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’) of the Rome Statute of the International Criminal Court1 (‘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’.2 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.3 (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’).4 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

3 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’).

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and fact-finding\(^5\) and controversial for its introduction of a new standard of appellate review.\(^6\) The 2019 year commenced with former Côte d’Ivoire President Laurent Gbagbo being acquitted on all charges on no case to answer motion.\(^7\) This result was first delivered, peculiarly, in an oral decision on 16 January.\(^8\) 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.\(^9\) 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).\(^10\)

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

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\(^6\) 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>.


\(^8\) Ibid. A written decision is required by the Statute: *Rome Statute* (n 1) art 74(5). Cf art 83(4), as discussed below in Part VI(B).

\(^9\) 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>.

\(^10\) *Prosecutor v Ntaganda (Judgment)* (International Criminal Court, Trial Chamber VI, Case No ICC-01/04-02/06-2359, 8 July 2019) (‘Ntaganda Judgment’).
(Bangladesh).\textsuperscript{11} While in one sense a straightforward application of territorial jurisdiction, the decision had the effect of extending the reach of an already overstretched 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.\textsuperscript{12} Controversially, the judges decided that such an investigation would not serve the interests of justice, citing a range of practical or prudential considerations.\textsuperscript{13} 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\textsuperscript{14} (in a decision which surprised most commentators\textsuperscript{15} and which was widely criticised as ‘misguided’, ‘dangerous’, a ‘mess’ and as stretching thin the Court’s credibility).\textsuperscript{16} 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

\textsuperscript{11} 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’) \textsuperscript{[72]}; Douglas Guilfoyle, ‘The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar’ (2019) 73(1) \textit{Australian Journal of International Affairs}; Payam Akhavan, ‘The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute’ (2019) 17(2) \textit{Journal of International Criminal Justice} 325.

\textsuperscript{12} \textit{Afghanistan Decision} (n 3).

\textsuperscript{13} Ibid [87]–[96]. At time of writing, this had been overturned on appeal: \textit{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’).

\textsuperscript{14} \textit{Prosecutor vs 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’).\textsuperscript{14}–\textsuperscript{17}.

\textsuperscript{15} Robert Cryer, Darryl Robinson and Sergey Vasiliev, \textit{An Introduction to International Criminal Law and Procedure} (Cambridge University Press, 4\textsuperscript{th} ed, 2019) 530.


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longstanding African Union dissatisfaction with the Court, especially as regards prosecution of serving heads of state.\textsuperscript{17}

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, \textit{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.\textsuperscript{18} \textit{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.\textsuperscript{19}

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 Ibañez Carranza, Judge Hofmański (the President of the Appeals Division) and Judge Eboe-Osuji (the President of the Court) over whether Judge Ibañez Carranza should have been assigned to preside on the appeal in \textit{Prosecutor v Gbagbo} (‘Gbagbo’).\textsuperscript{20} 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


\textsuperscript{20} See \textit{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 (‘\textit{Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza’}), annex 2 (‘\textit{Joint Declaration of Judge Eboe-Osuji and Judge Hofmański on the Procedure on the Election of Presiding Judges’}), annex 3 (‘\textit{Statement of Judge Ibañez 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’}).

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to parity with Judges of the International Court of Justice.\(^\text{21}\) (The ILO Administrative Tribunal has jurisdiction over ICC employment disputes.)\(^\text{22}\) 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.\(^\text{23}\) That 14 judges saw nothing in a fellow judge accepting an executive branch appointment that would ‘affect confidence in [her judicial] independence’ was startling.\(^\text{24}\) 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’.\(^\text{25}\) Judge Ozaki subsequently resigned her ambassadorship on 18 April 2019, thus implicitly acknowledging she was wrong to have accepted the post.\(^\text{26}\) 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


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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". 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. 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’. 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 which 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 the that 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


28 Ibid 2.


footnotes. 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 twenty-year life, and in the 16 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;
- Thomas Lubanga (Situation in the DRC): sentenced to 14 years;
- Ahmad Al Mahdi (Situation in Mali): sentenced to nine years on guilty plea; and
- Bosco Ntaganda (Situation in the DRC): sentenced to 30 years.

While ‘[a]cquittals are part of a healthy system of criminal justice, … the low rate of successful prosecutions suggests systemic dysfunctions’. The Court’s very limited successes on this front are further marred by the considerable disquiet

31 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.

