

On the exercise of the judicial function at the International Criminal Court: Issues of credibility and structural design

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We are disappointed by the quality of some of its judicial proceedings, frustrated by some of the results, and exasperated by the management deficiencies that prevent the Court from living up to its full potential.¹

Prince Zeid Raad Al Hussein, Bruno S. Ugarte, Christian Wenaweser, and Tiina Intelman, former Presidents of the Assembly of States Parties to the Rome Statute, 2019

1. *Framing the Problem*

More than twenty years after the adoption of the Rome Statute, the ICC suffers from an ever-growing legitimacy deficit. Although the ICC is regularly subject to State criticism ranging from its ineffectiveness² to bias and overreaching, this deficit is not due, or, *rectius*, is due only in part, to external factors.³ It owes, in significant part, to internal and self-

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¹ Prince ZR Al Hussein et al, 'The International Criminal Court Needs Fixing' *New Atlantic* (24 April 2019) <www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing>. Prince ZR Al Hussein, BS Ugarte, Ch Wenaweser, T Intelman are all former Presidents of the Assembly of States Parties to the Rome Statute.

² See R Clements, 'From Bureaucracy to Management: The International Criminal Court's Internal Progress Narrative' (2019) 32 *Leiden J Intl L* 149-167.

³ See, among others, D Robinson, 'Inescapable Dyads: Why the ICC Cannot Win' (2014) 28 *Leiden J Intl L* (2015) 323; JR Bolton, 'The Risks and Weaknesses of the International Criminal Court from America's Perspective' (2001) 64 *L and Contemporary Problems* 167-180; D Makaza, 'African States and International Criminal Law: Re-

created causes. The ICC's legitimacy is strained because of what some of its judges have said, done or not done, such as their failure to, at times, issue cogent and authoritative decisions.⁴ These missteps have tainted the ICC as a judicial institution, affecting both its credibility and the clarity of the applicable law. This paper purports to be an opportunity to diagnose these problems and to identify an analytical framework to appropriately tackle them.

Unquestionably, the adoption of the Statute Rome in 1998 was a milestone achievement.⁵ It promised a new dawn in the field of international criminal justice, envisaging a community of States working together in the pursuit of shared aspirations and intuitions. International criminal justice was no longer to be 'victors' justice' or *ad hoc* justice, but a fair way to deal with 'the most serious crimes of international concern'.⁶ It also harboured the advent of a judicial institution fairer and more efficient than the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda (the ICTY and ICTR, respectively), where judges would, in full accordance with the principle of legality, be

thinking the Narrative and Contextualising the Discourse', in J Nicholson (ed), *Strengthening the Validity of International Criminal Tribunals* (Brill 2018) 313-335. See also for an overview R Cryer, D Robinson, S Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019) 166-171; H Woolaver, 'Withdrawal from the International Criminal Court: International and Domestic Implications' in G Werle, A Zimmermann (eds), *The International Criminal Court in Turbulent Times* (Springer 2019) 23-42.

⁴ See in this regard H Mistry, 'The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals' (2017) 17 *Intl Crim L Rev* 703-727. See also M Simmons, 'In the Hague's Lofty Judicial Halls, Judge Wrangle over Pay' *New York Times* (20 January 2019) <www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html>; KJ Heller, 'ICC Labor Woes Part II: What's Two Million Euros Between Friends?' *Opinio Juris* (30 June 2018) <www.opiniojuris.org/2018/06/30/the-iccs-labor-woes-part-ii/>.

⁵ P Kirsch, JT Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *American J Intl L* 2-12. See also President of the Assembly of States Parties O-Gon Kwon, 'Remarks at Solemn Hearing of the 20th Anniversary of the Adoption of the Rome Statute of the International Criminal Court' (Statement at International Criminal Court Assembly of States Parties, The Hague, 17 July 2018) <www.icc-cpi.int/itemsDocuments/20180717-asp-speech.pdf>.

⁶ See generally M Damaška, 'What is the Point of International Criminal Law' (2008) 3 *Chicago Kent L Rev* 329, 359-363; D Zolo, *Victors' Justice: From Nuremberg to Baghdad* (Verso 2009); C Stahn, *A Critical Introduction to International Criminal Law* (Cambridge UP 2018) 166-168.



the servants of law codified well before the occurrence of the crimes.⁷ Still, notwithstanding the undeniable significance of that landmark achievement, there is a growing perception that the ICC's initial ambitions have not come into fruition as envisaged by its founders.⁸ The perceived failure in expectations was expressed, *inter alia*, at a recent Assembly of States Parties to the Rome Statute (ASP), where the UK noted that 'After 20 years, and 1.5 billion Euros spent we have only three core crime convictions'.⁹

In a sense, this discontent reflects a general fatigue in the international criminal justice movement and the difficulty of carrying forward a process with numerous and, at times, contradictory, demands and expectations.¹⁰ It is difficult for a project as ambitious as that of international justice to thrive in a world community of States so preoccupied with asserting and defending their own sovereignty and interests.¹¹ The cosmopolitan mindset that favoured the establishment of the ICC is now in retreat, being replaced by parochial sentiments that challenge

⁷ See in this regard G Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in C Stahn (ed), *The Emerging Practice of the International Criminal Court* (Brill 2009) 281-304.

⁸ E Wilmshurst, 'Strengthen the International Criminal Court' Chatham House (12 June 2019) <www.chathamhouse.org/expert/comment/strengthen-international-criminal-court>. See also M Kersten, 'Whither the Aspirational ICC, Welcome the "Practical" Court?' EJIL Talk! (22 May 2019) <www.ejiltalk.org/whither-the-aspirational-icc-welcome-the-practical-court>. See also D Guilfoyle, 'Part I: This is Not Fine: The International Criminal Court in Trouble' EJIL Talk! (21 March 2019) <www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble>; M de Hoon, 'The Future of the International Criminal Court: On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017) 17 Intl Crim L Rev 591-614.

