sup>247</sup> See Kevin Jon Heller, 'Can the PTC Review the Interests of Justice?', *Opinio Juris* (Blog Post, 12 April 2019) <<https://opiniojuris.org/2019/04/12/can-the-ptc-review-the-interests-of-justice/>>, archived at <<https://perma.cc/QYW5-WUA8>>; Dapo Akande and Talita de Souza Dias, 'The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice', *EJIL:Talk!* (Blog Post, 18 April 2019) <<https://www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/>>, archived at <<https://perma.cc/K8WK-LE39>>. See also Talita de Souza Dias, "'Interests of Justice': Defining the Scope of Prosecutorial Discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court' (2017) 30(3) *Leiden Journal of International Law* 731. But see Dov Jacobs, 'ICC Pre-Trial Chamber Rejects OTP Request to Open an Investigation in Afghanistan: Some Preliminary Thoughts on an Ultra Vires Decision', *Spreading the Jam* (Blog Post, 12 April 2019) <<https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/>>, archived at <<https://perma.cc/VL7F-A2NB>>; Dov Jacobs, 'Some Extra Thoughts on Why the ICC Pre-Trial Chamber Acted Ultra Vires in Using the "Interests of Justice" to Not Open an Investigation in Afghanistan', *Spreading the Jam* (Blog Post, 12 April 2019) <<https://dovjacobs.com/2019/04/12/some-extra-thoughts-on-why-the-icc-pre-trial-chamber-acted-ultra-vires-in-using-the-interests-of-justice-to-not-open-an-investigation-in-afghanistan/>>, archived at <<https://perma.cc/Y7VR-8UB7>>.

<sup>248</sup> See *Rome Statute* (n 1) arts 53(1)(c), (2)(c), (3)(a)–(b).

<sup>249</sup> *Ibid* art 53(3).

<sup>250</sup> *Afghanistan Appeal* (n 13).

leave the court; others try to switch to another unit.’<sup>251</sup> Turnover of skilled personnel is often a sign of poor organisational ‘climate’ and leadership. The ICC judiciary also seems to place little stock in following provisions of the *Rome Statute* which could perhaps foster collegiate decision making. The Statute *requires* Trial Chambers to issue *only* one judgment of the Court, while dissenting opinions on questions of law are only expressly permitted on appeal.<sup>252</sup> Neither dissents at the Trial and Pre-Trial level nor separate concurring opinions on appeal are known to the Statute. While other options for reform are canvassed in Part VII, a useful first step towards collegiality and coherence might be closer compliance by the judges with the procedural requirements of the Statute itself. As noted, the ICC judiciary have now agreed a common framework for judgement writing, the detail and impact of which remains to be seen.

## VI WHO CAN DO THE FIXING?

### A Introduction

This section proposes that, other than the Court’s own leadership class, the only body capable of ‘fixing’ the ICC is its political arm, the ASP. The ASP is the Court’s legislative and management oversight body.<sup>253</sup> It sets the *ICC Rules*.<sup>254</sup> It sets the *Elements of Crimes*.<sup>255</sup> It has power to establish, as it has done, a body to advise on judicial nominations<sup>256</sup> and an independent oversight mechanism.<sup>257</sup>

Moreover, to the extent that the Court’s problems have been identified as failures of leadership, the ASP must accept much of the responsibility. The ASP elects the judges.<sup>258</sup> It elects the Prosecutor.<sup>259</sup> Indeed, the only senior Court official not appointed by the ASP is the Registrar.<sup>260</sup> However, the ASP’s management oversight functions are plainly intended to extend to all aspects of the Court’s management other than those impinging on judicial independence. As art 112(2)(b) of the *Rome Statute* states, the ASP is to: ‘[p]rovide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court’. Article 112 thus establishes the centrality of the ASP and its administrative arm, the Bureau, to the Court’s management and governance. Indeed, even one of the Court’s staunchest defenders, the Coalition for the International Criminal Court NGO, has called for the ASP, ‘as the governing body ... of the *Rome Statute* System’, to make

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<sup>251</sup> Kai Ambos, ‘Interests of Justice? The ICC Urgently Needs Reforms’, *EJIL:Talk!* (Blog Post, 11 June 2019) <<https://www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/#more-17264>>, archived at <<https://perma.cc/9VX5-2XWP>>.

<sup>252</sup> See *Rome Statute* (n 1) art 74(5). Cf at art 83(4).

<sup>253</sup> *Ibid* art 112.

<sup>254</sup> *Ibid* art 51.

<sup>255</sup> *Ibid* art 9; International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (adopted 9 September 2002).

<sup>256</sup> *Ibid* art 36(4)(c); Assembly of States Parties, International Criminal Court, *Strengthening the International Criminal Court and the Assembly of States Parties*, Res ICC-ASP/10/Res.5, Official Records, vol I, 10<sup>th</sup> sess, 9<sup>th</sup> plen mtg, Doc No ICC-ASP/10/20 (21 December 2011) para 19.

<sup>257</sup> *Rome Statute* (n 1) art 112(4).

<sup>258</sup> *Ibid* art 36(6).

<sup>259</sup> *Ibid* art 42(4).