32 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).

33 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).

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

35 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).

36 Cryer, Robinson and Vasiliev (n 15) 169.
expressed regarding the Katanga conviction, which involved judicial recharacterisation of the relevant mode of liability after the close of proceedings.\textsuperscript{37}

Put simply, the core raison d’être of the ICC is expressive or retributive justice, of which it has delivered very little.\textsuperscript{38} While the Court may be said to serve numerous objectives,\textsuperscript{39} the ‘key rationale for creating the ICC is to eradicate impunity for the gravest crimes’; this cannot be achieved without convictions.\textsuperscript{40} 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’.\textsuperscript{41} One may thus claim that the Court can be successful if it ‘has a catalysing effect’ on national justice mechanisms,\textsuperscript{42} or contributes to international peace and security more generally. Such arguments involve counterfactuals, which are hard to test in practice,\textsuperscript{43} and claims that the Court has had such an effect in specific contexts,
such as Colombia, are contested. Irrespective, such arguments involve claims about behaviour changing in the ‘shadow’ of the court, 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’. (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

<table>
<thead>
<tr>
<th>ICC Core Crime Statistics</th>
<th>Number</th>
<th>Individuals</th>
<th>Situation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrest Warrant Issued</td>
<td>11</td>
<td>Mudacumura</td>
<td>DRC</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Kony</td>
<td>Uganda</td>
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<td></td>
<td></td>
<td>Otii (reportedly deceased)</td>
<td>Uganda</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Al-Bashir</td>
<td>Sudan</td>
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<td></td>
<td></td>
<td>Harun</td>
<td>Sudan</td>
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<tr>
<td></td>
<td></td>
<td>Kushayb</td>
<td>Sudan</td>
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<td></td>
<td></td>
<td>Hussein</td>
<td>Sudan</td>
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<td>S Gbagbo</td>
<td>Côte d’Ivoire</td>
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<td>S Gaddafi</td>
<td>Libya</td>
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<td>Al-Tuhamy</td>
<td>Libya</td>
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<td></td>
<td></td>
<td>Al-Werfalli</td>
<td>Libya</td>
</tr>
<tr>
<td>Case Inadmissible</td>
<td>1</td>
<td>Al-Senussi</td>
<td>Libya</td>
</tr>
</tbody>
</table>


45 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>.


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. The line of argumentation one takes in critique or defence will depend largely on which of those two attributes one prioritises. 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. Universalism requires that the Court transcend both the states and political power that created it. Universalist arguments may, therefore, tend to adopt teleological interpretations of the law supporting these commitments. For positivists, the International Criminal Court 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). These competing lines of argumentation lead to a potential legitimacy problem:

[The 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.]

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

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48 Powderly uses the term ‘international criminal justice project’ to encompass both support for the ICC and international criminal law more widely (with the former being crucial to the latter): Powderly, ‘International Criminal Law in an Age of Perpetual Crisis’ (n 30).


55 Mégret (n 40) 195–6.

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approach, and despite a rich and growing critical literature,\textsuperscript{56} 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.\textsuperscript{57}

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.\textsuperscript{58} 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.\textsuperscript{59} 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’).\textsuperscript{60} 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.\textsuperscript{61} 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


\textsuperscript{57} Shirley V Scott, International Law in World Politics: An Introduction (Lynne Rienner Publishers, 3\textsuperscript{rd} ed, 2017) ch 6; van Sliedregt, ‘International Criminal Law: Over-Studied and Underachieving?’ (n 56) 5.


\textsuperscript{61} Ibid 142.

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inevitable) or appear to concede the argument by engaging in token symbolic reform. 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. 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’. 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. 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’ 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. 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. Public organisations may thus be less likely to be self-correcting and ‘more likely to fail if they have weak political and managerial leadership’. For the purposes of this article, it will be assumed the key leaders of

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62 Ibid 140–5. See also Barnett and Finnemore (n 38) 723–4.
64 Amankwah-Amoah and Debrah (n 63) 640–1.
67 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, 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 Arigo, Draglan 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).
68 Barnett and Finnemore (n 38) 723.
69 Amankwah-Amoah and Debrah (n 63) 641.
the ICC are the Prosecutor and the Judges. (The Registrar also has an important leadership function, which has been dealt with in the context of organisational failure elsewhere.)

