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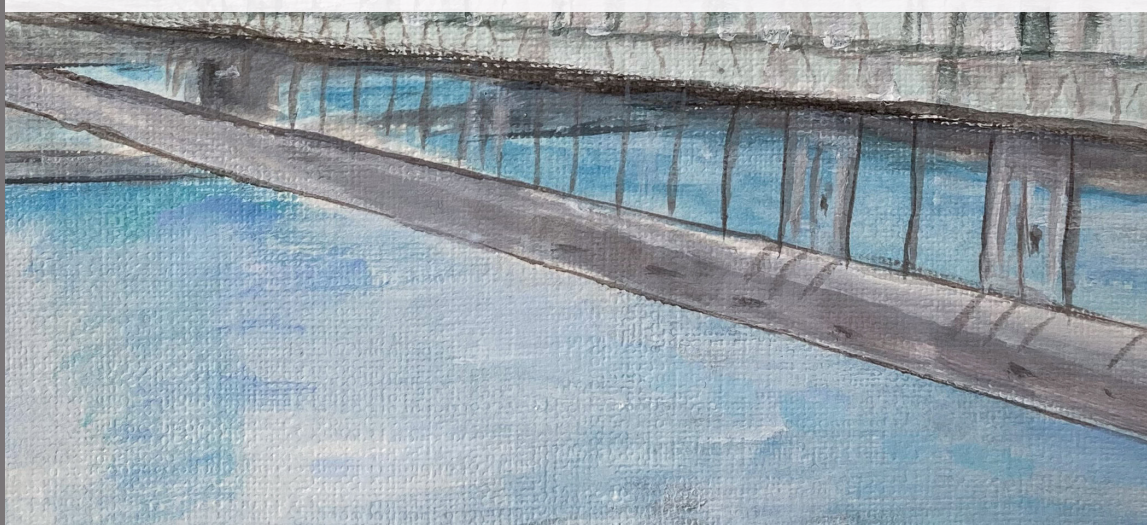
# The Past, Present and Future of the International Criminal Court

Alexander Heinze and Viviane E. Dittrich (editors)



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***Front cover:*** *An artistic rendering of the permanent premises of the International Criminal Court in The Hague, by Katrin Heinze, 2021.*

# 21

# Politics and the Institutional Integrity of the International Criminal Court

**Shannon Fyfe***

## 21.1. Introduction

The Rome Statute of the International Criminal Court ('Rome Statute' and 'ICC') emerged following years of interest from various governments in establishing a permanent court to prosecute perpetrators of international crimes. The treaty that eventually established the ICC was the result of inter-governmental negotiations, which were ultimately successful in large part due to the 'tribunal fatigue'[1] of governments concerned by "the financial and political costs of creating *ad hoc* United Nations ('UN') criminal tribunals for the atrocities that burdened so many regions of the world".[2] A permanent court would "provide greater efficiencies in addressing the investigation and prosecution of atrocity crimes",[3] but drafting the parameters of the Rome Statute required several years of work by legal experts and diplomats from a majority of the world's governments.[4]

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1 David Scheffer coined this term to refer to the Security Council's lack of enthusiasm about the prospect of financing a new judicial mechanism "every time an outrage against humanity merits judicial intervention", David Scheffer, "International Judicial Intervention", in *Foreign Policy*, 1996, vol. 22, no. 102, p. 34.

2 David Scheffer, "The International Criminal Court", in William Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, 2010, pp. 67–83, 68.

3 *Ibid*.

4 *Ibid*.

Politics not only played a crucial role in the drafting of the Rome Statute, but it is also enshrined in its structure. The individuals who work for the Court, while charged with performing their duties with integrity and without bias, all hail from somewhere, and it is impossible to ensure that prosecutors and judges make decisions while remaining completely neutral. Members of the UN Security Council are even more likely to allow political relationships to influence their decisions about whether or not to refer situations to the ICC. And much of the Court's ability to obtain accused individuals and evidence of crimes relies on the co-operation of States.

Some of the political influences that affected the drafting of the Rome Statute and subsequent jurisprudence of the ICC appear to be an inevitable and perhaps even necessary feature of the Court's existence. Yet, in other ways, politics appears to undermine the institution at its very core, as the role the UN Security Council and individual States can play in ICC processes threatens to compromise the promise of the ICC as a source of justice. As we look ahead to the future of the ICC, these latter concerns about power and politics remain, and there is no indication that they will subside in the future. Recent decisions by the Appeals Chamber, the Office of the Prosecutor ('OTP') and the Pre-Trial Chamber suggest that the ICC may be moving toward intractable political entanglements. Accordingly, in this chapter I will consider the future of the institutional integrity of the ICC and its various organs, in light of three recent decisions. I begin by attempting to construct a normative framework for understanding the role of integrity in institutional obligations, and the relationship between politics and institutional integrity. I then use three illustrative decisions to draw out concerns about the ability of the ICC to maintain its integrity in light of political forces.

## 21.2. Integrity

Although my focus is on the institutional integrity of the ICC, we must first consider what it means for an individual to 'act with integrity'[5] before we can explore questions about what it means for a group or an organization to do so. This normative framework can help us assess various actors carefully, individuals and institutions alike, instead of merely relying on natural

[5] A more comprehensive analysis can be found in Shannon Fyfe, "Ethics, Integrity, and the *Bemba* Acquittal", in Morten Bergsmo and Viviane Dittrich (eds.), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (http://www.toaep.org/nas-pdf/4-bergsmo-dittrich).

language appeals to 'character' and 'integrity' and 'justice'. Understanding the conceptual underpinnings of the term gives us better tools for identifying whether or not an individual or institution can claim to possess integrity.

### 21.2.1. Individual Integrity

In Section 21.2.1., I argue that integrity should involve two necessary features: a structural sense of integrity and a substantive sense of integrity. Within these two aspects of the normative framework, I explore several prominent possibilities for understanding integrity. Each of these ways of understanding integrity introduces important considerations to an individual actor's decision-making process.

#### 21.2.1.1. Structural Conceptions of Integrity

One way to understand integrity is as a formal relation an entity has to itself, between parts of itself, or with other entities. Views that focus on these relations consider integrity to be a formal, structural concept. Bernard Williams defends such a view, based on 'identity-conferring commitments'.[6] An identity-conferring commitment is "the condition of my existence, in the sense that unless I am propelled forward by the conatus of desire, project and interest, it is unclear why I should go on at all".[7] According to Williams, if an individual abandons such a commitment, then the individual begins to lose what gives their life its moral identity. An individual is "identified with his actions as flowing from projects and attitudes which in some cases he takes seriously at the deepest level, as what his life is about"[8] – and when he makes any choice that alienates him from these projects and attitudes, he fails to act with integrity.[9]

Relatedly, we can think about integrity in terms of wholeness and integration. Gabriele Taylor defines a person with integrity as "the person who 'keeps his inmost self intact', whose life is 'of a piece', whose self is whole and integrated".[10] A person of integrity "lacks corrupt in the sense

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6 See Bernard Williams, "Integrity", in J.J.C. Smart and Bernard Williams (eds.), *Utilitarianism: For and Against*, Cambridge University Press, 1973, pp. 108–117; see also Bernard Williams, *Moral Luck: Philosophical Papers 1973–1980*, Cambridge University Press, 1981.

7 Bernard Williams, "Persons, Character and Morality", in Smart and Williams (eds.), 1973, pp. 1–19, 12, see above note 6.

8 Williams, 1973, p. 116, see above note 6.

9 *Ibid*.