⁹ A Murdoch, 'UK Statement to ICC Assembly of States Parties 17th session' Statement at International Criminal Court Assembly of States Parties Session (5 December 2018) <www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session>; D. Guilfoyle, 'Part I: This is Not Fine: The International Criminal Court in Trouble' EJIL Talk! (21 March 2019) <www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble>.

¹⁰ T Krever, 'International Criminal Law: An Ideology Critique' (2013) 26 Leiden J Intl L 701-723; BR Roth, 'Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice' (2010) 8 Santa Clara J Intl L 231-288. See also L Vinjamuri, 'The International Criminal Court and the Paradox of Authority', (2016) 79 L and Contemporary Problems 275-287.

¹¹ R Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' (2005) 16 Eur J Intl L 979, 992-1000.



international institutions and courts.¹² Perhaps the ICC is, at least for the time being, bound to endure as an only partially successful institution, constrained by the diatribe among States Parties and States that oppose it. Be that as it may, the fact is that the ICC does exist, against all odds, and should therefore move forward. Yet, it seems to be navigating backwards.¹³ To one's dismay, one of the causes lies in the conduct of those who should be leaders of the organisation. Their behaviour portrays, at times, a lack of modesty and collegiality.¹⁴ One could argue that these missteps may be just a few bumps along an otherwise stable path of well-balanced jurisprudence, while the ICC is still moving from adolescence to adulthood. This paper asserts, however, that they are indicative of a malaise within the ICC, which needs to be adequately reflected upon in order to contribute to the discussion on whether a change of course is warranted at the ICC.¹⁵

¹² See generally MR Madsen, P Cebulka, M Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 *Intl J L in Context* 197-220.

¹³ See also M Simmons, 'In the Hague's Lofty Judicial Halls, Judge Wrangle over Pay' *New York Times* (20 January 2019) <www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html>; KJ Heller, 'ICC Labor Woes Part II: What's Two Million Euros Between Friends?' *Opinio Juris* (30 June 2018) <www.opiniojuris.org/2018/06/30/the-iccs-labor-woes-part-ii>.

¹⁴ S Fernández de Gurmendi, 'Judges: Selection, Competence, Collegiality' (2018) 112 *AJIL Unbound* 163-167. According to R O'Keefe, 'It is unfair to say that the ICC has scarcely covered itself in glory during the first 12 years of its existence ... some Pre-Trial Chambers have displayed an over-inflamed sense of their place in the procedural scheme established under the Statute, and not a few judges have exhibited a lamentable grasp of general international law and elementary international legal technique, as well as an over-determination to reach the result they deem necessary to end "impunity".' (R O'Keefe, *International Criminal Law* (OUP 2017) 581).

¹⁵ According to former ICC Presidents: 'Today, it is time to make a new deal between the ICC and its states parties, in the spirit that made us succeed in Rome. The Court should 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'. See above Prince ZR Al Hussein et al (n 1). See also K Ambos, 'Interests of Justice? The ICC Urgently Needs Reforms' *EJIL Talk!* (11 June 2019) <www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/>.



2. *Issues of credibility*

2.1. *Lack of judicial modesty*

Judicial modesty, often used as a synonym for judicial restraint, is a term often referred to at the domestic¹⁶ and internal levels¹⁷ in praise of an approach whereby judges consciously refrain from dealing with issues that they perceive to be inappropriate for their consideration because they fall outside their mandated grasp and reach.¹⁸ The problem of ‘modesty’ that has emerged at the ICC, however, has a distinctive trait. It concerns not the adoption of a given judicial policy, or the display of hubris by judges in ruling on issues that fall outside their purview. It is about the conduct of certain judges in public settings.

On 17 May 2017, Judge Marc Perrin de Brichambaut gave a talk before Chinese law students at Peking University Law School.¹⁹ In that context, he made a set of derogatory remarks concerning the ICC and its proceedings. He is, for instance, reported to have said that European countries were ‘paying the bills for the ICC’ while African countries ‘provide the suspects’; to have commented quite freely on the conduct of the Defence lawyers appearing in the cases before the ICC; and to have revealed his uneasiness towards granting interlocutory appeals, indicating that he and his colleague (defined as ‘no nonsense’ German judge colleague) had agreed to refuse to grant interlocutory appeals.²⁰ As put by Kevin Jon Heller, ‘[i]t becomes impossible to have confi-

¹⁶ R Dworkin, *Justice in Robes* (Harvard University Press 2006) 72-73.

¹⁷ E McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (Martinus Nijhoff 1986) 99-101; R Posner, *How Judges Think* (Harvard UP 2010) 287-289.

¹⁸ H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1982) 75-95.

¹⁹ See Judge Marc Perrin de Brichambaut, ‘Transcription écrite de l’intervention de Monsieur le Juge Marc Perrin de Brichambaut (ICC Statute Article 68)’ CILRAP Lecture at Peking University Law School (17 May 2017) <www.icc-cpi.int/RelatedRecords/CR2019_02039.PDF>. See also KJ Heller, ‘Problematic Statements by the French Judge at the ICC’ *Opinio Juris* (3 May 2019) <www.opiniojuris.org/2019/05/03/problematic-statements-by-the-french-judge-at-the-icc/>; T Lingsma, ‘ICC Judges at Centre of Controversy’ *JusticeInfo.Net* (16 May 2019) <www.justiceinfo.net/en/tribunals/icc/41447-icc-judges-at-centre-of-controversy.html>.