<sup>260</sup> *Ibid* art 43(4).

major improvements ... in its working methods and mechanisms, including in the election of judges; in its role in advancing universality, complementarity, cooperation; in the relationship of the ICC with the United Nations, and with other relevant international, regional and sub-regional organizations — and especially in the search and election of the next Prosecutor.<sup>261</sup>

(Indeed, the ASP has established a Committee on the Election of the Prosecutor to receive applications for the post and ‘shortlist of three to six of the most highly qualified candidates’.<sup>262</sup>) Despite such calls, the argument must first be made that the ASP is a legitimate repair-person. Claiming that the ASP should be involved in fixing the Court runs into objections that such action would (or could) be contrary to judicial and prosecutorial independence and potential concerns that ‘international criminal justice’ should be insulated ‘from political discretion’.<sup>263</sup> Hannah Woolaver and Emma Palmer have ably identified the issues which must be considered in any discussion of judicial and prosecutorial independence under the *Rome Statute*.<sup>264</sup> My analysis here generally follows theirs, though my conclusions may differ. Woolaver and Palmer correctly observe that there is ‘potential overlap’ under the *Rome Statute* between legitimate ASP functions and the prosecutorial and judicial functions of the Court and that, at least in certain concrete cases, this *could* risk ‘undermining the ICC’s judicial and prosecutorial independence’.<sup>265</sup> Assessing where to draw the line between such potentially overlapping spheres of responsibility requires us first to define both judicial and prosecutorial independence, and to consider the ASP’s legitimate sphere of legislative and political action.

#### B *What Is the Purpose of Judicial Independence and What Does It Require of the ASP?*

Woolaver and Palmer recall that the Preamble to the *Rome Statute* speaks of establishing an ‘independent’ and ‘permanent’ International Criminal Court and that art 40(1) provides that ‘the judges shall be independent in the performance of their functions’.<sup>266</sup> However, given the lack of further specificity in the Statute, it becomes necessary to consider the content and purpose of judicial independence.

Judicial independence is not an absolute end in itself, leaving judges completely unfettered. Judging ‘inevitably involves discretion, and no discretionary power, no matter how well-intentioned its holder may be, can be thought of as unlimited and uncontrolled’.<sup>267</sup> Rather, judicial independence exists to protect a core judicial function: impartial dispute settlement. That is, judicial independence is a *means to*

<sup>261</sup> William Pace, ‘Statement of the Convenor of the Coalition for the ICC, Mr William Pace: General Debate of the 17<sup>th</sup> Session of the Assembly of States Parties to the International Criminal Court’ (Speech, World Forum, 6 December 2018), archived at <<https://perma.cc/D47S-MB3V>>.

<sup>262</sup> Assembly of States Parties, International Criminal Court, *Bureau of the Assembly of States Parties: Election of the Prosecutor — Terms of Reference*, 18<sup>th</sup> sess, Doc No ICC-ASP/18/INF.2 (11 April 2019) [14], [16].

<sup>263</sup> Mégret (n 40) 212.

<sup>264</sup> Hannah Woolaver and Emma Palmer, ‘Challenges to the Independence of the International Criminal Court from the Assembly of States Parties’ (2017) 15(4) *Journal of International Criminal Justice* 641.

<sup>265</sup> *Ibid* 641.

<sup>266</sup> *Ibid* 643, quoting *Rome Statute* (n 1) Preamble para 9.

<sup>267</sup> Crawford and McIntyre (n 131) 199.

the end of judicial impartiality.<sup>268</sup> Threats to judicial independence (which tend to be structural or contextual, such as executive direction) or to judicial impartiality (which tend to be more case-specific, such as bribing a judge) undermine the judicial function.<sup>269</sup> Impartiality requires that a judge is free from subordination by: ‘the parties to the conflict’; ‘any other power interested in a given resolution’; and, so far as is possible, any personal bias.<sup>270</sup> It entails that judicial decisions shall not be made on the basis of ‘irrelevant, extra-legal factors’.<sup>271</sup> Impartiality further requires, inter alia, that international judges ‘must be free from undue influence from any source’ and ‘must enjoy independence from ... the international organisations under the auspices of which the court or tribunal is established’.<sup>272</sup> It does not, however, require that judges be protected ‘from any influence for any reason’.<sup>273</sup>

Once we accept that judicial independence and impartiality are not absolutes (but exist to support the proper exercise of the judicial function), we can accept that they ‘must be properly constrained, as is consistent with the limited functional character of the concepts’.<sup>274</sup> The other side of the coin, then, is judicial accountability, a multi-faceted concept incorporating

ideas such as [judicial transparency and] open proceedings, written judgments, multi-judge panels, professional and academic critique, training and education, as well as more formal mechanisms including appeals and reviews, and judicial discipline.<sup>275</sup>

Judicial independence and impartiality thus *require* ‘mechanisms to be in place and available to ensure their application — so that those with concerns, including judges themselves, may know how to raise and address such concerns’.<sup>276</sup> Judicial accountability is not a subtraction from judicial independence. Both exist to support the optimal exercise of the judicial function impartial dispute settlement. The principles exist not in tension, but in balance.<sup>277</sup>

Criticising particular decisions of a court, for example, does not per se infringe judicial independence.<sup>278</sup> In the ICC context, a wide-ranging power for member states to discuss ‘their dissatisfactions with the Court within the confines of the ASP’ is desirable, both to avoid any ‘sense that legitimate concerns are being ignored’ and the possibility of unaddressed grievances resulting in parties withdrawing from the *Rome Statute*.<sup>279</sup> Further, the *Rome Statute* remains a treaty. This makes the subsequent practice of its member states — including their practice

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<sup>268</sup> Ibid 196.

<sup>269</sup> Ibid 201.

<sup>270</sup> Pasquale Pasquino, ‘Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History’ (2003) 2(1) *Law and Practice of International Courts and Tribunals* 11, 25.

<sup>271</sup> Crawford and McIntyre (n 131) 201.