10 Gabriele Taylor, "Integrity", in *Proceedings of the Aristotelian Society*, *Supplementary Volumes*, 1981, vol. 55, pp. 143–159, 143.

that his self is disintegrated".[11] Taylor claims that a person of integrity will usually possess substantive moral qualities like honesty and loyalty, but "we ascribe integrity to him who behaves in socially acceptable ways, or to him who sticks to his principles however adverse the circumstances".[12] A person of integrity must also act rationally, based on reasons that are sufficient for action.[13]

A third structural understanding of integrity comes from David Luban, who offers a view based on the concept of wholeness, which to him means avoiding cognitive dissonance. He sees integrity as "wholeness or unity of a person, an inner consistency between deed and principle".[14] In Luban's account, cognitive dissonance, or the clashing of our conduct and our principles, threatens our intuitions about integrity.[15] He claims that because we are "highly resistant to the thought of our own wrongdoing",[16] it is likely that "we will bend our moral beliefs and even our perceptions to fight off the harsh judgment of our own behavior".[17] Yet Luban distinguishes this so-called integrity from genuine integrity, and identifies the former as mere 'dissonance reduction'.[18] Genuine integrity "consists of taking the high road, the road of conforming our behavior to our principles",[19] and requires that an individual keep her principles intact.[20]

Finally, Cheshire Calhoun understands integrity to refer to relationships with others rather than oneself. She claims that "the notion of 'standing for something' is central to the meaning of integrity".[21] Calhoun distinguishes 'standing by' one's principles (which one can do alone) from 'standing for' one's principles, which captures what happens when one is a

11 *Ibid.*, p. 144.

12 *Ibid*.

13 *Ibid.*, p. 148.

14 David Luban, "Integrity: Its Causes and Cures", in *Fordham Law Review*, 2003, vol. 72, no. 2, p. 279.

15 *Ibid*.

16 *Ibid.*, p. 281.

17 *Ibid*.

18 *Ibid*.

19 *Ibid.*, p. 298.

20 *Ibid*.

21 Cheshire Calhoun, "Standing for Something", in *The Journal of Philosophy*, 1995, vol. 92, no. 5, p. 253.

member of a community where there may be conflicting views.[22] The 'standing by' one's principles is "intimately, tied to protecting the boundaries of the self – to protecting it against disintegration, against loss of self-identity, and against pollution by evil".[23] Calhoun argues that integrity should instead be "tightly connected to viewing oneself as a member of an evaluating community and to caring about what that community endorses".[24] This particular account of integrity allows us to see "why we care that persons have the courage of their convictions" when engaged in deliberation (or collective decision-making) with other members of a community.[25]

These structural conceptions of integrity are arguably insufficient because they would permit immoral individuals, either acting alone or collectively in immoral communities, to meet the formal requirements for integrity in spite of morally reprehensible behaviour. In the sub-section that follows, I provide a necessary complement to these structural views of integrity.

#### 21.2.1.2. Substantive Conceptions of Integrity

We may also have the intuition that a complete understanding of integrity should include substance, since it is possible to act with complete structural integrity, and still act in ways that most would find to be objectively immoral. In my view,[26] it is necessary to include substantive constraints on what it means to act with integrity. In what follows, I explore two ways of understanding substantive constraints on integrity.

##### 21.2.1.2.1. Virtue

We tend to think of integrity as "an admirable trait of character and genuine excellence of persons in its own right".[27] Virtue might be seen as a disposition which itself yields motivations, or as "necessary for that relation to

22 *Ibid.*, pp. 253–54.

23 *Ibid.*, p. 254.

24 *Ibid*.

25 *Ibid.*, p. 259.

26 While they do not use the same terminology I use, other views that require two discrete aspects of integrity include those espoused by Lynne McFall, "Integrity", in *Ethics*, 1987, vol. 98, no. 1, pp. 5–20; and Deborah L. Rhode, "If Integrity Is the Answer, What Is the Question?", in *Fordham Law Review*, 2003, vol. 72, no. 2, pp. 335–336.

27 Greg Scherkoske, "Could Integrity Be An Epistemic Virtue?", in *International Journal of Philosophical Studies*, 2012, vol. 20, no. 2, p. 185.

oneself and the world which enables one to act from desirable motives in desirable ways".[28] Or we might understand integrity as a 'cluster concept', signifying:

> a cluster of morally praiseworthy attributes including such things as the sincerity and steadfastness with which [an individual's] moral beliefs are held, the struggle [an individual] ha[s] undergone to achieve them, [an individual's] willingness and capacity to question them.[29]

Damian Cox, Marguerite LaCaze and Michael Levine defend such a 'cluster concept' view,[30] arguing that an individual who exemplifies the virtue of integrity finds an Aristotelian mean between excesses. An example of an excess of virtue might be steadfastness where integrity demands change, and an example of a vice might be hypocrisy, where it undermines integrity.[31] Understanding integrity as a virtue, as either an intrinsically valuable feature or as a cluster of admirable attributes, is compatible with the structural constraints I examined in the previous sub-section, and provides additional moral constraints.

#### 21.2.1.2.2. Moral Purpose

An alternative way to undergird the moral elements of integrity is to adopt a view about the specific sorts of commitments that may be acceptably defended on a structural account of integrity. Mark Halfon understands an individual of integrity as one who embraces "a moral point of view that urges them to be conceptually clear, logically consistent, apprised of relevant empirical evidence and careful about acknowledging as well as weighing relevant moral considerations".[32] He identifies these constraints as those which guarantee that an individual attempts to do 'what is best' instead of just whatever can be plausibly defended.[33] Elizabeth Ashford defends a similar account of 'objective integrity', in which an attribution of

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28 Bernard Williams, "Utilitarianism and Self-Indulgence", in Smart and Williams (eds.), 1973, pp. 40–53, 49, see above note 6.

29 Damian Cox, Marguerite LaCaze and Michael P. Levine, "Should We Strive for Integrity?", in *Journal of Value Inquiry*, 1999, vol. 33, no. 4, p. 521.

30 *Ibid.*, pp. 521, 523.

31 Damian Cox, Marguerite LaCaze and Michael P. Levine, *Integrity and the Fragile Self*, Ashgate Publishing, Aldershot, 2003, p. 49.

32 Mark Halfon, *Integrity: A Philosophical Inquiry*, Temple University Press, 1989, p. 37.

33 *Ibid*.

integrity requires that an individual's own understanding of her moral decency "must be grounded in her leading a genuinely morally decent life".[34]

The individuals who make up the ICC and its discrete organs are expected to possess both 'integrity' and 'high moral character', and it makes sense that the terms should have distinct definitions. Demanding that an individual act 'virtuously' or 'with objectively good reasons' does not give us *deontic verdicts*, which are verdicts about which actions are optional, forbidden, or required. Accordingly, we need both structural and substantive conceptions of integrity to help shape what an individual should do to act with integrity.

### 21.2.2. Institutional Integrity

We can think of an institution's integrity as an aggregation of the integrity of the individuals which make up the organization. On this view, we can reduce the concept of a board of directors, for instance, to those individuals who make up the board, with no remainder. This is an individualist account of an organization, on which individuals "are not, when brought together, converted into another kind of substance", but instead they remain individuals.[35] A reference to the integrity of the board of directors merely refers to the aggregation of the individual integrity of each director, according to this account.

Yet, we do not think of most organizations in such a limited manner. A group or institution usually engages in collective decision-making, and the outputs of that group or institution are *collective* decisions, at least to some extent. One individual may represent the organization and possess final decision-making power, or there may be a collective decision-making procedure that results in a 'judgment' or decision on behalf of the organization. Either way, the individual integrity of the members of an organization is at most necessary, but not sufficient, to establish institutional integrity.

Institutional integrity can also be distinguished from individual integrity on the basis of the legitimacy of the entity. There are some accounts of individual integrity that claim individuals who do not act with integrity do

[34] Elizabeth Ashford, "Utilitarianism, Integrity and Partiality", in *Journal of Philosophy*, 2000, vol. 97, p. 4.

[35] John Stuart Mill, "On the Logic of the Moral Sciences (Book VI)", in John Stuart Mill, *A System of Logic, Ratiocinative and Inductive, Part II*, University of Toronto Press, 1981, p. 879.

not act as agents at all.[36] I would argue that it makes more sense to understand individuals who fail to act with integrity as existing, but perhaps not be trusted or taken seriously. Institutions, however, may collapse without integrity. An institution may become illegitimate because it lacks integrity, especially if integrity is a crucial feature of the institution's mandate or identity, and it could cease to function altogether. It may also be the case that the perception of the institution as illegitimate causes the institution to collapse, especially due to lost support from external actors. The loss of integrity can be fatal to an institution, even where it would not be fatal for an individual.

