

**Title:** Key Operational Challenges to Ensuring the Long term Success of the International Criminal Court

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**Date of Submission:** December 2016

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## **Abstract**

*The International Criminal Court requires a solid foundation on which to build its future success, investigating the most heinous international crimes and prosecuting the alleged perpetrators. This thesis examines some remaining challenges to ensure the long term success of the Court. It begins by requiring the ICC to establish a culture that adheres to the values of the organization and a legal system capable of fairly and expeditiously carrying out its mission. This requires an ethical approach and effective management. It is necessary for the Office of the Prosecutor to understand the burden of proof requirements at the confirmation of charges stage, which in turn requires the Pre-Trial Chambers to be consistent in their decisions. The OTP appear to have accepted the direction from the Pre-Trial Chamber, that its investigations should be largely completed by the time of the confirmation of charges hearing. This is, in the author's view, a mistake and should be challenged again at an opportune moment. The Office of the Prosecutor, learning from its experience, is adhering to good governance by creating and publishing its strategic goals. One of the strategic goals is to have largely completed its investigations by the time of the confirmation of charges hearing, a reaction to a critical decision by the Pre-trial Chamber in the Gbagbo case.*

# Table of abbreviations

AI – Administrative Instruction

ASP – Assembly of States Parties

AU – African Union

CAH - Crimes Against Humanity

CAR – Central African Republic

CIV – Ivory Coast

DRC – Democratic Republic of the Congo

ExCom – Executive Committee of the Office of the Prosecutor

FAO – Food and Agriculture Organisation of the United Nations

FIDH - Fédération Internationale des Droits de l’Hommes

GA – General Assembly

GTA – General Temporary Assignment

ICC – International Criminal Court

ICL – International Criminal Law

ICTR - International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the Former Yugoslavia

ILC – International Law Commission

IMT – The International Military Tribunal

IOP – Immediate Office of the Prosecutor

JT – Joint Team

NGO – Non-Governmental Organisation

NMT - The Nuremberg Military Tribunals

OTP – Office of the Prosecutor

PSU – Protection Strategies Unit

SCSL - Special Court for Sierra Leone

STA – Short Term Assignment

STL - Special Tribunal for the Lebanon

UGA – Uganda

UN – United Nations

UNSC – United Nations Security Council

UNSG – United Nations Secretary General

VWS – Victims and Witnesses Section

VWU – Victims and Witnesses Unit

WWII – World War 2

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# Chapter 1 – Introduction

## 1.1 Introduction

This chapter will, following a brief introduction, set out the research question of the thesis. It will also explain the justification for the decision to address that particular research question.

In July 2012 the International Criminal Court (ICC, or Court) celebrated its tenth anniversary<sup>1</sup>. Even though, as a new institution, it had the benefit of learning lessons from the *ad hoc* tribunals<sup>2</sup> also based in The Hague – the International City of Peace and Justice<sup>3</sup> – the first decade of the Court’s existence was difficult and many hurdles were faced.

The Office of the Prosecutor (OTP, or Office) has clearly identified the first decade as the ‘start-up phase’,<sup>4</sup> perhaps in an effort to distance itself from some public failures in the early years of its operation, although the OTP has never made such a claim. For example, during this period, there were occasions when the *Lubanga*<sup>5</sup> trial looked to be in serious difficulty and the proceedings were stayed on two separate occasions.<sup>6</sup> In other cases, not all of the charges brought by the Prosecution were accepted by the pre-trial chamber. In the Democratic Republic of Congo (DRC)

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<sup>1</sup> The Rome Statute entered into force on 1<sup>st</sup> July 2002 after it was ratified by 60 states.

<sup>2</sup> The *ad hoc* tribunals are those tribunals established by the UNSC to investigate or prosecute alleged breaches of international criminal law in specific instances. They include: the Yugoslavia and Rwandan tribunals as well as the Special Court for Sierra Leone and Special Tribunal for the Lebanon.

<sup>3</sup> See UN Secretary General’s remarks at the 60<sup>th</sup> anniversary celebration of the International Court of Justice, The Hague on 12<sup>th</sup> April 2006, <http://www.icj-cij.org/presscom/index.php?pr=1005&lg=en&pt=1&p1=6&p2=1/> - Last accessed 19/08/2013. The Municipality of the City of The Hague and the Dutch Ministry of Foreign Affairs have embraced this slogan in order to promote the city and, depending on the audience, is sometimes expanded to include ‘security’ (i.e. the International City of Peace, Justice and Security).

<sup>4</sup> Strategic Plan June 2012 – 2015, International Criminal Court, Office of the Prosecutor, 11 October 2013, para. 2, p.5, <http://www.legal-tools.org/doc/954beb/>.

<sup>5</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06.

<sup>6</sup> In June 2008 and again in July 2010.



Situation<sup>7</sup> in the case of *The Prosecutor v. Callixte Mbarushimana*,<sup>8</sup> the Pre-Trial Chamber declined to confirm the charges against Mr. Mbarushimana and he was released from custody in December 2011, in what was an embarrassing defeat for the Prosecutor.<sup>9</sup> Also within the DRC situation, the acquittal of Mathieu Ngudjolo in December 2012<sup>10</sup> brought the spotlight upon the Court and reinforced a growing notion that the OTP was struggling to secure convictions.<sup>11</sup>

Tellingly, the first Prosecutor, Luis Moreno Ocampo, publicly at least, did not seem to accept any criticism for how the OTP conducted its activities during his term of office. “I received criticism because I was too slow in Sudan, too fast in Libya; too comprehensive in one case, a very small case in Lubanga. That is the life of the Prosecutor. I’m not in a popularity contest. I respect my legal mandate; standards were fully respected”<sup>12</sup>, he said in an interview at the end of his tenure. It is this arrogance that tends to lead the author to the conclusion that the OTP, or maybe just Ocampo himself, was not taking responsibility for his actions. In the same interview he stressed that “the Court itself is managing the challenges of international criminal law. We manage well”<sup>13</sup> but “the system around the Court responsible for

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<sup>7</sup> A ‘situation’ could also be called an investigation, and within each situation it is possible to have a number of cases. For example, in the DRC situations there are a number of individual cases, which would usually be tried separately. The ICC also has a third category of affairs called ‘preliminary examinations’, where evidence is being assessed but no decision has been taken on whether or not to open an investigation. For more information, see: <https://www.icc-cpi.int/pages/situations.aspx?ln=en>.

<sup>8</sup> *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10.

<sup>9</sup> A positive spin on the Chamber failing to confirm charges in *Mbarushimana*, is that it is evidence that the Court is functioning and capable of taking tough and fair decisions. On 23<sup>rd</sup> April 2010, Pre-Trial Chamber I also declined to confirm the charges in *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, <http://www.legal-tools.org/doc/cb3614>.

<sup>10</sup> *The Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, 18 December 2012, <http://www.legal-tools.org/doc/2c2cde/>.

<sup>11</sup> The Prosecution appealed the verdict on 20 December 2012. On 27 February 2015, the verdict was upheld by the Appeals Chamber - Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, <http://www.legal-tools.org/doc/1dce8f/>.

<sup>12</sup> IPI Global Observatory, 25 January 2012, <http://theglobalobservatory.org/2012/01/interview-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court/> - Last visited 25/02/2015

<sup>13</sup> *Ibid.*

implementing and enforcing its decisions can still improve”, he said, “as the international relations challenges are still there”.<sup>14</sup>

However, a number of significant problems have persisted beyond the Court’s ‘start-up’ phase and, as late as June 2013 the Pre-Trial Chamber in the Situation in the Republic of Cote d’Ivoire (CIV),<sup>15</sup> in the case of *The Prosecutor v. Laurent Gbagbo*,<sup>16</sup> failed to confirm the charges against the former Ivorian President<sup>17</sup>. The decision was unexpected by the OTP’s trial team and illustrated a profound gap in the interpretation of the Rome Statute, Rules of Evidence and Procedure and case-law of the Court between the OTP on the one hand, and this Pre-Trial Chamber on the other.<sup>18</sup> One of the main issues highlighted by this decision is the applicable evidentiary standard required for the confirmation of charges. Previous decisions by the Court had given guidance on this very matter. However, in this case, the Pre-Trial Chamber<sup>19</sup> found that the Prosecutor did not present sufficient evidence to meet the standard of the ‘substantial grounds to believe’ threshold required under Article 61(7) of the Statute.<sup>20</sup>

Additionally, in December 2013 the Prosecutor made the shocking announcement that she had requested an adjournment of the commencement of the trial against Mr. Uhuru Muigai Kenyatta,<sup>21</sup> the incumbent President of Kenya, within the Kenya (KEN) Situation,<sup>22</sup> stating that “... [I] come to the conclusion that currently the case against Mr. Kenyatta does not satisfy the high evidentiary standards required at trial. I therefore need time to complete efforts to obtain additional evidence, and to

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Situation in the Republic of Cote d’Ivoire*, ICC-02/11.

<sup>16</sup> *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15. The Blé Goudé Gbagbo cases were joined on 11 March 2015. The trial finally began on 28 January 2016.

<sup>17</sup> *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 03 June 2013, <http://www.legal-tools.org/doc/2682d8/>.

<sup>18</sup> This issue is discussed in detail in Chapter 4.

<sup>19</sup> Although not unanimously: Presiding Judge, Silvia Fernández wrote a dissenting opinion - <http://www.legal-tools.org/doc/4936d0/>.

<sup>20</sup> The article says “shall...determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.

<sup>21</sup> *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11.

<sup>22</sup> *Situation in the Republic of Kenya*, ICC-01/09.

consider whether such evidence will enable my Office to fully meet the evidentiary threshold required at trial.”<sup>23</sup> The case highlights the vulnerability of the OTP when relying largely on witness testimony to prove its case. According to the International Bar Association, who launched a report entitled ‘Witnesses before the International Criminal Court’, in July 2013:

“The ICC has made significant strides in protecting, supporting and managing witnesses during its first ten years of operation; both the Court and its Member States are to be commended. However, the Court still encounters serious witness-related challenges in almost all of its cases.’ Dr. Ellis cited the case of the prominent Kenyan politician Mr Francis Muthaura, accused of crimes against humanity, as a prime example, saying, ‘The ICC Prosecutor recently dropped all charges against Mr Francis Muthaura due to critical and unresolved problems with key witnesses.’ He added, ‘This single case highlights the myriad of issues surrounding witness-management and the need for the Court to evaluate and review its approach to witnesses in order to bolster its international credibility and ensure fair, efficient and effective trials.’”<sup>24</sup>

Later in 2013, in a different case, *Bemba*,<sup>25</sup> the arrest of several members of the defence team of Jean-Pierre Bemba Gombo<sup>26</sup> indicates that some of the difficulties faced by the Prosecutor, even while outside her control, have the potential to seriously damage the reputation of the OTP, and the Court generally.

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<sup>23</sup> “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following an application seeking an adjournment of the provisional trial date”, 19/12/2013 - <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-19-12-2013>.

<sup>24</sup> “ICC’s reliance on live witness testimony at a crossroads states new IBA report”, Mark Ellis, IBA Executive Director - <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4470a96b-c4fa-457f-9854-ce8f6da005ed> - Last visited 12/12/2013.

<sup>25</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08. Bemba was found guilty, on 21 March 2016, of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging). The crimes were committed in Central African Republic (“CAR”) from on or about 26 October 2002 to 15 March 2003 (“2002-2003 CAR Operation”) by a contingent of Mouvement de Libération du Congo (“MLC”) troops. Mr Bemba was a person effectively acting as a military commander with effective authority and control over the forces that committed the crimes. He was sentenced on 21 June 2016, to 18 years of imprisonment. See: <https://www.icc-cpi.int/car/bemba> - Last accessed 29/08/2016.

<sup>26</sup> See: “Aimé Kilolo Musamba, Fidèle Babala Wandu, and Jean-Pierre Bemba Gombo make first appearance before ICC”, 27/11/2013, in relation to *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13 - <https://www.icc-cpi.int/Pages/item.aspx?name=966&ln=en>.

Despite the challenges,<sup>27</sup> it would be wrong to say that the ICC did not make any progress in its first decade. Under the stewardship of its first Prosecutor, Luis Moreno Ocampo, an Argentinian lawyer who earned a reputation as a public prosecutor during the Argentine ‘junta trials’ in 1985,<sup>28</sup> a functioning organisation was developed and the strategic use of narrow, focused investigations combined with the deployment of staff on a rotating basis, meant that Situations were opened in seven countries.<sup>29</sup> Furthermore, the Court’s first guilty verdict was delivered on 14th March 2012 against Thomas Lubanga Dyilo, for the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities.<sup>30</sup>

It could well be argued that the mere existence of the Court is already a significant victory against the odds.

“The fact that the Rome Statute passed with such a lopsided victory, despite all of the objections from different sides regarding the semantics of the document, was a major victory in itself. Then, the rapidness of the ratification of the treaty, just four short years after the monumental signing, showed that the need to establish a world criminal court was present. Since the inception of the court, fifty seven additional nations have joined the court, with more coming all the time. The support for the ICC is definitely growing, especially among the smaller nations of the world, as they view the ICC as a support system to their

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<sup>27</sup> 11 years after the formation of the Court, only cases based in Africa have been opened. This has led to claims of an anti-African bias and on 11<sup>th</sup> October 2013 the African Union held an extraordinary session specifically to address the “[p]rogress Report on the Implementation of Decision Assembly/AU/Dec. 482 (XXI) of May 2013 on International Jurisdiction, Justice and ICC”. Pressure is being brought from influential opponents of the ICC from within the African Union after a number of its leaders were indicted. See: <http://www.au.int/en/content/extraordinary-session-assembly-african-union> - Last visited 09/10/2013.

<sup>28</sup> The trial of the juntas was the first major trial held for war crimes since the Nuremberg Trials in Germany after the Second World War. It lasted from April to August 1985 and resulted in three generals and two admirals being found guilty, two of whom (General Videla and Admiral Massera), received life sentences.

<sup>29</sup> A further Situation was opened by Prosecutor Bensouda, in Mali, in January 2013.

<sup>30</sup> By September 2016, the Court had formally closed five cases. Two cases are at the Reparations stage, one is at the Appeals stage, a further six cases are at Trial stage and four are at the Pre-Trial stage. See: <https://www.icc-cpi.int/> - Last accessed 29/08/2016.

own domestic judicial institution.”<sup>31</sup>

Within the 10 active Situations<sup>32</sup>, the Office of the Prosecutor has opened 18 cases. Half of the Situations were referred to the Court by the States themselves.<sup>33</sup> A further two were referred to the ICC by the United Nations Security Council (UNSC)<sup>34</sup> and a two more were initiated by the Prosecutor under the *proprio motu* powers<sup>35</sup> delivered by Article 15 of the Rome Statute.<sup>36</sup>

The OTP is aware of the challenges that lie ahead and is mindful of its potential for making an impact on peace and justice in the world’s most war-torn regions and indeed its obligation to the victims of crimes.<sup>37</sup> The OTP strategy recognises that “jurisprudence is still developing, [the] judges are indicating through their decisions that they are expecting the OTP to be (more) trial-ready at an earlier stage in the proceedings and that they are expecting the OTP to submit more and different kinds of evidence than what the Office considered would suffice in its focused investigations and prosecutions.”<sup>38</sup>

## 1.2 Research Question

The main goal of this thesis is to identify some areas where the Court needs to establish a solid foundation upon which to grow into an institution, which can most effectively achieve its mandate. The primary research question therefore is: What are

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<sup>31</sup> Donovan, Daniel, “International Criminal Court: Successes and Failures, International Policy Digest”, 23 March 2012, <http://intpolicydigest.org/2012/03/23/international-criminal-court-success-and-failures-of-the-past-and-goals-for-the-future/>.

<sup>32</sup> The Court treats the two referrals from the Central African Republic as separate Situations.

<sup>33</sup> Uganda, Mali, Central African Republic (1 and 2) and Democratic Republic of the Congo.

<sup>34</sup> Darfur, Sudan and Libya.

<sup>35</sup> Kenya, Georgia and Côte d’Ivoire.

<sup>36</sup> According to Schabas, by 2010 the Court was “fully operational and that it has been able to arrest suspects and hold trials is an outstanding accomplishment. Few would have expected this sixteen years ago when international criminal justice revived ... with the creation of the [ICTY]. In 1993 the international Law Commission was working diligently on the preliminary draft of the Rome Statute, but probably most of its members – indeed, most knowledgeable observers – did not expect things to move very quickly” – Schabas, William, “The International Criminal Court: A Commentary on the Rome Statute”, Oxford Commentaries on International Law, Oxford University Press, p.7.

<sup>37</sup> See generally: OTP strategic plan June 2012 -2015 - <http://www.legal-tools.org/doc/954beb/>.

<sup>38</sup> *Ibid*, p.5.

some of the key operational challenges remaining to ensure the long term success of the International Criminal Court?

This can be addressed by looking at three separate areas: cultural, strategic and procedural/legal. By taking a more holistic approach it is possible to make the Court more successful generally. The ICC is not merely a court, it is a complex institution that needs to be managed strategically and with a large and diverse staff it is important to both understand and nurture the culture of the institution. It is however, necessary to implement some limitations to this work and therefore from the very beginning, it should be stated clearly that there are a great many issues which the author will not attempt to cover although some of the main criticisms of the Court and the OTP will be set out in a preliminary chapter, in order to provide the general context.<sup>39</sup>

In order to adequately answer the Research Question, the thesis will ask three sub-questions, the first of which relates to the legal culture of the Court; is the legal culture of the court hindering its effectiveness? This particular issue has not been subject to much examination by scholars, although Judith McMorrow<sup>40</sup> did excellent research on the topic as it related to the International Criminal Tribunal for the Former Yugoslavia (ICTY). Lawyers before international tribunals are licenced by their home bar associations. Their behaviour before an international tribunal could result in disciplinary hearings against them back home. But expectations of domestic bar associations differ. For example, “a British-trained defence counsel would not prepare a witness in advance of trial because it is forbidden in Great Britain. For U.S.-trained defence counsel, however, it would be considered inappropriate *not* to interview and prepare a witness for the rigors of trial if there were an opportunity to do so”.<sup>41</sup>

From a procedural point of view, the confirmation of charges process has produced mixed results and received much commentary. The Prosecutor has been heavily

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<sup>39</sup> See *Infra* Chapter 2, “Background and criticisms of the OTP”.

<sup>40</sup> McMorrow, Judith, “Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY”, 30 B.C. Int'l & Comp. L. Rev. 139 (2007), <http://lawdigitalcommons.bc.edu/iclr/vol30/iss1/8> - Last accessed 05/09/2016.

<sup>41</sup> *Ibid*, p.142.

criticised for the lack of evidence presented by the Pre-Trial Chamber<sup>42</sup> which declared that it “considers that the Prosecutor’s evidence, viewed as a whole, although apparently insufficient, does not appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges under Article 61(7)(b) of the Statute. Rather than making a final determination on the merits at this time, the Chamber considers it appropriate in this case to adjourn the hearings.”<sup>43</sup> Therefore, the second sub-question is: does the confirmation of charges stage need to be re-examined?

Thirdly, the Office has gone to some trouble to explain to its stakeholders, that it has a strategy in place. The third sub-question asks: where does the Prosecutor herself see the future of the OTP? The staff in the Office need to understand where the strategic direction lies. If this is clearly defined then it is easier to follow. It is also a necessary step in analysing the OTP as a whole because any recommendations should preferably be in keeping with Prosecutors Bensouda’s vision.

### **1.3 Justification for Research**

At the turn of the century, the new Court was looming and international criminal law had become more visible than at any time since the Second World War.<sup>44</sup> The former Yugoslavian and the Rwandan tribunals were having a big impact on the subject, and academics and commentators discovered a rich source of new law on which to focus their attention. There was a spike in publications, but these were largely theoretical, as the Court had yet to actually prosecute any cases. It was not until the *Lubanga* case that commentators really gained an insight to the workings of the OTP.<sup>45</sup>

As a long time servant of the Court, the author feels to a certain extent, a responsibility to do all in his power, limited as it may be, to ensure that it is the best

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<sup>42</sup> *The Prosecutor v. Laurent Gbagbo*, ICC-02/02/11-01/11.

<sup>43</sup> *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 03 June 2013, <http://www.legal-tools.org/doc/2682d8/>.

<sup>44</sup> Anderson, Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences” - *European Journal of International Law* 20, no. 2 (April 2009): 331-58.

<sup>45</sup> By this stage, “Archbold: International Criminal Court” had already been published and up-dated, without the benefit of a single judgement being delivered.

that it can be<sup>46</sup>. Therefore, the reason for choosing this topic is both practical and personal. It is only by exploring the past behaviour in an honest way that real lessons can be learnt, and for the Court to start to mature.

The Prosecutor of the Court frequently talks in terms of justice,<sup>47</sup> when it could be argued that the role of the OTP is merely to prosecute.<sup>48</sup> Perhaps the matter is not as straight forward in the case of the ICC because it does seem to have a role in providing justice.<sup>49</sup> It will also be considered throughout the following pages, how success or failure should be measured.<sup>50</sup> For example, the failure to secure a conviction at trial could be regarded as evidence that the process works and that an innocent person is set free. The safeguards in place to protect the rights of the accused, worked.

Expectations for the Court remain high and many still do not understand the limitations of the Court's mandate. The Prosecutor receives numerous requests to open investigations where there is no power or jurisdiction to do so. According to Human Rights Watch, the Court's "... daunting mandate and world-wide reach have made the flaws in its workings more visible. The governments on which the ICC depends to carry out its mandate have been inconsistent in their support, particularly when it comes to arrests ... [as of June 2012] [a]rrrest warrants are pending for suspects in the Libya, Sudan, Uganda, Cote d'Ivoire and D.R. Congo investigations.

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<sup>46</sup> The author is currently Head of the Information and Evidence Unit in the OTP, a position he has held since 2006.

<sup>47</sup> See for example: "Statement of ICC Prosecutor Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army", September 2016, The Hague Justice Portal, <http://www.haguejusticeportal.net/index.php?id=13596> - Last accessed 05/09/2016.

<sup>48</sup> Is it the Prosecutor's role to bring justice to victims or merely prosecute those responsible for committing crimes under her jurisdiction? Where the two converge, it is straight forward.

<sup>49</sup> The final paragraph of the Preamble of the Rome Statute specifically states that it is "[r]esolved to guarantee lasting respect for and the *enforcement of international justice*" (italics added).

<sup>50</sup> It is clear for example, that the mission of the ICTY, because of the mechanism which established it (i.e. Chapter VII of the UN Charter), is to 'maintain or restore international peace and security' - From address to the General Assembly of the United Nations, 4<sup>th</sup> November 1997.



The Court and its member countries face major challenges in meeting the expectations, for the court, in its second decade.”<sup>51</sup>

Finally, the culture of institutions is created right from the beginning. The Court today is fourteen years old, it is young still, but no longer new and its culture is being created. The possibility still exists to correct any bad habits that may have formed, but soon this opportunity will expire and methodologies and systems will become embedded making change difficult. It is therefore also opportune to visit the first chapter of the OTP’s work and consider the foundation on which its future will be built.<sup>52</sup>

#### **1.4 Structure of the Thesis**

As there are already a great many published works which describe how the Court came into existence, it is not necessary to delve into this further. Any text book about the Court will begin with a chapter setting out its origins via the Nuremberg trials and the *ad hoc*<sup>53</sup> tribunals of the early 1990s.<sup>54</sup> This thesis will begin, in Chapter 2, with a brief look at how the court came into existence and also will set out some of the main criticisms levied at the Court and the Office of the Prosecutor.

The primary sources for Chapter 3, which looks at the culture of the Court, including the conflict on the different legal traditions, are interviews conducted by the author

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<sup>51</sup> <http://www.hrw.org/topic/international-justice/international-criminal-court> - Last visited 24/12/2013.

<sup>52</sup> Already the ICC’s Registry has embarked upon on a process of “ReVision” where they are seeking to amend the structure of the organ. It has resulted in the first structured staff redundancy programme. It is an attempt to realign the work practices from the theoretical model to the reality.

<sup>53</sup> The term *ad hoc* tribunals will be referred to repeatedly during this thesis. For the most part, it refers to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Sometimes it is also extended to include the Special Court of Sierra Leone (SCSL) and the Special Tribunal for the Lebanon (STL).