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 *combating 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);
- *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, take the fifth as going to structural challenges (the Court’s legal architecture), both addressed in this section. The remainder I treat as questions of leadership competence in Part V.

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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 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.\(^\text{71}\) 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.\(^\text{72}\) Secondly, international criminal tribunals need powerful patrons to operate successfully. The Nuremberg Tribunal was operated by occupying powers.\(^\text{73}\) 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.\(^\text{74}\) The International Criminal Tribunal for Rwanda (‘ICTR’) was transparently dependent on the cooperation of Rwanda.\(^\text{75}\) 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.\(^\text{76}\) 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.\(^\text{77}\) This could be

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\(^\text{73}\) Cryer, Robinson and Vasiliev (n 15) 116–20.

\(^\text{74}\) Hagan and Levi (n 71) 1526–7.


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.

First, close scrutiny of the proposition that 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. However, total annual expenditure on the Australian Federal Court system is $345 million (approximately €214 million) and it has 1,000 employees. It is thus not hard to find better resourced national court systems. 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). In 2018 the ICC had an annual budget of €147.43 million. Thus, annually, the ICTY had a comparable budget to that the ICC has now. Stuart Ford has attempted an ‘apples to apples’ comparison of budget expenditures between the two courts. 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). These calculations suggest the ICC is underperforming.

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81 Although, as 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.

82 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, 62nd sess, Agenda Item 77; UN SCOR, 62nd sess, UN Docs A/62/172 and S/2007/469 (1 August 2007) para 114. The method adopted was to convert the US 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.


85 Ibid 98–103.

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Such a comparison may, again, be challenged as unfair based on the width of the ICC’s geographic remit. A single-jurisdiction tribunal should benefit from efficiencies of scale and a depth of local knowledge which will support more effective prosecutions. 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, 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.’

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. As at 2015, the OTP Investigations Division had a ‘headcount’ of only 165 staff, of whom only 53 were investigators. Certainly, the Registry’s workload is vast. 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. 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 was to be a ‘flexible and scalable institution’ with a budget driven by activities,

86 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 17th Session (n 78) 41 [161].
87 Notably the smoothest run of the ICC cases, Ntaganda Judgment (n 10) benefitted from the OTP’s 14 years of experience in Ituri: Clark, Distant Justice (n 39) 60 (on the Democratic Republic of Congo’s self-referral in 2004), 66–9 (investigative methods), 73–80 (co-operation of the UN Mission in Democratic Republic of Congo (MONUC) and the Democratic Republic of the Congo).
88 Official Records of the 17th Session (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’.
89 Ford (n 84) 101.
90 Human Resources Tables, Doc No ICC-ASP/17/5 (n 78) 45.
91 Assembly of States Parties to the Rome Statute International Criminal Court, Report of the Court on the Basic Size of the Office of the Prosecutor, 14th 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.
92 See Clements, ReVisiting the ICC Registry’s ReVision Project’ (n 70) 261–3.

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not organisational structure.\textsuperscript{94} This has not come about. The Court has instead ‘focussed both its activities and budget requests primarily on its own investigations and prosecutions’\textsuperscript{95} and the Court’s budget, while notionally organised around ‘major programmes’, strongly follows institutional structure (judiciary, OTP, registry etc).\textsuperscript{96}

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. State party seem increasingly exasperated at the expensive employment litigation brought before the ILO against the Court by its employees.\textsuperscript{97} 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.\textsuperscript{98} (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 International Labour Organization, 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.\textsuperscript{99}

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’.\textsuperscript{100} It was never intended, nor would it ever be possible for it to prosecute all crimes within its jurisdiction. The tragedy of international criminal justice is that it is

\textsuperscript{94} 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, 2013) 269, 275.
\textsuperscript{95} Ibid.
\textsuperscript{98} See Clements, ‘Revisiting the ICC Registry’s ReVision Project’ (n 70) 278–9; Simons (n 21); Anderson, ‘Money Matters at the ICC’ (n 21).
\textsuperscript{99} Batros, ‘The ICC Acquittal of Gbagbo’ (n 77).
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.\(^{102}\) 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.\(^{103}\) These are returned to below.\(^{104}\) 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.\(^{105}\) 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 expedite them as intended.\(^{106}\) 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.\(^{107}\) 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.\(^{108}\)

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.\(^{109}\) The principle that victims should have a right of access to a remedy necessarily selective.\(^{101}\) The classic work remains: Robert Cryer, \textit{Prosecuting International Crimes: Selectivity and the International Criminal Law Regime} (Cambridge University Press, 2005) ch 4.