#### 21.2.2.1. Substantive Integrity of Institutional Actors

As with individual integrity, it is intuitive to think that institutional integrity must be at least somewhat tied to moral substance. However, it is possible for an institution to act with complete structural integrity while acting in ways that are intuitively immoral. On my two-pronged account of integrity, it cannot be the case that an institution aimed at something intuitively immoral can act with integrity, so there must be substantive constraints on what it means for an institution to act with integrity.

The individual integrity of the members of an organization is likely to constitute a necessary feature of institutional integrity, as noted above. An individual actor within an institution must operate with a commitment to moral principles, whether explicitly required by the organization or coincidentally maintained by the individual in her own capacity. It seems possible, then, that the moral content underpinning the structural integrity of an organization could come about by accident, but not structural integrity itself. Organizations almost always require explicit statements regarding the aims, purposes and general structure of the organization. So an institution with structural integrity (in terms of cohesion or integration) will still fail to achieve institutional integrity if it operates pursuant to a clearly repugnant moral commitment (such as the promotion of ethnic cleansing). The substantive integrity requirement for an institutional actor could be met by encouraging individuals who make up the organization to act virtuously (in a broad sense), or by explicitly outlining the particular virtues that are crucial to the aims of the institution, or by outlining procedures that

[36] See Christine M. Korsgaard, *Self-Constitution: Agency, Identity, and Integrity*, Oxford University Press, 2009.

safeguard institutional decision-making as being based on 'objectively good reasons' or an 'objective moral purpose'.

### 21.2.2.2. Structural Integrity of Institutional Actors

The structural integrity of institutional actors can be understood as a formal relation an institution has to itself, between parts of itself (either sub-institutions or individuals), or with other institutions. Recalling Williams' view, integrity is based on 'identity-conferring commitments', or "the condition[s] of my existence, in the sense that unless I am propelled forward by the conatus of desire, project and interest, it is unclear why I should go on at all".[37] From an institutional perspective, organizations come into existence for reasons, in order to achieve a discrete purpose or further a particular project. An institution that abandons an identity-conferring commitment is very likely to lose what gives the institution its identity, causing the institution to collapse altogether, or at least lose legitimacy. An institution may be able to reorganize itself under different 'conditions of existence', but an institution like the ICC is unlikely to survive such a fundamental change.

Taylor identities an individual with integrity as one who 'keeps his self intact', meaning he "will not ignore relevant evidence, he will be consistent in his behaviour, he will not act on reasons which, given the circumstances, are insufficient reasons for action".[38] Institutions like the ICC have been created with a sense of what they are meant to do, so they can act rationally to maintain a sense of institutional self, and they can discourage conflict or disintegration between the sub-institutions and/or individuals making up the institution. Luban's view of genuine integrity can also map onto institutions, as an institution can be thought of as having structural integrity if it is "untouched, unsullied"[39] and keeps its principles intact.[40]

Calhoun's understanding of integrity as 'standing for something' helps flesh out institutional integrity in two ways. First, the virtue of integrity can refer to an institution's commitment to standing up for its own principles in the face of conflicting views from external institutions or individuals. Second, Calhoun's view can be used to understand how individ-

37 Williams, 1981, p. 12, see above note 7.

38 Taylor, 1981, p. 148, see above note 10.

39 See Luban, 2003, p. 298, see above note 14.

40 *Ibid*.

uals within the institution engage in collective decision-making. If the institution has a common objective or project, individuals should be "acting on one's own best judgment" while negotiating with other individuals within the institution.[41] Her account of integrity speaks to "why we care that persons have the courage of their convictions" when deliberating with other members of a community.[42]

### 21.2.2.3. Structural Integrity of Institutional Judicial Actors

Although in what follows, I also consider the integrity of prosecutorial organs, it is worth specifically addressing the structural integrity of judicial organs, due to their individual and collective power within a criminal legal system. The output of a judicial body should reflect, according to most scholars, a particular kind of structural integrity. I briefly consider one such argument from Ronald Dworkin.

In *Law's Empire*, Dworkin provides a model of adjudication known as 'law as integrity'.[43] This view sees that rights and responsibilities of individuals "flow from past decisions" and thus "count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification".[44] Individuals are entitled to a coherent extension of past decisions, "even when judges profoundly disagree about what this means".[45] Judges must "identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness".[46]

Using the analogy of a chain novel, Dworkin creates a scenario in which a group of individuals seek to write a novel together.[47] Each author is tasked with interpreting the chapters that have been written previously,[48] and each author "has the job of writing his chapter so as to make the novel

41 Calhoun, 1995, p. 256, see above note 21.

42 *Ibid.*, p. 259.

43 See Ronald Dworkin, *Law's Empire*, Harvard University Press, 1986, pp. 176–275.

44 *Ibid*.

45 *Ibid.*, p. 134.

46 *Ibid.*, p. 225.

47 *Ibid.*, p. 229.

48 *Ibid*.

being constructed the best it can be".[49] The novelists, according to Dworkin, "aim jointly to create, so far as they can, a single unified novel that is the best it can be",[50] just as a judge must try to create a single, unified story about the law. In order to do so, "the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment". [51] A judge who fails to do so "cannot claim in good faith to be interpreting his legal practice at all".[52]

The adjudicative model of law as integrity and its inherent relationship with both permissible and impermissible political influences lead us directly to the next section, in which I consider the normative foundations of the relationship between politics and law, especially within a criminal law institution.

## 21.3. Politics as a Threat to Integrity[53]

Of the various threats to substantive and structural integrity, particularly of legal institutions, certain political influences are one of the most concerning. Law in general, and criminal law in particular, is promulgated by political institutions. There are two main camps of views about the relationship between the political and the legal in terms of international criminal justice. One camp argues that the legal and political realms must remain completely separate, and the other camp recognizes that all law is political, but the important task is to distinguish between inevitable or permissible political influences, and those which threaten institutional integrity.

In the first camp, "law and politics must be kept apart as much as possible in theory no less than in practice".[54] Carl Schmitt is able to separate the two by definition when he identifies politics with having the power to defeat an enemy.[55] According to Judith Shklar's critique, for those who

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid.*, p. 255.

[52] *Ibid*.

[53] A more complete account of the arguments in this section can be found in Shannon Fyfe, "The Office of the Prosecutor: Seeking Justice or Serving Global Imperialism?", in *International Criminal Law Review*, 2018, vol. 18, no. 6, pp. 988–1014.

[54] Judith Shklar, *Legalism*, Harvard University Press, Cambridge, 1964, p. 111.

[55] Carl Schmitt, *The Concept of the Political: Expanded Edition*, University of Chicago Press, Chicago, 2007, p. 36. I provide this reference to Schmitt's articulation of the relationship between law and politics due to its influence, but given his role in laying the basis for the legality of the Nazi regime, I immediately move to other sources engaged with the first camp.

believe in the autonomy of politics, "[l]aw aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies".[56] Politics is the realm "in which power and its norms, the rules of prudence and expediency, operate",[57] and this realm must be overcome through the superior nature of the law. Carving out an independent rule of law seems to be a worthy endeavour. But on this first understanding of international criminal law, courts and their organs are either purely political actors, or they must be held out as immune to political pressures and interests. These views are too limiting, as becomes clear when we turn to the second type of view.

In the second camp, law and politics do not inhabit two separate spheres. Law is "not an answer to politics, neither is it isolated from political purposes and struggles".[58] On this view, even a limited conception of the political cannot be completely excluded from the legal domain. Hans Morgenthau developed an understanding of international law and politics that recognized the difficulty of separating the political and the legal.[59] Morgenthau claimed that "[a]nything might be, and nothing was necessarily political, including any question over which a court might possess jurisdiction", and thus the relationship between the political and the legal could not be symmetrical.[60] Legislatures make decisions about how courts should function, even overruling court decisions. That the ICC is largely untethered from a legislature should not make us think that politics can be completely kept out of prosecutorial and judicial decision-making. [61]

Some would claim that international criminal law came about as a codification of "customary and treaty-based international law, the applicable general principles of law and internationally recognized human rights",

56 Shklar, 1964, p. 111, see above note 54.

57 *Ibid.*, p. 126.