<sup>54</sup> Schabas, William, “The U.N. International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone”, Cambridge University Press, 2006, p. 7; Röling, B.V.A., “The Law of War and International Jurisdiction since 1945”, Hague Academy of International Law, Collected Courses, 1960-II, Leiden: A.W. Sijthof, 1961, p.356.

with two ICC officials<sup>55</sup> who were able to provide detailed knowledge and perspective on how the Court evolved in the way it did and, for example, on the balance between Civil and Common Law features in the Rules of Procedure and Evidence, as both interviewees were involved with the ICC going back as far as 1997, so even before the Court came into existence. Additionally, both officials still currently work for the Court in senior positions. The author was satisfied that the use of interviews would work well for Chapter 3 but not for additional parts of this thesis, because on the topic of the Court's history and culture they could speak freely and objectively; however, the same interviewees would not be free or able to offer any information on the cases before the Court. Both interviews were conducted at the seat of the Court in The Hague, and while they followed a structure (i.e. questions and answers), they were dynamic and the discussions were wide ranging.

Few lawyers actually practice International Criminal Law on a full time basis. Apart from those hired directly by the Court, for most lawyers who appear before the ICC on the defence side, it is not their full time job.<sup>56</sup> International criminal law is a relatively small aspect of public international law. However, in recent years between the ICC and the *ad hoc* tribunals, there is an increasing body of law for practitioners to study. Lawyers will come to the Court with their own experiences, learned from a habit of practice in their national jurisdictions. A clear contrast is the difference between an American lawyer (common law) and a German lawyer (civil law). Their route to the profession is different and their experiences, coming as they do from different legal traditions will vary. The difficulties are not confined to just the advocates, but include judges elected to serve in the Court, who are drawn from all over the world.<sup>57</sup>

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<sup>55</sup> The interview with Gilbert Bitti, currently a Senior Legal Adviser to the ICC Judges, took place on 30 June 2015. Hans Bevers, Legal Adviser to the Prosecutor, was interviewed by the author on 7 July 2015. Both meetings were held at ICC headquarters in The Hague.

<sup>56</sup> For example, one defence attorney, Mr Kaufman, who represented Jean-Pierre Bemba and Callixte Mbarushimana, is based in England and has regular domestic clients as well as his international criminal practice. With a few notable exceptions (for example, Karim Khan), lawyers practicing international criminal law, do not do so full time.

<sup>57</sup> Article 36(8)(a)(i) of the Rome Statute requires that judges should be selected by the States Parties, to take into account "the principal legal systems of the world".

In Chapter 4 the confirmation of charges stage of the judicial process is examined, a topic which has been considered a great deal by commentators. The confirmation process can be used to filter out the unmeritorious cases, or cases where the evidence is too weak to justify a trial and thus protecting suspects from unnecessary and potentially lengthy exposure to trial.<sup>58</sup>

Chapter 5 will consider what changes Fatou Bensouda has introduced since taking over the position in 2012. It will also examine the strategic plan produced by the OTP and add comment to the feasibility of the plan.

The final chapter will be the conclusion, which will offer concrete recommendations for the success of the court in the medium to long term. This chapter will also make some suggestions for future research and as a postscript highlight some recent developments in the court, which can be seen in a positive light and thus establishing a more solid foundation on which to grow.

## **Chapter 2 – Background and Criticisms of the OTP**

### **2.1 Introduction**

This chapter will provide a background to the creation of the Court and also highlight some of the work done in the first generation of its existence. It is not necessary to describe how the Court came into being, as the journey is very well documented elsewhere,<sup>59</sup> however, what follows is necessary to provide the reader with an understanding of the remaining, substantive, portion of the thesis, and to inform the Research Question.

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<sup>58</sup> Nerlich, Volker, "The Confirmation of Charges Procedure at the International Criminal Court. Advance or Failure?", *Journal of International Criminal Justice* (2012) 10 (5): 1339-1356, p.1354.

<sup>59</sup> See for example: Schabas, W.A., "An introduction to the International Criminal Court", Third Edition, Cambridge University Press, 2007, at Chapter 1.

It is also useful to identify some of the most common criticisms made about the OTP, as these will be generally referred to throughout the thesis.<sup>60</sup> Furthermore, it is important to understand the commentary offered from a wide variety of observers, in order to properly address the most pressing topics, facing the OTP and the wider Court as a whole.

## **2.2 The Beginning of International Criminal Law<sup>61</sup>**

According to one commentator, there was a long tradition during the 19<sup>th</sup> and early 20<sup>th</sup> century of not placing the political leadership of a defeated country on trial: “The relevant negative practice was predicated on the assumption that wars were a fact of life and that nothing could be gained by instituting criminal proceedings against the responsible office holders after the end of hostilities”,<sup>62</sup> believing that the inter-relationship between many of Europe’s monarchs might have a bearing on this ‘liberalism’<sup>63</sup>. Nevertheless, as early as January 1942, representatives from a number of Allied Countries met in London to consider how they might eventually punish the Nazis for war crimes, followed throughout the war by similar meetings in Tehran<sup>64</sup>, Yalta<sup>65</sup> and Potsdam<sup>66</sup>. However, it was the London Charter<sup>67</sup> (sometimes referred to

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<sup>60</sup> The examples provided are not an exhaustive list by any means.

<sup>61</sup> Most of the academic literature points out that there were early examples of international trials, but the first significant attempt did not come until the Paris Peace Conference in 1919 at the conclusion of which there was an attempt to prosecute the German Kaiser. Many commentators make reference to the trial of Peter von Hagenbach as far back as 1474, as the first international criminal trial (See for example: Glasius, Marlies, “The International Criminal Court A Global Civil Society Achievement”, Routledge, 2006 at p. 5), dismissed by the author as irrelevant to the ICC. Perhaps more relevant is the idea conceived by Gustave Moynier, a founder of the International Committee of the Red Cross, following the Franco-Prussian war, in 1872. The proposal suggested that an international tribunal be established to punish those who violated international humanitarian law.

<sup>62</sup> Tomuschat, Christian, “The Legacy of Nuremberg”, *Journal of International Criminal Justice* 4 (2006), 830-844, p.831.

<sup>63</sup> Kaiser Wilhelm II, Emperor of Germany was the eldest grandson of British Monarch, Queen Victoria and a second cousin of Tsar Nicholas II of Russia, among others.

<sup>64</sup> This was the first time that Stalin met with Churchill and Roosevelt met at took place in November 1943 at a time when the war began to swing in favour of the Allies.

<sup>65</sup> Took Place in February 1945, was also referred to as the Crimea Conference. See: Berthon, Simon; Potts, Joanna, “Warlords: An Extraordinary Re-creation of World War II Through the Eyes and Minds of Hitler, Churchill, Roosevelt, and Stalin”, Da Capo Press, 2007.

<sup>66</sup> The conference at Potsdam, which is not far from Berlin, took place after the surrender of Germany. By this time Roosevelt had died and was replaced by Truman. It was agreed here that the Nazi leadership would be put on trial.

as the Nuremberg Charter) which gave the tribunal, which was to follow, its legal basis.<sup>68</sup> Following the end of WWII, it was decided to hold the trials of the most prominent Nazi leaders in the city of Nuremberg,<sup>69</sup> once considered the ceremonial birthplace of the Nazi party.<sup>70</sup>

Justice Jackson, who had been appointed by President Truman in May 1945 to act as the US representative and Chief Counsel at Nuremberg,<sup>71</sup> insisted that the Allies must respect the Rule of Law,<sup>72</sup> stating that “[t]he ultimate principle is that you must put no man on trial under the form of judicial proceedings, if you are not willing to see him free if found not guilty. If you are determined to execute a man in any case, there is no occasion for a trial”.<sup>73</sup> Indeed, three of those tried were acquitted and others received prison sentences.<sup>74</sup> Initially not all the powers were in favour of holding the trials.<sup>75</sup> These proceedings, at Nuremberg, were the first of their kind in

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<sup>67</sup> The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis – 8<sup>th</sup> August 1945.

<sup>68</sup> Although the Tribunal had a legal basis, one of the arguments put forward by critics of the court was that the defendants could not be punished for crimes for which there was no offence at the time of the act, *nullum crimen sine lege*, for ‘crimes against peace’, these days called the crime of ‘aggression’.

<sup>69</sup> The International Military Tribunal (“IMT”) gained more prominence over the Nuremberg Military Tribunals (NMT), because the accused were some of the most high-ranking leaders of the defeated regime, including Rudolf Hess, Herman Goring and Martin Bormann.

<sup>70</sup> Whatever about the symbolic impact, the city had a large courthouse with a prison attached, which remarkably remained intact despite much of the rest of the city being badly damaged due to allied bombing.

<sup>71</sup> Executive Order 9547 Providing for Representation of the United States in Preparing and Prosecuting Charges of Atrocities and War Crimes Against the Leaders of the European Axis Powers and Their Principal Agents and Accessories, May 2, 1945.

<sup>72</sup> By some accounts, Churchill was in favour of summarily executing selected Nazi leaders and allegedly made this proposal at Yalta, but he was overruled by Roosevelt. See: Cobain, Ian, “Britain favoured execution over Nuremberg trials for Nazi leaders”, The Guardian, 26 October 2012, <https://www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders> - Last accessed 29/08/2016.

<sup>73</sup> Robert H. Jackson, in an address to the American Society of International Law, cited by Harris, Whitney, “Justice Jackson at Nuremberg”, International Lawyer, vol. 20, no. 3, Summer 1986, p. 869.

<sup>74</sup> Hjalmar Schacht, Franz von Papen and Hans Fritzsche were all found to be not guilty.

<sup>75</sup> In fact it was reported that Churchill was initially in favour of executing the captured Nazi leaders without even a trial. In an essay written about the Nuremberg Trials, Doug Linder writes “Churchill reportedly told Stalin that he favoured execution of captured Nazi leaders. Stalin answered, “In the Soviet Union, we never execute anyone without a trial.” Churchill agreed saying, “Of course, of course. We should give them a trial first.” All three leaders issued a statement in

history, where jurists from different nations came together to prosecute individuals for their actions during the war. Crimes against peace and war crimes were added to by a new category of crime, crimes against humanity,<sup>76</sup> which rejected the previous defence of obeying superior orders, which was pleaded at Leipzig, following the end of the First World War.<sup>77</sup>

When opening the trial, Justice Jackson declared: “That four great nations, flushed with victory and stung with injury, would stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that power has ever paid to reason.”<sup>78</sup>

According to John Bolton<sup>79</sup> “[w]henver the idea of a war crimes tribunal is raised, Nuremberg is the model invariably cited. But an international criminal court [will be] nothing like Nuremberg”.<sup>80</sup> One of the most significant points about Nuremberg, to the extent that it relates to the ICC, is that it took place. That, by itself, was a large step forward from the aftermath of previous wars.<sup>81</sup> Additionally, a precedent was established that crimes committed in war would be punished.

“The most important point of Nuremberg was the conclusion that aggressive war, which had been a national right throughout history, was henceforth going to be punished as an international crime. That was a revolution in thinking.

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Yalta in February, 1945 favouring some sort of judicial process for captured enemy leaders. <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nurembergACCOUNT.html> - Last accessed 15/05/2016.

<sup>76</sup> Set out in Section 6 of The Charter and Judgment of the Nürnberg Tribunal – “History and Analysis: Memorandum submitted by the Secretary-General Formulation of the Nürnberg Principles”, [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_5.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_5.pdf) - Last accessed 07/08/2016.

<sup>77</sup> For an interesting discussion on the debate between customary international law and the ICC’s statute on this topic, see: Gaeta, Paola, “The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law”, EJIL, 1999, <http://ejil.org/pdfs/10/1/571.pdf> - Last accessed 08/08/2016.

<sup>78</sup> Cited in Telford Taylor, “The Anatomy of the Nuremberg Trials”, New York, 1992, p.167.

<sup>79</sup> Former US Ambassador to the United Nations 2005-2006 and a high profile critic of the ICC.

<sup>80</sup> Dempsey, Gary T., “Reasonable Doubt: The Case Against the Proposed International Criminal Court”, from Driscoll, William, Zompetti, Joseph; and Zompetti, Suzette W., (Editors), “The International Criminal Court. Global Politics and the Quest for Justice”, The International Debate Education Association, 2004.

<sup>81</sup> Following the First World War there was no serious effort to prosecute those most responsible for serious crimes committed during the conflict, although it is conceded that the Leipzig trials at least set the foundation for the Nuremberg and Tokyo trials.

We've always had wars, and many would say that warfare was inevitable and immutable as part of some Divine eternal plan – “The big fish eat the little fish”. Well Justice Jackson said, “No more”...the time had come when we must hold accountable those leaders who hold the reins of power, so they will know that they will be answerable for their evil deeds, and warfare is an evil deed.”<sup>82</sup>

While Nuremberg can be viewed as the beginning of modern international criminal law, its importance to the ICC is more symbolic than practical. The two courts, in fact, were vastly different institutions. The *ad hoc* tribunals, established in the 1990's had a more direct impact and influence on the institution that was being negotiated in Rome in 1998.

### 2.3 The Rome Conference

Despite some initial headway in the post war years, progress on the development of an international criminal court was disrupted by the Cold War<sup>83</sup> and, comparatively little work was done between the end of the war and the early 1990s. However, once the International Law Commission (ILC)<sup>84</sup> finally finished its task of creating a draft statute, it was submitted to the United Nations General Assembly in 1994.<sup>85</sup> The Assembly then created the Ad Hoc Committee on the Establishment of an International Criminal Court which met twice the following year, 1995. The next step was the creation of the Preparatory Committee on the Establishment of an

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<sup>82</sup> Ferencz, Benjamin B., “A World of Peace under the Rule of Law: The view from America”, Washington University Global Studies Law Review, Symposium – Judgment at Nuremberg, Vol. 6, No. 3, 2007, p.663-664.

<sup>83</sup> The General Assembly suspended the mandate of the ILC in 1954.

<sup>84</sup> The International Law Commission was established by the General Assembly, in 1947, to undertake the mandate of the Assembly, under article 13(1)(a) of the Charter of the United Nations to “initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification”. See <http://legal.un.org/ilc/>. - Last accessed 03/03/2016. The Commission, according the Article 15 of its statute has two main functions: 1) “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States”, and 2) “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States” See: United Nations, *Statute of the International Law Commission*, 21 November 1947, [http://untreaty.un.org/ilc/texts/instruments/english/statute/statute\\_e.pdf](http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf) - Last accessed 24/05/2014.

<sup>85</sup> The report, which also contains commentaries on the draft articles, appears in “Yearbook of the International Law Commission”, 1994, Vol. II, Part Two.

International Criminal Court, whose function was to prepare a more diplomatically acceptable text which could be presented to a diplomatic conference. This work was completed in 1998.<sup>86</sup> Finally, after almost fifty years the United Nations held a full diplomatic conference<sup>87</sup> in Rome.

The Conference was attended by 160 States, many with large delegations. The Statute was adopted on July 17<sup>th</sup> 1998,<sup>88</sup> after five intense weeks of negotiations between the states with a great deal of involvement from civil society. Before the Court could be formally established, there was a requirement for 60 States to ratify the Statute. This happened on 11 April 2002 and the Treaty finally entered into force on 1 July 2002.<sup>89</sup> In October 2016 the Court has ten cases under preliminary examination<sup>90</sup> and is currently conducting investigations in a further ten situations.<sup>91</sup>

## 2.4 Common Criticisms of the OTP

This section will set out the most frequent criticisms of the OTP and the ICC that the author has encountered. Some have more merit than others and some are more persistent than others. It is not proposed to go into each topic in much detail, merely

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<sup>86</sup> During the 6<sup>th</sup> committee of the 52<sup>nd</sup> session of the General Assembly in late 1997, the US Ambassador to the United Nations, Bill Richardson declared that *“As we approach the 21st Century, individuals--of whatever rank in society—who participate in serious and widespread violations of international humanitarian law must no longer act with impunity. The time has come to create an international criminal court that is fair, efficient, and effective, and that serves as a deterrent and a mechanism of accountability in the years to come. We therefore strongly support the decision to hold a diplomatic conference to finish and adopt the statute of a Court in the summer of next year.”* Evidence that the United States, in theory, were in favor of a permanent international criminal court. However, his support was not absolute and he did, in the same speech, acknowledged that there was further work to be done and cautioned that important details should be ironed out before the conference as they could prove to be barriers to the success of the mission: *“It is neither prudent nor wise to leave such supposed “details” unresolved, as there may be surprising controversy and difference of opinion, and a total absence of shared assumptions, about even very simple, albeit essential, procedures and rule”.* Debate on the Establishment of an International Criminal, New York, 23 October 1997, <http://www.iccnw.org/?mod=ga52> - Last accessed 12/02/2014.

<sup>87</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

<sup>88</sup> The vote actually might have taken place in the early hours of the following day, the 18<sup>th</sup> of July 1998.

<sup>89</sup> <http://www.iccnw.org/?mod=icchistory>.

<sup>90</sup> <https://www.icc-cpi.int/pages/preliminary-examinations.aspx> - Last accessed 28/08/2016.

<sup>91</sup> <https://www.icc-cpi.int/pages/situations.aspx> - Last accessed 28/08/2016. Within some situations, cases have been completed; nevertheless the general investigation remains open.



to present the reader with a cursory look at the most common criticisms directed towards the Court. That the challenges faced by the Court are immense is not really in doubt; for example, one challenge experienced by the OTP is the sheer difficulty in actually collecting evidence and it is therefore not to be unexpected that it has received criticism in this area. In addition this section will address *inter alia*: the Court's focus on Africa, the apparent desire for states to self-refer rather than have the Prosecutor use her on power under article 15 of the statute, shortcoming in preliminary examinations, the OTP's reliance on NGO's and other actors, particularly at the early stages of an investigation, the lack of a formal code of conduct for the OTP and finally the accusation of impartiality on behalf of the Office of the Prosecutor. Not all of the following specific criticisms will be addressed within this thesis beyond acknowledging that they exist, for the purposes of economy.

#### 2.4.1 Evidence Collection

In many cases, ICC investigators have access to the Situation countries where investigations are taking place. They may even have the assistance of the governments of those countries.<sup>92</sup> In the Darfur Situation however, it was not possible to visit the region and the Government of Sudan would not provide any assistance; particularly after President Omar al-Bashir was accused by the ICC Prosecutor of being responsible for genocide, crimes against humanity and war crimes committed in Darfur since 2003.<sup>93</sup> Because of these circumstances, the OTP

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<sup>92</sup> There is a long running debate about the ICC's involvement in the African continent. Currently all of the active situations are in Africa and there has been a lot of criticism, including from some leading voices within the continent suggesting that external forces were interfering in Africa's problems. The debate centers around the conflict between peace and justice. Thabo Mbeki believes that the priority is "to stop the killing of ...Africans. But the challenge that arises is when someone says that the issue of justice trumps the issues of peace". See: Thabo Mbeki on Al Jazeera, "Justice cannot trump peace", November 26, 2013, Sierra Express Media, <http://www.sierraexpressmedia.com/archives/63396>.

<sup>93</sup> In his "Report of the Prosecutor of the International Criminal Court, to the Security Council Pursuant to UNSCR 1593 (2005)", Prosecutor Ocampo said that "[t]he initiation of the investigation marks the start of a new phase in the proceeding that will require specific, full and unfettered cooperation of the Government of Sudan and other parties in the conflict". See: [https://www.icc-cpi.int/nr/rdonlyres/cc6D24F9-473F-4A4F-896B-01A2B5A8A59A/0/ICC\\_Darfur\\_UNSC\\_Report\\_290605\\_en.pdf](https://www.icc-cpi.int/nr/rdonlyres/cc6D24F9-473F-4A4F-896B-01A2B5A8A59A/0/ICC_Darfur_UNSC_Report_290605_en.pdf) - Last accessed 15/08/2016. However, by the time of the OTP's 18<sup>th</sup> Report to the Security Council in 2013, the Prosecutor reported that "The Government of the Sudan's failure to cooperate with the ICC is but

has had to rely on third parties, often Non-Governmental Organisations (NGOs), to provide it with information and evidence, a practice for which they have been criticised by the Judges.<sup>94</sup>

A further difficulty experienced by the OTP when collecting evidence is that governments who support the Court and its work, can often not be seen to assist investigations for political reasons. For instance, South Africa is a State Party and it recently received criticism for failing to arrest President Omar al-Bashir when he visited the country in 2015.<sup>95</sup>

The Office's practices of collecting evidence are looked at in Chapter 4, specifically in the context of the Confirmation of Charges hearings.

#### 2.4.2 Focus on Africa

One of the most persistent criticisms of the OTP is its apparent focus on the continent of Africa. The African Union's threat to withdraw from the ICC has made such criticism an urgent issue.<sup>96</sup> This is a problem which both the current and the former Prosecutor have addressed on numerous occasions. Just prior to taking over the leadership of the OTP, Fatou Bensouda stated "[w]ith due respect, what offends me most when I hear criticisms about the so-called African bias is how quick we are to focus on the words and propaganda of a few powerful, influential individuals and

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*one of the many incidents of the Sudan's continuous failure and/or refusal to implement the Security Council's decisions. This has bolstered Mr Al-Bashir's resolve to ignore the Security Council prompting him to even publicly boast in a 13 October 2011 speech that the Sudan did not implement Security Council resolutions."* See: "Eighteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)", <https://www.icc-cpi.int/iccdocs/otp/OTP-18ReportUNSCDafurDecember2013.pdf> - Last accessed 15/08/2016

<sup>94</sup> *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to article 61(7)(c)(i) of the Rome Statute, 03 June 2013, para.29 - <http://www.legal-tools.org/doc/2682d8/>.

<sup>95</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Order requesting submissions from the Republic of South Africa for the purposes of proceedings under article 87(7) of the Rome Statute, 04 September 2015 - <http://www.legal-tools.org/doc/8a12a8/>.

<sup>96</sup> <http://www.dandc.eu/en/article/criticism-international-criminal-court-being-too-focussed-africa-misleading>.

to forget about the millions of anonymous people that suffer from these crimes ... because all the victims are African victims.”<sup>97</sup>

It was not until January 2016 that the ICC’s Prosecutor, under her *proprio motu* powers, opened an investigation in a country outside Africa, Georgia.<sup>98</sup> Furthermore, the majority of cases under preliminary examination, by the OTP, are outside Africa.<sup>99</sup> One journalist has gone so far as to accuse the Court of being racist:

“Imagine if there were a criminal court in Britain which only ever tried black people, which ignored crimes committed by whites and Asians and only took an interest in crimes committed by blacks. We would consider that racist, right? And yet there is an International Criminal Court which only ever tries black people, African black people to be precise, and it is treated as perfectly normal. In fact the court is lauded by many radical activists as a good and decent institution, despite the fact that no non-black person has ever been brought before it to answer for his crimes. It is remarkable that in an era when liberal observers see racism everywhere, in every thoughtless aside or crude joke, they fail to see it in an institution which focuses exclusively on the criminal antics of dark-skinned people from the ‘Dark Continent’... Liberal sensitivity towards issues of racism completely evaporates when it comes to the ICC, which they will defend tooth and nail, despite the fact that it is quite clearly, by any objective measurement, racist, in the sense that it treats one race of people differently to all others.”<sup>100</sup>

Time and again, it is a position defended by the OTP. In a 2012 speech, Mrs Bensouda declared: “Again and again we hear criticisms about our so-called focus on Africa and about the court being an African court, having an African bias. Anti-ICC elements have been working very hard to discredit the court and to lobby for

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<sup>97</sup> Smith, David, “New chief prosecutor defends international criminal court: Fatou Bensouda, who takes over at ICC next month, rejects view that court is ‘pro-western, anti-African’”, *The Guardian*, 23 May 2012, <https://www.theguardian.com/law/2012/may/23/chief-prosecutor-international-criminal-court> - Last accessed 12/15/2016.