²⁰ He made this latter remark notwithstanding it essentially amounted to a breach of art 82 of the ICC Statute, which expressly provides for a right to lodge interlocutory appeals. See in this regard KJ Heller (n 19).



dence in a judge who feels he is ‘entitled to publicly show off his own private thinking on sensitive public issues’.²¹

Another example of a lack of modesty comes from Judge Kuniko Ozaki, the Japanese member of the ICC, when she sought to cumulate a post as an ambassador with her own country with the ICC judgeship.²² On 7 January 2019, Judge Ozaki, ‘citing personal reasons and without mention of any future activities or occupation’, asked and obtained to change her status from full judge to part-time judge.²³ Shortly thereafter, on 18 February 2019, she sent a memorandum to the ICC Presidency and all the judges, communicating that she had been appointed as the Japanese Ambassador to the Republic of Estonia beginning on 3 April 2019.²⁴ She justified taking this post by citing her ‘firm belief that [her] new responsibility would not in any way interfere with [her] judicial function’.²⁵ The absolute majority of the ICC judges agreed with Judge Ozaki’s request.²⁶ In so doing, they reasoned that Article 40(3) of the ICC Statute, which mandates judges who serve on a ‘full-time basis’ not to ‘engage in any other occupation of a professional nature’, would not apply to Judge Ozaki as a part-time judge. Rather, Judge Ozaki was only subject to the general prohibition of external activities likely to interfere with the judicial function under Article 40(2) of the ICC Statute.²⁷ The majority of judges held that there was only a ‘minimal risk of her activities as Ambassador’ interfering with ‘her judicial functions as a non-full-time judge’.²⁸ The ambassadorial position was, in fact, confined to the bilateral relationship between Japan and Estonia, that is, two

²¹ *ibid.*

²² KJ Heller, ‘Judge Ozaki Must Resign - Or be Removed’ *Opinio Juris* (28 March 2019) <www.opiniojuris.org/2019/03/29/judge-ozaki-must-resign-or-be-removed>. See also W Wakabi, ‘No Reason to Disqualify Judge Ozaki, Says ICC Prosecutor’ *International Justice Monitor* (30 May 2019) <www.ijmonitor.org/2019/05/no-reason-to-disqualify-judge-ozaki-says-icc-prosecutor>.

²³ *Prosecutor v Bosco Ntaganda*, ‘Annex I to the Notification of the Decision of the Plenary of Judges pursuant to Article 40 of the Rome Statute: Decision on your request of 18 February 2019 (Internal Memorandum)’ (19 March 2019) ICC-01/04-02/06-2326-Anx1, paras 3-4.

²⁴ *ibid.* para 5.

²⁵ *ibid.* para 8.

²⁶ *ibid.*

²⁷ *ibid.* para 9.

²⁸ *ibid.* paras 12-15.



States with no connection to any case before the ICC.²⁹ Moreover, she had committed to make ‘herself available as necessary for her judicial duties’ which ‘were confined to the *Ntaganda* case’.³⁰ On the other hand, the three judges in the minority replied that the second part of Article 40(2) of the ICC Statute also included a clear focus on the likelihood of affecting confidence in judicial independence in the eyes of reasonable outside observers. For these judges, it was evident that the undertaking of an executive or political function for a State party by an individual who remained a judge of the ICC was entirely likely to affect public confidence in judicial independence.³¹

Regrettably, the majority of the judges did not discuss the Code of Judicial Ethics adopted by the ICC.³² Albeit not binding, Article 10(2) of the Code makes clear that the judges should not exercise any political function, and does not distinguish between full-time or part-time judges.³³ Interestingly, that norm speaks only of political functions. It does not cover other external appointments a judge may have, such as for instance academic posts. This means that among the activities that a judge may engage in beyond his or her judicial function, a distinction should be drawn between extra-judicial activities having a political character and those falling under other categories. For activities of a political character, such as an ambassadorship, the prohibition operates immediately without the need to demonstrate whether these are likely to interfere with the judicial function. As the allegiance one owes to his or her country as an ambassador does not operate part-time, it is incompatible with other allegiances, such as the one judges by definition have towards the ICC. Although the majority referred to the fact of the case before them, the reasoning may be employed in other contexts and as such does not seem to be persuasive. The principle seemingly emerging from the approach of the majority is that a non-full-time judge can take a political post provided that these duties have no connection with a case before the ICC and spare them enough time to be able to perform both functions. This in itself does not seem convincing, however, particularly given that the majority regrettably did not provide a more de-

²⁹ *ibid* para 13.

³⁰ *ibid* paras 12-13.

³¹ *ibid* para 15.

³² ICC, ‘Code of Judicial Ethics’ (9 March 2005) ICC-BD/02-01-05.

³³ *ibid* art 10(2).



tailed analysis of what could be an important precedent. In most domestic systems, allowing a member of the judiciary to serve also as a member of the executive branch of government would seem to be an abomination, regardless of whether there is material overlap between the two functions.