58 *Ibid.*, p. 143.

59 *Ibid*.

60 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, 2001, p. 441, citing Hans Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen*, Noske, Leipzig, 1929, pp. 62–72.

61 The Assembly of States Parties is the management oversight and legislative body of the ICC, but it does not hold the same power that most legislative bodies hold over the law in a domestic context. Since the body is made up of State Parties, it does not avoid politics simply by holding itself out as legislative.

reflecting a cosmopolitan commitment to universal human rights.[62] Others would argue that the international criminal legal system only came about as a result of political consensus among States. Modern international criminal law emerged in response to the atrocities committed during and after World War II, and the ICC came into existence through a large multilateral treaty. The international criminal legal system has grown in large part due to "its promise to make the world a better place",[63] but the growth has occurred through the promulgation of political agreements.

Sarah Nouwen and Wouter Werner argue that the ICC acts politically because it makes distinctions between friend and enemy.[64] They claim that the ICC "adjudicates crimes which are frequently related to politics, and it depends on a mysterious and seemingly magical "political will" for the enforcement of its decisions".[65] Frédéric Mégret has argued that while international criminal justice tries to distance itself from any "blatantly political decision", the aims of international criminal law "cannot come about without some political power".[66] The concern, however, is that even narrow political considerations could have too much influence on prosecutorial and judicial decisions. Once we acknowledge that politics and law always intersect, the hard question is whether a given political influence on a court is inappropriate, threatening the integrity of the relevant organ or the entire institution.

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62 See, for example, Alexander Heinze, "The Statute of the International Criminal Court as a Kantian Constitution", in Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018, p. 356 (http://www.toaep.org/ps-pdf/34-bergsmo-buis); see also Errol P. Mendes, *Peace and Justice at the International Criminal Court*, Edward Elgar Publishing, 2010, pp. 15, 21–22; Yvonne McDermott, "The Influence of International Human Rights Law on International Criminal Procedure", in Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, 2018, p. 282.

63 See John H. Barton and Barry E. Carter, "International Law and Institutions for a New Age", in *Georgetown Law Journal*, 1992–93, vol. 81, no. 3, pp. 535–562, 535, 536; see also Laurence Juma, "Unclogging the Wheels: How the Shift from Politics to Law Affects Africa's Relationship with the International System", in *Transnational Law and Contemporary Problems*, 2014, vol. 23, pp. 305–365, 309.

64 See Sarah M. H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan", in *European Journal of International Law*, 2010, vol. 21, no. 4, pp. 941–965, 942.

65 *Ibid.*, p. 943.

66 Frédéric Mégret, "The Anxieties of International Criminal Justice", in *Leiden Journal of International Law*, 2016, vol. 29, no. 1, pp. 197–221, 201.

Given the foundations and function of international criminal law,[67] we ought to view international criminal courts and tribunals as both political and legal entities, at least to some extent. Law and politics cannot be disconnected from each other. Given that laws are generally promulgated by political institutions, and international law necessarily involves the continued participation of political entities, the influence of politics on law is inevitable. So, by my lights, a 'political influence', or the participation of a political entity in a legal process, is not necessarily nefarious. Keeping politics from impermissibly intruding into the domain of law so as to maintain the integrity of legal institutions can be interpreted as preventing prosecutorial and judicial decisions from being made by political leaders who are not judicial officers. The Prosecutor of the ICC, for example, can actually be seen as a "counterweight to state power".[68] Political leaders are not expected to make decisions without bias for the interests of their own people (or themselves). Yet, we expect officers of a court to render *fair* decisions.

Accordingly, the distinction I draw to identify what constitutes an impermissible political influence, threatening the integrity of the ICC, relies on the concept of fairness. The goal of international criminal law is to 'bring the guilty to justice', and the commitment to giving a fair trial to each accused party is "merely a means, albeit conceivably a cardinal and central one".[69] Fairness is not sufficient for ensuring the integrity of international criminal justice institutions like the ICC, but I argue that it is necessary for both structural and substantive components of integrity. Accordingly, political influence is impermissible when it introduces certain kinds of unfairness into decision-making. Mégret contends that we cannot easily determine if the concept of fairness in international criminal law is meant to be procedural, substantive, or distributive.[70] I argue that we should care about all three types of fairness, despite the fact that they will sometimes

[67] International criminal law has come about through the co-operation of States seeking to prevent future mass atrocities. In the preamble of the Rome Statute, the treaty parties resolve to "guarantee lasting respect for and the enforcement of international justice", Rome Statute of the International Criminal Court, 17 July 1998, Preamble ('Rome Statute') (http://www.legal-tools.org/doc/7b9af9/).

[68] Allison M. Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", in *American Journal of International Law*, 2003, vol. 97, no. 3, pp. 510–552, 518.

[69] Mégret, 2016, p. 209, see above note 66.

[70] *Ibid.*, p. 210.

be at odds with one another, but that procedural fairness is particularly crucial for maintaining institutional integrity.

Procedural fairness is assessed on the basis of a system's rules.[71] Rights that are guaranteed by procedures "allow for a system of law to emerge out of a set of substantive rules and […] minimize arbitrariness".[72] A system can be said to be procedurally fair, regardless of outcomes, if the same rules are applied to all parties without bias. Correspondingly, an institution that is not procedurally fair can be seen as lacking structural integrity. The requirements for structural integrity cannot be met by a system that does not function with internal and external consistency, with at least a nominal commitment to seeking its own stated goals.

Substantive fairness involves the protection of substantive rights, such as the right to bodily autonomy, liberty from confinement, and a trial that does not result in a mistaken conviction.[73] This type of fairness ensures that trials do not result in absurd or intuitively immoral outcomes,[74] or in which there are not violations of the vague demands that officers of the Court act with "high moral character".[75] An institution that consistently reaches bad outcomes, even when following procedures, to the letter, might be said to lack substantive fairness. Again, even when an institution maintains structural integrity, the content of the integrity should be morally good as well, reflecting substantive integrity.

Distributive fairness in a criminal justice system involves who is actually tried for crimes, out of the group of all potential defendants.[76] A criminal justice system might be seen as fair with respect to distribution if

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71 See, for example, *ibid.*; Yvonne McDermott, *Fairness in International Trials*, Oxford University Press, 2016.

72 Larry May, *Global Justice and Due Process*, Cambridge University Press, 2011, p. 52.

73 See, for example, Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?", in *Law and Philosophy*, 1998, vol. 17, no. 1, pp. 19–42, 19.

74 See Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford University Press, New York, 1995; see also Lon L. Fuller, *The Morality of Law*, Yale University Press, 1964.

75 I merely note the sources of prosecutorial and judicial ethical obligations here. For a comprehensive analysis of prosecutorial ethics at the ICC, see Alexander Heinze and Shannon Fyfe, "Prosecutorial Ethics and Preliminary Examinations at the ICC", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (http://www.toaep.org/ps-pdf/33-bergsmo-stahn).

76 Mégret, 2016, p. 211, see above note 66.

it is willing and able to try all parties who deserve to be tried. While distributive fairness can be distinguished from substantive fairness, it can be captured by the concept of substantive integrity. While we might think that there is nothing procedurally[77] or substantively[78] wrong with the fact that nearly all of the investigations and cases at the ICC have been directed at the Global South, this distributive unfairness does not meet the requirements of substantive integrity. Both in fact and in terms of perception, this generates moral concern.

Again, we should care about all three types of fairness, and both structural and substantive features of integrity, but here I will argue that clear violations of procedure or structure are what constitute an impermissible political influence on the ICC. Like most criminal justice institutions, the ICC cannot be structured to completely avoid substantive[79] and distributive injustice. There may be *permissible* political influences that should nonetheless be avoided in order to maintain the perception and existence of substantive and distributive justice, and the corresponding perception and existence of the substantive integrity of the ICC. I will consider some of these influences in the next section.

## 21.4. Integrity of the ICC and its Organs

In this final section, I turn to some recent examples of actions taken by three organs (or sub-organs) of the ICC, each of which appears to threaten the integrity of the Court in one way or another, especially due to political influence. I begin with a discussion of some of the normative, substantive constraints on the individual judges and prosecutors who make up the organs and sub-organs of the Court. I consider the tension between political influence and integrity with respect to the actions taken by each organ. The two examples I use are cases that have received a great deal of discussion and criticism, inside and outside of the Court due to what the various decisions suggested about the direction of and prospects for the Court.