<sup>98</sup> See: <https://www.icc-cpi.int/georgia>

<sup>99</sup> Of the nine situations under review, only two are in Africa; Guinea and Burundi. <https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx> - Last accessed 15/05/2016

<sup>100</sup> O’Neill, Brendan, “The International Criminal Court is, by any objective measurement, racist. So why do liberals love it?”, *The Daily Telegraph*, 15 March 2012.

non-support and they are doing this, unfortunately, with complete disregard for legal arguments.”<sup>101</sup>

Others analyzing this issue claim “[t]he critics of the ICC’s actions in Africa assert claims based in morality, legality, and sociological legitimacy (understood as perceptions of fairness). First, critics accuse the ICC of acting immorally by discriminating against Africa and Africans in deciding which situations to investigate and prosecute. Second, critics claim that the ICC has failed to respect the sovereignty of African states.”<sup>102</sup>

The author recalls an informal conversation with Luis Moreno Ocampo<sup>103</sup> where he indicated that while the Court certainly seem to be working within Africa a lot, it was only because that is where the crimes were being committed. However, in the 1980’s, he said, the world’s attention was in South America and a hundred years ago most of the conflicts took place in Europe. The implication being that right now, certain countries in Africa need the ICC, but that will not always be the case. The author is not aware of any policy decision, for example, to either remain focused on Africa, nor to move away from Africa. He therefore does not believe there is an African bias. The opening of the situation in Georgia in January 2016<sup>104</sup> marks a shift away from the African continent, but there has been no policy decision to so do.

The thesis will consider the OTP’s relationship with Africa in both Chapters 3 and 5 and will also make a specific recommendation on the topic in the final chapter.

#### 2.4.3 Shortcomings of Preliminary Examinations

With regard to situations under Preliminary Examination, the Office of the Prosecutor received a fair share of criticism, expressed below. These comments generally centre on a number of areas: a lack of reporting on the analysis conducted,

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<sup>101</sup> *Supra* note 97.

<sup>102</sup> deGuzman, Margaret M., Associate Professor Temple University Beasley School of Law. “Is the ICC Targeting Africa Inappropriately?” - <http://iccforum.com/africa>.

<sup>103</sup> There is no reference for this conversation and it is quoted merely because it helped shape the author’s view on the ICC’s relationship with Africa.

<sup>104</sup> See generally: <https://www.icc-cpi.int/georgia> - Last accessed 10/09/2016.

the length of time it takes and the apparent reluctance to close situations under preliminary analysis.<sup>105</sup>

In a report about the Office of the Prosecutor of the ICC, the FIDH<sup>106</sup> considered the issue of situations under preliminary examination. It believes that it could be beneficial for the OTP to involve the Pre-Trial Chamber in respect of certain key legal aspects of preliminary analysis. The report explains that “in practice, victims of situations where the OTP appears to have been inactive for years have nowhere to turn. In a court of law, it would be desirable for some debates to take place before a judge”.<sup>107</sup> Indeed, there is a need to ensure that victims from situations under preliminary examination can access justice within a reasonable time. However, this may not be a view shared by the OTP and in any event, there is not a pre-trial judge appointed to deal with situations under preliminary examination.

#### 2.4.4 Investigative Capacity and Reliance on External Actors

Luis Moreno Ocampo encouraged his staff to operate in small, lean teams, which would expand and shrink with investigations.<sup>108</sup> A new approach appears to have been adopted by the new Prosecutor and this will be more specifically discussed in Chapter Five of this thesis. Nevertheless, it is undisputed that a court based such a long way from the situations it is investigating will need to rely upon the cooperation of others, particularly in the initial stages of the investigation. However, it is a question of balance.

Again the FIDH has expressed “reservations about this ‘small investigation team’ policy on several occasions. Another matter which has attracted criticism is the lack of sufficient professional investigators with grounding in police services, forensic sciences, intelligence or

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<sup>105</sup> There are currently nine situations under preliminary examination, and the OTP has closed only three: Honduras, Republic of Korea and Venezuela. See: <https://www.icc-cpi.int/pages/preliminary-examinations.aspx> - Last accessed 05/08/2016.

<sup>106</sup> Fédération Internationale des Droits de l’Homme.

<sup>107</sup> FIDH, “The Office of the Prosecutor of the ICC- 9 Years On Analysis of the Prosecutorial Strategy and Policies of the Office of the Prosecutor (2003-2011) Recommendations to the Next ICC Prosecutor”, December 2011, <https://www.fidh.org/IMG/pdf/cpiproc579ang.pdf> - Last accessed 05/06/2016.

<sup>108</sup> Prosecutor Ocampo developed something called the ‘court capacity model’ in order to justify the number of situations and cases the Office could carry out based on its resources. The idea was to make the best use of resources by moving staff from one case to another as the needs dictated. He (Ocampo) makes reference to the court capacity model at an “Informal Meeting of Legal Advisors of Ministries of Foreign Affairs” held in New York on 24 October 2005. [https://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO\\_20051024\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf) - Last accessed 28/08/2016.

criminology. While ensuring multidisciplinary expertise within teams is laudable, FIDH stresses that this must not be done at the expense of sufficient critical skills and experience in core investigative roles”.<sup>109</sup> They recommend reinforcing the Office’s independent investigative capacity<sup>110</sup> and, as will be demonstrated later, this is a course of action already begun started by the Office of the Prosecutor.<sup>111</sup> This will be considered in more detail in Chapter 5.

#### 2.4.5 Code of Conduct for the OTP

A code of conduct is generally regarded as a transparent method for a group with some authority or power to demonstrate that they work following an accountable standard. In Ireland, for example the Bar operate a code of conduct for its members<sup>112</sup> and An Garda Síochána, the Irish Police force, also operate a code of conduct, “which must be strictly adhered to.”<sup>113</sup> However, former Prosecutor Moreno Ocampo always resisted such a code. The current Prosecutor, Mrs. Bensouda, introduced a Code of Conduct for the Office of the Prosecutor in 2013.<sup>114</sup> Such a Code could reassure commentators that the Office behaves in a transparent manner and might even address certain long standing criticisms such as the perception of one sided investigation.<sup>115</sup>

According to Milan Markovic, the Court has established a code of conduct for the judiciary and the defence counsel, but as yet has failed to introduce one for the OTP. “This is problematic because the ICC Statute imposes conflicting obligations on the ICC Prosecutor, and the Prosecutor has resolved his conflicting obligations in the Lubanga and Al-Bashir cases in ways that have undermined the ICC’s credibility”.<sup>116</sup>

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<sup>109</sup> <https://www.fidh.org/IMG/pdf/cpiproc579ang.pdf>.

<sup>110</sup> *Ibid.*

<sup>111</sup> See: Chapter 5.

<sup>112</sup> See: <https://www.lawlibrary.ie/media/lawlibrary/media/Adopted-Code-of-Conduct-Bar-of-Ireland-23-July-2014.pdf> - Last accessed 15/07/2016.

<sup>113</sup> See: <http://www.garda.ie/Controller.aspx?Page=10125&Lang=1> - Last accessed 17/07/2016.

<sup>114</sup> Entered into force 5 September 2013. Copy on file with the author, still considered an ICC-OTP internal document.

<sup>115</sup> <http://www.dandc.eu/en/article/criticism-international-criminal-court-being-too-focussed-africa-misleading>.

<sup>116</sup> Honourable Abraham L. Freedman Teaching Fellow, Temple University Beasley School of Law; J.D., Georgetown University Law Center (2006); M.A., New York University (2003); B.A., Columbia University (2001). In 2007, the author served as a law clerk to the Honourable Philippe Kirsch in his capacity as a judge on the International Criminal Court’s

The idea of a code of conduct requires a body in place to regulate or oversee complaints grounded in the code. This has the potential to add to the OTP's bureaucracy. Additionally, the Chambers are at liberty to monitor the OTP's behaviour during investigations, which provides a certain level of accountability already. Nevertheless, it is an important step in demonstrating transparency and accountability, and the author is of the view that a code of conduct should be viewed positively.

#### 2.4.6 Impartiality of the OTP

Most of the critics agree on the necessity for the OTP to investigate all parties to a conflict in order to ensure that the Office is perceived as impartial.<sup>117</sup> Where one side to a conflict appears not to be under investigation it raises questions as to why not. In the Uganda Situation for example, when Ocampo held a joint press conference with the Ugandan President, Yoweri Museveni, he was severely criticised and lasting damage to the integrity of the Office took place.<sup>118</sup> The topic of how the OTP intend to conduct its investigations and prosecutors will be examined in broader detail in Chapter 5.

#### 2.4.7 A Desire for States to Self-Refer

One of the three mechanisms for the Prosecutor to be seized of a case is for a State to self-refer the situation to the Court.<sup>119</sup> This mechanism was used for the first three situations, namely Uganda, Democratic Republic of Congo and the Central African Republic, to come before the Court. But, according to Human Rights Watch:

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Appeals Chamber. Richard Greenstein, Jaya Ramji-Nogales, and Meg DeGuzman (see below) provided valuable comments on this Article, as did Elena Baylis, Jean Galbraith, Craig Martin, and David Zaring on an earlier draft.

<sup>117</sup> See: Tiemessen, Alana, "The International Criminal Court and the politics of prosecutions, The International Journal of Human Rights", (2014) DOI: 10.1080/13642987.2014.901310; As recently as April 2016 the prosecutor reaffirmed that she believes the ICC to be "*fair, independent and impartial*". Also see: <http://www.jfjustice.net/letter-to-foreign-ministers-on-support-for-the-icc-in-advance-of-extraordinary-au-summit/commentary/africa-and-the-icc-legitimacy-impunity-selectivity-fairness-and-accountability> - Last accessed 02/08/2016

<sup>118</sup> Kersten, Mark, "Why the ICC Won't prosecute Museveni", Justice In Conflict, 19 March 2016, <https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/> - Last accessed 01/08/2016.

<sup>119</sup> Article 14(1) of the Rome Statute: "*A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes*".

“Selecting situations that have been voluntarily referred may have negative implications for perceptions of the prosecutor’s independence and impartiality in affected communities. This likelihood is increased in those country situations where the alleged ICC crimes have been committed along ethnic or political lines and implicate actors in the referring government (voluntary referral should not deflect attention from alleged government crimes, for example). There is a substantial risk that any collaboration between the referring government and the ICC in these polarized country situations will be perceived negatively by those affected by the crimes. The court must be sensitive to this reality and should actively seek to address the negative misperceptions that may follow a decision to open an investigation. Ultimately, the OTP should ensure investigation of state actors in the context of voluntary referrals to determine if there is sufficient evidence to do prosecute and the other requirements are satisfied”.<sup>120</sup>

In the Kenya investigation, Ocampo encouraged the Kenyan Government to refer the case itself,<sup>121</sup> only using his Article 15 powers when they declined to do so. From the Prosecutor’s perspective, a referral by the State itself removes some procedural obligations imposed by Article 15; the need to “submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected”.<sup>122</sup> This obligation doesn’t exist either when the United Nations Security Council refers a situation to the OTP.<sup>123</sup>

Although the author acknowledges that this is a criticism that has been raised. It will not be developed further within this thesis.

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<sup>120</sup> <https://www.hrw.org/reports/2008/icc0708/5.htm>.

<sup>121</sup> See: ICC Prosecutor: “Kenya Can Be an Example to the World”, Press Release: “... [s]hould efforts to conduct national proceedings fail, the Government of Kenya committed to referring the situation to the Court in accordance with Article 14 of the Rome Statute”, 18 September 2009, <https://www.icc-cpi.int/Pages/item.aspx?name=pr452> - Last accessed 14/08/2016.

<sup>122</sup> Article 15(3) of the Rome Statute.

<sup>123</sup> So far, two situations have been referred by the Security Council: Darfur, which was referred in March 2005 with an investigation opened in June 2005, and Libya which was referred in February 2011. An investigation was opened in March of the same year.



## 2.5 Success of the ICC

Every December, the representatives of the ICC's States Parties –the stakeholders of the Court - meet either in New York or The Hague to agree, among other things, the budget for the following year. It is during this process that the officials from the court are scrutinised over their previous activities and have to provide justifications for future spending plans.<sup>124</sup> Like any country's national budget, the States are looking for value for their money, an idea that is abstract unless they can define success. At first glance it is easy to say that the number of investigations, prosecutions and convictions are solid success measurement criteria, because this is something we can understand. A football team that wins the most matches is the overall winner. Using this criterion however, the ICC is on uncertain ground.

Luis Moreno Ocampo often chose to measure success in a more abstract way.<sup>125</sup> “Success”, he declared in answer to the direct question ‘how do you define the success of the ICC?’, “will be 2 billion kids from all over the world that understand and support the idea. Success was an Australian pilot who refused to drop a bomb during the Iraq war because he realized that the real collateral damage would be bigger than planned. He realized that if he executed the order received, he could be prosecuted in accordance with the Rome Statute. He returned to his base without dropping the bombs.”<sup>126</sup> In the same forum he said that the “important aspect... is not what happens in The Hague, but how the Court impacts on the world”<sup>127</sup>. Therefore, the overall impact is more important than the outcome of the cases in court.

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<sup>124</sup> “The Assembly of States Parties decides on various items, such as the adoption of normative texts and *of the budget*, (emphasis added) the election of the judges and of the Prosecutor and the Deputy Prosecutor(s)” [from https://asp.icc-cpi.int/en\\_menus/asp/assembly/Pages/assembly.aspx](https://asp.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx).

<sup>125</sup> By the end of his tenure Ocampo believed he had already contributed to ending impunity. “*What is happening in the world today is there is a rule, very clear. Political leaders cannot gain or stay in power committing massive atrocities*”, Interview with Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, January 25, 2012 by Till Papenfuss, <http://theglobalobservatory.org/2012/01/interview-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court/> - Last accessed 15/08/2015.

<sup>126</sup> The Reckoning: Understanding the International Criminal Court – Luis Moreno-Ocampo Responds to Questions from Work Shop Participants, Facing History and Ourselves, <https://www.facinghistory.org/reckoning/luis-moreno-ocampo-responds-questions-workshop-participants> - Last visited 17/07/2015.

<sup>127</sup> *Ibid.*

Although it is important to have the positive judicial results in order to shape the global impact.

While reviewing the performance of the first Prosecutor and considering who should replace him, one commentator said that “[t]o achieve the ICC’s promise as a global court, the parties to the Rome Statute must select a prosecutor who can meet the court’s most serious challenges: concluding trials; convincing governments to arrest fugitives; conducting credible investigations in difficult places, such as Libya and Sudan; and expanding the ICC’s reach beyond Africa. This may be a lot to ask for, but the future of the ICC depends on it.”<sup>128</sup> This assessment moves away from Ocampo’s abstract model, which lacked the ability to actually measure success, or failure, to a more conventional system. A failure to secure convictions, as in the cases within the Kenya Situation, will certainly have a negative impact on the reputation of the Court.

## 2.6 Conclusion

The decision to remain outside the ICC by some large states, particularly the US, could be seen as troubling, however over the longer term, it might be judged more positively; that the Court was allowed to develop without their influence.<sup>129</sup> Even the jurisprudence of the Court might get a chance to develop in a truly mixed legal way, whereas if the Court had US lawyers prosecuting many of the cases<sup>130</sup> as with the ICTY, the case law might develop in a more common law direction. This impact will be discussed in the next Chapter and should not be underestimated.

Although widely seen as the successor of the *ad hoc* tribunals, the ICC must find its own way. The author remains cautiously optimistic about the future: if the Court can

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<sup>128</sup> Kayne, David, “Who’s afraid of the International Criminal Court - Finding the Prosecutor Who Can Set It Straight”, *Foreign Affairs*, May-June 2011, <https://www.foreignaffairs.com/articles/2011-04-18/whos-afraid-international-criminal-court> - Last accessed 25/05/2015.

<sup>129</sup> States can influence the work of the Court in many ways, the most obvious being the allocation of funds, which the Assembly of States Parties do each year.

<sup>130</sup> There are already a number of US citizens working in the OTP, within the Prosecution Division and elsewhere. Currently two of the Senior Trial Attorneys are from the US. Christine Chung, a former New York federal prosecutor was the first senior hire made by Ocampo. Harvard Law professor Alex Whiting had several key positions within the OTP, including Prosecution Coordinator, a member of the Executive Committee (ExCom).

learn from the lessons of its early years, and assuming that it has not, as an institution become culturally too embedded in its ways, and that it continues to get the support required from the States Parties, then the Court will go on to create a substantial body of law, enabling it to chart a more successful course.

Whilst the Prosecutor is independent and free from political interference, in reality it would be entirely naive to believe that politics does not severely impact on the Court's work. In the first place, it is the State Parties who provide the Court with its funding, an annual budget<sup>131</sup> being approved each year at the Assembly of States Parties.<sup>132</sup> Court officials regularly meet with members of the Committee on Budget and Finance (CBF) during the year. This Committee is made up of representatives from the largest contributing States.<sup>133</sup>

Additionally, the United Nations plays a big role in the Court's activities. In both cases where the Security Council referred cases to the ICC, namely Libya<sup>134</sup> and Darfur,<sup>135</sup> they were clear that the UN should not pay towards the investigations or prosecutions, should any arise.<sup>136</sup> It could be argued that by assigning work, but

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<sup>131</sup> The approved budget for 2013 was 115.12 million Euro, of which 28.27 million Euro was assigned to the OTP. States are demanding when it comes to funding the Court's operations, and each cycle considerable resources are spent negotiating the budget for the following year. The process begins in March and only concludes when the ASP meet and vote in either November or December.

<sup>132</sup> The Assembly is the management oversight and legislative body of the ICC. It has a permanent Secretariat based within the Court's headquarters, and a Bureau made up of a president, two vice presidents and 18 representatives of the States Parties, elected on a geographical distribution model. See: [http://www.icc-cpi.int/en\\_menus/asp/assembly/Pages/assembly.aspx](http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx) - Last accessed 15/03/2014.

<sup>133</sup> According to the CICC, "*The Committee on Budget and Finance, which is composed of 12 members, is responsible for the technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of financial, budgetary or administrative nature, as may be entrusted to it by the Assembly of States Parties. The members of the Committee are experts of recognized standing and experience in financial matters at the international level from States Parties.*" See: <http://www.iccnw.org/?mod=budgetbackground>.

<sup>134</sup> Referred to the ICC by the UNSC on 26<sup>th</sup> February 2011.

<sup>135</sup> Referred to the ICC by the UNSC on 31<sup>st</sup> March 2005.

<sup>136</sup> United Nations Resolution 1593 (2005), Security Council Refers Situation in Darfur, Sudan to Prosecutor of International Criminal Court, 31 March 2005, which states: "*7. Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to*

refusing to fund that work, the Security Council is affecting the Court's ability to properly conduct its activities generally. It is also not difficult to believe that the decision by Russia and China to vote against the draft resolution on referring Syria to the ICC<sup>137</sup> was taken for purely political reasons. It should also be recalled that many of the crimes within the mandate of the Court are committed in the context of political rivalry. In the Kenya Situation, for example, the alleged crimes were committed in the run up to the general election in 2008.<sup>138</sup> Politics and the ICC should be considered to walk hand in hand.<sup>139</sup> Of course the Prosecutor does not have a political mandate, however, her decisions certainly possess the potential to have political ramifications. A decision to charge a nation's prime minister or for president with war crimes, for example, is likely to have a big political impact within that country.

As we leave the introductory chapters and prepare to enter the substantive part of this work, it is worth reflecting on the purpose of an international criminal tribunal and to consider if the goal is ever achievable in a geo-political climate where those with the most power often appear to disregard international law. For the author, the purpose of the Court remains clear: it is to end impunity for the worst crimes imaginable, genocide, war crimes and crimes against humanity, words sometimes uttered without the full impact of their meaning being understood. Where States are either 'unwilling' or 'unable' to investigate or prosecute these crimes themselves, then the Court must step in. It must not take sides or treat anyone unfairly. Because the idea of the ICC was debated for so long, and then once created, generated a lot of comment, the author sometimes has the impression from his discussions with those outside the Court that it is a mere academic or theoretical model. Rather, it is a real institution, with real cases and real victims. It is sometimes overlooked how difficult

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*contribute voluntarily*", <http://www.un.org/press/en/2005/sc8351.doc.htm> - Last accessed 02/02/2015.

<sup>137</sup> See: <http://www.un.org/apps/news/story.asp?NewsID=47860#.U4dG0U38Lcc> - Last accessed 29/05/2014.

<sup>138</sup> The same is true for Gabon which referred a situation to the OTP in September 2016. The Prosecutor will more than likely open a preliminary investigation in the near future.

<sup>139</sup> See an interesting opinion in the New York Times: Mbeki, Thabo and Mamdani, Mahmood, "Courts Can't End Civil Wars", New York Times, 5<sup>th</sup> Feb 2014, <http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html?hp&#rref=opinion&#r=1> - Last accessed 16 February 2014.

it is to carry out the Court's purpose in practice and it is inevitable that it will face challenges.

Nevertheless, the creation of the ICC in 2002 could be seen as finally inserting the 'missing link'<sup>140</sup> in the international criminal law chain.

Even within the family of international law generally, the absence of an international criminal court was a glaring gap. However, the fact that a court now exists is far from the end of the story. At the time of writing, the Court has been in existence for 14 years. Expectations, which were initially very high, are beginning to become more realistic, and commentators, as we have seen above, now understand and continue to explore and highlight some of the vulnerabilities of the Institution. However, the idea of the Court, what it represents, especially to those who are victims of the violence covered under the competency of the Court, is not entirely rational. There is a great deal of misinformation about the powers and capacity of the Court and this constituency continue to hold the ICC to an arguably impossibly high standard.

The following chapter will examine the culture of the Court, how it developed and the impact it will have on the Institution as it grows. A solid culture, understood by its staff and the States that support the work of the Court is critical to its long term success.

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<sup>140</sup> <http://legal.un.org/icc/general/overview.htm> - Last accessed 15/02/214.

# Chapter 3 - The Legal Culture of the ICC

## 3.1 Introduction

The identity of the Court is strongly influenced by its culture, both its operational culture and its legal culture. Generally, culture is influenced by the governing framework which creates the overall structure, however what really creates a culture is the traditions, actions and beliefs of the members of the community. To a certain extent a new organisation doesn't really have its own culture; because a culture is developed over time and through experience.

While this chapter focuses on the development of a new legal culture at the Court, it will also look at how and by whom this culture was developed; the different legal traditions, the Court actors and even factors such as the geographical and gender balance.”

Although examining the culture of the court is not a legal topic, it is nevertheless an important aspect of ensuring the long term success of the Court. This is because the consequences of allowing a negative culture to develop could seriously damage the courts reputation, the quality its investigations and prosecutions and ultimately its existence. Conversely, the development of a positive culture, one which promotes integrity, impartiality and hard work, for example, will go a long way towards securing the success of the ICC.<sup>141</sup> Because the organisation is impacted by so many different cultural centres, it could be reasonably argued that where a clash of cultures occurs, then it would have a negative impact. In order to address the primary research question of this thesis, it is necessary to evaluate the cultural health of the body. This chapter will examine the culture of the institution, including how the current value structure was created and how it is developing. This topic is considered to be an important building block towards creating the ICC of the future and therefore, fits into the primary research question.

A strong organisational culture is vital for the long term health of an organisation and its employees. The culture is the ‘secret sauce’ that makes a work place great

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<sup>141</sup> In recent year, the OTP has invested considerable effort in promoting and building the cultural identity of the Office, and the author has been closely involved with this initiative.

and without it, as one former Goldman Sachs executive said: “I look around today and see virtually no trace of the culture that made me love working for this firm for many years. I no longer have the pride, or the belief”.<sup>142</sup> Creating the correct culture is a difficult task, made even more so by the truly diverse staff employed by the ICC.<sup>143</sup> This chapter will focus more on the legal culture than the management culture, but the two are closely related.

Lawyers from all around the world receive different legal education and professional experience, which shapes how they view the law. In the international legal environment this can present challenges. This was true for both the *ad hoc* tribunals and the ICC, however it is not necessarily a barrier to its success, merely another challenge to the first generation of lawyers and staff, who will help create a new legal culture. According to Justice Jackson at Nuremberg, “members of the legal profession acquire a rather emotional attachment to forms and customs to which they are accustomed and frequently entertain a passionate conviction that no unfamiliar procedure can be morally right.”<sup>144</sup>

Because international criminal tribunals have operated under a very distinctive blend of common and civil law,<sup>145</sup> and these two traditions indeed dominate the legal foundation of the Court<sup>146</sup> procedurally, lawyers from the different systems can sometimes encounter difficulties in accepting certain principles not enshrined in their own national jurisdiction for example the issue of witness preparation in advance of

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<sup>142</sup> Smith, Greg, “Why I Am Leaving Goldman Sachs”, The New York Times, 14 March 2012 [http://www.nytimes.com/2012/03/14/opinion/why-i-am-leaving-goldman-sachs.html?\\_r=4&pagewanted=all](http://www.nytimes.com/2012/03/14/opinion/why-i-am-leaving-goldman-sachs.html?_r=4&pagewanted=all) - Last accessed 05/05/2015.