<sup>272</sup> Sands, McLachlan and Mackenzie (n 25) 251.

<sup>273</sup> Crawford and McIntyre (n 131) 196 (emphasis in original).

<sup>274</sup> Ibid 199.

<sup>275</sup> Ibid 200.

<sup>276</sup> Sands, McLachlan and Mackenzie (n 25) 250, quoted in ibid 199.

<sup>277</sup> Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) ch 14.

<sup>278</sup> Ambos, ‘Interests of Justice?’ (n 251).

<sup>279</sup> Woolaver and Palmer (n 264) 663. Cf at 656.

within the ASP — relevant to its interpretation.<sup>280</sup> The ASP may thus debate the outcome of cases and judicial interpretations of the Statute without infringing judicial independence.<sup>281</sup> Further, as Woolaver and Palmer note, *ICC Rules* ‘amendments are not a judicial function under the *Rome Statute*, as this is explicitly the task of the ASP’.<sup>282</sup> If the ASP is to amend the *ICC Rules*, it must be free to discuss their judicial application to date.

It would thus go too far to claim *tout court* that ‘the use of the ASP’s powers to influence the implementation and interpretation of the *ICC Rules* and Statute is contrary to [judicial independence as established in] Article 40’.<sup>283</sup> Such a claim may, however, be made out in particular cases. The clearest is the successful Kenyan attempt to secure in the ASP an understanding that r 68 of the *ICC Rules* (allowing use of previously recorded evidence should a witness become unavailable) would not apply retrospectively, which would have — in Kenya’s view — disadvantaged the defendants in *Ruto*.<sup>284</sup> This case concerned the situation in Kenya and was marred by allegations of witness intimidation.<sup>285</sup> Using parliamentary tactics to try to influence cases which are underway obviously infringes judicial independence and an appropriate solution may be some version of Woolaver and Palmer’s proposal that the ASP should adopt a *sub judice* rule prohibiting discussion of cases presently before the Court.<sup>286</sup>

The next question is whether, if the ASP engages in ‘assessing Chambers’ implementation of the *Rome Statute* or [the *ICC Rules*], this would necessarily ‘erode the guarantees for judicial independence in the *Rome Statute* and defeat its object and purpose of establishing an independent judicial institution’.<sup>287</sup> Rule amendment is, as noted, a core function of the ASP.<sup>288</sup> Any claim that amending rules in light of judicial activity to better reflect the intent of the rule-making body would erode judicial independence should thus be met with some scepticism. Further, given that powers to amend the *Rome Statute* also vest in the ASP, the ASP must be free to debate whether such amendments are needed. Thus, it is entirely proper for member states to use the ASP to comment on whether they consider the Statute is being correctly interpreted and applied. Concluding otherwise suggests that the Court must be immunised from criticism in order to

<sup>280</sup> *Prosecutor v Ruto (Reasons for the Decision on Excusal from Presence at Trial under Rule 134quater)* (International Criminal Court, Trial Chamber V(A), Case No ICC-01/09-01/11, 18 February 2014) [56]. See also Dapo Akande and Antonios Tzanakopoulos, ‘Treaty Law and ICC Jurisdiction over the Crime of Aggression’ (2018) 29(3) *European Journal of International Law* 939, 945–6.

<sup>281</sup> Cf Fatou Bensouda, ‘Statement by the ICC Prosecutor at the Opening of the 14<sup>th</sup> Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court’ (Speech, World Forum, 18 November 2015), archived at <<https://perma.cc/GX86-VKQ4>> (‘Statement by the ICC Prosecutor at the Opening of the 14<sup>th</sup> Session’), stating that ‘[m]atters that ... have already been adjudicated, must not be undermined by virtue of discussions and decisions of States Parties’.

<sup>282</sup> Woolaver and Palmer (n 264) 650.

<sup>283</sup> *Ibid* 663.

<sup>284</sup> *Ibid* 649–52.

<sup>285</sup> Stahn, *A Critical Introduction to International Criminal Law* (n 76) 237; Phil Clark, *Distant Justice* (n 39) 236–7.

<sup>286</sup> See also Woolaver and Palmer (n 264) 661–3; Bensouda, ‘Statement by the ICC Prosecutor at the Opening of the 14<sup>th</sup> Session’ (n 281).

<sup>287</sup> See Woolaver and Palmer (n 264) 651.

<sup>288</sup> *Ibid* 650.

preserve its independence. As explained above, this goes far beyond what judicial independence requires.

A further question requiring scrutiny is the impact on the ASP, if any, of art 119(1), which holds: '[a]ny dispute concerning the judicial functions of the court shall be settled by the decision of the Court'.<sup>289</sup> Certainly, '[s]ome States expressed during [the] negotiations the belief that any disagreement or difference of opinion of any kind concerning the Court was for it alone to decide'.<sup>290</sup> A very long list of 'judicial functions' reserved to the Court's exclusive competence under art 119(1) has been proposed.<sup>291</sup> But to take these claims at their highest would be to risk evacuating the concept of judicial accountability entirely. Article 119(1) is a dispute resolution clause.<sup>292</sup> The function of a dispute resolution clause is to determine who has the final say on such questions.<sup>293</sup> The principle of judicial independence cannot be used to turn a dispute resolution clause into a gag order. Nor can art 119(1) prevent the discussion of legal disputes, nor their existence. As discussed, to deny the ASP the right to debate the appropriate bounds of such important jurisdictional principles as complementarity and personal immunities would undercut judicial accountability. That said, any dispute as to the correct application of those principles in particular cases *can only* be resolved by the Court's judicial arm: 'it goes without saying that the Court possesses the inherent power to adjudicate on any dispute, issue, or difficulty arising in the exercise of its judicial functions'.<sup>294</sup> Article 119(1), however, goes no further than confirming this inherent power.