2.2. *Inadequate reasoning*

On 12 April 2019, after one and a half years of judicial deliberations, the ICC Pre-Trial Chamber II decided to turn down the Prosecutor's request to open an investigation into Afghanistan.³⁴ It found that both the jurisdiction and the admissibility requirement for authorising the commencement of an investigation were satisfied because, *inter alia*, there was 'a reasonable basis to believe that the Taliban and other anti-governmental armed groups have pursued a plan of deliberate attacks against civilians believed to oppose their rule and ideology'.³⁵ The Pre-Trial Chamber noted that crimes were committed on the territory of a State Party (Afghanistan)³⁶ and that 'civilian casualties in the period 2009-2016, as witnessed throughout the Afghan territory, exceed 50,000, of which 17,1000 deaths and over 33,000 injuries'.³⁷ It moreover found that the request was admissible pursuant to the principle of complementarity, as there were no national proceedings concerning the alleged crimes.³⁸

³⁴ *Situation in the Islamic Republic of Afghanistan*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' (12 April 2019) ICC-02/17. The appeal hearing was held from 4 to 6 December 2019 before the Appeals Chamber, composed of Judge P Hofmański, Presiding judge, Judge H Morrison, Judge L Ibáñez Carranza, Judge S Balungi Bossa and Judge K Prost. The judgment had not yet been rendered at the time of writing. See 'Afghanistan: ICC Appeals Chamber will hear oral arguments on 4-6 December 2019' International Criminal Court Media Advisory ICC-CPI-20191129-MA248 (29 November 2019) <www.icc-cpi.int/Pages/item.aspx?name=MA248>.

³⁵ *Situation in the Islamic Republic of Afghanistan* (n 34) para 64.

³⁶ *ibid* paras 58-59.

³⁷ *ibid* para 66.

³⁸ *Situation in the Islamic Republic of Afghanistan* (n 34) paras 73-75. See also A Whiting, 'The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?' Just Security (12 April 2019) <www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations>.



Nevertheless, the Pre-Trial Chamber dismissed the Prosecution's request under Article 53(1)(c) of the ICC Statute because there were 'substantial reasons to believe that an investigation would not serve the interests of justice'.³⁹ The fundamental assumption of the Pre-Trial Chamber was that 'an investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure'.⁴⁰ The Pre-Trial Chamber noted that the current circumstances in Afghanistan were 'such as to make the prospects for a successful investigation and prosecution extremely limited', and that 'pursuing an investigation would inevitably require a significant amount of resources', which would force the Prosecutor to divert resources from other active situations.⁴¹ On this point, it could be replied that it is for the Prosecutor, rather than for the Chambers, to determine how its resources should be employed.

The Pre-Trial Chamber did not explain how these considerations show that the *opening* of the investigation as such would not have been in the interests of justice.⁴² It may be a truism that there is no point in beginning an investigation that is inevitably doomed to failure. However, the impression is that the Chamber adopted a concept of interests of justice that is essentially synonymous with the political interests of the ICC, rather than of justice in general. By contrast, it appears arguable

³⁹ *Situation in the Islamic Republic of Afghanistan* (n 34) para 87. For commentary and criticism on the decision of the Pre-Trial Chamber see, among others, M Varaki, 'Afghanistan and the 'Interests of Justice': An Unwise Exercise?' EJIL Talk! (26 April 2019) <www.ejiltalk.org/afghanistan-and-the-interests-of-justice-an-unwise-exercise/>; Ch De Vos, 'No ICC Investigation in Afghanistan: A Bad Decision with Big Implications' International Justice Monitor (15 April 2019) <www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/>; D Akande, 'The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice' EJIL Talk! (18 April 2019) <www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/>; S Vasiliev, 'Not Just Another 'Crisis': Could the Blocking of the Afghanistan Investigation Spell the End of the ICC? (Part II)' EJIL Talk! (20 April 2019) <www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-ii/>.

⁴⁰ *Situation in the Islamic Republic of Afghanistan* (n 34) para 90.

⁴¹ *ibid* paras 95-96.

⁴² See in this regard Office of the Prosecutor, 'Policy Paper on the Interests of Justice' International Criminal Court (2007); T de Souza Dias, 'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court' (2017) 30 *Leiden J Intl L* 731-751.



that the notion of interests of justice ought to be construed as covering the need to provide some degree of justice to the thousands of civilian victims who, in the case of Afghanistan, had received none and absent ICC intervention were unlikely to receive any in future. On 5 March 2020, the Appeals Chamber ruled on the Prosecution's appeal and reversed the Pre-Trial Chamber's decision.⁴³ The Appeals Chamber faulted the Pre-Trial Chamber for having reviewed the Prosecution's request in light of Article 53(1)(a) to (c) of the Rome Statute, which includes the 'interests of justice' criterion. While characterising the Pre-Trial Chamber's conclusion regarding the 'interests of justice' as 'cursory' and 'speculative',⁴⁴ the Appeal Chamber grounded its reversal on a more comprehensive basis, namely a different interpretation of the function of the Pre-Trial Chamber under Article 15(4) of the Statute. According to the Appeals Chamber, when reviewing a Prosecution's request to open an investigation, the Pre-Trial Chamber should not assess the underlying reasoning of the Prosecution in complying with Article 53(1)(a) to (c) of the Statute; but only whether there is a reasonable factual basis to proceed with an investigation in the sense of (i) 'whether crimes have been committed' and (ii) the case 'appear[ed] to fall within the Court's jurisdiction'.⁴⁵ Absent earlier jurisprudence considering the interests of justice criterion on appeal,⁴⁶ the Appeals Chamber reached its conclusion through a textual and logical construction of the Rome Statute.⁴⁷

Leaving full examination of the Appeals Chamber's interpretation for another paper, one is struck by the fact that twenty years after the adoption of the Rome Statute the same provision can still evoke such radically divergent interpretations on issues of fundamental importance. Arguably, the Appeal Judgment may be considered a case in point alerting us that there is a problem not only with the conduct of certain judges; but more profoundly with the wording of the Rome Statute itself, prone to hinder the exercise of the judicial function at the ICC.

⁴³ *Situation in the Islamic Republic of Afghanistan* (Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17 OA4 (5 March 2020).

⁴⁴ *ibid* para 49.

⁴⁵ *ibid* para 46.