<sup>143</sup> In the author’s team at the Court, there are eighteen people from 16 different countries, from Sierra Leone to Argentina.

<sup>144</sup> Jackson, Robert H, “United States Representative to the International Conference on Military Trials”, 29 December 1947, [http://avalon.law.yale.edu/imt/jack\\_preface.asp](http://avalon.law.yale.edu/imt/jack_preface.asp) - Last accessed 05/05/2014.

<sup>145</sup> For a good explanation of the common and civil law traditions see “The Common Law and Civil Law Traditions”, The Robinson Collection, School of Law, University of California at Berkeley, <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html> - Last visited 20/02/2015.

<sup>146</sup> There is no evidence of an influence from the Soviet or Chinese legal systems, nor are any of the religious based legal systems represented, e.g. Sharia. Similarly for traditional tribal cultures practices.

testimony, which is discussed in later chapters, is a polarising one.<sup>147</sup> However, in addition to the procedural challenges, the author has observed that there are also engrained cultural practices which are challenging to incorporate in the courtroom.

This chapter will attempt to identify these challenges with the assistance of those who have and still are practicing within the Court. Courts are hierarchical institutions by nature, with the judge at the top. They often involve old fashioned rituals and customs that reinforce these hierarchies.<sup>148</sup> However, whatever its parentage, the ICC is a new system. It is a new tradition with a unique system of law that will develop and settle. Over time it will gain characteristics of both civil law and common law as the two dominant influences, which have shaped and influenced the ICC's legal framework, including its Rules of Evidence and Procedure.<sup>149</sup> Nevertheless, the Court is likely to be seen in its own right as a unique and individual legal system, with a constituency of practitioners who dedicate their careers to international criminal justice.

The Rome Statute is a result of tough negotiations, conducted before and during the Rome Conference. Up until the time the Statute was drafted, the prosecution and enforcement of the law were “carefully guarded sovereign prerogatives”.<sup>150</sup> According to Judge Silvia Fernández, (now President of the Court), who played a

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<sup>147</sup> Lawyers who practiced in the US are very comfortable with the idea of briefing their witnesses in advance of them providing testimony, whereas in England the practice is not permitted. While allowing ‘witness preparation’ in the DRC6 case, the Court refused it in Ongwen (*The Prosecutor v. Dominic Ongwen*, Decision on Protocols to be Adopted at Trial, 22 July 2016, <http://www.legal-tools.org/doc/311696/>) and Gbagbo (*The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on witness preparation and familiarization, 02 December 2015, <http://www.legal-tools.org/doc/aa620a/>).

<sup>148</sup> The language used in courts in Ireland and England is unusually formal and seniority is especially important: Seniors and Juniors. Although only a judge wears a robe in the US, in Ireland and the UK, lawyers also wear robes and wigs.

<sup>149</sup> See: <https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf> - Last accessed 06/08/2016.

<sup>150</sup> Lee, Roy S., “The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results”, Kluwer Law international, 2002, p.5. Further, in evidence of how busy the Rome negotiations were, Lee describes how more than 200 written proposals were officially submitted by delegates and at the height of its activity, roughly 80 interpreters were hired to service meetings at the Conference.



prominent part in the Rome Conference,<sup>151</sup> it was easy to agree that a global court should not be seen to favour a particular legal system and that compromises needed to be found between the major legal systems. However, the theory was easier said than done, as it “proved to be extremely difficult in practice.”<sup>152</sup> States had to compromise sufficiently to ensure that the new Court could operate effectively. Fernández quotes Professor James Crawford, Chairman of the ILC Working Group for the ICC, when he said that the Commission “had also to contend with the tendency of each duly socialized lawyer to prefer his own criminal justice system’s values and institutions”.<sup>153</sup> The fact that the “different legal traditions do not fit together seamlessly, [leads] to myriad, heated disagreements over how to combine them into a single, coherent, workable legal system”<sup>154</sup>.

It should be noted however, that because the US (common law) was not a party to the Rome Statute,<sup>155</sup> the American influence over the Court, in its formative years was substantially diminished. The US had a big influence on the *ad hoc* tribunals, not just in relation to the Rules of Procedure but also on the culture of the legal proceedings.<sup>156</sup> Watching from the public gallery one would be struck by the US and British influence on the prosecution side. It could even be argued that the absence of the US as a State Party of the ICC is a positive fact, especially given that the

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<sup>151</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998.

<sup>152</sup> Fernández de Gurmendi, Silvia A., “International Criminal Law Procedures, The Process of Negotiation Chapter in The International Criminal Court: The Making of the Rome Statute”, Lee, Roy S., (Editor) Kluwer Law International 1999.

<sup>153</sup> *Ibid* p.220. Crawford, James, “The ILC Adopts a Statute for an International Criminal Court”, 89 A.J.I.L. pp.404, 408 (1995).

<sup>154</sup> Van Sliedregt, Elies, “Introduction: Common Civility – International Criminal Law as Cultural Hybrid”, *Leiden Journal of International Law*, Volume 24, Issue 2, pp. 389-391.

<sup>155</sup> President Clinton did in fact sign the Rome Treaty in 2000, however it was never ratified and while the US voted against the Treaty when it was put to a vote, their delegation at the Conference played an active role in the negotiations.

<sup>156</sup> See for example, the statement made by Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia before the U.S. Helsinki Commission on 7 October 2003: <http://www.icty.org/en/press/statement-judge-theodor-meron-president-icty-commission-security-and-cooperation-europe> - Last accessed 04/05/2015.

majority of the cases before the Court are francophone,<sup>157</sup> with dominant civil law traditions. However, this is a difficult argument to justify because of the presence of other common law states, like the United Kingdom.

### **3.2 Sources for this Chapter**

The author had the opportunity to conduct a number of interviews for this chapter. The interviewees were chosen because of their expertise and direct involvement in the development of the Rome Statute and the creation of the actual court in The Netherlands. The sources were able to provide the author with a great deal of practical insight into the background of the court and its historical context. These first-hand accounts provided during a number of open conversations, is difficult to find in other texts about the court.

One of the selected sources for the purpose of this chapter is a French Lawyer, Gilbert Bitti, currently employed as the Senior Legal Adviser to the Pre-Trial Chamber. Previously, he served as a Legal Adviser in both the Office of the Prosecutor and in the Court's Registry. Prior to joining the Court, he was the Legal Adviser to the French Delegation at the Rome Conference and was responsible for presenting and defending the French Government's amendments to the Rome Statute.<sup>158</sup> The second important source for this chapter is Dr Hans Bevers, also a lawyer, who worked for the Dutch Government in the Ministry of Justice. He is currently the Legal Adviser to the ICC's Prosecutor. His experience is of great importance also because Dr Bevers worked, on the ICC's Host Agreement with The Netherlands. He also became a member of the Preparatory Committee (PrepCom).<sup>159</sup>

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<sup>157</sup> Of the nine situations opened by the Court only two (Kenya and Uganda), of the States concerned operate a common law legal system. Note of the nine situations, two are the Central African Republic, which is therefore counted twice.

<sup>158</sup> See also:

<http://www.grotiuscentre.org/resources/1/ICL%20Summer%20School/Gilbert%20Bitti.pdf> - Last visited 07/07/2015. Bitti is one of a number of young lawyers who were involved in the Rome Conference who came to work eventually in The Hague. Many others have since moved on again and to a certain extent, this gives the few 'relics from Rome' still at the Court, a certain comfortable sense of entitlement and practically, a second career publishing and lecturing.

<sup>159</sup> Between 1996 and 1998, six sessions of the United Nations Preparatory Committee were in New York to work on a draft statute to establish a permanent international criminal court; a first draft had been produced by the UN's International Law Commission. A number of NGOs were also actively present during these meetings. See UN General Assembly

Moreover, he was involved in facilitating, on behalf of the Dutch Government, the Special Court for Sierra Leone and the Scottish Government's Temporary Court in The Netherlands for the prosecution of the (PamAm) Lockerbie bomb case.<sup>160</sup> He therefore has vast experience in setting up international tribunals in The Netherlands.<sup>161</sup>

### 3.3 Creation of the Court's Culture

According to Powell and McLaughlin Mitchell "negotiators involved in the creation of the ICC pushed for rules and procedures that mimicked those of their domestic legal systems to help reduce uncertainty regarding the court's future decision-making processes".<sup>162</sup> The idea being that States need to be sure when they join a court like the ICC, that it will be "fair and unbiased",<sup>163</sup> being able to recognize parts of their own domestic law helps in providing this reassurance.

"The hybrid nature of the Court's design enhanced the attractiveness of the court to civil and common law states, making them significantly more likely to sign and ratify the Rome Statute. Empirical models demonstrate that common and civil law states were fervent supporters of the ICC in preliminary negotiations and that they have shown higher levels of support for the Court since the ICC's inception in comparison to Islamic law or mixed law states."<sup>164</sup>

The initial draft statute for an international criminal court was prepared by an Australian, James Crawford SC,<sup>165</sup> a distinguished academic who served as the ILC's Special Rapporteur on State Responsibility from 1997 – 2001. Initially, it was more similar to the ICTY's Statute and many countries were unhappy with its

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A/RES/50/46, U.N. GAOR, 50<sup>th</sup> Sess., Sup. No.49 at 307,

<http://www.un.org/documents/ga/res/50/a50r046.htm>.

<sup>160</sup> For details of the trial and its verdict see

<http://www.asil.org/insights/volume/6/issue/2/lockerbie-trial-verdict> - Last visited 10/07/2015.

<sup>161</sup> These two remarkable personalities offer very different views on the Court. In keeping with their personalities, Bitti was open and unguarded in this interview, freely offering his opinion on all matters, which is in marked contrast to Bevers, who is measured and precise.

<sup>162</sup> Powell, Emilia Justyna and McLaughlin Mitchell, Sara, "The Creation and Expansion of the International Criminal Court: A Legal Explanation", Paper prepared for the Midwest Political Science Association Conference, Chicago, IL, April, 3-6, 2008.

<sup>163</sup> *Ibid* p.2.

<sup>164</sup> *Ibid*.

<sup>165</sup> Crawford's pedigree is impressive and he was appointed as a Judge in the International Court of Justice in November 2014, for a nine year term.

leaning towards the common law.<sup>166</sup> On the 12<sup>th</sup> August 1996, the French Government's delegation presented an alternative draft statute, which sought to address French and other civil law countries sensitivities.<sup>167</sup> In the end, the French delegation compromised their primary objective, that of having a judge-led investigation in favour of the more common law idea of a prosecutor. The main reason for the creation of the Pre-Trial Division was that States "needed a mechanism to counter-balance the power of an independent Prosecutor. Independent in the sense that he or she could initiate investigations on his/her own initiative".<sup>168</sup> A prosecutor with a political agenda could open frivolous investigations and States felt there ought to be safeguards put in place to prevent this from happening.<sup>169</sup>

The Court is an international organization, created by a founding treaty, the Rome Statute.<sup>170</sup> Therefore, it is a political organization,<sup>171</sup> formed by representatives of the governments of States Parties.<sup>172</sup> It follows then that it is a compromise organization, subject to the various non-legal influences of different countries and groups of countries.<sup>173</sup> In order to establish a proper consensus, it was necessary to create a

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<sup>166</sup> Bitti interview.

<sup>167</sup> Bitti Interview.

<sup>168</sup> Bergsmo, Morten and Pejić, Jelena, "Commentary on the Rome Statute of the International Criminal Court", p.361 (Otto Triffterer, ed. 1999).

<sup>169</sup> Fourmy, Olivier, "Powers of the Pre-Trial Chambers, in the Rome Statute of the International Criminal Court: a commentary", Vol. II 1210 (A. Cassese, P. Gaeta and J.R.W.D. Jones eds., 2002).

<sup>170</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998.

<sup>171</sup> It can also be considered political by the nature of the terrible crimes it must investigate, often committed by those holding political office. See further: Marston Danner, Allison, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", 97 AM. J. INT'L L. 510, 510 (2003), in which it is stated that the Court has jurisdiction over "*crimes ... committed by governments themselves, or with their tacit approval*"; and also that the cases before the ICC are "*infused with political implications*".

<sup>172</sup> Actually, formed by representatives of governments of more than States Parties; for example the United States of America were big contributors to the creation of the Court, but didn't eventually become a member. The US Ambassador-at-large, David Scheffer, who led the US delegation at the Rome Conference, has visited the ICC on more than one occasion and appears to be a supporter of the Court. See: Schabas, William A., "An Introduction to the International Criminal Court", 4<sup>th</sup> Edition, Cambridge University Press, 2011, p.28.

<sup>173</sup> The author recalls regularly hearing former Prosecutor, Luis Moreno Ocampo, telling people that the Court was not influenced by politics and that he was above politics. If he did believe this, it was possibly a bit *naïve*, as a great deal of effort goes into meetings with the States parties every year. Each year the budget for the Court is approved at the Assembly, wherein several weeks of negotiations take place. An example of a state flexing its authority

legal framework that was a blend of the two different legal traditions. This is simply how the ICC came to have its particular procedural model.<sup>174</sup>

As with many discussions on International Criminal Law, we can refer back to the Nuremberg trials.<sup>175</sup> Even then we see examples where one set of procedural rules, when adopted into the legal framework of the IMT, were criticized by advocates from the other legal traditions. For example “the evidence rules, which exhibited a flexible approach to the handling of evidence that is typical of civil law systems, were vehemently criticized by common law lawyers.”<sup>176</sup>

While the court is obliged to ensure that the “the principal legal systems of the world”<sup>177</sup> are represented in the constitution of the Chambers, there is no specific obligation to actually have their legal systems represented in the Court’s rules, regulations and procedures. Therefore, according to Bitti, the major ‘western’ legal systems prevailed. However, the Statute does facilitate a wide approach when it comes to the applicable law of the Court under Article 21(1) which points out that “general principles of law derived by the court from national laws of legal systems of the world including”<sup>178</sup> to be used in certain circumstances. The ICC has been slow

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over an international organization, is the US’ decision to withhold its funding contribution from UNESCO because that organization allowed Palestine to become a member. See: Statement by the Director-General of UNESCO on Withholding of Funds by the United States, <http://www.unesco.org/new/en/media-services/single-view/news/statement-by-the-director-general-of-unesco-on-withholding-of-funds-by-the-united-states/#.VXHcP038IUA> - Last visited 04/06/2015.

<sup>174</sup> According to Lee – *supra*, note 150- the Court’s “*justice system represents the successful product of harmonization of the distinctive principles, rules and procedures derived from the world’s major judicial systems*”, p38.

<sup>175</sup> The Charter of the International Military Tribunal (IMT) that was adopted at the London Conference on August 8, 1945, represented the finalization of the Allies’ decision to prosecute principal German war criminals. The IMT was to prosecute crimes against peace, war crimes and crimes against humanity. Proceedings against the major war criminals were instituted in Berlin on October 18, 1945, with the Tribunal’s receipt of the indictments. The defendants were 24 high-ranking representatives of the Nazi regime, along with seven organizations. The trials themselves were held in the Jury Courtroom, also known as “Courtroom 600,” at the Palace of Justice in Nuremberg, <http://www.nurembergacademy.org/the-nuremberg-legacy/the-nuremberg-trials-and-courtroom-600/> - Last visited 04/04/2015.

<sup>176</sup> See: Schoun, Christine, “International Criminal Procedure: A Clash of Legal Cultures”, TMC Asser Press, 2010, p.5.

<sup>177</sup> Rome Statute, Art. 36(8)(a)(i).

<sup>178</sup> Rome Statute, Art. 21(1)(c).

to embrace the ‘general principles’ concept and for now, firmly establishing that it is lower down the hierarchical structure and should only be used to complete a lacuna in the law of the Court.<sup>179</sup> The role of comparative criminal law is already established in the *ad hoc* tribunals and was first used at the Court during the *Lubanga* trial, where the Pre-Trial Chamber considered the different approaches to the question on ‘witness familiarisation’.<sup>180</sup> The ICC legislation is silent on the matter and, within their judgment, the Court made pointed reference to the fact that the OTP referred to two common law jurisdictions but failed to establish a link to any jurisdiction from a civil law country:

“[T]he Trial Chamber does not consider that a general principle of law allowing the substantive preparation of witness prior to testimony can be derived from national legal systems worldwide ... Although this practice is accepted to an extent in two legal systems, both of which are found upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Trial Chamber notes that the prosecution’s submission with regard to national jurisprudence did not include any citations from the Romano-Germanic legal system”<sup>181</sup>.

Badar and Higgins identify a good example of where the Prosecutor’s argument in the *Lubanga* trial, that the concept of witness proofing was commonly used in national legal systems, was rejected by the Bench because the two jurisdictions quoted were both common law jurisdictions. The Prosecutor failed to provide any civil law examples. They note that an opportunity was lost by the Court, stating: “further elucidation on what type of examination of national laws would have been

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<sup>179</sup> See: Elewa Badar, M. and Higgins, N., “General Principles of Law in the Early Jurisprudence of the ICC”, Chapter 12, p.18; Mariniello, Triestino, “The International Criminal Court in Search of its Purpose and Identity”, (ed), Routledge, 2015.

<sup>180</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, paras 35-7 - <http://www.legal-tools.org/doc/dd3a88/>.

<sup>181</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practice Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, para 41 - <http://www.legal-tools.org/doc/ac1329/>.

appropriate was not forthcoming from the Chamber and thus it failed to seize an opportunity to clarify the nature of Article 21(1)(c)”<sup>182</sup>

Judge Goldstone refers to a situation which he encountered during the *Tadi* trial, at the ICTY. However it involved not a clash of cultures between the civil and common law, but between three different lawyers from a common law tradition. He explains:

“[T]hree of the prosecutors found themselves at odds with each other. One practiced at the London Bar and he explained that, according to his professional rules, it was considered unprofessional conduct to meet with witnesses prior to their appearance on the witness stand—and, further, that he could be disbarred for doing so. The second prosecutor came from the Edinburgh Bar. He relayed that, according to Scottish rules, not only was such conduct regarded as unprofessional, it was also considered criminal. The third counsel came from the New York Bar and he explained that under the rules governing legal practice in the United States, failure to prepare a witness would be regarded as unprofessional, and is conduct for which he could be disbarred. (I might mention that in my own country, South Africa, we would follow the approach of the United States.)”<sup>183</sup>

In his book on the ICC, Benjamin Schiff<sup>184</sup> identifies the ‘Civil-Law and Common-Law Heritage’ as a ‘conundrum’. While the role of the Prosecutor of the Court hails from a common law model, in the Pre-trial Chambers the Judges are operating under a civil law model, with the conundrum being that the “common-law orientated Office of the Prosecutor is contending with the civil-law-orientated Pre-Trial Chamber Judges to establish operational and legal precedents for the Court’s operations”<sup>185</sup> Further stating that “[t]he structure of the situation, the orientation of the personal involved, and in many areas in which precedents can be established only by operating the machinery are causing clashes between judges and prosecution”<sup>186</sup>

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<sup>182</sup> *Ibid.* p.19.

<sup>183</sup> Goldstone, R., *International Judges: “Is There a Global Ethic?”*, Ethics & International Affairs, <http://projects.ethicsandinternationalaffairs.org/internationaljudges> - Last accessed 25/08/2016.

<sup>184</sup> Schiff, Benjamin N., *“Building the International Criminal Court”*, Cambridge University Press, 2008.

<sup>185</sup> *Ibid.*, p.10.

<sup>186</sup> *Ibid.*

It is noteworthy though, that while the role of a prosecutor is generally understood to come from the common law tradition, according to one source<sup>187</sup> one of the main responsibilities of the ICC's Prosecutor, imposed by Article 54 "seems to require the prosecutor to take a civil-law, investigative-judge approach, whereby the prosecutor gives equal weight to incriminating and exonerating circumstances (though only a mediocre prosecutor would not do the same in any adversarial system)".<sup>188</sup>

### 3.4 Legal Traditions

As noted above, Article 21 of the Statute permits the Court to apply general principles of law from national jurisdictions throughout the world, under certain conditions. In this section the author will briefly set out the different legal systems and articulate how they directly impact the ICC. Professor Schabas asserts that "within the Statute can be found other provisions that ...present a fascinating experiment in comparative criminal law, drawing upon elements from the common law, the Romano-Germanic<sup>189</sup> system, Sharia law and other regimes of penal justice"<sup>190</sup>. However, the common law and civil law are by far the most dominant.

The common law<sup>191</sup> system is grounded in the liberal philosophy born in England, whereby the state refrains from interfering in society in as much as it is possible. This extends to the role of the judge in legal proceedings, where he or she acts as more of an umpire between opposing parties. This is probably the most obvious characteristic of the common law,<sup>192</sup> the role the judge plays, or does not play in the proceedings. It is often described as adversarial; arguments and counter arguments,

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<sup>187</sup> Alex Whiting, former Prosecution Coordinator within the OTP and now Professor of Practice at Harvard Law School.

<sup>188</sup> Whiting, Alex, "Dynamic Investigative Practice at the International Criminal Court, Law and Contemporary Problems", Vol. 76:163, at 165.

<sup>189</sup> Professor Schabas prefers to use this term over *Civil law*. The author uses both interchangeably.

<sup>190</sup> Schabas, William, "An introduction to the International Criminal Court", Third Edition, Cambridge University Press, 2007.

<sup>191</sup> Also often referred to as Anglo-American Law, after the two dominant influences.

<sup>192</sup> In addition to the presence of a jury, although, not all criminal cases have a jury. In Ireland and England serious crimes associated with the Northern Ireland 'troubles' sit with three judges, rather than a jury.



allegations and rebuttals. While a code does not exist to the same degree in the common law system, it is indeed becoming more codified.<sup>193</sup>

In his interview, Bitti raised the point that there are more Roman-Germanic jurisdictions in the world than states which operate a Common Law legal tradition.<sup>194</sup> In the age of empire, England spread its legal traditions as it did its language and other culture all over the world. He (Bitti) speculated that there are perhaps forty-five countries in the world which could be said to operate a common law legal tradition,<sup>195</sup> less than half the amount of Roman-Germanic jurisdictions. Gilbert Bitti has speculated that it is this imperialistic gene which has led the English to argue so much for the inclusion of its system.<sup>196</sup> In his interview, Bitti also recounts a story about the negotiation process in which he repeatedly heard his common law contemporaries talking about a word he did not understand: *Subpoena* – a word familiar to common law lawyers as a document compelling someone’s attendance in court. Bitti had no idea what this meant, despite being a practising lawyer and law teacher. He grew annoyed at the arrogance of his colleagues that he should know and he recalls it as a practicable example of some of the differences between the common law and civil law camps.<sup>197</sup>

In the civil or Roman-Germanic legal systems, in direct contrast to the common law approach, the judge has a much more proactive role in the judicial process. Truth plays a central role in the proceedings and it is firmly considered that justice cannot be served without establishing that truth. The common law model could be said to be more interested in the settlement of disputes. According to Bitti, the main difference

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<sup>193</sup> The European Union is responsible for harmonizing the laws of its Member States and as a result the growing codification of laws in Ireland and England and Wales.

<sup>194</sup> JuriGlobe, a research group formed by professors from the Faculty of Law of the University of Ottawa state the number of UN member States who operate the Common Law, as 23. It puts the number of States using the Civil Law at 75. See Alphabetical Index of the 192 United Nations Member States and Corresponding Legal Systems. <http://www.juriglobe.ca/eng/syst-onu/index-alpha.php> - Last accessed 15/06/2016.

<sup>195</sup> JuriGlobe, a research group formed by professors from the Faculty of Law of the University of Ottawa state the number of UN member States who operate the Common Law, as 23. It puts the number of States using the Civil Law at 75. See Alphabetical Index of the 192 United Nations Member States and Corresponding Legal Systems. <http://www.juriglobe.ca/eng/syst-onu/index-alpha.php> - Last accessed 15/06/2016.

<sup>196</sup> Bitti interview.