[77] Insofar as the situations and cases have been handled in accordance with the procedures outlined in the Rome Statute.

[78] Insofar as the outcomes of the cases have been accurate and morally defensible.

[79] The ICC cannot guarantee perfectly accurate results, but it can ensure that the dignity of each accused individual is respected.

### 21.4.1. Integrity at the Court

Prosecutors and judges at the Court maintain individual ethical obligations toward their roles in the criminal justice system. They must "be concerned with the way choices are made, defendants' rights are respected, and trials are conducted, independent of the end-states the trials produce".[80] Luban, for instance, claims that a lawyer's objective should always be to protect the human dignity of the client.[81] This means judges and prosecutors are obligated to aim at treating individuals as subjects of their experience and their testimony, and as individuals, rather than as entities that can be "entirely subsumed into larger communities" if doing so serves some desirable end-state.[82] In order to uphold this standard of human dignity, prosecutors and judges must never humiliate victims or defendants, or treat these individuals as mere resources to be used in furtherance of a particular outcome.[83]

Individual integrity for prosecutors and judges requires reflection on substantive moral values, but they must also think strategically about achieving substantive results. In order to maintain integrity, these individuals must keep their own guiding principles intact, as well as those of the OTP and the judiciary, and Court as an institution. The institutional integrity of the ICC is fragile, as the failure of any individual or organ of the Court could threaten the integrity of the ICC as a whole. One of the considerations that prosecutors and judges must take into account, in their own capacity and as representatives of organs of the Court, is whether or not an individual or collective decision is likely to threaten the continued existence of the institution of the ICC. This, in turn, would threaten the greater institution of international criminal law.

I return to the accounts we have from Taylor and Luban of integrity as wholeness, which are particularly relevant when applied to both individual prosecutors and judges, as well as the Court, in terms of demanding decisions that are unlikely to threaten the continued existence of the institution. If the ICC is to continue to exist, it must remain focused on identity-conferring commitments (as explained by Williams). These can be found in

80 Heinze and Fyfe, 2018, p. 10, see above note 75.

81 See David Luban, *Legal Ethics and Human Dignity*, Cambridge University Press, 2007, pp. 65–95.

82 *Ibid.*, p. 88.

83 *Ibid*.

the Preamble to the Rome Statute, including the idea that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,[84] the determination to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes",[85] and the resolution to "guarantee lasting respect for and the enforcement of international justice."[86] If the Court ceases to pursue the ends for which it was constructed, then it is likely to fail to meet the requirements for substantive and structural integrity, and may eventually fall apart altogether.

Accordingly, I argue that ICC prosecutors and judges are obligated to at least consider the end states that are reasonably expected be produced by their decisions, in order to maintain the stability and coherence of the Court. This will suggest the permissibility of certain political influences, and discourage others. I now turn to examples of situations in which the demands of integrity at the ICC have been influenced by politics.

### 21.4.2. The Judiciary

As Dworkin suggests, the judiciary is a critical site of integrity for a legal system, especially in a common law system or a hybrid system like the system at the ICC. On the Dworkinian view of law as integrity, judges are tasked with interpreting the law and making decisions as part of the long story of the ICC. Here we look at the coherence of three different judicial actions.

#### 21.4.2.1. Case Study: The *Bemba* Appeal[87]

In June 2018, the Appeals Chamber of the ICC acquitted Jean-Pierre Bemba Gombo ('Bemba') of the charges of war crimes and crimes against humanity, overturning the decision of Trial Chamber III to convict the defendant.[88] Three judges joined in the Judgment issued by the majority,

[84] Rome Statute, Preamble, see above note 67.

[85] *Ibid*.

[86] *Ibid*.

[87] A similar analysis can be found in Fyfe, 2020, see above note 5.

[88] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article

while two judges dissented.[89] The Judgment overturning the conviction focused on two grounds of appeal: that the conviction exceeded the charges, and that Bemba was not liable as a superior.[90]

#### 21.4.2.1.1. Second Ground of Appeal – Conviction Exceeding Charges

On one ground of appeal, the majority of the Appeals Chamber found that the Prosecutor offered a 'non-exhaustive' list of alleged criminal acts, including murder, rape and pillaging, which was broadly confirmed by the Pre-Trial Chamber.[91] The Prosecutor went on to provide information on individual criminal acts which were not stated explicitly in the initial charging document,[92] and the Trial Chamber convicted Bemba of a number of these acts.[93] Bemba alleged on appeal that "[n]early two thirds of the underlying acts for which [he] was convicted were not included or improperly included in the Amended Document Containing the Charges and fall outside the scope of the charges".[94]

Despite the Appeals Chamber's acknowledgement of amended documents containing more specific factual allegations against Bemba, the majority of the Appeals Chamber found that his convictions were for specific acts that were not substantiated in the Trial Chamber's conviction document,[95] and that the Trial Chamber erred when it convicted Bemba of acts which did not fall within the "facts and circumstances described in the charges."[96] The dissenting judges argued, conversely, that the Trial Chamber could consider any criminal acts that fell within the broad geographical, temporal, and other substantive parameters outlined by the Prosecutor.[97]

74 of the Statute", 8 June 2018, ICC-01/05-01/08A ('*Bemba* Judgment') (http://www.legal-tools.org/doc/40d35b/).

89 *Ibid*.

90 *Ibid.*, para. 32.

91 *Ibid.*, para. 75.

92 *Ibid.*, para. 76.

93 *Ibid.*, para. 83.

94 *Ibid.*, paras. 77–78.

95 *Ibid.*, paras. 116–118.

96 *Ibid*.

97 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański to the Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636, paras. 32, 36 ('Dissenting Opinion') (http://www.legal-tools.org/doc/dc2518/).

They claimed that Bemba's conviction did not exceed the facts and circumstances described in the charges.[98]

#### 21.4.2.1.2. Third Ground of Appeal – Command Responsibility

On another ground of appeal, the majority of the Appeals Chamber concluded that the Trial Chamber erred in concluding that Bemba failed to take all necessary and reasonable measures to prevent or repress the crimes committed by Mouvement de Libération du Congo ('MLC') forces in the Central African Republic ('CAR'), that his case was materially affected by these errors, and that Bemba cannot be held criminally liable for crimes committed by MLC troops during the CAR operation.[99] The majority of the Appeals Chamber found that the Trial Chamber ignored significant evidence relevant to Bemba's liability for the crimes committed by MLC forces.[100] The dissenting judges disagreed, finding that the Trial Chamber's conclusion with respect to Bemba's liability for the crimes committed by MLC forces in the CAR was in fact supported by the evidence.[101]

#### 21.4.2.1.3. Integrity of the *Bemba* Appeals Chamber

It may be the case that some of the judges in the Appeals Chamber failed to meet the requirements for institutional integrity. The arguments proffered by the dissenting judges in the *Bemba* Appeal suggest that the requirements for charging individuals with crimes and the requirements for establishing liability under a theory of command responsibility each depart significantly from prior jurisprudence.[102] If this is the case, the ICC Judiciary is no longer telling a consistent, unified story, unless it is able to give a coherent explanation for these significant departures. As written, the Appeals Chamber's majority decision reflects a failure to express a "coherent conception of justice and fairness"[103] and a failure to take into account the actual political history of its community and institution.[104] The dissenting judges also suggest that the majority view creates a challenge for the international rule

98 *Ibid.*, para. 32.

99 *Bemba* Judgment, paras. 137, 194, see above note 88.

100 *Ibid.*, paras. 166–194.

101 Dissenting Opinion, paras. 185–191, see above note 97.

102 I do not have space to go into detail about the jurisprudence here, but instead I rely on the argument of the dissenting judges.

103 Dworkin, 1986, p. 225, see above note 43.

104 *Ibid.*

of law. Bemba was detained for many years, and his supporters claimed that his prosecution was politically-motivated.[105] Yet, the lack of accountability suggests that the ICC cannot be a source of justice for victims of human rights violations.