⁴⁶ *ibid* para 25. The Appeals Chamber did nonetheless note that Pre-Trial Chambers had previously had a practice of considering factors under art 53 of the Rome Statute. See *ibid* para 24.

⁴⁷ *ibid* paras 26-42 and 45.

2.3. *Lack of collegiality*

Another factor casting a shadow on the credibility of the ICC is the diminishing degree of collegiality that has grown to characterise some of its practice and the declarations from its judges.⁴⁸ Former ICC President Judge de Gurmendi has stressed, for instance, that it is necessary to ‘develop a more cohesive judicial culture’ to enhance the judicial work of the ICC,⁴⁹ lamenting that ‘collegial discussions are frustrated to no purpose [because] judges of the Court have persistently invoked their judicial independence as a barrier to collegial discussions’, notwithstanding that the two may well coexist.⁵⁰

Judicial collegiality is an acknowledgement of the fact that judges have a common interest in getting the facts and the law right, and must therefore be willing to engage with and listen to each other, reciprocally persuading and being persuaded by their colleagues.⁵¹ Collegiality requires that all judges, regardless of their specific individual opinions, are expected and allowed to contribute to a judgment and claim responsibility for it.⁵² Such collegiality is, however, difficult to achieve. Cooperation among colleagues entrusted with a shared responsibility is in and of itself a difficult enterprise in any working environment. It is all the more so at the international level, when individuals with profound differences in terms of languages, culture, background and approach to law have to work together. Lack of collegiality impacts the jurisprudence of any given court at different levels. It undermines the ability to

⁴⁸ In 2018, the ICC President called for a judicial retreat addressing collegiality because ‘It is highly desirable to cultivate a cohesive and constructive environment marked by the highest degree of dignity and respect for one another, encouraging judges to share their diverse expertise, experience and professional backgrounds to the benefit of the Court’. See ‘ICC judges hold retreat focusing on collegiality and various aspects of judicial proceedings’ International Criminal Court Media Advisory ICC-CPI-20180928-PR1412 (28 September 2018) <www.icc-cpi.int/Pages/item.aspx?name=pr1412>.

⁴⁹ S Fernández de Gurmendi (n 14) 166.

⁵⁰ *ibid* 167.

⁵¹ HT Edwards, ‘The Effects of Collegiality on Judicial Decision Making’ (2003) 151 *U Pennsylvania L Rev* 1639, 1644-46.

⁵² R Jennings ‘The Collegiate Responsibility and Authority of the International Court of Justice’, in R Jennings, *Collected Writings of Sir Robert Jennings* (Kluwer 1998) 343, 345.

reach agreement on factual and legal issues and in consequence to provide adequately reasoned judgments. It causes internal disagreements among judges to remain unresolved and exacerbate until they spill out in public documents, at times combatively and in ways confusing to external observers.⁵³ Two concrete examples of a lack of collegiality at the ICC are in order.

On 8 June 2019, the ICC Appeals Chamber in *Bemba*, split by three votes to two, reversed the *Bemba* Trial Judgment because the accused's first-instance conviction exceeded the facts and circumstances described in the charges brought against them.⁵⁴ Judges were, *inter alia*, unable to agree on the correct standard of review, and failed to provide any coherent rationale for the new approach they adopted for the issue as there seemed to be little concurrence among the judges, including within the majority itself. Judges Monageng and Hofmański would have upheld the conviction. Judge Eboe-Osuji would have permitted a retrial on the new charges his colleagues found to be outside the scope of the original conviction.⁵⁵

In the rather succinct (compared to the length of the Separate Opinions) *Bemba* Appeal Judgment, the majority declined to defer to the factual findings of the Trial Chamber and chose to evaluate the evidence in a *de novo*-like fashion. They held that the Appeal Chamber could 'interfere with the factual findings of the first-instance Chamber whenever the failure to interfere may occasion a miscarriage of justice, and not "only in the case where [the Appeals Chamber] cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it"'.⁵⁶ This was because the 'Appeals Chamber must be careful not to constrain the exercise of its appellate discretion in such a way that it ties its own hands against the interest of justice'.⁵⁷ In their Dissenting Opinion, Judges Monageng and Hofmański noted

⁵³ LN Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo' EJIL Talk! (12 June 2018) <www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo>.

⁵⁴ *Prosecutor v Bemba Gombo* (Appeals Judgment) ICC-01/05-01/08 A (8 June 2018) 4.

⁵⁵ *ibid* para 1. See also *ibid*, Dissenting Opinion of Judge S M Monageng and Judge P Hofmański para 1 and Concurring Separate Opinion of Judge Eboe-Osuji para 5.

⁵⁶ *ibid* para 40.

⁵⁷ *ibid*.



that ‘more explanation would have been helpful to better understand the nature of this test and the reason for this departure from the conventional standard’.⁵⁸ They criticised the majority for elaborating a standard that ‘accords little or no deference to the trial chamber’s findings and therefore cannot be reconciled with the conventional standard of appellate review’.⁵⁹

Regrettably, the majority did not respond to the objections raised by the minority. Rather, a number of reasons supporting the approach of the majority such as that under the ICC Statute the Appeals Chamber does not need to exercise deference to the findings of the Trial Chamber, are articulated only in the Separate Opinion of Judge Eboe-Osuji.⁶⁰ Puzzlingly, the fact that these reasons are relegated to a separate opinion makes it difficult to understand whether they are shared by all the judges in the majority and leaves it up to speculation why they were not incorporated in the text of the judgment. The truly succinct reasoning employed by the majority, covering only a few paragraphs in contrast to the detailed analysis conducted by Judge Eboe-Osuji, renders the majority’s conclusion and the Appeal Judgment as a whole perplexing. It undermines the authority of the Appeal Judgment, and may make it easier to overturn in subsequent cases.⁶¹ Moreover, in their Concurring Opinion, Judges Van der Wyngaert and Morrison saw fit to make a statement as sweeping as this:

‘While we fully respect their views, it is important to recognise that the strong divergence in how we evaluate the Conviction Decision is not just a matter of 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, both in terms of how the law

⁵⁸ *ibid* Dissenting Opinion of Judge SM Monageng and Judge P Hofmański para 9.