<sup>197</sup> Bitti interview.

between common law and civil law is the role played by the judge and the trust in his or her office.<sup>198</sup>

While the dominant legal families are the civil and common law, in fact “[t]here are three highly influential legal traditions in the contemporary world: civil law, common law, and socialist law [<sup>199</sup>]... A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system and about the way law is or should be made, applied, studied, perfected, and taught.”<sup>200</sup>

The Legal Information Institute of the Law School of Cornell University believes that despite the great variety of legal systems in the world “it is important to begin by emphasizing one great division: that into religious and secular legal systems. Each side of this split holds quite different views as to law, in its source, scope, sanctions, and function. The source of religious law is the deity, legislating through the prophets. Secular law is made by human beings, and one of the most famous examples being ‘We, the people’.”<sup>201</sup> The ICC’s Statute and its Preamble clearly make of the respect of humanity a brand new post-biblical rule, universal and permanent as its creation. This is a novel approach and serves to emphasise the uniqueness of the ICC system of law and its legal culture.

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<sup>198</sup> The categorisation of legal families was the subject of a master’s thesis written in Bond University that gives an interesting insight to common law and civil law families. See: Landskron, R., “Common Law and Civil Law Legal Families: A Misleading Categorisation”, 16 February 2008, <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1048&context=theses> - Last accessed 20/08/2016.

<sup>199</sup> In fact, most of the socialist nations had operated a version of the civil law tradition prior to the Soviet area, to which they all largely returned following the collapse of the Soviet bloc.

<sup>200</sup> Merryman J.H., “The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America”, 2 Ed., Stanford University Press, Stanford, California (1985), 1, note 13.

<sup>201</sup> Legal Information Institute, Cornell University Law School, Legal Systems, [https://www.law.cornell.edu/wex/legal\\_systems](https://www.law.cornell.edu/wex/legal_systems) - Last accessed 21/07/2015.

The legal infrastructure of the Nuremberg's International Military Tribunal reflected the legal systems of the Second World War winning powers, namely the USA, the UK, France, and the Soviet Union. The legal basis for the trials was known, as previously mentioned as the London Charter,<sup>202</sup> and from this foundation all subsequent international criminal tribunals were developed.<sup>203</sup>

The *ad hoc* tribunals for Rwanda and the former Yugoslavia were created in the early 1990s, at a time when the ILC had already made progress with drafting the rules of procedure and evidence for the International Criminal Court. In terms of case law, the ICTY has had a remarkable impact on the Court, with ICTY decisions being quoted in every case to date.<sup>204</sup> The trial chambers of the *ad hoc* tribunals were able to rely on proposals from NGOs and different civil and common law countries.<sup>205</sup> This is because the Rules of Evidence and Procedure were generally broad and the judges had "much room for interpretation and variation".<sup>206</sup> Essentially then, the chambers had plenty of discretion to develop their own rules, indicative of a more common law type of environment.

Bitti is convinced that the ICTY is heavily influenced by the American system because of the institution which created it, the UN Security Council. The Security Council, in this matter, was entirely dominated by the US, supported by the UK. As a consequence, the ICTY along with the ICTR have been clearly influenced by the

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<sup>202</sup> Its full name was The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis.

<sup>203</sup> While the IMTs were created by a number of international partners, proceedings were dominated by the Common Law's United States, with support of the United Kingdom; and while the Nuremberg trials offer interesting comparisons and lessons for the International Criminal Court generally, in this case there is no real evidence to suggest that the earlier Tribunal was hampered by the different judicial traditions.

<sup>204</sup> For example, in *The Prosecutor v. Jean-Pierre Bemba*, (Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, <http://www.legal-tools.org/doc/f4c14e/>, Fn 32 ICTY, *Popović et al.* Appeal Judgment); *The Prosecutor v. Thomas Lubanga Dyilo* (Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, <http://www.legal-tools.org/doc/c79996/>; Fn 52 ICTY, *Prosecutor v. Nikolic*, Appeal, Judgment, para. 58) and *The Prosecutor v. Germain Katanga* (Judgment pursuant to article 74 of the Statute, 7 March 2014, <http://www.legal-tools.org/doc/f74b4f/>; Fn 1826 *Prosecutor v. Tadić*, Trial Judgement, para. 616).

<sup>205</sup> See: Alexander Knoops, Geert-Jan, "An Introduction to the Law of International Criminal Tribunals: A Comparative Study", Second Revised Edition, Brill Nijhoff, 2014. p.6.

<sup>206</sup> *Ibid.*

Anglo-Saxon common law system.<sup>207</sup> The fact that the ICC's Statute was debated before the UN General Assembly, where the US influence is less dominant<sup>208</sup> led to a more broad inclusion of legal traditions.<sup>209</sup>

Set up in 2009, the Special Tribunal for Lebanon (STL) differed from the other *ad hoc* tribunals in that it allowed for a trial *in absentia* and like the ICC, has the possibility to include victims in the judicial process,<sup>210</sup> both these key characteristics are features of a civil law tradition. It is sometimes considered that the international criminal courts are carbon copies of one another, and while they do have a great deal of similarities, significant differences also exist. The ability to conduct a trial without the presence of an accused is not a feature of most common law jurisdictions. While international in nature, the STL, by virtue of its creation can only prosecute crimes that exist under Lebanese law, a system of law inspired by the French civil law system and criminal procedural model.<sup>211</sup>

It could be argued that the best way to understand and develop international law is to study the mixed national traditions. It is possible that this is because a comparative analysis “presupposes that international law fits into one of the traditional legal families and can legitimately be analysed under the same rubric typically applied to national legal systems.”<sup>212</sup> The European Union has brought together, under an EU legal system, different common and civil law countries. In fact according to Tetley “[i]n effect, the European Union is a mixed jurisdiction or is becoming a mixed jurisdiction, there being a growing convergence within the Union between Europe's two major legal traditions, the civil law of the continental countries and the common law of England, Wales and Ireland”.<sup>213</sup> This should at least indicate that the two different systems can become harmonised. EU law has been taught throughout the

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<sup>207</sup> The ICTY was created by Security Council Resolution 808(1993), 22 February 1993 - [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_808\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf).

<sup>208</sup> In the General Assembly, the US is one of 193 countries, without a veto, where as in the Security Council it is one of 15 and has a veto - <http://www.un.org/en/members>.

<sup>209</sup> Bitti interview.

<sup>210</sup> The role of victims during the trial phase has been one of the most scrutinized aspects of the ICC project, and is discussed in every book ever written on the Court.

<sup>211</sup> Schabas, *Supra*, note 172, p.15.

<sup>212</sup> [http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Picker\\_final\\_7.pdf](http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Picker_final_7.pdf).

<sup>213</sup> Tetley, William, Q.C, “Mixed jurisdictions : common law *vs* civil law (codified and uncoded)” (Part I), *Unif. L. Rev.* 1999-3, 591 at 593.

Continent in universities, for the past thirty years. An accepted part of the legal curriculum now, it could provide a template for international criminal law to follow.

### **3.5 Re-characterisation of the Mode of Liability**

It has been suggested that “lessons from earlier tribunals suggest that the mixture of different legal traditions in the ICC will prove awkward for defence counsel, with all that that implies for the accused, unless the defence counsel is accustomed to practicing in such a mixed jurisdiction. Thus, the merger of the two traditions in the ICC may have an impact on the justice afforded the accused”.<sup>214</sup> One example of this situation happened towards the very end of the *Katanga*<sup>215</sup> case. In the *Katanga* case, the Trial Chamber re-characterised the mode of liability at the end of the case: this is something which would comply with the rules in civil law but nonetheless it received much criticism. For example Kevin Heller is deeply critical of the provision:

“An impartial judiciary concerned with maintaining the Rome Statute’s distribution of authority between the judges, the OTP, the victims, and the defence would invalidate Regulation 55. Unfortunately, with regard to the Regulation, the judiciary is anything but impartial. After all, the judges themselves wrote it. Regulation 55 thus represents the most indefensible form of judicial lawmaking particularly aggressive and particularly self-interested all at once”.<sup>216</sup>

In November 2012 while the Trial Chamber was deliberating the evidence, and even after the accused had made his oral statement to the Court, it made the unusual decision to amend the legal characterisation of the facts of the cases, as permitted under Regulation 55. The Trial Chamber by way of explanation stated:

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<sup>214</sup> Picker, Colin B., “International Law’s Mixed Heritage: A Common/Civil Law Jurisdiction”, *Vanderbilt Journal of Transnational Law* [Vol. 41:1083], [http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Picker\\_final\\_7.pdf](http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Picker_final_7.pdf) - Last visited 22/05/2015.

<sup>215</sup> *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07.

<sup>216</sup> Heller, Kevin Jon, “A Stick to Hit the Accused with: The Legal Re-characterization of the Facts Under Regulation 55”; Carsten Stahn et al (eds), “The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements”, 20 December 2013.

“Upon examining the evidence, it appeared to the Majority of the Chamber (“the Majority”), Judge Van den Wyngaert dissenting on this point, that Germain Katanga’s mode of participation could be considered from a different perspective from that underlying the Confirmation Decision and it was therefore appropriate to implement regulation 55 of the Regulations of the Court<sup>19</sup> while ensuring that the Defence is able to exercise its rights effectively, in accordance with regulation 55(2) and 55(3). Accordingly, the Majority hereby informs the parties and participants that the legal characterisation of facts relating to Germain Katanga’s mode of participation is likely to be changed and that the accused’s responsibility must henceforth also be considered having regard to another paragraph of article 25(3) of the Statute.”<sup>217</sup>

The Prosecutor did not make a submission to have the characterisation of the facts change, nor did the representatives of the victims; and obviously the defence team did not make the request. It was a decision made by the Bench itself. It proved to be a very controversial decision.<sup>218</sup> The decision was appealed and upheld by the Appeals Chamber, however, they cautioned the Trial Chamber that “The Appeals Chamber also emphasises that, considering the advanced stage of the proceedings, the Trial Chamber will need to be particularly vigilant in ensuring Mr Katanga’s right to be tried without undue delay”.<sup>219</sup>

It is worth remembering that this was only the second case before the Court, and Mr Katanga’s co-accused, Mathieu Ngudjolo Chui was shortly found to be not guilty. Had the Chamber not taken this decision, it is also possible that Katanga would also have been found to be not guilty. This event will remain a controversial one.

The example described above, in the *Katanga* case, is very much an example of a civil law influence on the ICC’s mechanism, where the focus is on the facts more than on how the OTP characterise them in the indictment or even the charges confirmed at the end of the confirmation of the charges hearing. In civil law jurisdictions “the judges are considered to know the law and be the best able to

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<sup>217</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012 - <http://www.legal-tools.org/doc/f5cbd0/>.

<sup>218</sup> In fact it was a majority decision and Belgian Judge Van den Wyngaert dissented.

<sup>219</sup> “Katanga case: Appeals Chamber confirms Trial Chamber II’s decision on potential modification of the form of responsibility” - <https://www.icc-cpi.int/legalAidConsultations?name=pr892>.

characterize the facts presented during trial. The prosecution's characterization in the indictment is considered a mere recommendation or theory of the case. This is the approach taken by the ICC".<sup>220</sup> While this statement could be true in a national jurisdiction, it appears out of sorts in the international arena, and because of the controversial nature of the provision, the proceedings were deemed to be unfair and controversial by scholars.<sup>221</sup> For the future, the Court should explain its decisions more effectively or avoid such late decisions. It is likely that Regulation 55 will receive closer attention in the future and may even eventually be amended.

One of the greatest challenges for this author and other commentators and scholars is how to view the unique procedural law model of the ICC. Disputes arise between common law and civil law lawyers over how to interpret certain provisions because they are unable to reconcile a given provision with their own system. When one examines the ICC's procedures solely from the perspective of one of the legal traditions, it creates difficulties.

### **3.6 Actors in the Court**

As stated previously, in order for the Court to succeed in the future, it needs to have a solid base. One of the central goals of this thesis is to examine how the Court can work more efficiently. The Court is made up of and run by people from different jurisdictions around the globe and they bring with them their own bias, rules cultures and even religions. The final section of this chapter will look at the actors, whose voices shape the rules, regulations and procedures.

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<sup>220</sup> International Justice Monitor, "A Closer Look at Regulation 55 at the ICC", <http://www.ijmonitor.org/2013/05/a-closer-look-at-regulation-55-at-the-icc/> - Last visited 29/05/2015. One of the key principles of the Rome Statute is that of *complementarity*. See: Preamble, para 10 and Articles 1, 17-20, Rome Statute.

<sup>221</sup> See generally: Heller, Kevin Jon, "A Stick to Hit the Accused With: the Legal Re-characterization of Facts Under Regulation 55", 20 December 2013, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2370700](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370700) - Last visited 21/05/2015; Duffy, Clair, "Fundamental Fair Trial Questions Remain Unanswered Ahead of Tomorrow's Judgment in the Katanga Case", International Justice Monitor, 06 March 2014 - <https://www.ijmonitor.org/2014/03/fundamental-fair-trial-questions-remain-unanswered-ahead-of-tomorrows-judgment-in-the-katanga-case/>.

When Richard Goldstone<sup>222</sup> arrived in The Hague on August 15, 1994, as the ICTY's first Chief Prosecutor, there were "then serious questions raised as to whether judges and prosecutors from different systems, including the common and civil law jurisdictions, could work together and fashion a system of criminal justice that would be considered fair by international standards."<sup>223</sup> According to Bitti, the background of the actors is all important. He believes "it's obvious: simply, the structure of the trial and people in the Court room are not the same, so you cannot have the same process. It's a matter of legal culture and legal principles and actors of the process"<sup>224</sup>.

The role played by the judges is probably the most challenging.<sup>225</sup> Bitti says "in France there is a lot of trust towards the judge and it is normal that you give to the judge the power to drive the process. It would not come into your mind to give it to the parties because you don't trust them. You trust the judge as the representative of the state".<sup>226</sup> This is the same principle in all civil law jurisdictions and is very different to the role played by common law judges.

With the same facts, in the same courtroom, running simultaneously, it is very likely that the conduct of the trial, even within the same legal framework, would be wholly different. However, at least all the parties would have something in common and in theory each trial might run smoothly. Imagine then mixing it up and inserting a judge from a different background presiding over a case. This is likely to be the most difficult scenario. Bitti dismisses the notion that eventually people will become comfortable with the new international system, stating that "[p]eople will be comfortable with the common law and people will be comfortable with the civil law.

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<sup>222</sup> An experienced South African Judge who served as Chief Prosecutor of the UNICTY between August 1994 and September 1996.

<sup>223</sup> Goldstone, R., *Supra* note 183.

<sup>224</sup> Bitti Interview.

<sup>225</sup> There are many different actors who can influence the trial: Judges and their Legal Officers, Prosecution Lawyers, Prosecution Investigators, Registry support staff, language and technical staff and Defence Counsel.

<sup>226</sup> Bitti interview.



That will remain for a very long time ... before we could reach a kind of common culture”.<sup>227</sup>

Hans Bevers takes a different view. He stated that “even in national courts judges differ in their decisions and that is why there should be an appellate system in place, as there is”.<sup>228</sup> He is not convinced that the background of the individual makes that much difference and that a competent lawyer can apply the rules of another jurisdiction.

Attracting high quality candidates to work in this field can be challenging. While the benefits are generally generous<sup>229</sup> for top lawyers there are limitations to the financial compensation that many would find unacceptable. Nevertheless there is a peak for early career lawyers where the experience gained and the financial rewards are sufficient to keep them in this environment for a number of years.<sup>230</sup>

### 3.6.1 Prosecutors

Of the current leadership within the Office of the Prosecutor’s Prosecution Division, four officials have previously worked in the ICTY, while only a single one of the eight Senior Trial Attorneys has no prior experience within international criminal courts.<sup>231</sup> Hans Bevers considers that the ICC has more in common with the other international criminal law tribunals than it does with any national system and therefore hiring lawyers with previous international experience is an advantage. However, again he is at pains to point out that this is not necessarily the only relevant factor, as you can have lawyers with a lot of international experience who are not very good, and good lawyers from a domestic system who can easily adapt.

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<sup>227</sup> *Ibid.*

<sup>228</sup> Bevers interview.

<sup>229</sup> For example, tax free salaries, education grants, home leave.

<sup>230</sup> Trial lawyers will generally be graded at P3 level. A Senior Trial Lawyer, who is responsible for running a case is graded at the P5 level. See the Salary Scale for professional staff members of the UN Common System, [http://www.un.org/Depts/OHRM/salaries\\_allowances/salaries/salaryscale/professional/base-01-2016.xls](http://www.un.org/Depts/OHRM/salaries_allowances/salaries/salaryscale/professional/base-01-2016.xls) - Last accessed 20/08/2016.

<sup>231</sup> At the ICC the Senior Trial Attorney, who is part of the Prosecution Division, acts as the head of a Joint Team (JT) which consists of the investigative team (part of the Investigation Division) and the prosecution team.

Although in recent years we have witnessed the Sierra Leone Tribunal all but close down, and the ICTY and ICTR have been down-sizing in a meaningful way over recent years as well,<sup>232</sup> the focus for career opportunities are therefore centred more on the ICC for positions. It also means that there is currently a reasonably good supply of lawyers who are capable of filling vacant positions. Many years of practice in the international arena means that prosecutors have had time to become accustomed to the new legal system. Indeed, some have practiced in The Hague longer than they have in their national jurisdictions.

### 3.6.2 Judges

In many ways it could be more challenging for judges to adapt to the new system because for the most part, they are older, heading towards the end of their careers and therefore could be more embedded in their national legal culture. Judges are different from other actors because they are elected by the States Parties on a global scale, from different geographic regions according to a built-in mechanism to ensure diversity. However, they are nominated in the first instance by their national governments and the actual selection can be a highly political process. To address this matter, civil society in the form of the Coalition for the International Criminal Court (CICC) has created a committee to “[urge] governments to put forward the most highly qualified candidates in a fair, transparent and merit-based election process.”<sup>233</sup>

The ICTY and ICTR differed slightly in the election process of their judicial appointments in that the judges are elected, following nomination from their home governments, by the UN Security Council and for a period of only four years.<sup>234</sup> Within the ICC, once elected, judges serve for a non-renewable mandate of nine

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<sup>232</sup> The United Nations Security Council did create the Mechanism for International Criminal Tribunals (MICT) in December 2010 to “carry out a number of essential functions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), after the completion of their respective mandates”. See: <http://www.unmict.org/en/about> - Last accessed 10/03/2016.

<sup>233</sup> <https://cicglobaljustice.wordpress.com/2014/04/29/wanted-highly-qualified-candidates-to-become-icc-judges/> - Last visited 15/04/2015.

<sup>234</sup> Although it can be renewed once for a further four year term.

years.<sup>235</sup> This longer term enables judges to become embedded within the institution and allows them to gain experience. Some commentators have levied criticism at some States whose diplomatic “representatives have apparently viewed success on [the] nomination of judges to the tribunals and to the court as adding to states’ prestige – and thus elections have become exercises in campaigning and logrolling rather than the determination of expertise”.<sup>236</sup>

### 3.6.3 Defence Counsel

The ICC has set criteria for those wishing to appear before it:<sup>237</sup> “These prerequisites to practicing before the Court are designed to guarantee that every person in need of legal representation implicated in ICC proceedings has available to him or her a pool of highly competent counsel to ensure quality legal representation.”<sup>238</sup>

To qualify for admission to the list of counsel, lawyers must meet certain criteria,<sup>239</sup> which provide a foundation for the harmonization of competence. The obligation to be at least ten years qualified provides a safety net and ensures that inexperienced counsel do not have the opportunity to take on a case for which they may be unqualified. In order to further harmonise the defence counsel from different jurisdictions, an idea was proposed to create an International Criminal Bar Association.

## **3.7 International Criminal Court Bar Association**

In March 2015 the ICC’s Registrar, Herman von Hebel held an event where he brought together a panel of experts to consider the establishment of a Victims Office and a Defence Office,<sup>240</sup> as part of a re-structure of the ICC’s Registry. One of the

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<sup>235</sup> Article 36(9)(a) of the Rome Statute.

<sup>236</sup> Schiff, *supra*, note 184, p.52.

<sup>237</sup> To be admitted, candidates must satisfy the minimum quality assurance requirements set out in Rule 22 of the Rules of Procedure and Evidence, and Regulation 67 of the Regulations of the Court.

<sup>238</sup> Counsel authorised to act before the Court at <https://www.icc-cpi.int/about/registry/Pages/list-of-counsel.aspx>.

<sup>239</sup> Appointment and qualifications of Counsel for the Defence, Rule 22(1), Rules of Procedure and Evidence of the International Criminal Court ICC-ASP/13, 3-10 September 2002.

<sup>240</sup> The Office of Public Counsel for Defence was “created in order to reinforce the equality of arms and to enable a fair trial within the meaning of the Rome Statute.” See: “Delivering on the

agenda items was the potential creation of an association or bar for counsel operating or supporting the work of the Court. One of the outputs of the conference was the establishment of an *ad hoc* committee to draft a constitution for an ICC Bar Association for such counsel. Although there was already a list of counsel,<sup>241</sup> the recent proposals are a step further and are not without an element of controversy.<sup>242</sup>

Hans Bevers is very much in favour of the concept of an international criminal bar and takes some credit, along with Béatrice Le Fraper du Hellen<sup>243</sup> from the French delegation at the Rome Conference, for its early development. Bevers helped to draft Rules 20 to 22 of the Rules of Procedure and Evidence, which rooted the idea of a bar association. Therefore, according to Bevers himself within his post as the Dutch representative in *PrepCom*, he championed, or followed at least, and stimulated this initiative.<sup>244</sup>

Around the time of the Rome Conference an organization was established called The International Criminal Defence Attorney Association (ICDAA). They were present at the Rome Conference. It was “[c]reated in 1997, [the] ICDAA initially focused on vigorously supporting the establishment of the International Criminal Court (ICC) and proposing specific measures in the ICC rules to reinforce defence rights and the independent organization of lawyers practicing at the court. The Association led the coalition of legal organizations, bars and lawyers that created the International Criminal Bar (ICB), founded in Montreal in 2002 and now headquartered in The Hague, Netherlands, near the ICC”.<sup>245</sup>

Bevers, who also played a part in the creation of this organization and sees merit in it, believes though that it never became established as the sole representation of the international defence attorneys, for the purposes of dealing with the Registry,

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promise of a fair, effective and independent Court” - Legal Representation, <http://www.iccnw.org/?mod=legalrep&idudctp=21&show=all> - Last visited 15/05/2015.

<sup>241</sup> The List of Counsel created and maintained by the Registrar in accordance with Rule 21(2) of the Rules of Procedure and Evidence.

<sup>242</sup> See: Jonathan Goldsmith’s comments in the Law Society Gazette, “International courts and lawyers”, <http://www.lawgazette.co.uk/analysis/comment-and-opinion/international-courts-and-lawyers/5049285.article> - Last visited 22/06/2015.

<sup>243</sup> See: <http://www.ambafrance-mt.org/Beatrice-le-Fraper-du-Hellen> - Last visited 06/06/2015

<sup>244</sup> Bevers interview.

<sup>245</sup> <http://www.aiad-icdaa.org/>.

possibly because the then Registrar preferred not to have a sole liaison point, but to rather deal with many associations and organizations.<sup>246</sup>

The new proposal, which has recently come into being, could create a bar association more akin to a national bar association with requirements for entry and even disciplinary powers. It would differ from other international law associations like the American Bar Association<sup>247</sup> or the International Bar Association. However, an ICC Bar Association would have a number of benefits which could assist lawyers practice law before the ICC, and help lawyers to operate more effectively. However, it is questionable if it can make a significant impact to the quality of the advocacy before the Chambers, given that members are generally dispersed throughout the world and spend comparatively little time in The Hague. A cynical view is that it would operate more as a ‘workers union’, who cooperate to negotiate with the Registrar on the fees they can charge.

The ICTY had already created an association, called ‘Association of Defence Counsel Practising Before The International Criminal Tribunal For The Former Yugoslavia (ADC- ICTY)’.<sup>248</sup> “The ADC-ICTY is an independent professional association established under the laws of The Netherlands”<sup>249</sup>. It is not an organ of the Tribunal itself, it is recognized as the Defence Counsel organization serving the ICTY pursuant to Rule 44 of the ICTY Rules of Procedure and Evidence. However, this was not the only body representing defence counsel. The ICTY also had an association who operated at a policy and organizational level established by Misha Wladimiroff, a member of the International Criminal Law Bureau.<sup>250</sup>

“The Bureau is a group of highly qualified lawyers with unrivalled expertise in international criminal law, international humanitarian law, human rights law and criminal law. The Bureau’s lawyers provide clients with the skill and

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<sup>246</sup> Bevers interview.