\(^{102}\) Mirjan Damaška, ‘The International Criminal Court between Aspiration and Achievement’ (2009) 14(1) \textit{UCLA Journal of International Law and Foreign Affairs} 19, 32.

\(^{103}\) Mégret (n 40) 212–13, 219–22.

\(^{104}\) See below Part V(A).


\(^{106}\) 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.

\(^{107}\) Roox and Beirlant (n 105).


is obviously fundamental; however, a right to participate in criminal proceedings against perpetrators, while perhaps desirable, is not the only means to give expression to that principle. 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.

On the first point, victim participation in ICC proceedings has proven complex and difficult. While, inevitably, one can raise the ‘teething problems’ defence, the Lubanga proceedings were obviously slowed down significantly by interlocutory appeals on victim’s participation questions. 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. Practices diverged among different Chambers as to how best to deal with this administrative burden. 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. 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

111 For alternative mechanisms, see ibid annex, para 12.
112 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 (‘Prosecution’s 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.
116 Stahn, A Critical Introduction to International Criminal Law (n 76) 310–11.
117 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.
object to the Registry’s assessment of the application”. However, this procedure simply ignores Rule 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. 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. 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. It has been observed that the second mandate is a more efficient and potentially fairer use of resources. This leads to the sensible suggestion that the question of assistance to victims should be decoupled entirely from criminal proceedings.

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 Rule 89 and revisiting the limitation of individualised reparation orders to those victims ‘fortunate’ enough to climb the narrowing pyramid of proceedings should be considered.

120 Clark, Distant Justice (n 39) 300.
122 Damaška, ‘The International Criminal Court between Aspiration and Achievement’ (n 102) 31–4; Roox and Beirlant (n 105).
123 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!’). They also have the most destructive long-term impact on organisational performance across a range of accepted indicators. 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. However, the data tends to suggest that hierarchically structured legal-service organisations all too frequently have poor management and workplace cultures.

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. The ICC Prosecutor has ‘full authority over the management and administration of’ the OTP. 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. 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).

125 Ibid 81–3.
128 Stahn, A Critical Introduction to International Criminal Law (n 76) 281. See also Clark, Distant Justice (n 39) 31.
129 Rome Statute (n 1) art 42(2).
130 Ibid art 38(1).

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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. Further, obtaining defendants and evidence requires, in practice, the cooperation of states. 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’. 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.

In this context it is worth noting that substantial political discretion was vested in the ICC Prosecutor, not least in the sense that highly complex resource-allocation decisions incapable of being determined by mechanical application of rules may be considered political. 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 enormous 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. 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


134 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.


136 Mégret (n 40) 212–15.


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 International Criminal Court, Luis Moreno Ocampo, bestrode the world like an Olympian figure. 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. 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. 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. 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.’

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. 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.

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

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140 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.
142 Ibid.
144 Verini (n 139).
145 Ibid.

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Nations cooperation and intelligence.\textsuperscript{146} 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’.\textsuperscript{147} 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’.\textsuperscript{148} (Although, arguably, doing otherwise may have endangered witnesses that the ICC could not protect.) His practice of ‘phased investigations’,\textsuperscript{149} 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.\textsuperscript{150} (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 \textit{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.\textsuperscript{151} This led to scathing criticism in \textit{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’.\textsuperscript{152} The indefinite stay of proceedings in \textit{Lubanga} was lifted after waivers of confidentiality had been negotiated.\textsuperscript{153} This didn’t end matters: Ocampo had another run-in with the \textit{Lubanga} Trial Chamber in 2010 over his refusal to disclose

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\textsuperscript{147} Ibid 190.


\textsuperscript{150} Verini (n 139).


\textsuperscript{152} \textit{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].

\textsuperscript{153} \textit{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).

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

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.¹⁵⁵ 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.¹⁵⁶ 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,¹⁵⁷ 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).¹⁵⁸

One may also question Ocampo’s skill in managing the politics of his job. The first prosecutor 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’.¹⁵⁹ and challenges to the Court’s focus on Africa have often been deflected by pointing out that early cases had arrived through ‘self-referrals’.¹⁶⁰ 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.¹⁶¹ 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 ‘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.¹⁶² 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

¹⁵⁴ 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’).