⁵⁹ *ibid* paras 10-11.

⁶⁰ *ibid* Concurring Separate Opinion of Judge Eboe-Osuji 19-32. Interestingly, Judge Eboe-Osuji states that the notion of appellate deference for the factual findings is ‘something of a blind-spot in the ICC appellate jurisprudence, resulting directly from the undiscerning reception of the notion from the jurisprudence of the *ad hoc* tribunals’, while ‘the Rome Statute does not suggest—let alone require—appellate deference to the factual findings of the Trial Chamber’. See *ibid*, Concurring Separate Opinion of Judge Eboe-Osuji paras 44-45.

⁶¹ D Guilfoyle, ‘Part III: This Is Not Fine: The International Court in Trouble’ EJIL Talk! (25 March 2019) <www.ejiltalk.org/part-iii-this-is-not-fine-the-international-criminal-court-in-trouble>.



should be interpreted and applied and in terms of how we conceive of our role as judges. While we do not presume to speak for our colleagues, 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 in an adversarial trial setting.⁶²

In fact, it appears that the disagreement expressed by the two judges — both part of the majority introducing a modified standard of review in appeal — moved from debating legal issues to pointing out personal differences. The Concurring Opinion implicitly suggests that their colleagues (who had just written a 269-page opinion to explain their viewpoint) cared about fair trial standards less because of the fundamental, yet unelaborated, differences in their approach to the international judicial function. Such bickering through the medium of judicial opinion is, of course, no help in enhancing the authority of the Appeal Judgment, let alone the ICC.

Next, on 18 January 2019, the ICC Appeals Chamber issued a decision appointing Judge Chile Eboe-Osuji as the Presiding Judge in *Gbagbo and Blé Goudé*.⁶³ The decision was legitimately taken under Regulation 13(1), which tersely provides that ‘The judges of the Appeals Chamber shall decide on a Presiding Judge for each appeal’ without any requirement to explain the reasons for doing so. Nonetheless, Judge Luz del Carmen Ibañez Carranza saw fit to pen a five-page footnoted Dissenting Opinion explaining why it was unfair not to appoint her as Presiding Judge in the appeal. Appearing to feel snubbed, she complained of the ‘lack of clear and transparent procedures in the Appeals Chamber to designate a Presiding Judge for each appeal’, which she considered of such gravity as to impinge ‘upon the fundamental right of the parties to have a pre-established judge thereby negatively affecting the fairness, predictability and transparency of proceedings before the

⁶² *Prosecutor v Bemba Gombo* (n 49) Separate Opinion of Judge Ch Van den Wyngaert and Judge H Morrison para 4.

⁶³ *Prosecutor v Gbagbo and Blé Goudé*, ‘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’ CC-02/11-01/15OA14 (18 January 2019).



Appeals Chamber'.⁶⁴ She also complained of 'the absence of a fair and equal distribution of workload in the Appeals Chamber which is detrimental to the efficient conduct of proceedings and the right to be tried without undue delay'.⁶⁵ Regrettably, the length and vehemence of the Dissenting Opinion — in comparison to the few lines of the unreasoned Decision — casts doubts not on the outcome her four colleagues had agreed on, but on whether the dissenting judge herself had the necessary modesty to work successfully in a collegial way.

3. *The selection of ICC judges*

The shortcomings discussed in the previous sections have prompted commentators to urge a re-thinking of the process of selection of ICC judges to ensure that the best candidates are selected.⁶⁶ In fact, as noted by Judge de Gurmendi, 'the Court [ICC] can only be as good as its members can make it, starting with its judges'.⁶⁷ In a recent report reflecting on the pitfall of judges' selection at the ICC, the Open Society Justice Initiative spells out that 'Excellence, not Politics should Choose the Judges at the ICC'.⁶⁸ Nonetheless, what 'excellence' means and who should decide on it are not easy determinations to make.⁶⁹ In fact, the debate among practitioners and academics seems somewhat stagnant — not because it lacks activity, but because it keeps revolving around the somewhat vexed question over whether the best judge candidates are

⁶⁴ *ibid* Dissenting Opinion of Judge L Ibañez Carranza para 2.

⁶⁵ *ibid*.

⁶⁶ For an overview of the process of selection of international judges, including those for the ICC, see R Mackenzie, 'The Selection of International Judges' in C Romano, KJ Alter, Y Shany (eds) *The Oxford Handbook of International Adjudication* (OUP 2014) 737-756.

⁶⁷ S Fernández de Gurmendi (n 14) 163-167.

⁶⁸ Y Al-Khudayri, Ch De Vos, 'Excellence, Not Politics, Should Choose the Judges at the ICC' Open Society Justice Initiative (28 October 2019) <www.justiceinitiative.org/voices/excellence-not-politics-should-choose-the-judges-at-the-icc>.

⁶⁹ M Bohlander, 'International Criminal Judiciary Problems of Judicial Selection, Independence and Ethics', in M Bohlander (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May 2007) 325-390.



criminal lawyers⁷⁰ or international lawyers. This debate fails to sufficiently address critical issues relating to the election process itself or on the States' tendency to favour a political process over a competitive one.