Finally, ICC judges have a powerful guarantee of independence from the rest of the institution through a disciplinary procedure which entrenches their position

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<sup>289</sup> Ibid 644 (emphasis omitted), quoting *Rome Statute* (n 1) art 119(1).

<sup>290</sup> Mark Klamberg, 'Article 119: Settlement of Disputes' in Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher, 2017) 739, 739 <<http://www.toaep.org/ps-pdf/29-klamberg>>, archived at <<https://perma.cc/7FDC-AXQM>>.

<sup>291</sup> Including but not limited to: questions of jurisdiction and admissibility; interpretation of the definitions of crimes; the excusing of judges and disqualifying them; disqualification of the Prosecutor; disciplinary matters relating to a judge, the Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar; questions involving the Rules of Procedure and Evidence; etc: see Roger S Clark, 'Article 119: Settlement of Disputes' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (CH Beck, 3<sup>rd</sup> ed, 2016) 2274.

<sup>292</sup> Indeed, some authors have taken the view that art 119 of the *Rome Statute* is a dispute settlement clause applicable only to disputes as between states party, and not to disputes between states party and the Court: Bert Swart and Göran Sluiter, 'The International Criminal Court and International Criminal Co-operation' in Herman AM von Hebel, Johan G Lammers and Jolien Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press, 1999) 91, 104. This may go too far: although art 119(2) is expressly limited to '[a]ny other dispute between two or more States Parties', art 119(1) is not.

<sup>293</sup> Annalisa Ciampi, 'The Obligation to Cooperate' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) vol 2, 1607, 1615 n 23.

<sup>294</sup> Alain Pellet, 'Settlement of Disputes' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) vol 2, 1841, 1844.

more strongly than in many liberal democratic systems.<sup>295</sup> Judges of the Court can only be removed for misconduct by a two-thirds majority of the ASP, but only after the matter has been referred to the ASP by a two-thirds vote of the other ICC judges.<sup>296</sup> Following the events of the Judge Ozaki affair discussed above, one might be tempted to conclude this is unlikely ever to occur in practice.

### C *Prosecutorial Independence at the ICC*

Woolaver and Palmer highlight several necessary considerations in balancing ASP oversight obligations and prosecutorial independence, especially as regards questions of resourcing and resource-allocation. First, they note: ‘Article 42 makes clear that: “The Office of the Prosecutor shall act independently as a separate organ of the Court”.’<sup>297</sup> Secondly, they suggest that

by giving ‘full authority over the management and administration of the Office’ to the Prosecutor, Article 42(2) appears to exclude any involvement of other actors, such as the ASP, in making managerial or administrative decisions concerning the OTP.<sup>298</sup>

However, this is qualified by the fact that, as they note, ‘[a]rticle 112(2) gives the ASP a broad mandate, encompassing legislative, operational, and administrative roles’ and that ‘the ASP’s administrative and management functions include oversight for the Presidency, Prosecutor and Registrar’.<sup>299</sup> There is obviously a line to be drawn between acceptable management and administrative oversight of the OTP and unacceptable intervention in its day-to-day running. The question is where.

The ASP enjoys considerable leverage in determining the Court budget and this power could conceivably be abused. Woolaver and Palmer note that budget constraints will affect prosecutorial and judicial decision making, and that the *deliberate* provision of ‘insufficient resources’ could interfere with prosecutorial independence.<sup>300</sup> The latter would certainly be true, though difficult to prove. It

<sup>295</sup> In Australia, a federal judge may be removed by the Governor-General in Council after a simple majority vote in both Houses of the Commonwealth Parliament: *Australian Constitution* s 72(ii). The position in the United Kingdom is similar: *Supreme Court Act 1981* (UK) s 11(3). Article I § 2–3 of the *United States Constitution* permits the House of Representatives to impeach a federal judge by simple majority vote, but a judge may only be removed following a two-thirds majority vote in the Senate. However, in Canada, while a body of judicial officers (the Judicial Council) may first recommend removal of a federal judge for misconduct, the vote required is a simple majority of both Houses of Parliament: *Judges Act*, RSC 1985, c J-1, ss 63, 65, 71.

<sup>296</sup> *Rome Statute* (n 1) art 46(2)(a).

<sup>297</sup> Woolaver and Palmer (n 264) 644.

<sup>298</sup> *Ibid* 645.

<sup>299</sup> *Ibid* 645–6.

<sup>300</sup> *Ibid* 658. Conversely, it has been suggested that international criminal justice has deliberately been allowed to grow too expensive and is thus perhaps over-resourced: see M Cherif Bassiouni, ‘Wolfgang Friedmann Memorial Award Address’ (2012) 51(1) *Columbia Journal of Transnational Law* 1, 11, suggesting:

Maybe there is a purposeful intent to make international criminal justice so costly, so cumbersome and so ineffective that people will give up on it. ... Maybe the only way to make sure that the ICC will not be what we wanted it to be is simply to let it flourish bureaucratically. Employ a thousand people and pay more than 140 million dollars per year for a few cases with a few defendants until world public opinion gets disillusioned with it.

has been noted that in 2011 the ICC as a whole requested that states party should ‘prioritize among the Court’s different mandates and identify those which should be reduced or eliminated’ if it was to be expected to present a draft budget based on zero growth.<sup>301</sup> The budgetary constraints facing the Court have been discussed above. As professionals, lawyers ‘don’t like to think about costs’; ‘[t]he professional ethos ... [includes] a commitment to the interests of clients above considerations of cost’.<sup>302</sup> However, at the end of the day, all justice systems work within resourcing constraints. There is nothing extraordinary in a prosecutorial office having to prioritise its work. Prosecutor Bensouda noted in her 2016 address to the ASP that strategic priorities for the Court in 2017 included ‘to conduct and support six active investigations’ while continuing with ‘10 planned preliminary examinations and three trials’.<sup>303</sup> Whether it is feasible to deliver high-quality work on so many fronts (but so few trials) is ultimately a question for the Prosecutor; but it is also a managerial question into which the ASP might legitimately enquire.