Importantly, the ICC was set up to prosecute the leaders and organizers of mass atrocity crimes, accused of planning and co-ordinating heinous crimes. It is plausible that the majority of the Appeals Chamber may not have been acting in good faith in their interpretation, due to their failure to consider the previous decisions and the political history of the Court, or the impact of the decision on international rule of law. Here there may be a failure to consider the permissible political influence of history, and it is not known whether this the result of a good faith adjudicative effort, the personal preferences of the judges, or impermissible political influence of outside forces. It may be that this decision reflects a breach of the requirements for institutional integrity, insofar as the majority opinion in the *Bemba* case does not tell a coherent story (whether or not there is one for the judges to tell).

### 21.4.2.2. Case Study: The Afghanistan Situation

In April 2019, the Pre-Trial Chamber of the ICC unanimously rejected the Office of the Prosecutor's request to proceed with an investigation for alleged crimes against humanity and war crimes in Afghanistan.[106] The request from the OTP concerned potential crimes committed by the Taliban and their affiliated Haqqani Network, Afghan National Security Forces, US armed forces and the Central Intelligence Agency of the US.[107] The judges declined to accept the request on the basis that "an investigation into the situation in Afghanistan at this stage would not serve the interests of justice".[108] In March 2020, the Appeals Chamber of the ICC overturned the

[105] For instance, the former United States Under-Secretary for African Affairs, Herman Cohen, wrote to the ICC and requested Bemba's release prior to the 2018 presidential elections in the Democratic Republic of the Congo. The letter is available on *La Libre Afrique*'s web site.

[106] ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, 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-02/17-33 ('Decision Pursuant to Article 15') (http://www.legal-tools.org/doc/2fb1f4/).

[107] *Ibid*.

[108] *Ibid.*, p. 32.

Pre-Trial Chamber's rejection, paving the way for the Prosecutor's investigation into the situation in Afghanistan.[109]

#### 21.4.2.2.1. Pre-Trial Chamber Decision

Because the situation was brought to the Court by the OTP, the Pre-Trial Chamber was tasked with providing prior authorization for the OTP to proceed with the investigation, which is "a specific, fundamental and decisive filtering role".[110] Under the Rome Statute, the OTP must provide the relevant evidence to suggest that there is a "reasonable basis to proceed"[111] with an investigation, and the Pre-Trial Chamber is asked to examine the request and the supporting material, and approve or reject the request to proceed with an investigation.[112] In determining whether or not such a reasonable basis exists, the OTP and the Pre-Trial Chamber must consider three separate factors. The first question is whether there is enough evidence "to believe that a crime within the jurisdiction of the Court has been or is being committed".[113] The second question is whether the case is admissible under Article 17 of the Rome Statute.[114] Finally, the third question is whether, "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".[115]

In deciding not to authorize an investigation into the situation in Afghanistan, the Pre-Trial Chamber found that the OTP's request established a reasonable basis to proceed in terms of jurisdiction, as well as gravity and complementarity (that is, admissibility under Article 17).[116] However, the Pre-Trial Chamber determined that an investigation would not serve the interests of justice.[117] In so doing, it relied on the understanding that "an investigation would only be in the interests of justice if prospectively it ap-

109 ICC, *Situation in the Islamic Republic of Afghanistan*, Appeals Chamber, Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138 ('Judgment on the Appeal') (http://www.legal-tools.org/doc/x7kl12/).

110 *Ibid.*, para. 30.

111 Rome Statute, Article 15, see above note 67.

112 *Ibid*.

113 *Ibid.*, Article 53(1)(a).

114 *Ibid.*, Article 53(1)(b).

115 *Ibid.*, Article 53(1)(c).

116 See Decision Pursuant to Article 15, see above note 106.

117 *Ibid*.

pears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame."[118] With respect to the situation in Afghanistan, the Pre-Trial Chamber determined that the interests of justice could not be served due to:

- the significant time elapsed between the alleged crimes and the Request;
- the scarce co-operation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence;
- the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution's investigative efforts and activities at this stage.[119]

Accordingly, the Pre-Trial Chamber rejected the OTP's request due to the fact that "the current circumstances of the situation in Afghanistan [were] such as to make the prospects for a successful investigation and prosecution extremely limited."[120]

#### 21.4.2.2.2. The Integrity of the Pre-Trial Chamber

Based on the above summary, it may be the case that the judges in the Pre-Trial Chamber failed to meet the requirements for institutional integrity, and on two separate bases. First, like the judges in the majority from the Appeals Chamber in the *Bemba* case, it appears to be the case that the judges are not telling a consistent story.[121] While the Pre-Trial Chamber is not required to act consistently with previous authorization decisions, it

[118] *Ibid.*, para. 89.

[119] *Ibid.*, para. 91.

[120] *Ibid.*, para. 96.

[121] The OTP has consistently made decisions without regard to feasibility of investigations (see, for example, ICC-OTP, "Report on Preliminary Examination Activities 2013", 25 November 2013, para. 70 (http://www.legal-tools.org/doc/dbf75e/)). Additionally, there is no jurisprudential support for the Pre-Trial Chamber's decision to reject the authorization altogether, when there is only evidence that investigating certain of the crimes for which the OTP has provided information will prove challenging. ICC, *Situation in the Islamic Republic of Afghanistan*, Office of the Prosecutor, Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', 7 June 2019, ICC-02/17-34, para. 1 ('Request to Appeal') (http://www.legal-tools.org/doc/039451/).

should, at least on Dworkin's model of law as integrity, offer an explanation for the clear departure from previous decisions.

Additionally, it is likely that the Pre-Trial Chamber was influenced by impermissible political forces, threatening the integrity of the Pre-Trial Chamber and the Court. The decision concludes with what appears to be a permissible concern for the continued existence of the Court, as the Pre-Trial Chamber's decision notes that "pursuing an investigation would [not] result in meeting the objectives listed by the victims favoring the investigation, or otherwise positively contributing to it",[122] which, "far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve".[123] On its face, these statements appear to reflect a concern for maintaining the perception and existence of the Court as a valuable tool for seeking international criminal justice.

And yet, other evidence suggests that this may not be the real reason for rejecting the OTP's request. The OTP has asked the Pre-Trial Chamber to authorize their investigation into Afghanistan because it thinks that it has the resources, in terms of evidence and prospects for co-operation, to effectively pursue the investigation. The Pre-Trial Chamber's rejection of their claims suggests that open hostility the US has exhibited toward the Court broadly, and toward this situation in particular, is a sufficient justification for denying the authorization for the investigation. If a State's disinterest in co-operation (under a particular administration or under any administration) is sufficient to end an investigation, then it seems the institution of the ICC is likely to crumble. The Court exists, in part, because of States' being unwilling or unable to pursue justice for international crimes in their own criminal justice systems. The role of the ICC is to pursue justice *in spite of* this unwillingness, and the OTP has the discretion to decide to pursue cases despite state refusals to co-operate. If the position of the Trump Administration with respect to the ICC played a role in the Pre-Trial Chamber's decision, then this constitutes a serious political threat to the integrity of the Pre-Trial Chamber and the Court as a whole.

[122] Decision Pursuant to Article 15, para. 96, see above note 106.

[123] *Ibid*.

#### 21.4.2.2.3. The Appeals Chamber Judgment

The OTP sought and was granted leave to appeal a "decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" under Article 82(1)(d) of the Rome Statute.[124] In this sub-section and the next, I outline and analyse the Appeals Chamber's response, although I consider the OTP's appeal in a later section.

The Appeals Chamber unanimously agreed to amend the Pre-Trial Chamber's 2019 decision on the basis of two conclusions. First, the Appeals Chamber found that the Pre-Trial Chamber erred in reviewing the OTP's analysis of the factors under Article 53(1)(a) to (c) of the Rome Statute, which require that a situation involves (a) a reasonable basis to believe that a crime within the Court's jurisdiction has been committed or is being committed, (b) admissibility, and (c) the absence of substantial reasons to believe that an investigation would not serve the interests of justice.[125] Second, the Appeals Chamber found that the Pre-Trial Chamber's decision to authorize an investigation "should not be restricted to the incidents specifically mentioned in the Prosecutor's request under Article 15(3) of the [Rome] Statute and incidents that are 'closely linked' to those incidents".[126] In the interest of space and in light of the analysis above, I focus on the first of these conclusions.