¹⁵⁵ Lubanga Trial Chamber Decision (n 154) [14]–[15], [32]–[33].
¹⁵⁶ Ibid [27]. Cf Lubanga Appeals Chamber Decision (n 154) [48].
¹⁵⁷ Hagan and Levi (n 71) 1505.
¹⁵⁹ Bosco (n 148) 143; Moreno-Ocampo (n 66) 222.
¹⁶⁰ Cryer, Robinson and Vasiliev (n 15) 165.
¹⁶¹ Moreno-Ocampo (n 66) 220–1; Bosco (n 148) 96–7.
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’.163 (These are allegations that he denies.164)

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’.165 Such a culture undermines ‘vigorous peer review’ of court documents166 and is unlikely to furnish a leader with good advice. Results included his embarrassingly poorly-prepared examination of Uhuru Muigai Kenyatta.167 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.168 During his tenure, ‘22 of the top staff members in the OTP left’.169 Ocampo himself describes the climate in the OTP under his tenure as ‘a mess’.170

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.171 However, on his watch cases were mounted following limited investigations and pursued without a staff which 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.172 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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163 Becker, Blasberg and Pieper (n 18).
164 Ibid.
167 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.”’).
169 Bergsmo et al (n 165) 2.
170 Verini (n 139).
171 Ibid.
172 Hagan and Levi (n 71) 1510.

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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 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,\(^\text{173}\) 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.\(^\text{174}\) 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.\(^\text{175}\) 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.\(^\text{176}\) 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.\(^\text{177}\) 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.\(^\text{178}\) 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.\(^\text{179}\)

\(^{173}\) ‘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>.

\(^{174}\) See Table 2.

\(^{175}\) Phil Clark, *Distant Justice* (n 39) 66–7.


\(^{177}\) Ibid.

\(^{178}\) Ibid.

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.180 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.181 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.182 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.183 This view has been confirmed, at time of writing, by the scathing majority reasons given for granting the motion.184 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.185 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.186 This signals a pragmatic move beyond the OTP’s historical ‘we only

181 *Gbagbo Reasons for Oral Decision* (n 7) annex B, [78]–[79] (Judge Henderson). The dissenting opinion is highly critical: at annex C (Judge Herrera Carbuccia).
182 *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].
184 See *Gbagbo Reasons for Oral Decision* (n 7) annex B (Judge Henderson).
186 Ibid 15 [45].

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follow the law’ discretion-denying rhetoric. The OTP Strategic Plan 2019–2021 is even more important. 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’. 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’. The document also acknowledges that the OTP will need to achieve these reforms within existing resources. 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.

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. The impression left is less of reflection and lessons learned than ruling a line under mistakes made during the first Prosecutor’s tenure.

187 Such pragmatism may also perhaps be seen in efforts to secure an indefinite stay in 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.

188 Office of the Prosecutor, Strategic Plan 2019–2021 (n 149).

189 Ibid 4, 11.

190 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’).

191 Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (n 132) 6 [12], 16 [49].


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

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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. 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. 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 which gave different reasons for decision. 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. 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. 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. 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. 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

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194 See above n 20.
195 Mistry (n 131).
196 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).
197 Mistry (n 131).
198 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).
199 Mistry (n 131) 718–21.
200 Ibid.
The Bemba appeal and Judge Perrin de Brichambaut’s written observations on the motion to have him disqualified in Lubanga. 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 ...

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. 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’.

In one sense, the Appeals Chamber decision in 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 Bashir enjoyed no immunity from arrest and surrender to the Court in a unanimous decision of five judges. Eccentrically, however, four of the judges appended a concurring separate opinion to which the judgment itself frequently cross-references. 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? 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

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 Carbuccia).


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).

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.

Ibid annex I (Judges Eboe-Osuji, Morrison, Hofmański and Bossa).


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paragraph on the state practice of the African Union regarding head of state immunity in 2009–19.\textsuperscript{208}

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.\textsuperscript{209} Colleagiality may be harder to foster amidst the diversity of legal traditions, professional backgrounds, nationalities and genders represented on the ICC bench.\textsuperscript{210} 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’.\textsuperscript{211}

2 \textbf{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

\textsuperscript{208} 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 consensu 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.

\textsuperscript{209} Mistry (n 131) 711. Cf Stahn, A Critical Introduction to International Criminal Law (n 76) 292.