Judge de Gurmendi alerts us that 'under the current selection process, there is no guarantee that the best individual amongst them will be nominated and selected' because – despite the creation of the Advisory Committee on Nominations⁷¹ – elections continue to be dominated by the 'trading' of votes among States.⁷² Article 36 of the ICC Statute provides that a judge should have either: (i) 'established competence in criminal law and procedure, and the necessary relevant experience'; or (ii) 'established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity'.⁷³ This establishes an

⁷⁰ According to the Open Society Justice Initiative, 'the expertise requirements established in the Rome Statute are failing to ensure that elected judges possess the experience required to manage complex criminal litigation'. Namely, while 'Knowledge and experience in criminal law and procedure' and 'substantial experience in managing complex trials' are key to the effective exercise of judicial functions at the ICC, not all of the judges elected to the bench have been effectively vouched for these qualities. Y Al-Khudayri et al, 'Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court' Open Society Justice Initiative (2019) <www.justiceinitiative.org/uploads/a43771ed-8c93-424f-ac83-b0317feb23b7/raising-the-bar-20191112.pdf>. The Open Society Justice Initiative points out that candidates with 'established competence in relevant areas of international law' lack the necessary extensive experience to manage court proceedings, and notes with concern that 'many government officials, including career diplomats, have previously been elected to ICC judgeships'. Along the same lines, Douglas Guilfoyle argues 'the criminal law practitioner credentials of those on the bench should be substantially strengthened' because 'running a complex criminal trial is, as is often observed, largely a question of expertise in the law of procedure and evidence'. As such, he suggests that international law judges should only be appointed for appeal proceedings and not at the trial level. D Guilfoyle, 'Of Babies, Bathwater, and List B Judges at the International Criminal Court' EJIL Talk! (13 November 2019) <www.ejiltalk.org/of-babies-bathwater-and-list-b-judges-at-the-international-criminal-court>.

⁷¹ See Assembly of States Parties, 'Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court' ICC-ASP/10/36 (30 November 2011) 3; Assembly of States Parties, 'Strengthening the International Criminal Court and the Assembly of States Parties' ICC-ASP/10/Res.5 (21 December 2011) para 19.

⁷² S Fernández de Gurmendi (n 14) 167.

⁷³ See in this regard Z Wen-qi, S Chana, 'Article 36: Qualifications, Nomination and Election of Judges' in O Triffterer, K Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Hart 2016) 1216-1225.



entry threshold for ICC judges; but does not effectively require that the position be assigned to the most qualified candidate available. Rather, the standard still effectively leaves it to the States to determine which candidate should be ‘put forward’ for election. This means that the determination of the suitability of a candidate for the job at the ICC unfolds domestically with no set, let alone public, procedure obliging the States or requiring them to report to the Assembly of States Parties about their choices. Of course, a State is to present candidates that demonstrably meet the requirements contained in the ICC Statute. However, the discretion of a State (or better of the government holding office at the time of the nomination) is seemingly unfettered during the process of determining the ‘suitable’ candidate. The State is not required to select its own candidate upon a competitive process in a comparative evaluation of different candidates. Absent such a comparative review, it is difficult to confidently assess whether the one selected is the fittest available for the job. Article 36 also endeavoured to curb this discretion by allowing the Assembly of State Parties to create an Advisory Committee on Nominations, which has been operational since 2013.⁷⁴ Nevertheless, its observations are by definition advisory, and States are free to appoint candidates that the Committee has deemed ‘only formally qualified’ as opposed to ‘very well qualified’.⁷⁵ Moreover, not only are the composition and mandate of the Committee determined by the Assembly of State Parties, but the latter also votes on the election of candidates proposed by States. Some requirements, such as ‘a fair representation of both genders’⁷⁶ and ‘equitable geographical distribution’ may stand in the way of selecting the most qualified candidate *stricto sensu*, even though they certainly cannot be ignored for a wealth of reasons.

All this suggests that the process of selecting ICC judges is far from being a genuinely competitive process. In the same way as they sought

⁷⁴ See Assembly of States Parties, ‘Report of the Advisory Committee on Nominations of Judges on the work of its first meeting’ ICC-ASP/12/23 (31 May 2013).

⁷⁵ Assembly of States Parties, ‘Report to the Bureau on the review of the procedure for the nomination and election of judges’ ICC-ASP/18/31 (2 December 2019) Annex II. See also See Assembly of States Parties, ‘Report of the Advisory Committee on Nominations of Judges on the work of its sixth meeting’ ICC-ASP/16/7 (10 October 2017) in which the Advisory Committee distinguished between ‘particularly well qualified’ and ‘formally qualified’ candidates. This distinction did not however prevent candidates who were ‘only’ formally qualified from being elected.

⁷⁶ *ibid.*



to limit judicial law-making in order to have control over the law applied at the ICC, States may see it necessary to secure nominees who are likely to favourably represent their given interests or, at the very least, not to go against them.⁷⁷ Given the political nature of the election process as shaped by governments' wills, one can then safely assume that the reasons for putting forward a specific candidate as opposed to another may be themselves political, or perhaps more fairly a mixed appreciation of legal skills and political evaluations. Hence, finding the best possible candidate from an academic or professional perspective, which is already not an easy assessment to make and be agreed upon, may be less valued than what a State perceives are its own interests and aspirations. This does not mean that the battle for ensuring that the most qualified people get elected to some of the most sought after jobs within the field of international criminal justice is not worth fighting; but it highlights the need for the right armour. Unveiling the shield of formalism and acknowledging the inescapably political substance of all the processes involved may help in this regard to sharpen one's arguments and strategies in favour of a better approach: one that serves the ICC better than the current one. The true challenge, then, is how to ensure that the interests and mandate of the ICC as a judicial institution are prioritised and protected notwithstanding the irreducibly political nature underlying the selection process.