<sup>247</sup> The American Bar Association runs a special ICC project implementing longstanding ABA policies on international criminal justice. See <https://www.aba-icc.org/> - Last accessed 01/01/2015.

<sup>248</sup> The Association of Defence Counsel Practising Before The International Criminal Tribunal For The Former Yugoslavia, see: <http://adc-icty.org/> - Last visited 07/07/2015.

<sup>249</sup> *Ibid.*

<sup>250</sup> <http://www.internationallawbureau.com/index.php/members/mischa-wladimiroff/> - Last visited 07/07/2015.

experience needed to handle the most complex international criminal cases, political situations and problems. The Bureau provides advice, consultancy and training services to States, international organisations, international courts and private clients”.<sup>251</sup>

Although this seems less like a bar association, there is no doubt that its members understand international criminal law procedure and have a mission to train would-be defence lawyers, which is an important goal. Despite the existence of these organisations, there remains some scepticism as to their value.

Gilbert Bitti stated that the reason that a real international bar association didn't exist was because of the opposition of the Spanish speaking countries of South America. They objected to this during *PrepCom* back in 1999/2000. He states: “The [South American representatives] will say we have to be part of the bar to get cases and they [the powerful common law countries and the French] will be the ones deciding if we can get the cases or not.”<sup>252</sup> He further indicated that a ‘soft association’, where it was more of a social club would be acceptable, but as proper bar association, not.

The concept of an association responsible for the legal training and continuous developing of its members is certainly an important way to harmonise the different cultures and help foster an entirely new civilization. It is important too, to see what jurisdictions have the largest representation on the ICC's list of counsel. The chart below gives a visual illustration. Despite the fact that most cases to date are based in Africa, the greatest geographical representation of counsel is from Europe. Uganda has been a situation country for more than a decade and only has four lawyers admitted to the ICC's list of counsel.<sup>253</sup> The dominance of European defence lawyers appearing before the Court is impacting its culture. Furthermore, on the prosecution side, despite having an African Chief Prosecutor, only a single senior trial attorney

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<sup>251</sup> <http://www.internationallawbureau.com/index.php/the-group/> - Last visited 07/07/2015.

<sup>252</sup> Bitti interview.

<sup>253</sup> See: <https://justicehub.org/article/diversifying-list-counsel-icc> - Last visited 20/07/2015.

out of eight is from Africa<sup>254</sup>. Also there is only one woman leading a prosecution team.

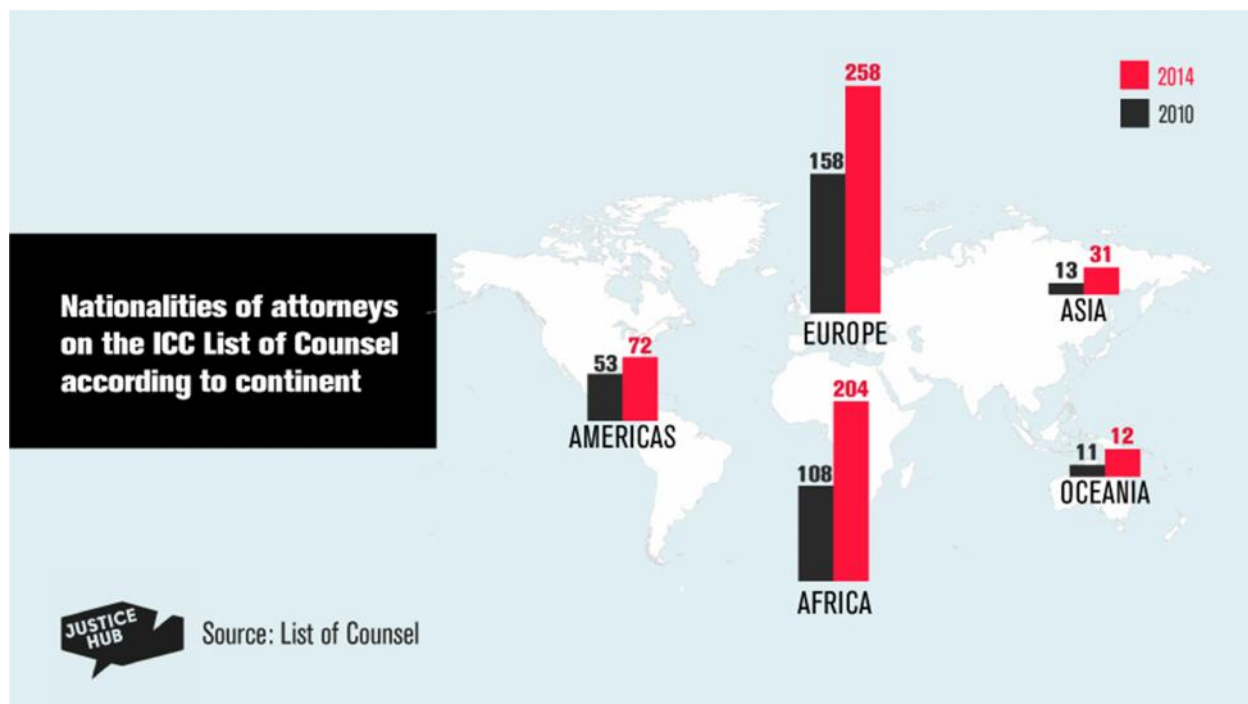


Figure 1. Geographical distribution of lawyers on the ICC's list of Counsel<sup>255</sup>

### 3.8 Legal Education and Training

An obvious way to introduce a new culture is to begin early in the legal education of students. Ideally, this could begin in high school, but international law features on the curriculum of many of the leading universities. There is a lucrative business in attracting students from all over the world to certain schools,<sup>256</sup> but there is also a danger that the ICC and other international courts will only choose their staff from among the high ranking universities, resulting in a lack of diversity of cultures within the corridors of the Court. Additionally, while the ICC does offer internships, they are no longer funded as they once were.<sup>257</sup> As with all unpaid internships, only a

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<sup>254</sup> See: Table 20: Major Programme II: Proposed staffing for 2016, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-10-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf). The table does not break down geographical distribution, but the author has been able to verify this figure.

<sup>255</sup> Source: <https://justicehub.org/article/diversifying-list-counsel-icc> - Used with permission.

<sup>256</sup> For example, in recent years Leiden University has created a campus based in The Hague and built up an excellent reputation for its international law courses.

<sup>257</sup> The EU used to provide a generous stipend to interns from certain countries, however, this funding ended in 2011.

privileged few are in a position to move to The Hague for six months. There is a danger therefore, that those entering the Court will fail to properly represent all of the States who make up the Court. To counter this, the Assembly of States Parties (ASP) need to set aside resources to fund interns and visiting professional from underrepresented countries and there might even be an argument to specifically identify candidates from Africa, as currently most of the Court's Situations are based in that Continent.

### 3.9 Gender Balance and Geographical Distribution

The Rome Statute, sets out the selection procedure of recruiting staff in the Court.<sup>258</sup> The ICC should “pursue fair representation of women and men for all positions, representation of the principle legal systems of the world for legal positions, and equitable geographical representation for positions in the professional category.”<sup>259</sup> In fact the Court has achieved a gender balance that is almost equal.<sup>260</sup> Even at the more senior levels of Director and Professional levels, the data provided in March 2013 showed that 182 male and 178 female staff members occupied these positions.<sup>261</sup>

However, the data relating to the geographical distribution of staff needs some work to ensure that staff from under-represented countries are given a better chance.<sup>262</sup> A gender and geographical distribution balance goes to the heart of what the drafters of the Statute wanted to achieve and thus, points directly to the culture of the organisation.

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<sup>258</sup> Arts. 44(2) and 36(8) of the Rome Statute. See also: Assembly resolution ICC-ASP/1/Res.10.

<sup>259</sup> Assembly of States Parties: “Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court”, ICC-ASP/12/49, Twelfth session, The Hague, 20-28 November 2013, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-49-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-49-ENG.pdf) - Last accessed 15/05/2016.

<sup>260</sup> Statistics provided as of 31 March 2013, show that female staff comprise 49.4 percent of the Court's professional staff, while male staff comprise 50.6 percent, *Ibid.*

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*, para.10.



### 3.10 Conclusion

While it may be understandable why the drafters of the Rome Treaty wanted to include the different legal traditions, and also that because international criminal law is a relatively new discipline still not practiced by many, differences are bound to emerge. The tone for a mixed legal heritage was set down at Nuremberg and, for the most part, all the international criminal tribunals based in The Hague have a very similar flavour, allowing lawyers to move easily between them. While people, of course, have a bias towards their own system, a hybrid culture has grown its own roots and there is enough of each of the common law and civil law characteristics that allows a growing number of states to trust the process.<sup>263</sup> Bitti believes that “people come with their own baggage, and this is not necessarily a bad thing”<sup>264</sup>, but, he states, there will always be clashes.

In terms of gender balance, the Court is well composed. However, in order for the geographical distribution of staff to be balanced the Court needs to ensure that it makes a special effort to reach candidates from underrepresented regions. Vacancy announcements could be advertised in local media outlets or even directly at universities. Direct contact with embassies of underrepresented countries is also a realistic option. Of course, to balance this proactive approach the Court needs to enforce a programme of not hiring candidates from over represented countries or regions. This naturally will present challenges to the hiring managers.

The ICC is creating new case law all of the time. Decisions are being made and appealed on an almost weekly basis and there is now a substantial body of law laid down. In addition, many lawyers and other staff have been working at the Court for a long period of time and have become accustomed to its methods. In many cases, having experience in other jurisdictions may lead to enhanced advocacy and the quality of the cases being presented is improving all the time. However, what we have seen in this chapter is that participants, defence counsel, judges and prosecutors, are becoming accustomed to the new system. Many universities are now

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<sup>263</sup> Although there is no real sign of States like Israel, Russia, USA and China joining the ICC, this is not necessarily as a consequence of the judicial process or courtroom activities, but more for political reasons.

<sup>264</sup> Bitti interview.

offering courses in public international law, which includes a component of international criminal law and also universities are training their students in moot courts and tribunals.

In the final analysis, the ICC is distinct from the international tribunals that have come before it and from the national courts of the States which form part of it. It may have taken time for the actors involved to become accustomed to the new method, but they have managed to do so. The Rome Treaty is a compromise instrument, both politically and legally. According to President Fernández, quoting the *PrepCom* draft statute: “the decision of the authors [of proposals] to move away from national positions towards a single straight forward procedural approach, acceptable to delegations representing different national legal systems”.<sup>265</sup>

The Trial Chamber’s decision to convict Mr. Katanga was initially appealed by the Defence, however, the appeal was later withdrawn.<sup>266</sup> It has never been tested whether or not the Trial Chamber’s late decision to change the characterisation of the facts impinged on the accused’s right to a fair trial, and commentators will continue to argue the merits and demerits of the provision.

Ultimately, “[n]o one State or group of States may claim total victory, or a monopoly of the Statute, for each made concessions and compromises in order to make the instrument generally acceptable”.<sup>267</sup> The Court’s culture will continue to evolve and to settle. Procedures, Administrative Instructions (AI’s) and Internal Policies are making working habits more standardised and staff know what is expected from them. The move to a new permanent premises means that for the first time in many years all of The Hague based staff are under one roof again and this has led to a more familiar working relationship between the different Organs of the Court.

As more cases are brought to trial, it is hoped that the law will also settle and participants will know what to expect from the proceedings. The Court’s staff are drawn from all over the world; many come to The Hague for a definite period of time and as a result there is a temporary feel to working at the ICC. Additionally, the

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<sup>265</sup> *Supra*, pp. 223, 224.

<sup>266</sup> “Defence and Prosecution discontinue respective appeals against Judgment in Katanga Case”, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1021&ln=en>.

<sup>267</sup> *Supra*, note 150, p.36.

longest fixed term contract of employment is for five years and many join the Court on significantly shorter contracts than that.<sup>268</sup> In order to provide a more stable environment, these contracts should be examined. Additionally, there is no promotion structure in place. All positions are advertised and staff need to compete with external candidates for 'promotions'. Again, this is something for the Assembly to look into. A stable environment is necessary for staff to perform well and therefore this is related to the research question as a challenge to be addressed for ensuring the long term success of the court.

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<sup>268</sup> General Temporary Assignments (GTA) along with Short Term Assignments (STA) cannot be offered beyond the current budget term, meaning that they terminate at the end of each year. It is not uncommon for staff to have four or six short term contracts. A colleague of the author moved from the West Coast of the United States for a contract that began on the 1<sup>st</sup> of December with no guarantee that he would have a new contract in January the following year.

# Chapter 4: Confirmation of Charges and Evidence

## 4.1 Introduction

This Chapter will address a large procedural issue which has received a lot of attention from commentators. It is directly relevant to the research question because, if the Prosecutor and the Judges are philosophically opposed on the issue of the nature and extent of the evidence to be presented at the confirmation of charges stage, then it could present serious credibility problems for the Court.

In particular the *Gbagbo* case raised serious concerns for the OTP, especially around the topic of how much of the evidence should have been collected and how ‘trial ready’ the Office should be at the time of the confirmation of charges. This chapter will closely examine that particular case. The author strongly disagrees with the idea that an investigation should be all but complete, believing it to be inefficient and contrary to the spirit of the Statute. Furthermore, not being trial ready will not necessarily adversely impact the interests of the accused, and turning the confirmation of charges hearings into a mini-trial will not serve the general interests of justice. How the Court deals with this issue in the next few cases will have a big impact on the success of the Court in the future.

The idea of holding a hearing in order to confirm charges brought by a prosecutor after an investigation in a criminal process, is not a concept familiar to many of us in Europe. Although, those readers familiar with the common law culture practiced in the US will, no doubt, be aware of the Grand Jury system<sup>269</sup> which is, in essence, a pre-trial hearing with the capacity to hear witnesses and review evidence before deciding to send a case forward for trial before a criminal court.<sup>270</sup>

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<sup>269</sup> For a history of Grand Jury’s see: “Behind the Locked door of an American Grand Jury: Its History, its Secrecy and its Process”, Kadish, Mark, Florida State University Law Review, 1996, <http://www.law.fsu.edu/journals/lawreview/frames/241/kaditxt.html>.

<sup>270</sup> The Grand Jury is larger than a regular jury and it is used in some common law jurisdictions but not in others.

The drafters of the Rome Statute enshrined, in Article 61, the requirement for the Pre-Trial Chamber to hold a hearing within a “reasonable time after the person’s surrender or voluntary appearance before the Court” in order to confirm the charges which the Prosecutor initiated.

The hearing does have some characteristics of a trial: it is presided over by 3 judges,<sup>271</sup> the prosecution presents some evidence to support the charges, and the accused is present<sup>272</sup> along with his or her counsel. The process allows parties to issue opening and closing statements and for the examination of witnesses. Following the hearing, the judges retire to issue their judgment.<sup>273</sup> Although I will delve deeper into the function of the confirmation of charges hearing later in this chapter, it is not a trial. Nor is it even a mini-trial. Its function is to allow the judges of a pre-trial chamber to evaluate whether the prosecution has enough evidence to move ahead with a trial on the charges cited. The Prosecution need not present all of its evidence at this stage but enough to satisfy the judges that there are “substantial grounds to believe”<sup>274</sup> that the accused committed the crimes alleged.

The confirmation of charges process is unique to the ICC and does not exist in the *ad hoc* tribunals.<sup>275</sup> It was designed in order to allow the Prosecutor complete

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<sup>271</sup> These Judges, from Pre-Trial Chamber, will not be the same as those chosen for the actual trial, should the charges be confirmed. The ICC is composed of three separate Chambers: Pre-Trial, Trial and Appeals.

<sup>272</sup> Article 61(2) of the Rome Statute allows for the possibility for the confirmation of charges hearings to take place without the presence of the accused, for a number of stated reasons.

<sup>273</sup> The options available to the judges are to dismiss all charges, some of the charges, confirm some or all of the charges or postpone the issuing of a decision and instead, instruct the prosecutor to provide more information by a certain date. See: Art. 61(7) of the Rome Statute.

<sup>274</sup> In the lead up to the signing of the Rome Statute the drafters had considered using the phrase ‘*prima facie*’, however a number of States felt the expression was insufficiently clear and that the ‘clearer expression’ reasonable grounds to believe should be adopted, which ultimately is what happened. It should be noted however, that there was no difference in the actual standard, merely the way of expressing the former was considered, by some at least, to be less clear than the latter.

<sup>275</sup> The essay of Tochilovsky represents a comparative analysis of charging at the *ad hoc* tribunals – ICTY, ICTR and SCSL – and at ICC. The core difference, according to the author, is the confirmation and amendment of charges at the ICC granted by Article 61 of the Statute, which obliges the prosecutor to support each charge with sufficient evidence, and allows the accused to present evidence at the hearing. Article 61 also gives the Pre-Trial or Trial Chambers an ability to amend the indictment. In contrast, at the ICTR, if satisfied, the

responsibility for when to initiate an investigation, while at the same time providing a system of accountability down the line, to apply the brakes on a case where there is insufficient evidence. The confirmation of charges step in the process, would also act as a reassurance to those States that were sceptical of a prosecutor with too much independence.<sup>276</sup> During the hearing, the Prosecutor is required to “support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crimes charged”.<sup>277</sup> The test therefore, is for the Prosecutor to establish that there are ‘substantial grounds to believe’ that the accused committed the alleged crime.

This test has a higher threshold than the requirement of ‘reasonable grounds to believe’ required when seeking a warrant for arrest or summons to appear.<sup>278</sup> It is lower, however, than the ‘beyond reasonable doubt’ test<sup>279</sup> required to secure a conviction. Mixed messages have come from the Pre-Trial Chambers, which will be discussed below, and it remains unclear as to what level of evidence is required to be presented at the confirmation of charges hearing in order for the Prosecutor to meet the ‘substantial grounds to believe’ requirement.

#### **4.2 Practical Purpose of the Confirmation of Charges Hearing**

As mentioned already, the case of *The Prosecutor vs. Laurent Gbagbo* is of special interest to the author because it was the first time that a Pre-Trial Chamber adjourned the hearing using Art. 61 para.7(c)(i) of the Statute. Additionally, the dissenting opinion raised doubts about the Majority’s understanding of the essence of the pre-trial phase and the Judge’s roles. It is this Case, therefore, which demonstrates best the challenges facing the OTP in order to be sure it has done enough to present a

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Judge shall confirm the charge upon the review with supporting material. See: Tochilovsky, V., “Charging in the ICC and Relevant Jurisprudence of the Ad Hoc Tribunals”, Chapter 23; Doria, J., Gasser H.P., Bassiouni C.M. “The legal regime of the International Criminal Court: essays in honour of Professor Igor Blishchenko: in memoriam Professor Igor Pavlovich Blishchenko (1930-2000)”, pp.827-841. Leiden; Boston: Martinus Nijhoff Publishers, 2009, p.840.

<sup>276</sup> This is explained by Bitti in Chapter 3.

<sup>277</sup> Article 61(5) of the Rome Statute.

<sup>278</sup> Article 58 of the Rome Statute.

<sup>279</sup> Article 66 of the Rome Statute.

case to the required standard at the confirmation stage. It is thus, central to the research question.

To better understand the rulings in the *Gbagbo* case, the author will look at the decisions of the Pre-Trial Chambers and their rulings about the basic meaning of the pre-trial phase at the ICC and the findings on ‘substantial grounds to believe’. An important question that will be considered, is whether the rulings in the different *Gbagbo* cases are really consistent with the former and later decisions and the principles that are outlined for the pre-trial phase.

There are a number of important principles which the Court must consider at the pre-trial phase: The rights of the defendant, should the case proceed to trial, ensuring that the pre-trial stage is not conducted as the actual trial, the factual matter of the case, and finally, judicial economy.

The first and maybe most important principle on which the pre-trial phase function is based on, is to protect the rights of the defendant. That means in practical terms, that no case should enter the trial phase without sufficient evidence to establish substantial grounds to believe that the accused has committed the crimes he is charged with.<sup>280</sup> Therefore, it is up to Pre-Trial Chamber to ensure the defendant will be protected against wrongful and wholly unfounded charges.<sup>281</sup>

### **4.3 Committal for Trial**

A further purpose of the confirmation of charges hearing is to ensure that the evidence presented is sufficient to justify committal for trial.<sup>282</sup> Furthermore, it means that the evidence supporting the charges proves that the accusations of the prosecution are going beyond mere theory or suspicion.<sup>283</sup> That also might be the

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<sup>280</sup> *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, para. 63 - <http://www.legal-tools.org/doc/67a9ec/>; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Case No. ICC-02/05-03/09, Decision on the Confirmation of Charges, 7 March 2011, para. 31 - <http://www.legal-tools.org/doc/5ac9eb/>.

<sup>281</sup> *The Prosecutor v. Germain Katanga*, *Ibid.*

<sup>282</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007, para. 34 - <http://www.legal-tools.org/doc/b7ac4f/>; *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 9 - <http://www.legal-tools.org/doc/5686c6/>.

<sup>283</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain*, *supra*, note 280.

reason why Pre-Trial Chamber I highlighted its ‘gate-keeper’.<sup>284</sup> The evidence should be assessed as a whole<sup>285</sup> to determine whether the Prosecution built a solid case.

Another important, and not well-known, function of the pre-trial phase is to actually set the scope of the case that will go on trial. This means that charges that are not approved by the Pre-Trial Chamber are not going to be heard before the Trial Chamber. Therefore, the pre-trial phase sets the factual subject matter of cases reaching the Trial Chamber.<sup>286</sup> It also shows in what ways the Chamber is bound by the charges presented by the Prosecutor, for they may not exceed these accusations.<sup>287</sup>

It is important that the confirmation of charges hearing should not become a trial before the trial or a mini-trial. The confirmation of charges hearing has a limited scope and purpose,<sup>288</sup> and the Pre-Trial Judges may not go beyond the accusations of the prosecution, nor should they attempt to investigate on their own.<sup>289</sup> They are of course mindful of the rights of the defendant and the accessible evidence but the Rome Statute does not give them the right to fully explore the evidence.<sup>290</sup> This is the duty of the Trial Chamber, otherwise it would be confusing to split the process of the prosecution in a trial and a pre-trial phase. The Pre-Trial Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction.<sup>291</sup>

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<sup>284</sup> *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013 para. 18 - <http://www.legal-tools.org/doc/2682d8/>.

<sup>285</sup> *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, paras. 22, 23 - <http://www.legal-tools.org/doc/5b41bc/>.

<sup>286</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 44 - <http://www.legal-tools.org/doc/96c3c2/>.

<sup>287</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain*, *supra* note 280.

<sup>288</sup> *The Prosecutor v. Germain Katanga*, *supra* note 280.

<sup>289</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, para. 40 – 08 February 2017, <http://www.legal-tools.org/doc/cb3614/>.

<sup>290</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, *Ibid.*

<sup>291</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, *Ibid.*



Furthermore, the principle of judicial economy is connected to the other purpose of the pre-trial phase: the Pre-Trial Judges are obliged to ensure that only those persons against whom sufficient compelling charges are proven, will go on trial.<sup>292</sup>

Alex Whiting believes that the “pre-trial judges have gone too far in mandating that the Prosecution reach this stage by the confirmation hearing, unless it can show exceptional circumstances requiring additional investigation”.<sup>293</sup> He stated that even the *ad hoc* tribunals, often cited as the model to be followed by the Court, never imposed such a strict regime on the OTP. He believes that while “it is essential that the core elements of the charges remain fixed so that the defence has proper notice, attempting to freeze in place the evidence at some point before the trial is unworkable and will ultimately undermine the goal of the Court to uncover the truth”.<sup>294</sup>

#### **4.4 Substantial Grounds to Believe**

The burden of proof required to be met is lower at the confirmation of charges stage than at the trial stage. This section examines what is meant by ‘substantial grounds to believe’.