\textsuperscript{210} Rome Statute (n 1) art 36(8)(a).

\textsuperscript{211} 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.

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as a whole.\textsuperscript{212} 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.\textsuperscript{213}

Nonetheless, some ICC judges plainly do consider a holistic approach to the evidence to be compatible with the \textit{Rome Statute} and the \textit{ICC Rules}.\textsuperscript{214} 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.\textsuperscript{215} 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.\textsuperscript{216} 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.\textsuperscript{217} 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.\textsuperscript{218} This is, in essence, what happened in \textit{Gbagbo}.\textsuperscript{219} 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


\textsuperscript{214} 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’; \textit{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.

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


\textsuperscript{217} Office of the Prosecutor, \textit{Strategic Plan 2019–2021} (n 149) 11; Al Hussein et al (n 2).

\textsuperscript{218} \textit{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.

\textsuperscript{219} Bouwknegt, ‘Gbagbo: An Acquittal Foretold’ (n 108); see also \textit{Gbagbo Reasons for Oral Decision} (n 7) annex B (Judge Henderson), annex A (Judge Tarfusser).

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evidence will be lead and how it relates to the charges. Nonetheless, as in Blé Goudé, the initial ‘document containing the charges’ is sometimes drawn in very wide terms. 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 Hayes and Powderly about taking too absolutist and exhaustive an approach to the requirements of the Document Containing the Charges. 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. 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, including its assessment of the credibility of sixteen key witnesses. 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. 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 (touched on above), 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. 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


221 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].


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

224 Ntaganda Judgment (n 10) [48]–[88].

225 Ibid [89]–[262].

226 Ibid [285]–[658].

of inverting complementarity. Rather than honour the assumption in the *Rome Statute* that the Court should generally defer to national proceedings, 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. This hollows out complementarity and creates de facto primacy. It also prioritises a vision of the Court as a universal institution standing above states rather than it being a court of last resort as a compliment to national jurisdictions.

On the immunity *ratione personae* controversy, the Appeals Chamber in *Al-Bashir* made several unforced errors. While not necessarily compelling, 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, placed Sudan in an analogous position to states party regarding available immunities and cooperation obligations. 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. 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. 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’, 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

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228 Ibid. See *Rome Statute* (n 1) art 17(1)(c).
229 On the *Rome Statute* as containing such a textual presumption: Nouwen, *Complementarity in the Line of Fire* (n 42) 58.
231 Ibid.
236 *Al-Bashir Appeal* (n 14) [120]–[149].
237 *Q&A regarding Al-Bashir* (n 27). The *Al-Bashir Appeal* (n 14) 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, Hofinański 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.\textsuperscript{238} 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".\textsuperscript{239} The International Court of Justice has consistently held that immunities both \textit{ratioe personae} and \textit{ratioe materiae} apply in national proceedings in respect of international crimes.\textsuperscript{240} 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 (\textit{nemo dat quod non habet}).\textsuperscript{241} Certainly, the universalist argument can be made that there is an international plane above states (complete with a \textit{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 \textit{de novo}.\textsuperscript{242} 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.\textsuperscript{243} First, there has been the attempt to substantially eliminate prosecutorial discretion to \textit{not} open an investigation on any grounds other than the interests of justice, a ground that is subject to review by a PTC.\textsuperscript{244} 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.

\begin{footnotesize}
\begin{enumerate}
\item[238] Bangladesh Decision (n 11) [64].
\item[239] Al-Bashir Appeal (n 14) annex I [57] (Judges Eboe-Osuji, Morrison, Hofmanński and Bossa).
\item[242] Al-Bashir Appeal (n 14) [115]–[116]. See also Kreß, ‘The International Criminal Court and Immunities under International Law for States Not Party to the Court’s Statute’ (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).
\item[243] See Raynor (n 24) [90].
\item[244] 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] (Judges Kovács). See discussion in Guilfoyle, \textit{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].
\end{enumerate}
\end{footnotesize}
Secondly, a PTC has sought to direct the OTP’s conduct of investigations, including what steps should be taken to collect and preserve evidence at an early stage.\(^{245}\) 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.\(^{246}\) While a reasonable argument can be made that a PTC may independently invoke the interest of justice criterion to reject such an application,\(^{247}\) 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.\(^{248}\) 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.\(^{249}\) 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.\(^{250}\)

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,

\(^{245}\) *Bangladesh Decision* (n 11) [80]–[88].