#### D Conclusion

If the ICC’s leadership fails to address the organisation’s dysfunction, it risks the ASP stepping in. As noted, the ASP has substantial powers and responsibilities in this regard. Its formal powers include amendment of the *ICC Rules*, if necessary, to address the Court’s own failure to set clear rules regarding the assessment of evidence. Substantively, its control of the ICC budget provides it with significant leverage in court reform (as further discussed below). The Court’s budget is plainly too little for it to investigate and mount cases regarding every possible situation within its jurisdiction involving international crimes. That, however, was never its mandate. Claims that states are actively using the ‘ICC budget to interfere

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<sup>301</sup> Woolaver and Palmer (n 264) 657 n 93, seemingly attributing the remark to the OTP in 2015. The passage appears only in Assembly of States Parties, International Criminal Court, Official Records, vol I, 10<sup>th</sup> sess, Doc No ICC-ASP/10/20 (12–21 December 2011) 18 [42], referring to a paper submitted by the Court as a whole. See, however, Prosecutor Bensouda’s addresses to the ASP in 2012, 2015 and 2018: Fatou Bensouda, ‘Address to the Assembly of States Parties: Eleventh Session of the Assembly of States Parties’ (Speech, World Forum, 14 November 2012) [18]–[20], archived at <<https://perma.cc/9Z2K-654W>>; Bensouda, ‘Statement by the ICC Prosecutor at the Opening of the 14<sup>th</sup> Session’ (n 281) (‘Resource constraints simply impede my Office’s ability to conduct the desired full investigations in many situations’); Fatou Bensouda, ‘17<sup>th</sup> session of the Assembly of States Parties: Opening Plenary’ (Speech, World Forum, 5 December 2018) <<https://www.icc-cpi.int/itemsDocuments/20181205-otp-statement.pdf>>, archived at <<https://perma.cc/2YHW-EH3S>> ([m]y remarks will not be complete without making a genuine and necessary plea for resources’).

<sup>302</sup> Jerry Z Muller, *The Tyranny of Metrics* (Princeton University Press, 2018) 8–9.

<sup>303</sup> Fatou Bensouda, ‘Address at the First Plenary: Fifteenth Session of the Assembly of States Parties’ (Speech, World Forum, 16 November 2016) 7, archived at <<https://perma.cc/7S JL-QHML>>. In 2016 the OTP budget assumptions had been based on ‘nine preliminary examinations, one new situation, five active investigations, nine hibernated investigations, one pre-trial proceeding, four trials, one appeal and one reparations hearing’: Assembly of States Parties, International Criminal Court, Official Records, vol II, 14<sup>th</sup> sess, Doc No ICC-ASP/14/20 (18–26 November 2015) 258 [45].

with its work' are thus overstated.<sup>304</sup> The ASP also has a heavy responsibility in selecting the Court's leaders: the judges and the Prosecutor. While there have been improvements in the judicial selection process, more thought overall may need to be given to the substantial leadership responsibilities these posts entail beyond technical and professional expertise.

## VII OPTIONS FOR REFORM

The view taken in this article as to what a successfully functioning ICC would look like is not an especially radical one. It would involve a court in which the Prosecutor regularly put up cases capable of securing convictions under fair trial conditions. Cases would be administered according to a stable jurisprudence and completed within a reasonable time, not being unnecessarily slowed by a complex legal architecture. The OTP would deliver high-quality investigations by focussing on a narrower range of situations commensurate with its resources. Member states would have sufficient trust in the institution to give it their full cooperation.<sup>305</sup>

How is such court reform to be achieved? The call has been made for a high-level expert inquiry into the Court's management and governance and, indeed, in late 2019 the ASP voted to establish a nine-member Independent Expert Review ('IER') to report in the course of 2020.<sup>306</sup> The argument of this paper has been that our expectations of such a technocratic exercise should be modest. Certainly, there are some matters where adjustments to the *ICC Rules* and other Court processes may be of assistance in streamlining confirmation of charge proceedings, the rules surrounding victim participation and, crucially, providing certainty about how evidence should actually be assessed by the Court. However, the Court's problems go deeper. Its problems are also unlikely to be resolved by the importation of a chief executive from the international business realm<sup>307</sup> or the deployment of management consultants. As to the latter, efforts at Registry reform following management consultants' recommendations has had, at best, limited effectiveness.<sup>308</sup> Indeed, 'the mere removal of administrative layers and strengthening management [did] not automatically improve Court functioning'.<sup>309</sup> Further, while certain efficiencies were achieved, total Registry staffing was reduced by only 10 people and a new layer of potentially 'top-heavy' management

<sup>304</sup> See, eg, Elizabeth Evenson and Jonathan O'Donohue, 'States Shouldn't Use ICC Budget to Interfere with Its Work', *Amnesty International* (online, 23 November 2016) <<https://www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/>>, archived at <<https://perma.cc/R3FL-X2DC>> (referring to an 'initiative by Canada, Colombia, Ecuador, France, Germany, Italy, Japan, Poland, Spain, UK and Venezuela [which] is part of a damaging long-term effort by the biggest financial contributors to the court to curtail the ICC's growth').