4. *The way forward: Addressing issues of structural design*

This paper has outlined some of the shortcomings that have emerged at the ICC undermining its credibility as a judicial institution. Aside from general constructive debates and adequate responses from the ICC judges themselves, the most obvious response to those shortcomings would be to ensure that the very best qualified individuals be selected. Certainly, the ICC would, in principle, benefit enormously from an A-Team of judges assuming that it possible to identify who should be its members. The debate in this regard is of course of much significance, and everything possible should be done with a view to se-

⁷⁷ See in this regard WM Reisman, R Nadadur, 'Book Review: Selecting International Judges: Principle, Process, and Politics' (2012) 106 *AJIL* 704-708, 705.



lecting the very best candidates. It remains, however, that this debate rests on the assumption that judges alone can make the difference in shaping successfully an institution as complex as the ICC. In my view, not even Ronald Dworkin's Hercules would feel at ease in an institution as complicated and multi-faceted as the ICC. As such, a more thorough approach may be needed. In an effort to strengthen the International Criminal Court and Rome Statute system, the Assembly of States Parties has recently commissioned a number of experts to conduct a 'review of a technical nature of processes, procedures, procedures, practices and the organization of and framework for the Court's operation'.⁷⁸ This initiative constitutes a significant response to recent criticism surrounding the ICC's functions; yet, it seems to limit the scope of the review to issues of 'technical nature' in terms of how the ICC works. It consequently omits the more structural question of who works at the ICC and how these individuals are selected, as well as the equally fundamental question of whether the Rome Statute itself should be reviewed. Without neglecting the importance of the ASP's initiative, this paper argues for a more structural approach premised on the consideration that the ICC is both a Statute-centered institution and a political institution.

The fact that the ICC is a Statute-centered institution means that, unlike the *ad hoc* tribunals, it cannot develop law autonomously under the leadership and creativity of judges who did so by making a virtue out of necessity due to the paucity of the applicable law.⁷⁹ In this sense, the ICC is more similar to a domestic court, required to punctually comply with the codified applicable law written in all aspects of its work without the possibility of challenging or amending it.⁸⁰ To func-

⁷⁸ Assembly of States Parties, 'Review of the International Criminal Court and the Rome Statute System' ICC-ASP/18/Res.7 (6 December 2019) Annex I.

⁷⁹ A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *Eur J Intl L* 144, 163-164; J Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique' in C Stahn (ed), *The Law and Practice of the International Criminal Court*, (OUP 2015) 444-498. See also D Hunt, 'The International Criminal Court: High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges' (2004) 2 *J Intl Crim Justice* 56, 58-59.

⁸⁰ M McAuliffe deGuzman, 'Article 21: Applicable Law' in O Triffterer, K Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Hart 2016) 935.



tion like a domestic court, however, the available law must be of equally good quality to provide clear and univocal guidance. Considering that domestic legal systems took centuries to arrive at their current content, this task appears by no means easy on the international level. While the ICC is an historical achievement, it is not void of legal problems, as shown by the difficulties encountered by its judges. It is full of ‘constructive ambiguities’ that have displaced the discussion from the political level (the drafters of the Rome Statute) to the judicial level (the judges of the ICC).⁸¹ Unsurprisingly, some of these discussions remain alive, and cannot be solved by the judges alone as they are constrained in their interpretation to the wording employed in text of the Rome Statute, which to the point of paradox may be where the problem lays. Hence, either more leeway should expressly be given to judges to develop the law in a manner they consider fair and efficient in a uniform manner as the *ad hoc* tribunals sought to; or member States should directly engage in the process of amending and updating those provisions of the Statute that have generated more problems than solutions in their application.

Moreover, although a major contribution to the development of the rule of law⁸² at the international level by subjecting political conduct to judicial review, the ICC remains, at its structure, a traditional States-centered institution as a result of a treaty among sovereign States and operating under the administrative supervision of the Assembly of States Parties.⁸³ The ICC’s political dimension, for reasons described above, while inescapable and necessary to obtain practical and economic support from States, requires suitable in-house counter-balances in terms of competence to guard the interests of the ICC as an authoritative judicial institution. This may be done by increasing the number of

⁸¹ M Delmas-Marty, ‘Ambiguities and Lacunae: The International Criminal Court’ (2013) 11 *J Intl Crim Justice* 527–536; see also C Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ (2003) 1 *J Intl Crim Justice* 603–617.

⁸² See B Schmitt, ‘Foreword’ in ‘The International Criminal Court in Turbulent Times’ (Springer 2018) at x. And on the concept of rule see S Chesterman, ‘An International Rule of Law?’ (2008) 56 *American J Comparative L* 331–362.

⁸³ D Guilfoyle, ‘Reforming the International Criminal Court: Is it Time for the Assembly of State Parties to be the Adults in the Room?’ *EJIL Talk!* (8 May 2018) <www.ejiltalk.org/reforming-the-international-criminal-court-is-it-time-for-the-assembly-of-state-parties-to-be-the-adults-in-the-room/>.



legal officers working in the Chambers of the ICC, currently limited to those directly working for a judge, and by ensuring that there exists a multi-layered legal secretariat within the ICC reporting to senior legal officers, capable of selecting the most qualified lawyers and keeping the best among them by offering concrete career advancements. Such a secretariat should provide full time advice and counsel and concrete assistance in drafting all documents, and be strong enough ‘to speak truth to power’ in the pursuit of the ICC’s institutional interests and culture. Similar mechanisms helped the overall performance of the *ad hoc* tribunals providing timely support to underperforming judges and a critical soundboard to the most dynamic ones. Granted, they may be costly, but perhaps not as costly as maintaining the *status quo*.