With respect to the first conclusion, the Appeals Chamber considered that in the five decisions that had been previously issued by pre-trial chambers in authorizing investigations under Article 15(4) of the Rome Statute, they "considered all the factors set out in Article 53(1) of the Statute, including, to a certain extent, the Prosecutor's interests of justice assessment under Article 53(1)(c) of the Statute."[127] The Appeals Chamber found that Article 53(1) "reflects an expectation that the Prosecutor will proceed to investigate referred situations, while allowing the Prosecutor not to proceed in the limited circumstances set out in Article 53(1)(a) to (c) of the Statute."[128] But this was the first appellate test of how Article 53(1) should be

[124] Rome Statute, Article 82(1)(d), see above note 67.

[125] Judgment on the Appeal, para. 1, see above note 109; Rome Statute, Article 53(1), see above note 67.

[126] Judgment on the Appeal, para. 2, see above note 109; Rome Statute, Article 15(3), see above note 67.

[127] Judgment on the Appeal, para. 24, see above note 109.

[128] *Ibid.*, para. 29.

applied in a case that is initiated *proprio motu*, by the Prosecutor.[129] Article 15 details that it is within the discretionary power of the Prosecutor to determine whether or not there is a reasonable basis to proceed with such an investigation, and if the Prosecutor finds such a reasonable basis, the Pre-Trial Chamber's authorization is required.[130]

The Appeals Chamber found that Article 15 of the Rome Statute "governs the initiation of a *proprio motu* investigation, while Article 53(1) concerns situations which are referred to the Prosecutor by a State Party or the Security Council".[131] Article 15, the Appeals Chamber notes, does not refer to Article 53 of the Rome Statute, nor does it refer to the interests of justice.[132] Rather, Article 15 only tasks the Pre-Trial Chamber with considering if "there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court".[133] The Appeals Chamber found that while the Prosecutor is required to consider all the factors under Article 53(1), these factors "are *not* relevant for the purposes of the pre-trial chamber's decision".[134] Accordingly, the Pre-Trial Chamber erred in considering the 'interests of justice' factor from Article 53(1)(c) of the Rome Statute.[135] The Pre-Trial Chamber instead "should have addressed only whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction".[136]

Since the 'interests of justice' factor was the Pre-Trial Chamber's sole consideration in declining to authorize the initiation of the investigation into the situation in Afghanistan, the Appeals Chamber found that "if the matter were remanded to the Pre-Trial Chamber, it would have no other recourse but to authorise the investigation".[137] Given this inevitable out-

[129] *Ibid.*, para. 25.

[130] *Ibid.*, paras. 30, 32; Rome Statute, Article 15, see above note 67.

[131] Judgment on the Appeal, para. 33, see above note 109.

[132] *Ibid.*, para. 34; Rome Statute, Article 15, see above note 67.

[133] Rome Statute, Article 15(4), see above note 67; Judgment on the Appeal, para. 34, see above note 109.

[134] Judgment on the Appeal, para. 35, see above note 117.

[135] *Ibid.*, para. 37.

[136] *Ibid.*, para. 46.

[137] *Ibid.*, para. 54.

come, the circumstances, and "in the interests of judicial economy",[138] the Appeals Chamber decided to amend the Decision Pursuant to Article 15 and authorize the Prosecutor's investigation into the situation in Afghanistan. [139]

#### 21.4.2.2.4. The Integrity of the Appeals Chamber

Here, the Appeals Chamber relies on judicial precedent (and the lack thereof), statutory interpretation, and the history of the drafting of the Rome Statute, in order to construct a coherent narrative and to provide clear guidance for the ICC and its organs going forward. As a result, the Appeals Chamber makes a better case than the Pre-Trial Chamber for maintaining (or restoring) the structural integrity of the institution.

First, the Appeals Chamber deals directly with cases that conflict or appear to conflict with their conclusions, not ignoring relevant evidence and maintaining consistency in behaviour, and thereby contributing to the integrity of the ICC and the judiciary. [140] As stated above, the Appeals Chamber addresses the five previous decisions from Pre-Trial Chambers authorizing investigations under Article 15(4) of the Rome Statute, all of which involved consideration of the Prosecutor's Article 53(1)(c) 'interests of justice' assessment, at least somewhat.[141] The Appeals Chamber is not obligated, however, to follow the precedent set by the Pre-Trial Chambers, so the Appeals Chamber provides a comprehensive analysis of why it chooses to read the Rome Statute differently, and set a new standard going forward. In so doing, the Appeals Chamber clarifies the relationship between the Prosecutor and the Pre-Trial Chamber where the Prosecutor has initiated an investigation *proprio motu*, which strengthens the structural integrity of the institution as a whole.

Second, the Appeals Chamber conducts a thorough analysis of the text of the Rome Statute, in light of the plain meaning of the text, the statutory history of the document, and the function of Articles 15 and 53 of the Rome Statute. The Appeals Chamber refers to the drafting process of the Rome Statute in noting the careful balance sought in giving the Prosecutor

138 *Ibid*.

139 *Ibid*.

140 See Taylor, 1981, p. 148, see above note 10.

141 Judgment on the Appeal, para. 24, see above note 109.

discretion to initiate investigations.[142] The discretion afforded by Article 15 is distinguished from the parameters of Article 53(1), which reflect "an expectation that the Prosecutor will proceed to investigate referred situations, while allowing the Prosecutor *not* to proceed in limited circumstances set out in Article 53(1)(a) to (c) of the [Rome] Statute".[143] The Appeals Chamber contrasts this with Article 15, noting that it would be "contrary to the very concept [of discretion] to suggest that a duty to investigate could be imposed by the Pre-Trial Chamber in the absence of a request for authorization of an investigation by the Prosecutor".[144] This reflects a difference in the appropriate role of judicial review with respect to referred and Prosecutor-initiated investigations.

The Appeals Chamber's analysis of the content and placement of Articles 15 and 53(1) shows that the two Articles are meant to address a Prosecutor's investigation in "two distinct contexts".[145] Article 15 of the Statute governs the initiation of a *proprio motu* investigation, while Article 53(1) concerns situations which are referred to the Prosecutor by a State Party or the Security Council. On a plain reading, Article 15 does not refer to Article 53, nor does it refer to the 'interests of justice', but it does state what that the Pre-Trial Chamber *is* supposed to consider.[146] Article 15(3) can be considered alongside Article 53(1), since both address the subject-matter of the Prosecutor's decision, but Article 15(4), which addresses the Pre-Trial Chamber's assessment, cannot similarly be read in light of Article 53(1).[147] The Appeals Chamber "concludes that a plain reading of the relevant legal provisions in their context suggests that the Pre-Trial Chamber under Article 15(4) of the [Rome] Statute is only required to assess the information contained in the Prosecutor's request to determine whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's ju-

142 *Ibid.*, para. 26; see also Morten Bergsmo, Jelena Pejić, and Dan Zhu, "Article 15", in Otto Triffterer and Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck, Hart and Nomos, München, Oxford and Baden-Baden, 2016, pp. 726–729; Morten Bergsmo, Pieter Kruger, and Olympia Bekou, "Article 53", in *ibid.*, pp. 1366–1368.

143 Judgment on the Appeal, para. 29, see above note 109.

144 *Ibid.*, para. 31.

145 *Ibid.*, para. 33.

146 *Ibid.*, para. 31; Rome Statute, Article 15, see above note 67.

147 Judgment on the Appeal, para. 36, see above note 109.

risdiction".[148] Again, the Appeals Chamber is providing clarity on roles and standards here, rather than trying to thread the needle to justify a nonsensical or incoherent distinction.