<sup>305</sup> See General Debate statements made by Poland: Konrad Marciniak, 'Eighteenth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court' (Speech, The Hague, 3 December 2019), archived at <<https://perma.cc/2C6N-5L2S>>.

<sup>306</sup> Assembly of States Parties, International Criminal Court, *Review of the International Criminal Court and the Rome Statute System*, Res ICC-ASP/18/Res.7, 18<sup>th</sup> sess, 9<sup>th</sup> plen mtg (adopted 6 December 2019) paras 6–7, 9 ('*Review of the International Criminal Court and the Rome Statute System*'), archived at <<https://perma.cc/4VDT-FJMS>>. See also Al Hussein et al (n 2).

<sup>307</sup> Raynor (n 24) [61].

<sup>308</sup> Clements, 'ReVisiting the ICC Registry's ReVision Project' (n 70).

<sup>309</sup> *Ibid* 274.

was created.<sup>310</sup> While this paper advocates treating the Court as simply another major public organisation, this does not mean that advice from general management consultants without specialised expertise in the core functions discharged by courts will necessarily be helpful. For the same reason, one should be sceptical of importing managerial expertise from the business sector.

There are reasons, however, for optimism. These arise not out of the new IER taken alone, but because ASP members see the IER as one part of a larger ‘process of reviewing and strengthening the Court’.<sup>311</sup> The watchwords are that this is to be a ‘transparent, inclusive *State-Party driven* process’.<sup>312</sup> Critically, it appears that this process is intended (at least by some) to be an ongoing one, rather than a one-off review exercise.<sup>313</sup> The significance of this is that the ASP appears to be taking ownership of its oversight and governance role.<sup>314</sup> Indeed, the best tool of accountability it can probably exercise is scrutiny. As will be explained below, the best possible outcome is probably one in which the Court’s leadership takes action itself before it becomes necessary for the ASP to step in or, where the issues are structural, engages the ASP in dialogue about necessary amendments to the *ICC Rules* and the *Rome Statute*.

Such action is certainly needed. The Court must address the ongoing fiasco in which it is embroiled before further damage is done to its legitimacy.<sup>315</sup> Meaningful and lasting change within an organisation normally comes from its own leaders. Such leaders must realise, to avoid the perils of token symbolic reform,<sup>316</sup> that change is a continuing process and not a one-off event. From the literature we know what such a reform process looks like. A highly motivated group of leaders with a clear vision must establish a sense of urgency, build a coalition within the organisation willing to implement reform, achieve notable quick wins to establish their credibility, and then maintain momentum.<sup>317</sup> This will not be easy for the leaders of a judicial institution. As noted, such an institution embodies both judicial and prosecutorial independence. It is therefore not easy for

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<sup>310</sup> Ibid 272, 277.

<sup>311</sup> *Review of the International Criminal Court and the Rome Statute System* (n 306) para 13.

<sup>312</sup> Ibid para 4 (emphasis added).

<sup>313</sup> See General Debate statements made by made by Australia, Denmark, the Netherlands, New Zealand, Poland, the Republic of Korea, Romania and the UK at the 18<sup>th</sup> session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (2–7 December 2019): ‘General Debate: Eighteenth Session’, *International Criminal Court* (Web Page, 7 December 2019) <[https://asp.icc-cpi.int/en\\_menus/asp/sessions/general%20debate/Pages/GeneralDebate\\_18th\\_session.aspx](https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_18th_session.aspx)>, archived at <<https://perma.cc/E7ER-DYY3>>.

<sup>314</sup> It is plain from the Independent Expert Review Terms of Reference that the Assembly of States Parties sees some issues as reserved to states parties, notably the practical operation of the complementarity principle: *Review of the International Criminal Court and the Rome Statute System* (n 306) app II para 5.

<sup>315</sup> Powderly (n 30) 4, 6, 8–10.

<sup>316</sup> Bovens et al, ‘The Politics of Blame Avoidance’ (n 60) 140–5.

<sup>317</sup> This is a simplified account of John Kotter’s well-known eight-step approach summarised in John P Kotter, ‘Leading Change: Why Transformation Efforts Fail’ (2007) 85(1) *Harvard Business Review* 96. Empirical research has largely borne out Kotter’s theory but has highlighted that it may need to be interpreted in flexible and context specific ways: Steven H Appelbaum et al, ‘Back to the Future: Revisiting Kotter’s 1996 Change Model’ (2012) 31(8) *Journal of Management Development* 764. For a sceptical analysis of such approaches, see Lawrence Freedman, *Strategy: A History* (Oxford University Press, 2013) pt 4.

such leaders to coordinate their actions.<sup>318</sup> It is also difficult for a criminal justice institution to be accommodationist: in terms of ideology and outlook, the criminal law exists to refashion and discipline society, not to be refashioned and disciplined by external social forces.<sup>319</sup> Nonetheless, such externalities — especially resource constraints — may focus minds.

It is hard to escape the conclusion that the Court has not been well served to date by either its Prosecutors or, collectively, its judiciary. What is required is a new motivating ethic of modesty throughout the entire institution: modesty as to how much it can achieve; modesty among the senior office-holders as to the scope of their roles and the divisions of responsibility among the Court's arms; modesty in terms of strict application of the *Rome Statute* and avoidance of judicial overreach. In particular, the Court must retire some of its more grandiose universalist rhetoric and set more realistic expectations in its communications with victims and other stakeholders.<sup>320</sup> Universalism may have fostered its legitimacy among some audiences, but it has led to missteps, and risked alienating major constituencies, including among the ASP.