\(^{246}\) *Afghanistan Decision* (n 3) [87]–[96].


\(^{248}\) See *Rome Statute* (n 1) arts 53(1)(c), 53(2)(c), 53(3)(a), 53(3)(b).

\(^{249}\) Ibid art 53(3).

\(^{250}\) *Afghanistan Appeal* (n 13).
leave the court; others try to switch to another unit.\footnote{Kai Ambos, ‘Interests of Justice? The ICC Urgently Needs Reforms’, \textit{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>\}. 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 \textit{Rome Statute} which could perhaps foster collegiate decision making. The Statute \textit{requires} Trial Chambers to issue \textit{only} one judgment of the Court, while dissenting opinions on questions of law are only expressly permitted on appeal.\footnote{Rome Statute (n 1) art 74(5). Cf at art 83(4).} 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.

\section*{VI \quad \textbf{WHO CAN DO THE FIXING?}}

\textbf{A \quad \textit{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.\footnote{Ibid art 112.} It sets the \textit{ICC Rules}.\footnote{Ibid art 51.} It sets the \textit{Elements of Crimes}.\footnote{Ibid art 9; \textit{International Criminal Court, Elements of Crimes}, Doc No ICC-ASP/1/3 (adopted 9 September 2002).} It has power to establish, as it has done, a body to advise on judicial nominations\footnote{Ibid art 36(4)(c); \textit{Assembly of States Parties to the Rome Statute of the International Criminal Court, Strengthening the International Criminal Court and the Assembly of States Parties}, Res ICC-ASP/10/Res.5, Official Records, vol I, Doc No ICC-ASP/10/20 (adopted 21 December 2011) para 19.} and an independent oversight mechanism.\footnote{Rome Statute (n 1) art 112(4).}

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.\footnote{Ibid art 112.} It elects the Prosecutor.\footnote{Ibid art 51.} Indeed, the only senior Court official not appointed by the ASP is the Registrar.\footnote{Ibid art 42(4).} 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 \textit{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 \textit{Rome Statute} System’, to make

\begin{thebibliography}{9}
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\item See \textit{Rome Statute} (n 1) art 74(5). Cf at art 83(4).
\item Ibid art 112.
\item Ibid art 51.
\item Ibid art 9; \textit{International Criminal Court, Elements of Crimes}, Doc No ICC-ASP/1/3 (adopted 9 September 2002).
\item \textit{Rome Statute} (n 1) art 112(4).
\item Ibid art 36(6).
\item Ibid art 42(4).
\item Ibid art 43(4).
\end{thebibliography}
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.  

(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’. 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’. Woolaver and Palmer have ably identified the issues which must be considered in any discussion of judicial and prosecutorial independence under the Rome Statute. 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’. 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 of 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’. 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

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263 Mégret (n 40) 212.


265 Ibid 641.

uncontrolled’. Rather, judicial independence exists to protect a core judicial function: impartial dispute settlement. That is, judicial independence is a means to the end of judicial impartiality. 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. 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. It entails that judicial decisions shall not be made on the basis of ‘irrelevant, extra-legal factors’. 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’. It does not, however, require that judges be protected ‘from any influence for any reason’.

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’. 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.

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’. 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.

Criticising particular decisions of a court, for example, does not per se infringe judicial independence. 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.

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267 Crawford and McIntyre (n 131) 199.
268 Ibid 196.
269 Ibid 201.
271 Crawford and McIntyre (n 131) 201.
272 Sands, McLachlan and Mackenzie (n 25) 251.
273 Crawford and McIntyre (n 131) 196 (emphasis in original).
274 Ibid 199.
275 Ibid 200.
276 Sands, McLachlan and Mackenzie (n 25) 250, quoted in ibid 199.
278 Ambos, ‘Interests of Justice?’ (n 251).
withdrawing from the *Rome Statute*. Further, the *Rome Statute* remains a treaty. This makes the subsequent practice of its member states — including their practice within the ASP — relevant to its interpretation. The ASP may thus debate the outcome of cases and judicial interpretations of the Statute without infringing judicial independence. 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. 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’ 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*. This case concerned the situation in Kenya and was marred by allegations of witness intimidation. 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.

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’. Rule amendment is, as noted, a core function of the ASP. 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

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279 Woolaver and Palmer (n 264) 663. Cf at 656.