##### 4.4.1 Definition

The Pre-Trial Chamber in the case of *The Prosecutor vs. Jean-Pierre Bemba Gombo* in a decision from the 15<sup>th</sup> of June 2009, attempted to define the term “substantial”.<sup>295</sup> They issued that according to the Oxford Dictionary, the term “substantial” can be understood as “significant”, “solid”, “material”, “well built” and “real”.<sup>296</sup> So the proof that the prosecution has to bring must be solid, well-built and real. Further, they stated concerning the threshold of proof, that in order to meet its

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<sup>292</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain*, *supra* note 280.

<sup>293</sup> Whiting, Alex, “ICC Prosecutor Announces Important Changes in New Strategic Plan”, Just Security, 24 October 2013, <https://www.justsecurity.org/2215/icc-prosecutor-announces-important-strategic-plan/> - Last visited 25/05/2015.

<sup>294</sup> *Ibid.*

<sup>295</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 28 - <http://www.legal-tools.org/doc/07965c/>.

<sup>296</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, *Ibid.*

evidentiary burden the Prosecutor must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations.<sup>297</sup>

According to the Court, the Prosecutor is not required to tender more evidence than is, in his or her view, necessary to convince the Pre-Trial Chamber that the charges should be confirmed.<sup>298</sup> This means that it is up to the Prosecutor to decide which evidence would bring solid proof that the person accused committed the crime. Furthermore, it is stated that the evidence must be assessed as a whole by the Pre-Trial Chamber.<sup>299</sup> On this basis, the Pre-Trial Chamber has to decide whether it is satisfied that all allegations are sufficiently strong to go for trial.

To summarise the rulings and findings mentioned above, the Pre-Trial Chambers said that, firstly, the evidence presented must be sufficient to justify committal for trial.<sup>300</sup> Secondly, the burden of proof lies somewhere in between the threshold for the issuing a warrant of arrest and the proof 'beyond reasonable doubt'.<sup>301</sup> Thirdly, that the proof needs to be 'solid', 'well-built' and 'real' in order to be substantial.<sup>302</sup>

#### 4.4.2 The Prosecutor v. Callixte Mbarushimana<sup>303</sup>

The burden of proof at the confirmation of charges stage was analysed in 2010 where the OTP failed to convince the Pre-Trial Chamber that they had met the required standard. On 28 September 2010, Pre-Trial Chamber I issued a warrant of arrest for Mr. Callixte Mbarushimana,<sup>304</sup> pursuant to the Prosecution's request.<sup>305</sup> The Warrant of Arrest was unsealed on 11 October 2010,<sup>306</sup> and Mr Mbarushimana was arrested later that day by the French authorities. It took more than three months to have him

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<sup>297</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 282.

<sup>298</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain*, *supra* note 280, para 40.

<sup>299</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 282.

<sup>300</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, *Ibid*.

<sup>301</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 295.

<sup>302</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, *Ibid*.

<sup>303</sup> Case No. ICC-01/04-01/10.

<sup>304</sup> A profile of Mr Mbarushimana can be found at: <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/941/action/show/controller/Profile.html> - Last accessed 03/03/2016.

<sup>305</sup> *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010 - <http://www.legal-tools.org/doc/04d4fa/>.

<sup>306</sup> <https://www.icc-cpi.int/drc/mbarushimana?ln=en>.

transferred to The Hague. He appeared before the Court for the first time on 28 January 2011.<sup>307</sup> Mbarushimana's arrest was the fourth by the ICC in the DRC Situation.

The Prosecution held him allegedly criminally responsible under Article 25(3)(a) or, in the alternative, under Article 25(3)(d), both of the Rome Statute, for eight counts of war crimes and five counts of crimes against humanity committed by the Forces Démocratiques pour la Liberation du Rwanda (hereinafter "FDLR") in the North and South Kivu Provinces of the DRC, between January 2009 and the date of the Application for a Warrant of Arrest.<sup>308</sup> The Prosecution submitted that he first became the *de facto* leader of the FDLR and he was later appointed FDLR First Vice President *ad interim* in 2010.<sup>309</sup> The confirmation of charges hearing was held from the 16 to 21 September 2011.

The Pre-Trial Chamber found that an armed conflict not of an international nature (NIAC) took place in the Kivu Provinces of the DRC between the DRC government forces and the FDLR, and that there were substantial grounds to believe that the FDLR, as an armed group, possessed the degree of organisation required under Article 8(2)(f) of the Statute.<sup>310</sup> Furthermore, after analysing the alleged crimes as submitted by the Prosecution, the Pre-Trial Chamber was satisfied that there were substantial grounds to believe that those crimes were committed by the FDLR, and took place in the context of the above-mentioned NIAC.<sup>311</sup>

The main submission by the Prosecution entailed the existence of an order to create a "humanitarian catastrophe" by directing attacks on the civilian population, emanating from the leadership of the FDLR in early 2009.<sup>312</sup> Nevertheless, after a careful examination of the Prosecution's evidence, the majority of the Pre-Trial Chamber, with the Presiding Judge dissenting, was not convinced, to the threshold of

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<sup>307</sup> *Ibid.*

<sup>308</sup> *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, para.13 - <http://www.legal-tools.org/doc/63028f/>.

<sup>309</sup> *Ibid* para. 5.

<sup>310</sup> *Ibid* paras. 106-107.

<sup>311</sup> *Ibid* para. 241.

<sup>312</sup> *Ibid* para. 245.

substantial grounds to believe, that crimes against humanity, under Article 7 of the Rome Statute were committed by the FDLR troops.<sup>313</sup>

After examining the evidence brought to its attention, the Majority was unable to be satisfied to the threshold of substantial grounds to believe that the FDLR pursued the policy of attacking the civilian population. Therefore, it concluded that there were likewise not substantial grounds to believe that the FDLR leadership constituted “a group of persons acting with a common purpose” within the meaning of Article 25(3)(d) of the Rome Statute.

Since the liability threshold under Article 25(3)(d) was not met for the armed group as a whole, the Chamber was not bound to verify whether Mr. Mbarushimana provided a significant contribution to the commission of the crimes mentioned above. Nevertheless, the Judges further analysed each of the suspect's alleged contributions, concluding that his role as a leader of the FDLR could not be qualified as any contribution, even less a "significant" one, to crimes by the FDLR in accordance with Article 25(3)(d) of the Statute.<sup>314</sup>

In light of the foregoing, the Majority, with Judge Sanji Mmasenono Monageng, dissenting, declined to confirm the charges against Mr. Callixte Mbarushimana.<sup>315</sup> The decision not to confirm the charges was undoubtedly a blow for the Office of the Prosecutor and the Pre-Trial Chamber expressed some harsh criticism for both the Prosecution and the Defence, for the way they conducted themselves in the lead up and during the proceedings. The Pre-trial Chamber stated:

“[b]efore going into the merits of the case, the Chamber wishes to express its dissatisfaction with both parties' conduct throughout the proceedings leading to the confirmation of the charges.<sup>316</sup> ‘First, there were significant oversights and mistakes regarding vital aspects of the case. Among these, the "errors, internal inconsistencies, omissions and duplications" identified by the Prosecution in the version of the DCC and LoE originally filed stand out as particularly unfortunate.’<sup>317</sup> ‘Such problems have not helped in streamlining the proceedings: in most cases they triggered additional petitioning and litigation,

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<sup>313</sup> *Ibid* para. 264.

<sup>314</sup> *Ibid* para. 303.

<sup>315</sup> *Ibid* para. 340.

<sup>316</sup> *Ibid* para. 35.

<sup>317</sup> *Ibid* para. 36.

such as when the Chamber was encumbered by the Prosecution with the unnecessary burden of authorising redactions to a document which had already been previously disclosed in an unredacted form.”<sup>318</sup>

The Pre-Trial Chamber levied further criticism at the Prosecutor which the Office had not heard before. The Chamber highlighted “its concern at the technique followed in several instances by some Prosecution investigators, which seems utterly inappropriate when viewed in light of the objective, set out in article 54(1)(a) of the Statute, to establish the truth by “investigating incriminating and exonerating circumstances equally”.<sup>319</sup>

The Prosecution never publicly reacted to the criticism, except to the extent that once the Appeal Decision was issued in May 2012, the OTP issued a statement saying it “takes note of today’s decision by the Appeals Chamber. We are evaluating the decision to see whether it is possible to present a new case against Mr Mbarushimana presenting additional evidence, in accordance with the Judges’ ruling”.<sup>320</sup> The case was then quietly dropped.

Although there are other instances in which charges failed to be confirmed,<sup>321</sup> for the next part of this chapter it is proposed to consider only a single case: that against the former Ivory Coast President, Laurent Gbagbo. The charges were eventually confirmed against him, but it was less than a smooth journey. The reason that this Case is so important is because the OTP was confident that it had understood the requirements of the process sufficiently well, and believed that it had put forward enough compelling evidence to meet the required burden of proof.

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<sup>318</sup> *Ibid* para. 36.

<sup>319</sup> *Ibid* para. 51.

<sup>320</sup> Press release *Prosecutor v. Callixte Mbarushimana* OTP Statement following the Appeals Chamber decision, 30/05/2012, <https://www.icc-cpi.int/Pages/item.aspx?name=otpstatement300512>.

<sup>321</sup> *The Prosecutor v. Henry Kiprono Kosgey* (ICC-01/09-01/11) and *The Prosecutor v. Bahar Idriss Abu Garda* (ICC-02/05-02/09).

#### 4.4.3 The Prosecutor vs. Laurent Gbagbo<sup>322</sup>

The Pre-trial Chamber, in line with Art. 61 para.7(c)(i) of the Statute,<sup>323</sup> issued a decision on 3rd Jun 2013 to adjourn the confirmation of charges. This Decision allowed the Prosecution the possibility to present more evidence on the Case and to conduct further investigations.<sup>324</sup> Firstly, the author will present the reader with the decisions and dissenting opinions, and then he will compare them to the findings before and after the judgements in this Case.

#### 4.4.4 First Confirmation of Charges Hearing

In the majority judgement<sup>325</sup> it is pointed out at first that “the Chamber will determine whether it is thoroughly satisfied that the (Prosecutor’s) allegations are sufficient strong to commit to trial.”<sup>326</sup> This is basically the applied standard used by the Pre-Trial Chambers before. It is describing the main three tasks of the Pre-Trial judges which it to ensure that only cases go on trial “for which the prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion”,<sup>327</sup> in order to protect the alleged person against wrongful prosecution<sup>328</sup> and to ensure judicial economy by selecting the cases that go on trial.<sup>329</sup> The judges, furthermore, started to emphasise, for the first time, the “gatekeeper function of the Pre-Trial Chamber”.<sup>330</sup>

The Pre-Trial Chamber changed its approach to the evidence as a whole in this Decision, by stating that “[e]ven though article 61(5) of the statute only requires the Prosecutor to support each charge with sufficient evidence at the confirmation hearing, the Chamber ‘must assume that the Prosecutor has presented her strongest

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<sup>322</sup> *Supra* note 284; *supra* note 285; *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the Defence request for leave to appeal the «Decision on the Confirmation of Charges against Laurent Gbagbo», 11 September 2014, <http://www.legal-tools.org/doc/17d7c7/>.

<sup>323</sup> *Supra* note 284.

<sup>324</sup> Article 61(7)(c)(i) of the Rome Statute.

<sup>325</sup> *Supra* note 284.

<sup>326</sup> *Supra* note 284, para. 17.

<sup>327</sup> *Supra* note 284, para. 18.

<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

possible case based on a largely completed investigation”<sup>331</sup>. By this, the Pre-Trial Chamber is referring to an Appeals Chamber decision where it was stated that ideally, the investigations of the prosecution shall be largely completed at the stage of the confirmation of charges hearing<sup>332</sup>. Furthermore, it is its opinion that: “This approach ensures continuity in the presentation of the case and safeguards the rights of the Defence, which should not be presented with a wholly different evidentiary case at trial.”<sup>333</sup>

Unfortunately, in the same decision the Appeals Chamber acknowledges that it is the Prosecutor’s decision how she investigates each claim and that there is no requirement in the Statute which suggests otherwise.<sup>334</sup> Neither do the Majority acknowledge that the Prosecution decides which evidence it will introduce, in which phase of the proceedings. The result should be that the Prosecutor has the choice whether she will introduce new evidence at trial. This would be just normal strategic planning in a case.

#### 4.4.5 The dissenting opinion of Judge Fernández de Gurmendi

Judge Fernández de Gurmendi issued a strong dissenting opinion. The author believes that the Minority opinion felt that the Majority judgement was introducing a completely new standard of proof. Fernández de Gurmendi stated that the Majority’s decision “is based on an expansive interpretation of the applicable evidentiary standard at the confirmation of charges stage that exceeds what is required and indeed allowed by the Statute”<sup>335</sup>. The Majority itself specifically acknowledges that it departed from the existing approach<sup>336</sup> and by doing that, they refer to two Appeals

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<sup>331</sup> *Supra* note 284, para. 25.

<sup>332</sup> ICC-01/04-01/10-514 para. 44.

<sup>333</sup> *Supra* note 284, para. 25.

<sup>334</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, para 54: "*The Appeals Chamber notes that, ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing - a matter that the Prosecutor acknowledges. However, for the reasons stated above, this is not a requirement of the Statute.*" - <http://www.legal-tools.org/doc/7813d4/>.

<sup>335</sup> *Supra* note 284, Anx., paras. 3, 4.

<sup>336</sup> *Supra* note 284, para. 37.

Chamber decisions<sup>337</sup> to modify their findings. The effect of deviation of the findings “makes it necessary for the Prosecutor to: (i) “present all her evidence”; (ii) “largely complete her investigation”<sup>338</sup>; and (iii) “present[] her strongest possible case.”<sup>339</sup>

Though it is stated in the Appeals Chamber Judgment that these findings above are not a legal requirement of the Statute itself,<sup>340</sup> which means the Prosecutor can decide whether she presents her strongest case possible.<sup>341</sup> Judge Fernández de Gurmendi first of all, questions the Chamber’s approach. She states that “the Pre-Trial Chamber is not an investigative chamber and does not have the mandate to direct the investigations of the Prosecutor.”<sup>342</sup> Further she is of the opinion that “such an approach undermines both the flexibility in the assessment of evidence that needs to prevail through all phases of the proceedings, as well as the possibility for the Prosecutor to rely solely on documentary and summary evidence.”<sup>343</sup>

The Pre-Trial Chamber also made specific reference to hearsay evidence and the reliance on external reports, noting that it would prefer first hand witness statements rather than NGO reports in order to support the allegations made by the Prosecutor.<sup>344</sup> Nevertheless, Article 61(5) of the Statute allows the Prosecutor to rely exclusively on documentary and summary evidence.

Judge Fernández stated that the “Pre-trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect, as was previously held.”<sup>345</sup> In addition, she stated that “the approach of my colleagues may end up reintroducing through the back door the “mini-trial” or ‘trial before the trial’ that the drafters and other Chambers of this Court wished so much to avoid.”<sup>346</sup>

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<sup>337</sup> The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali and in the case of The Prosecutor v. Callixte Mbarushimana.

<sup>338</sup> *Supra* note 284, Anx., para. 7 ; Decision, paras. 25 and 37.

<sup>339</sup> *Supra* note 284, Anx., paras. 7 ; 13 ; Decision, paras. 25 and 37.

<sup>340</sup> *Supra* note 284, Anx., paras. 7 ; 17 ; Decision, paras. 25 and 37.

<sup>341</sup> *Supra* note 284, Anx., para. 17.

<sup>342</sup> *Supra* note 284, Anx., para. 51.

<sup>343</sup> *Supra* note 284, Anx., para. 23.

<sup>344</sup> *Supra* note 284, paras. 28 ; 29 ; 30 ; 32.

<sup>345</sup> *Supra* note 284, Anx., para. 25.

<sup>346</sup> *Supra* note 284, Anx., para. 28.



Furthermore, the Chambers should not seek to determine whether the evidence is sufficient to sustain a future conviction<sup>347</sup>, this is simply not their responsibility.

“I believe that Pre-Trial Chambers need to exercise this gatekeeping function with utmost prudence, taking into account the limited purpose of the confirmation hearing. An expansive interpretation of their role is not only unsupported by law. It affects the entire architecture of the procedural system of the Court and may, as a consequence, encroach upon the functions of trial Judges, generate duplications, and end up frustrating the judicial efficiency that Pre-Trial Chambers are called to ensure”.<sup>348</sup>

The decision of the Pre-Trial Chamber to adjourn the hearing rather than failing to confirm the charges altogether, is a rather logical approach because without the knowledge of the newly applied standard, the Prosecutor had no chance to meet the higher requirement.

#### 4.4.6 Second Confirmation of Charges on the Prosecutor vs. Laurent Gbagbo

The Pre-Trial Chamber reconvened, and on 12 June 2014 confirmed the charges against Mr. Gbagbo and committed him for trial. However, it was again a majority judgement. The Pre-trial Chamber asserted that the Prosecutor must “offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [her] specific allegations.”<sup>349</sup> Further, all available evidence is assessed as a whole as required also by the limited scope and purpose of the confirmation of charges proceedings.<sup>350</sup>

The dissenting opinion was from Judge van den Wyngaert. She acknowledged that there was a “considerable quantitative increase in [the] evidence.”<sup>351</sup> However, she pointed out that “despite the request for more and better information as to the number of victims in relation to the alleged incidents, the previously identified

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<sup>347</sup> *Supra* note 284, Anx., para. 25.

<sup>348</sup> *Supra* note 284, Anx., para. 26.

<sup>349</sup> *Supra* note 285, para. 19; *Supra* note 280, para. 69; *Supra* note 282, para. 39.

<sup>350</sup> *Supra* note 285, paras. 22, 23.

<sup>351</sup> *Supra* note 285, Anx para. 2.

problem regarding reliance upon anonymous hearsay remains.”<sup>352</sup> In her opinion, she goes to some length to explain her rationale. She states that:

“charges should only be confirmed if the evidence has a realistic chance of supporting a conviction beyond reasonable doubt. I am, of course, aware that the applicable standard for confirmation is considerably lower than at trial. At the confirmation stage the Prosecutor may even be given the benefit of the doubt when there are questions about the credibility of certain witnesses or the probative value of particular documents. However, there must be at least enough of an evidentiary basis to sustain a possible conviction on the assumption that these questions are resolved in favour of the Prosecutor at trial. If it is clear that, even if the available evidence is taken at its highest, there is a substantial doubt that this will be enough to support a conviction, there is no point in confirming the charges.”<sup>353</sup>

The Appeals Chamber in the *Prosecutor vs. Callixte Mbarushimana*<sup>354</sup> pointed out that “the confirmation of charges hearing exists to separate those cases and charges which should go to trial from those which should not, a fact supported by the drafting history”. The decision continues to state:

“It serves to ensure the efficiency of judicial proceedings and to protect the rights of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence. It is by its nature an evidentiary hearing, with the Pre-Trial Chamber required to evaluate whether the evidence is sufficient to establish substantial grounds to believe the person committed each of the crimes charged. In order to make this determination as to the sufficiency of the evidence, the Pre-Trial Chamber must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to credibility arising from the evidence. By nature an evidentiary hearing.”<sup>355</sup>

The Chamber must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as its credibility.<sup>356</sup> The

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<sup>352</sup> *Ibid.*

<sup>353</sup> *Ibid.*, para. 4.

<sup>354</sup> *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012 - <http://www.legal-tools.org/doc/6ead30/>.

<sup>355</sup> *Ibid.*, para. 39.

<sup>356</sup> *Ibid.*, para. 39.

decision says that the confirmation of charges hearing is not an end in itself but: “serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial.”<sup>357</sup> Additionally, and importantly, the decision continues to state that:

“This limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor must only produce sufficient evidence to establish substantial grounds to believe the Person committed the crimes charged. The Pre-Trial Chamber need not be convinced beyond a reasonable doubt, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe. This limited purpose is also reflected in the fact that the Prosecutor may rely on documentary and summary evidence and need not call the witnesses who will testify at trial. As the Appeals Chamber has stated, the use of such summaries, even where the identities of witnesses are unknown to the defence and their underlying statements are not fully disclosed, is not necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>358</sup>

This Appeals Chamber decision in the Mbarushimana was delivered on 30 May 2012, more than a year before the decision to adjourn the confirmation of charges hearing in the *Gbabgo* Case, on 03/06/2013. It is interesting that the Pre-trial Chamber in the latter case decided to depart from the earlier Appeals Chamber decision and indicates that lower chambers are not obliged to follow the doctrine of *stare decisis*.

#### **4.5 Academic commentary**

The topic of confirmation of charges at the International Criminal Court is a widely discussed topic among academics and commentators. Most of the sources, being detailed descriptions of Articles 15, 57 and 61 of the Rome Statute, only have sketchy attempts to critically assess the confirmation process of the Court. However, the Washington College of Law drafted two reports on this topic: one in 2008 and another more recently, in 2015.

The first report describes the process of the confirmation of charges, and gives comments and recommendations on the current – back in 2008 – confirmed charges

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<sup>357</sup> *Ibid*, para. 47.

<sup>358</sup> *Ibid*, para. 47.

in the case against Thomas Lubanga Dyilo and in the joint case against Germain Katanga and Mathieu Ngudjolo Chui. The report reveals a number of complications in the confirmation stage, mainly delays and absence of full disclosure. As a result of this analysis, several recommendations have been made concerning the procedures during confirmation process and its conclusions, as well as decisions of the Pre-Trial Chambers.<sup>359</sup>

The recent report by the Washington College of Law is dedicated to propose fundamental restructuring of the confirmation process. The authors reason the need for changes in the system with a ‘disconnect between the drafters’ and the Court’s intentions regarding the confirmation process and the way that process has played out in practice<sup>360</sup>.” The report mentions the initiatives to improve the confirmation process undertaken by the Judges of the Court and by a group of outside experts, but discards these ideas as “insufficient to render the overall scheme consistent with the goals of the drafters and the Court itself”<sup>361</sup>. As a result of critical assessment of the confirmation of charges, a series of amendments to the ICC’s Rules of Procedure and Evidence and the Regulations of the Court have been made.<sup>362</sup>

The low level of inclusion of gender based crimes during the confirmation of charges, is raised by the report of the Executive Director of the Women’s Initiatives for Gender Justice, Brigid Inder.<sup>363</sup> She emphasises the pioneering role of the ICC in charging gender-based crimes in the case of Katanga and Ngudjolo. Nevertheless, she remains concerned that the impunity for these crimes continues, and criticizes the Court for not bringing charges of rape and other gender-based crimes against

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<sup>359</sup> “The confirmation of charges process at the International Criminal Court”, Washington College of Law, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project. Washington, DC: American University, Washington College of Law, 2008. pp. 7-12, 67-72.

<sup>360</sup> “The confirmation of charges process at the International Criminal Court: A Critical Assessment and Recommendations for Change”, Washington College of Law. War Crimes Research Office. International Criminal Court Legal Analysis and Education Project. Washington, DC: American University, Washington College of Law, 2015. pp. 2-3.

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*

<sup>363</sup> Inder is also Special Advisor on Gender to the Prosecutor of the International Criminal Court.

anyone else in the Democratic Republic of Congo.<sup>364</sup> Inder specifically raises the case of Mr Jean-Pierre Bemba Gombo in CAR, who faced charges of rape, but, according to The Women’s Initiatives for Gender Justice, was not charged with the full range of sexual violence crimes. While the Pre-Trial Chamber explains its reasoning that the ‘essence’ of the charges of torture and outrages upon personal dignity are fully subsumed by the charge of rape, the author argues that the Pre-Trial Chamber’s decision to only confirm charges of rape does not sufficiently address the extent of the harm suffered by those raped and those forced to watch family members being raped.<sup>365</sup>

Fabricio Guariglia<sup>366</sup> says that one of the contemporary challenges the ICC has to face is the authorisation of Pre-Trial Chamber. Guariglia notes this issue in the context of the Cote d'Ivoire Situation about the appropriateness of a Pre-Trial Chamber to make “autonomous findings pertaining to incidents and crimes not included in the Prosecutor's request”<sup>367</sup> and concludes that it is the task of the Court to deal with the uncertainty and ambiguity of these situations.<sup>368</sup> The recent confirmation of charges hearing in the Mali<sup>369</sup> Situation did not address the topic, but it is likely that future Pre-Trial Chambers will take the opportunity to address some of these challenges.