As regards the OTP, 'it is hard to see how the Court can succeed if the Office of the Prosecutor is failing to present convincing cases'.<sup>321</sup> Numerous factors appear to have led to this result: poor resource allocation (opening too many preliminary investigations or investigations in too many situations); poor strategy (turning quite late to the idea of prosecuting mid-level leaders first); poor case preparation (a lack of 'linking' evidence connecting high leaders with the crimes actually committed); a certain ignorance or naivete about local political conditions; as well as actual obstruction by states and a degree of judicial uncertainty as to applicable standards of evidence. However, despite its tortuous progress and near-collapse over disclosure issues, *Lubanga* remains the first real success story brought about by the Prosecutor's own efforts — *Katanga* having been salvaged by the Trial Chamber's *proprio motu* recharacterisation of the modes of liability and *Al Mahdi* being a guilty plea. The lessons of *Lubanga* are as stark as they are potentially unpalatable: a narrow case, run against a rebel leader on a single charge, can succeed. These lessons only appear confirmed by the conviction in *Ntaganda* and the acquittals of Mr Gbagbo and Mr Blé Goudé. This lesson chimes with the Prosecutor's new, if belated, policy direction of first targeting mid-level suspects in a situation before attempting to work up cases at higher levels of leadership. Such an approach will require the concentration of existing resources and mean focussing on a narrower range of situations. Inevitably, this in turn requires closing some 'active' situations (as the new OTP *Strategic Plan* appears to contemplate). These are all steps in the right direction. The next Prosecutor will need to be a leader capable of seeing such reforms through.

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<sup>318</sup> On high-level strategic coordination, see International Criminal Court, *Strategic Plan 2019–2021* (n 40) 4 [1]–[6]. Although the Court has attempted closer coordination in the past on issues such as communications: see International Criminal Court, *Integrated Strategy for External Relations, Public Information and Outreach* (Report, 2006).

<sup>319</sup> Mégret (n 40) 196.

<sup>320</sup> Raynor (n 24) [70].

<sup>321</sup> Batros, 'The ICC Acquittal of Gbagbo' (n 77).

As regards the ICC judiciary, the judges need to demonstrate greater commitment to each other and to the institution. In this context it is, perhaps, regrettable in retrospect that judges' terms are non-renewable. This may lead to loss of corporate memory, and the Court being seen less as a career capstone than a steppingstone to something else. (A radical, if unlikely, reform could be the creation of an ASP-elected Appeals Chamber, drawn from the ranks of existing ICC judges.) In terms of improving formal and substantive collegiality, Mistry has canvassed a range of possibilities, including the President taking a more active role in 'overseeing the institution's operational culture' and the possibility of the ICC (mirroring the International Court of Justice) adopting an internal resolution on judicial practice governing matters such as deliberation.<sup>322</sup> A step in this direction in the form of agreed judicial guidelines on judgment drafting has already been noted.<sup>323</sup> In so far as the Presidency has a role in promoting an effective internal working culture, this also falls within the supervisory remit of the ASP. A working group of the ASP on judicial dialogue might be one option. Certainly, opportunities for airing internal discord would be reduced if the judges were to more strictly follow the *Rome Statute* as regards issuing *only* single decisions of a whole chamber reflecting either a consensus or reporting both majority and minority reasoning, with separate opinions being confined solely to dissents on points of law in the Appeals Chamber.<sup>324</sup> The turf battles between the Chambers and the OTP need to cease, with Chambers showing appropriate deference to legitimate areas of prosecutorial discretion. In this respect, the recent overturning on appeal of the PTC's refusal to authorise an OTP investigation in Afghanistan represents a step in the right direction. Finally, if the judges cannot simplify the procedures adopted at the Pre-Trial level for the confirmation of charges and arrive at a coherent and internally agreed approach to the assessment of evidence at trial (eg through widespread adoption of the approach in *Ntaganda*) then they risk the ASP stepping in and fixing such matters for them through amendments to the *ICC Rules*.

The ASP has several major responsibilities. The first, as noted, is selecting in the next Prosecutor someone capable of seeing through present reforms.<sup>325</sup> Ideally, the next candidate would be a skilled manager of complex criminal trials, an efficient delegator, an experienced criminal lawyer with relevant international law expertise<sup>326</sup> and a talented diplomat. Secondly, the ASP needs to improve the

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<sup>322</sup> Mistry (n 131) 724. See International Court of Justice, *Resolution concerning the International Judicial Practice of the Court* (adopted 12 April 1976).

<sup>323</sup> See International Criminal Court, 'ICC Judges Hold Retreat, Adopt Guidelines on the Judgment Drafting Process and on the Timeframe for Issuance of Key Judicial Decisions' (n 211).

<sup>324</sup> Embarrassments such as the rambling, bricolage joint separate concurrence in the *Al-Bashir Appeal* would also be avoided: *Al-Bashir Appeal* (n 14) annex I (Judges Eboe-Osuji, Morrison, Hofmański and Bossa).

<sup>325</sup> Australia has called for a 'transparent, impartial and de-politicised process' to find a 'consensus candidate' for the next Prosecutor: see 'General Debate: Eighteenth Session' (n 313).