282 Woolaver and Palmer (n 264) 650.

283 Ibid 663.

284 Ibid 649–52.


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

287 See Woolaver and Palmer (n 264) 651.

288 Ibid 650.

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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 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’.\(^{289}\) 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’.\(^{290}\) A very long list of ‘judicial functions’ reserved to the Court’s exclusive competence under art 119(1) has been proposed.\(^{291}\) 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.\(^{292}\) The function of a dispute resolution clause is to determine who has the final say on such questions.\(^{293}\) 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’.\(^{294}\) 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

\(^{289}\) Ibid 644 (emphasis omitted), quoting Rome Statute (n 1) art 119(1).


\(^{291}\) 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, 3rd ed, 2016) 2274.

\(^{292}\) 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.


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more strongly than in many liberal democratic systems. 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. 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”’. 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.

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’. 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. The latter would certainly be true, though difficult to prove. It has been noted that in 2011 the ICC as a whole requested that states party should

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295 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.

296 Rome Statute (n 1) art 46(2)(a).

297 Woolaver and Palmer (n 264) 644.

298 Ibid 645.


300 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: M Cherif Bassiouni, ‘Wolfgang Friedmann Memorial Award Address’ (2012) 51(1) Columbia Journal of Transnational Law 1, 11 (‘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.’).

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‘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.\textsuperscript{301} 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’.\textsuperscript{302} 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’.\textsuperscript{303} 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 \textit{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


\textsuperscript{302} Jerry Z Muller, \textit{The Tyranny of Metrics} (Princeton University Press, 2018) 8–9.

with its work’ are thus overstated. 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.

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. 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 or the deployment of management consultants. As to the latter, efforts at Registry reform following management consultants’ recommendations has had, at best, limited effectiveness. Indeed, ‘the mere removal of administrative layers and strengthening management [did] not automatically improve Court functioning’.

Further, while certain efficiencies were achieved, total Registry staffing was

304 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’).


307 Raynor (n 24) [61].

308 Clements, ‘ReVisiting the ICC Registry’s ReVision Project’ (n 70).

309 Ibid 274.

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reduced by only 10 people and a new layer of potentially ‘top-heavy’ management was created.310 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’311. The watchwords are that this is to be a ‘transparent, inclusive State-Party driven process’.312 Critically, it appears that this process is intended (at least by some) to be an ongoing one, rather than a one-off review exercise.313 The significance of this is that the ASP appears to be taking ownership of its oversight and governance role.314 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.315 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,316 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.317 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

310 Ibid 272, 277.
312 Ibid para 4 (emphasis added).
314 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.
315 Powderly, ‘International Criminal Justice in an Age of Perpetual Crisis’ (n 30) 4, 6, 8–10.

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such leaders to coordinate their actions. 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. Nonetheless, such externalities — especially resource constraints — may focus minds.

It is hard to escape the conclusion 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. 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’. 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.

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318 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) <https://www.icc-cpi.int/NR/donlyres/423E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf>, archived at <https://perma.cc/WHL5-MLV7>.

319 Mégret (n 40) 196.

320 Raynor (n 24) [70].

The next Prosecutor will need to be a leader capable of seeing such reforms through.

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.\(^{322}\) A step in this direction in the form of agreed judicial guidelines on judgment drafting has already been noted.\(^ {323}\) 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 to 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 dissent on points of law in the Appeals Chamber.\(^ {324}\) 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.\(^ {325}\) 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\(^ {326}\) and a talented diplomat. Secondly, the ASP needs to improve the


\(^{324}\) 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).

\(^{325}\) 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).

\(^{326}\) Assembly of States Parties, *Bureau of the Assembly of States Parties: Election of the Prosecutor — Terms of Reference* (n 262) [12].
processes for the selection of judges.\textsuperscript{327} 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.\textsuperscript{328} 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.\textsuperscript{329} 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.\textsuperscript{330} 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.\textsuperscript{331}

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


\textsuperscript{331} 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.332

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 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.333 However, a skilled OTP can make meaningful use of evidence collection opportunities and, perhaps, sealed arrest warrants to lay the ground work for successful prosecution when political fortunes change. A course will need to be steered between pragmatism and high principle.334 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.335

332 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.
334 Kersten, ‘In the ICC’s Interest: Between ‘Pragmatism’ and ‘Idealism’?’ (n 138).