Finally, in direct contrast to the Pre-Trial Chamber, the Appeals Chamber's judgment is not undermined by concerns about political influence or interference. The Appeals Chamber notes that failing to acknowledge the appropriate scope of the Prosecutor's discretion cannot be justified as a way to ensure "that the Prosecutor does not embark on a frivolous or politically motivated investigation", since it would instead serve to "inhibit the Prosecutor's truth-seeking function".[149] The Appeals Chamber distinguishes the broad scope of the investigation from jurisdiction in particular cases, claiming that it is "premature and unnecessary to resolve specific and detailed jurisdictional issues on an incident-by-incident basis for the purposes of authorising the investigation into the situation in Afghanistan".[150] This preference for maintaining broad scope in the early stages of the legal process can be distinguished from the Pre-Trial Chamber's concerns that "the prospects for a successful investigation and prosecution [were] extremely limited",[151] which avoids even the appearance of political influence from particular parties, either directly or due to concerns that the parties will be uncooperative. This contributes to both the substantive and structural integrity of the ICC, avoiding unfair procedures and ensuring that the moral purpose of the ICC is not thwarted.

### 21.4.3. The Office of the Prosecutor

While Dworkin's concept of judicial integrity does not directly apply to the OTP, the presence of discretion provides an opportunity for a parallel, insofar as the OTP is also invested in telling a coherent story and ensuring the survival of the institution, albeit without the specific expectation that the OTP adhere to precedent. But the OTP must retain its reputation as a fair organ, not subject to impermissible influences that would challenge its identity as a source of justice.

148 *Ibid.*, para. 45.

149 *Ibid.*, para. 61, see above note 109.

150 *Ibid.*, para. 78, see above note 109.

151 Decision Pursuant to Article 15, para. 96, see above note 106.

#### 21.4.3.1. Case Study: Response to the *Bemba* Verdict and Integrity of the Office of the Prosecutor[152]

Several days after the Appeals Chamber rendered its verdict in the *Bemba* case, the ICC Prosecutor, Fatou Bensouda, released a statement[153] expressing concern with the Appeals Chamber decision. Notably, she explicitly claimed that she "must uphold the integrity of the Court's processes and accept the outcome".[154] Yet she also indicated her worries that the Appeals Chamber's judgment reflected radical interpretations of jurisprudence and precedent.[155] Prosecutor Bensouda ended her statement with an acknowledgment of the victims of violence in the Central African Republic and proclaimed the solidarity of the OTP with these victims.[156]

It is not clear that the OTP acted with institutional integrity from the standpoint of wholeness or integration, although this does not reflect anything about the Prosecutor's individual integrity or her commitment to keeping the substantive principles of the institution intact. The OTP's decisions must reflect reasoned deliberation, not just loyalty or a commitment to achieving outcomes that are desired by victims. Accordingly, I conclude that while the OTP should use its outreach capacity to assure victims of violence that the Court is not a futile source of international criminal justice, the OTP failed to exhibit institutional integrity when the Prosecutor used the OTP's official platform to suggest the opposite, with respect to individual cases or the Court's practices as a whole, thereby undermining the integrity of the Court and the OTP.

#### 21.4.3.2. Case Study: Response to the Afghanistan Decision and Integrity of the OTP

Several days after the Pre-Trial Chamber rejected the OTP's request for authorization to pursue an investigation into crimes committed in Afghanistan, Prosecutor Bensouda released a statement acknowledging the decision.[157] In the short statement, she notes that the only concern of the Pre-

[152] A similar analysis can be found in Fyfe, 2020, see above note 5.

[153] ICC, "Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo", 13 June 2018.

[154] *Ibid*.

[155] *Ibid*.

[156] *Ibid*.

[157] ICC, "Statement of the Office of the Prosecutor following the decision of Pre-Trial Chamber II concerning the Situation in Afghanistan", 12 April 2019.

Trial Chamber is their assessment of the interests of justice, and states that the OTP "will further analyse the decision and its implication, and consider all available legal remedies".[158] In June 2019, the OTP requested permission to appeal the Pre-Trial Chamber's decision to reject the request for authorization to pursue an investigation into crimes committed in Afghanistan.[159] In the filing, the OTP sought to appeal the decision based on:

- the Pre-Trial Chamber's interpretation of Articles 15(4) and 53(1)(c), with regard to the assessment of the interests of justice;
- the exercise of the Pre-Trial Chamber's discretion under those provisions; and
- the Pre-Trial Chamber's understanding of the scope of any investigation it may authorise, in light of Article 15 and other material provisions of the Statute.[160]

According to the OTP, these issues, affect "the fair and expeditious conduct of the proceedings", and "[t]hey also affect not only the outcome of any trial but also the very possibility of a trial occurring".[161] The OTP also claims that "the Pre-Trial Chamber's reasoning is likely to affect all situations which the Prosecutor may consider bringing before the Court *proprio motu*".[162]

It is in the second case study that we can see a clear rejection of impermissible political influences on the OTP, as an organ of the Court, and a clear concern for the political history and the continued existence of the Court. In short, the OTP's filing reflects the individual integrity of those who drafted the request for appeal, and the institutional integrity of the organ of the OTP. The OTP's request may be, in part, an attempt to reassure the specific victims of violence in Afghanistan, and the global community as a whole, and it is grounded in the identity-conferring commitments of the ICC as an institution, and the OTP as an organ of that institution.

With respect to structural institutional integrity, the filing of the request follows the stated procedures for disagreeing with a decision of the

158 *Ibid*.

159 Request to Appeal, see above note 121.

160 *Ibid.*, para. 3.

161 *Ibid.*, para. 4.

162 *Ibid.*, para. 5.

Pre-Trial Chamber, and it contains both substantive and structural concerns about the continued functioning of the OTP, the Pre-Trial Chamber, and the Court. The OTP's response seeks to clarify the OTP's ability to pursue their statutory tasks in the future, which will be necessary for the perceived and actual functioning of the Court within the relevant political climate. The OTP's request reflects reasoned deliberation and a focus on both substantive and structural integrity, and as we saw in a previous sub-section, the Appeals Chamber agreed with the OTP on these fronts.

## 21.5. Conclusion: The Future of the Integrity of the Court

The case studies above suggest that both the Judiciary and OTP are at risk for allowing impermissible political influences to threaten the integrity of the organs, and the ICC itself. If the majority of the Appeals Chamber and the Pre-Trial Chamber in fact failed to act with institutional integrity, which seems likely, this is concerning for the sub-organs, for the future of jurisprudence at the ICC, and for the Court itself. The potential casualties of these decisions speak directly to Prosecutor Bensouda's urge to defend the institution of the ICC, and challenge the decisions of both the Appeals Chamber and Pre-Trial Chamber. The Prosecutor cannot be responsible for maintaining the integrity of the entire institution if a separate branch fails in its own sub-institutional integrity requirements. Therefore, Prosecutor Bensouda individually, and the OTP as an organ, must remain committed to both substantive and structural integrity requirements if the Court is to remain coherent and continue to exist.

Bemba's 2018 acquittal by the Appeals Chamber and the Pre-Trial Chamber's 2019 rejection of the OTP's request to pursue an investigation in Afghanistan have been public lightning rods for those concerned with defending and challenging the legitimacy of the ICC and the enterprise of international criminal law. These decisions, among others, bring to light concerns about impermissible political influences on the Court, and the negative impact of these influences on the Court's integrity. Looking toward the future, it will be crucial for the OTP and the Judiciary in particular to think about the integrity of the Court and its organs in broader terms, considering the requirements of both substantive and structural integrity before making public decisions that could threaten the future of the primary seat of international criminal justice.

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**The Past, Present and Future of the International Criminal Court**

Alexander Heinze and Viviane E. Dittrich (editors)

This edited volume provides a broad perspective on the International Criminal Court's development over time and explores some of its topical issues, achievements, challenges and critiques. The anthology combines reflections from scholars and practitioners and includes voices from inside and outside the Court, featuring multiple readings of its activities, practice and developments. In line with the volume's title, the authors portray the establishment and development of the Court (hence the theme 'past'), critically engage with its successes and challenges ('present'), and draw conclusions on its achievements and way forward ('future'). The book examines five key topics: prosecutorial policy and strategy, jurisdiction and admissibility, victims and witnesses, defence issues, and legitimacy and independence. It includes a number of papers and speeches given at the Nuremberg Forum 2018.

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