<sup>326</sup> *Bureau of the Assembly of States Parties: Election of the Prosecutor — Terms of Reference*, Doc No ICC-ASP/18/INF.2 (n 262) [12].

processes for the selection of judges.<sup>327</sup> It is not good enough that, in the last round of elections, two judges rated as only meeting the formal criteria for appointment (as opposed to being ‘particularly well qualified’) were elected.<sup>328</sup> There have also been suggestions that the ‘two list’ system by which candidates are considered (for either expertise in international law *or* criminal law) needs revision to favour judges skilled principally in criminal law, albeit with some basic understanding of international law.<sup>329</sup> While the successful conduct of a criminal trial is largely a matter of procedural expertise, de-prioritising knowledge of international law in selecting candidates would be a mistake. The ICC remains a major international organisation with real impacts on international relations and one tasked with applying complex concepts drawn from, *inter alia*, international humanitarian law. Expertise in international law remains important, at least at the Appeals Chamber level. Nonetheless, an acceptable approach might be to effectively require judges to have extensive criminal law expertise but also demonstrated practical or academic experience of public international law. Steps should, regardless, be taken towards cultivating a wider pool of ‘appointment ready’ judges who have demonstrated substantial interest in acquiring whichever primary skill set they may lack — be it criminal law or international law expertise. An ASP-sponsored ‘judicial college’ might form the basis of such an endeavour. Alternatively, collegiality might be fostered through prioritising candidates with prior experience in (or appearing before) international criminal tribunals, as such persons are more likely to be acculturated to the working practices of such tribunals.

The ASP has substantial leverage in pursuing reform through its control of the ICC budget. This leverage should be used sparingly and carefully. In part, this must be to avoid the appearance or actuality of compromising the Court’s judicial or prosecutorial independence as discussed above. But one must also be careful to avoid goal-displacement. There are already signs that budgetary efficiency has become an end in itself within organs of the Court, and that the language of managerial efficiency is becoming a (or the) principal register in which the Registry and OTP address the ASP and other stakeholders.<sup>330</sup> This is dangerous. All public organisations are prone to mistaking the smooth operation of their internal procedures for outcomes and losing sight of the goals they were established to accomplish.<sup>331</sup> Efficiency discourse and the further specialisation of

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<sup>327</sup> On strengthening the judicial appointment process, see Assembly of States Parties, International Criminal Court, *Resolution on the Review of the Procedure for the Nomination and Election of Judges*, Res ICC-ASP/18/Res.4, 18<sup>th</sup> sess, 9<sup>th</sup> plen mtg (adopted 6 December 2019) (advance), archived at <<https://perma.cc/44AT-4WZ3>>.

<sup>328</sup> See Assembly of States Parties, International Criminal Court, *Report of the Advisory Committee on Nominations of Judges on the Work of Its Sixth Meeting*, 16<sup>th</sup> sess, Doc No ICC-ASP/16/7 (10 October 2017); ‘2017: Election of Six Judges’, *International Criminal Court* (Web Page, 4 December 2017) <[https://asp.icc-cpi.int/en\\_menus/asp/elections/Pages/Results-elections-judges-2017.aspx](https://asp.icc-cpi.int/en_menus/asp/elections/Pages/Results-elections-judges-2017.aspx)>, archived at <<https://perma.cc/9EDW-7W32>>.

<sup>329</sup> Ambos, ‘Interests of Justice? The ICC Urgently Needs Reforms’ (n 251). See also Open Society Justice Initiative, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court* (Report, 2019) 8, 21–2.

<sup>330</sup> Richard Clements, ‘From Bureaucracy to Management: The International Criminal Court’s Internal Progress Narrative’ (2019) 32(1) *Leiden Journal of International Law* 149.

<sup>331</sup> Barnett and Finnemore (n 38) 718–19.

working units within an organisation risk exacerbating, not ameliorating, the tendency to lose sight of the big picture.<sup>332</sup>

The call here for a more modest and more realistic Court does not entail that those wielding state power will never be prosecuted. But such a Court will have to accommodate itself to the fact that such suspects will never be prosecuted while they remain in office. Justice at the international level will — as it always has — have to follow political settlements. While conflict is unfolding, the liberal ideal of international criminal justice as able to impartially and even-handedly prosecute crimes committed on all sides will remain just that.<sup>333</sup> However, a skilled OTP can make meaningful use of evidence collection opportunities and, perhaps, sealed arrest warrants to lay the groundwork for successful prosecution when political fortunes change. A course will need to be steered between pragmatism and high principle.<sup>334</sup> Otherwise, the real risk for the Court is not walkout of members, but their disillusionment — and an accompanying diversion of effort and resources to alternative mechanisms at the national and regional level.<sup>335</sup>

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<sup>332</sup> Ibid; Jonathan I Klein, *Corporate Failure by Design: Why Organizations Are Built to Fail* (Quorum, 2000) 34–5. Setting efficiency targets may result in goal displacement, summarised in the adage ‘what gets measured is what gets done’: Muller, *The Tyranny of Metrics* (n 302) 169–70.

<sup>333</sup> Heidi Matthews, ‘Redeeming Rape: Berlin 1945 and the Making of Modern International Criminal Law’ in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (Oxford University Press, 2019) 90, 105; Bensouda, ‘Statement by the ICC Prosecutor at the Opening of the 14<sup>th</sup> Session’ (n 281).

<sup>334</sup> Kersten, ‘In the ICC’s Interest: Between “Pragmatism” and “Idealism”?’ (n 138).

<sup>335</sup> On the turn to national prosecutions, see War Crimes Committee of the International Bar Association, *Analysis of Overcrowded and Under-Examined Areas, Following a Mapping of Organisations’ Work on Ameliorating Domestic Capacity to Try Serious International Crimes* (Report, July 2018).