The late Judge Kaul also made observations on the perspectives and development of the Court, and he was critical of some of the proceedings. For example he believed they are not ‘expeditious’ enough, which causes many complications and delays. He offered a solution, where the Office of the Prosecutor works ‘full power *ab initio*’ to

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<sup>364</sup> Inder, B., “Making a statement: a review of charges and prosecutions for gender-based crimes before the International Criminal Court”, Second edition.

<http://www.iccwomen.org/publications/articles/docs/MaS22-10web.pdf> [Retrieved 29/07/2016] p. 19.

<sup>365</sup> *Ibid* p. 27.

<sup>366</sup> Guariglia is Director of Prosecutions at the OTP.

<sup>367</sup> Guariglia, F., “*Propio Motu* Powers of the Prosecutor”; Zidar, Andraž, “Contemporary challenges for the International Criminal Court” pp.93-102, London: British Institute of International and Comparative Law, 2014, p.100.

<sup>368</sup> *Ibid* p.102.

<sup>369</sup> See: <https://www.icc-cpi.int/mali> - Last accessed 28/08/2016.

achieve an unquestionable state of evidence.<sup>370</sup> Perhaps this point emphasises the difference between Chambers and the OTP, as the Prosecutor would certainly argue that she does in fact work at achieving the best possible evidence she can obtain.

The aspect of fairness and expeditiousness at ICC has been touched upon in a book chapter of “The Emerging Practice of the International Criminal Court” by Judge Trendafilova, who analyses the concept of *in absentia* proceedings in the history of the Rome Statute and the provision of Article 61(2)(b) of the Statute, in a scrupulous manner. She believes while a confirmation hearing *in absentia* “could provoke concern with respect to the person’s rights under the Statute, and, in particular the right to be informed of the allegations against him/her”,<sup>371</sup> she highlights that it is an option “to advance the pre-trial proceeding by virtue of [a] confirmation hearing in absentia”,<sup>372</sup> which would, in her view, contribute to fair and expeditious proceedings. Judge Trendafilova also believes that the right to be present is not absolute: “*Where fair trial standards are employed by the defendant to disrupt proceedings, the trial in absentia is an acceptable alternative to the usual procedure. [...] Proceedings in absentia are a contingency available to any judicial system in the event of the accused’s non-appearance. The failure to appear and defend in person should not render the court impotent.*”<sup>373</sup>

The material published by Human Rights Watch has summarised the experience of the Pre-Trial Chambers at the Court, emphasizing its unique role. The article does not provide the detailed description of the confirmation process, but marks it and

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<sup>370</sup> Kaul H, “The ICC of the future”; Andersen E., Crane D. M., “Proceedings of the Sixth International Humanitarian Law Dialogs”, American Society of International Law Studies in Transnational Legal Policy, No. 45, August 26 - 28, 2012, <http://heinonline.org/HOL/Page?handle=hein.journals/stdtlp45&id=113>, pp.110-111 – Last accessed.

<sup>371</sup> Trendafilova, E, “Fairness and expeditiousness in the International Criminal Court’s pre-trial proceedings”; Stahn, G. Sluiter C., “The Emerging Practice of the International Criminal Court”, pp.447-45, Leiden ; Boston: Martinus Nijhoff Publishers, 2009, p.445.

<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid.*

makes an overview of the cases which showed the necessity of the Pre-Trial Chambers.<sup>374</sup>

Understanding the place of the International Criminal Court among other international criminal courts and tribunals gives an opportunity for multilateral cooperation and exchange of experience. The essay of Tochilovsky represents a comparative analysis of charging at the *ad hoc* tribunals – ICTY, ICTR and SCSL – and at ICC. The core difference, according to the author, is the confirmation and amendment of charges at the ICC granted by the Article 61 of the Statute, which obliges the Prosecutor to support each charge with sufficient evidence and allows the accused to present evidence at the hearing. Article 61 also gives the Pre-Trial or Trial Chambers an ability to amend the indictment. In contrast, at the ICTR, if satisfied, the Judge shall confirm the charge upon a review with supporting material. Tochilovsky makes the conclusion that the Trial Chamber has discretion to allow the amendment of the charge and to grant additional time for the defence to prepare.<sup>375</sup>

The report “Defining the Case Against an Accused Before the International Criminal Court: Whose Responsibility Is It?” (2009) by the War Crimes Research Office at the Washington College of Law, focuses on the Court’s charges in the Lubanga and Bemba cases and, after thorough analysis, makes the following observations:

Firstly, the Rome Statute grants the Prosecutor “exclusive authority”<sup>376</sup> to frame the charges against the accused, while the Pre-Trial Chamber of the Court is not authorized “to become actively involved in the prosecution of the case”.<sup>377</sup> Secondly, in both cases of Lubanga and Bemba, the Pre-Trial Chambers have made decisions that have exceeded their authority: amended the charges, declined to confirm the charges and decided add new charges in the midst of the on-going trial. This, according to the report, was not in the interest of efficiency or protecting the rights of

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<sup>374</sup> “Courting history: the landmark International Criminal Court's first years”, Human Rights Watch, Landmark International Criminal Court's first years. New York, NY: Human Rights Watch, 2008, pp.14-27.

<sup>375</sup> *Supra* note 275.

<sup>376</sup> “Defining the case against an accused before the International Criminal Court: whose responsibility is it?”, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project; Washington, DC: War Crimes Research Office, American University Washington College of Law, 2009, p.42.

<sup>377</sup> *Ibid.*

the defendant, which “calls into question the very purpose of having confirmation of charges process”.<sup>378</sup> Finally, the report discusses in detail Trial Chamber I’s interpretation of Regulation 55 of the Regulations the Court in the Lubanga Case, which inevitably conflicts with a number of provisions of the Statute. Applying Regulation 55 to justify modifying the charges, “appears inconsistent with the Rome Statute”.<sup>379</sup>

The 2011 report “Expediting proceedings at the International Criminal Court” takes a closer look at the length of the confirmation process, and, as of the writing of this report, the ICC had concluded confirmation proceedings in five cases. In each case, the process had taken from 8 to 14 months.<sup>380</sup> The second issue the authors address in the report is the length of time between the transfer of the case to the Trial Chamber and the commencement of the trial proceedings, which took between 13 and 22 months.

The report proposes a solution to expedite the confirmation process, which requires the Prosecution to rely on fewer witnesses, as, according to the Article 61(5) of the Statute, the Prosecutor “need not call the witnesses expected to testify at the trial.”<sup>381</sup> The report also suggests shortening the sixty-day period given to the Pre-Trial Chamber to issue its decision, as “it seems appropriate at this stage to prioritize prompt delivery of the confirmation decision over detailed and lengthy discussions of the law and facts”<sup>382</sup> or, instead, require the decision of the Pre-Trial Chamber to be delivered “within 60 days of the last day of the actual confirmation hearing.”<sup>383</sup>

The article by Dr. Triestino Mariniello, “Questioning the Standard of Proof. The Purpose of the ICC Confirmation of Charges Procedure” is closely related to the researched topic and it represents an evaluation of the judicial debate, which arose in the pre-trial proceedings in the *Gbagbo* case. As mentioned already, in their 3 June

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<sup>378</sup> *Ibid* p.47.

<sup>379</sup> *Ibid* p.8.

<sup>380</sup> SáCout, S., Cleary, K., “Expediting proceedings at the International Criminal Court”, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project; Washington, DC: War Crimes Research Office, American University Washington College of Law, 2011, p.19.

<sup>381</sup> Rome Statute of the International Criminal Court.

<sup>382</sup> *Supra* note 379, p.23.

<sup>383</sup> *Ibid* p.25.



2013 decision (the “Gbagbo Adjournment Decision”), the majority of Pre-Trial Chamber I, for the first time since the establishment of the Court, requested the Prosecutor to present the case based on a “largely completed investigation”<sup>384</sup>. After a close examination of the Article 61 of the Statute, Mariniello argues that the Gbagbo Adjournment Decision approach, if put into practice, would bring several undesirable complications. Firstly, it would result in a vast amount of evidence being submitted to the Pre-Trial Chamber and probably delay the confirmation process. Secondly, it might lead to a “distortion of the confirmation of charges hearing, contrary to the purpose of Article 61 of the Statute”,<sup>385</sup> which aim is to prevent the transformation of the confirmation hearing into a mini-trial before the trial itself. Finally, the need for the Prosecutor to provide a more detailed investigation during the confirmation of charges, could, according to Mariniello, potentially “disrupt proceedings by blurring the boundaries between pre-trial and trial stages”<sup>386</sup>, which “would ultimately be detrimental to the rights of the accused, both in terms of the right to a speedy trial and the presumption of innocence.”<sup>387</sup>

#### **4.6 Conclusion**

The author believes that an obligation to have the case all but completed by the time of the Confirmation of Charges hearing, is inconsistent with the very notion of a Confirmation of Charges stage. The varying levels of proof required at the different stages are a key to the amount of effort that should be placed in the process. The OTP must cross each hurdle as they approach it. The same resources cannot expect to be allocated to the Confirmation of Charges hearing and the actual trial; the first is completed in a matter of weeks, the latter often takes several years.

The author supports Mariniello’s view and believes that the OTP should, where possible, argue this approach before the court in the future. The Prosecutor engages in regular future planning and will no doubt take a strategic view on this

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<sup>384</sup> *Supra* note 284, para. 25.

<sup>385</sup> Mariniello, T., “Questioning the Standard of Proof. The Purpose of the ICC Confirmation of Charges Procedure”, *Journal of International Criminal Justice* (2015) 13 (3): 579-599, p.593.

<sup>386</sup> *Ibid* p.598.

<sup>387</sup> *Ibid* p.579.

issue. However, by failing to address the issue at the next available opportunity, i.e. at the next confirmation hearing, there is a danger that a precedent will be set. It is therefore critical that the OTP seek to place the different stages in their correct context to avoid blurring the lines between the trial and confirmation stages.

The following chapter will examine the OTP's current strategic vision.



# Chapter 5 – The Future Strategic Direction of the OTP

## 5.1 Introduction

This chapter will focus however, on the greatest strategic changes being embarked upon by the Prosecutor and her team, and their possible long term benefit for the wider Institution. It will look at some of the issues mentioned in previous chapters, specifically the criticisms highlighted in chapter Two.

In order to predict how the Court will function in the future, it is proper to view inside the OTP to understand what is required to create a solid foundation for the next stage of its work to be completed. As will be discussed shortly, the management of the Office went to great lengths to consider its future strategy and explain it to its stakeholders.

The early years of the ICC have been marred by some difficult events in the courtroom. The Office of the Prosecutor was forced to evaluate its strategy after witnessing some flaws in its cases.<sup>388</sup> However, while *lessons learned* exercises began as early as the end of the *Lubanga* case, it was only with the change of leadership that the Office really began to consider a shift in strategy.<sup>389</sup> Nevertheless, because of the lifecycle of a case or situation any shift in strategy can take a long time to bear fruit.

This chapter will examine some of the biggest challenges faced by the Office in its early years and take a close look at the solutions being developed to address these

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<sup>388</sup> For example, after receiving criticism from the Trial Chamber in the Lubanga trial over its use of material collected under Art 54(3)(e) of the Statute, the Prosecutor at the time made a policy decision to inform his staff not to accept evidence which had a '*condition of receipt*' attached to it.

<sup>389</sup> Ocampo's strategy was to conduct intensive investigations and seek arrest warrants based on the minimum amount of evidence. He would then instruct investigators to continue to investigate and gather evidence in order to have enough to confirm the charges. Bensouda favoured an approach of wider and if necessary longer, investigations where the majority of the evidence could already be collected by the time of the confirmation of charges hearing.

challenges. It will also make a judgement on the effectiveness of these solutions and consider some new methods being pioneered by the Prosecutor Bensouda.

While considering the topics of strategy and strategic planning, the author has in mind the policies and plans that guide the Office in fulfilling its mandate. Yet it is important to be aware that investigations and trials are dynamic. No two cases are the same and it is necessary to react differently to different circumstances. Within the authors own team, the Information and Evidence Unit, the phrase '*strategic in the long term, tactics in the short term*' is often used. For example, it may be a strategy to use more forensic evidence and rely less on witness testimony; however, where no forensic evidence exists within a given investigation, this may not be possible.

## **5.2 New Prosecutor, New Strategy**

The 2013 Strategic Plan issued by the OTP in April 2013, provided the first formal indication that the Office was considering a change in its strategic approach. In reality, in the opinion of this writer, there was not much of a strategy in place at all during the infancy of the Office. A framework had been created, based to a very large degree on the model of the *ad hoc* tribunals and the early days were about attracting qualified staff. It has been suggested that:

“[d]uring its initial years, the OTP tested different approaches by relying on the diverse experience of staff members who came from different professional backgrounds. That experience applied within the very specific context and mandate of the OTP, resulted in the development of the OTP Operations Manual which, inter alia, defines the investigative standards of the Office. Since then the Office has continued to review and improve its practices and standards based on its experiences. As part of its strategy to enhance prosecutorial results, the OTP is, amongst other things, analysing the Court’s decisions in relation to its investigative practices to determine whether further changes to its investigative strategies and standards, are required”.<sup>390</sup>

The author can testify because of his direct involvement in the Institution that the initial stages of the OTP were challenging times, and the leadership of the Office

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<sup>390</sup> International Criminal Court, Office of the Prosecutor, Strategic Plan 2013 – 2015, 03 April 2013. Copy on file with the author.

relied on the diverse experience of the initial recruitment<sup>391</sup> in order to build a functioning organisation.<sup>392</sup> It appeared at times that the Office may have lacked a defined strategy. This cannot be uncommon in a new institution, and while it took some time to complete, new procedures and regulations were developed through trial and error. Each organisational unit developed its procedures and eventually an operations manual was drafted which attempted to bring together these procedures. The Operational Manual has undergone a redraft and it is a living document, which can be amended. It is not, however, a public document,<sup>393</sup> which means it will not be possible to extensively review it in this work.

According to one commentator close to the Prosecutor,<sup>394</sup> “the ICC has no uniform investigative approach across cases.”<sup>395</sup> This is not necessarily the result of poor structures or planning, but more because “each investigation is ... shaped by the constraints and opportunities peculiar to the situation ... Thus, ICC investigations are generally reactive, highly dynamic and unpredictable. Over time, evidence can become available or can disappear depending on many factors, including political circumstances and issues of security.”<sup>396</sup> This situation will always remain the case, particularly when the OTP only manages to open an investigation years after the

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<sup>391</sup> For example, Andrew Caley and Ekkehard Whitopf were both recruited from the ICTY where they served as trial attorneys and Christine Chung was recruited from the US, where she was a Federal Prosecutor, all as Senior Trial Attorneys. Caley and Whitopf were said to have had a difficult relationship with the then Prosecutor.

<sup>392</sup> According to one source, “*the role of ICC Prosecutor was always going to be extraordinarily difficult, under competing pressures from supporters and powerful detractors like the United States. Moreno Ocampo’s greatest asset was an exemplary cadre of professional staff for whom working at the ICC was more than a career – it was a vocation. ‘I loved this job’, an early recruit to the OTP told us. ‘It was my life’. The Prosecutor had the opportunity to draw upon the accumulated expertise of existing international tribunals and some of the world’s finest lawyers and investigators*”. See Flint, Julie and de Waal, Alex, “Case Closed: A Prosecutor Without Borders”, World Affairs Journal, Spring 2009, <http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders> - Last accessed 20/03/2016.

<sup>393</sup> The author in his professional capacity has a copy and has contributed to a number of sections of the Manual.

<sup>394</sup> Professor of Practice at Harvard Law School. He held several senior positions within the OTP between 2010 and 2013, including Investigation Coordinator and later Prosecution Coordinator.

<sup>395</sup> Whiting, Alex, “Dynamic Investigative Practice at the International Criminal Court, Law and Contemporary Problems”, Vol. 76:163.

<sup>396</sup> *Ibid.*

event, for example, in Georgia.<sup>397</sup> Nevertheless, decisions issued in some cases must have caused the OTP leadership to consider its methods<sup>398</sup> and judicial decisions have likely impacted on the strategy being deployed by the OTP in recently years.

### 5.3 OTP Strategic Plan 2012-2015

This plan was first made public in October 2013<sup>399</sup> and Dov Jacobs<sup>400</sup> was particularly cynical as to its reason for being. He claimed that it was essentially a public relations exercise designed to gain additional resources from the Assembly of States Parties, who agree on the Court's budget at the end of each year. He states: "This is made very clear in the Plan, which claims: there are no defensible alternatives to the increase in resources. In this sense, one can certainly not expect a large amount of self-reflection on past errors and anything more than a cursory attempt at self-criticism. But even with that in mind, as PR exercises go, this one seems to me to be particularly empty."<sup>401</sup>

Jacobs does not seem convinced that the OTP was being sufficiently introspective and facing up to past mistakes, commenting that "[s]ome acknowledgment that something needs to change at the OTP simply because things were not being done correctly before would have therefore been welcome, rather than the Strategic Plan blaming it on changing circumstances, the judges or lack of money."<sup>402</sup>

The 2012-2015 Strategic Plan, which could be called the 'post-Ocampo' approach or the 'Bensouda approach' highlights three new areas of change. Additionally, and

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<sup>397</sup> See: <https://www.icc-cpi.int/georgia> - Last accessed 15/08/2016.

<sup>398</sup> For example, following the Lubanga debacle over the use of Article 54(3)(e) material, the Prosecutor made a policy decision to permit the collection of evidence to which conditions of use were attached only in exceptional circumstances, a decision that stands to this day.

<sup>399</sup> The OTP Strategic Plan for 2012-2015, in addition to the previous one (2009-2012) seems to have been published quite late. One would expect the strategic plan for 2012 to be issued in 2011, rather than in 2013.

<sup>400</sup> Jacobs is a registered defence counsel at the ICC and also an Associate Professor at Leiden University.

<sup>401</sup> Jacobs, Dov, "Some Thoughts on the ICC OTP Strategic Plan: Trying to Build the Future on the Failures of the Past", 08 November 2013 - <https://www.justsecurity.org/2960/thoughts-icc-otp-strategic-plan-build-future-failures/> - Last accessed 15/03/2015.

<sup>402</sup> *Ibid.*

while not being expressed in a strategic plan, lessons seem to have been learned from the early cases and failures.

There appear, therefore, to be three main thematic shifts in the OTPs strategy:

1. Move away from narrow focused investigations.
2. Complete investigations at the time of the confirmation of charges.
3. Greater emphasis on forensic evidence while limiting the witness testimony evidence.

#### **5.4 Move Away from Narrow Focused Investigations**

One of the persistent allegations levied at the former Prosecutor was that he just sought to “secure quick convictions, rather than striving to capture a representative range of crimes committed during a given conflict.”<sup>403</sup> The policy of conducting narrow, focused investigations, which was a hallmark of Ocampo’s tenure, while causing ‘frustration ... for investigators’,<sup>404</sup> was justified on the basis that the Office could not investigate indefinitely<sup>405</sup> and it was a deliberate strategy based on an analysis of the ICTY experience in the *Miloševi* Case,<sup>406</sup> where it took the Tribunal six years to prepare indictments against Serbia’s former President.<sup>407</sup> However, the accused died four years into the trial and before the judgment could be rendered.<sup>408</sup> To contrast this scenario, Prosecutor Ocampo’s method was to conduct investigations in a short period of time, a few months, involving as few witnesses as possible.<sup>409</sup> In 2006 Ocampo stated that his approach to meet the challenges presented to his office was to “reduce the length and scope of the investigation.”<sup>410</sup>

According to Le Fraper du Hellen “In Uganda, it was a matter of drawing the balance between covering the widest range of victimisation, which is one of the main

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<sup>403</sup> Glassborow, Katy, “ICC Investigative Strategy Under Fire”, 27/10/2008, Institute of War & Peace Reporting, <https://iwpr.net/global-voices/icc-investigative-strategy-under-fire>

<sup>404</sup> According to former member of the OTP’s Executive Committee (ExComm), Beatrice Le Fraper du Hellen quoted in IWPR interview, *Ibid*.

<sup>405</sup> *Ibid*.

<sup>406</sup> ICTY, *The Prosecutor v Slobodan Milosevic*, Case No. IT-02-54.

<sup>407</sup> *Ibid*.

<sup>408</sup> See: <http://icty.org/cases/party/738/4> - Last accessed 01/01/2015.

<sup>409</sup> Le Fraper du Hellen quoted in IWPR interview, *supra* note 402.

<sup>410</sup> See: “Second public hearing of the Office of the Prosecutor NGOs and Other Experts”, 26 September 2006, [https://www.icc-cpi.int/iccdocs/otp/OTP\\_PH2\\_HGNGO.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP_PH2_HGNGO.pdf).



guiding principles of prosecutorial strategy, and conducting a focused investigation in a short time to have charges ready against those we considered most responsible,”<sup>411</sup> This was the persistent strategy deployed by the OTP for the duration of the Ocampo years.<sup>412</sup> When she became Chief Prosecutor, Bensouda<sup>413</sup> announced her intention to move away from this strategy reasonably quickly, without specifically criticising the previous regime, stating<sup>414</sup> “[w]hile the past strategy has achieved a number of positive results, the Office also has to evaluate whether it is adapted to future challenges”.<sup>415</sup> The OTP then presented a change in policy direction. It wanted to move away from the focused and narrow investigations where assumptions were made relatively quickly and a case hypotheses created at an early stage, towards a more contemplative scenario, where a great volume of evidence was collected and the Office might work on several case scenarios.

“Due to the higher evidentiary standards and the expectation to be trial-ready earlier, the notion of focused investigations is replaced by the principle of in-depth, open ended investigations while maintaining focus. The Office will expand and diversify its collection of evidence so as to meet the higher evidentiary threshold. It will apply multiple case hypotheses throughout the investigation which will further strengthen decision-making in relation to actual prosecutions.”<sup>416</sup>

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<sup>411</sup> *Ibid.*

<sup>412</sup> An ex-Senior Investigator, Martin Witteveen may have revealed why Ocampo decided upon the strategy of short investigations. While describing how the investigation team had been working for a year and a half on a number of different crimes, and one day were told without explanation to only focus on the crimes relating to child soldiers, dismissing 18 months worth of work, he says “*he thought that this might have happened because the investigation had already taken a long time, and prosecutors wanted something to present at court as soon as possible*”; simply that the investigative process was taking too long and it needed some focus. See: IWPR article, *supra*, note 402.

<sup>413</sup> Remember she had served as Moreno Ocampo’s Deputy Prosecutor for eight years prior to her election.

<sup>414</sup> Bensouda was part of this regime for almost its entire term. Although it is now widely understood that Ocampo was not a consensus leader.

<sup>415</sup> OTP Strategic Plan, 2012-2015, Executive Summary, 11 October 2013. Copy on file with the author.

<sup>416</sup> *Ibid* at 4.a, p.6.

Although it is not clear what the words ‘while maintaining focus’ mean,<sup>417</sup> it is a clear statement that the intense investigation deadlines<sup>418</sup> previously set by Ocampo were to be exchanged for longer investigations where more evidence would be gathered and reviewed before a decision was taken as to what charges should be brought. The new strategy also seems to reflect the personality of the second Prosecutor. In contrast to Ocampo, Bensouda appears to be more open, perhaps a little less decisive and aggressive in her approach.<sup>419</sup>

While the Prosecutor has never really commented on the extent to which her office evaluated the performance of the Office of the Prosecutor in the first years<sup>420</sup> she made it clear in a speech in Dublin in December of 2013, approximately 18 months after she assumed office and shortly after the publication of her first strategic plan, that “on the basis of my Office’s early experience and the lessons we have learned from an evaluation of our early practices, my Office has revised its prosecutorial strategy and policies, where necessary, to meet today’s challenges.”<sup>421</sup> Since she made this comment, the Office has opened a new investigation into crimes

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<sup>417</sup> Often these documents are drafted by a committee and undergo several revisions. The meaning may have been lost through a re-draft. Whatever the explanation, it does not add much and even complicates the point a little.

<sup>418</sup> Moreno Ocampo was obsessed by the idea of ‘focused’ investigations: “So all I’m talking about is the focus idea. And I love that. Because, yes, Lubanga is a small case; I love it. It’s a focused case on the evidence we have and we move with that. That’s perfect”; from an exit interview conducted by ICC Forum, see: <http://iccforum.com/forum/ask-former-prosecutor> - Last visited 12/03/2015. In fact it was a standing joke within the Office, captured on an internal staff video, in which the Prosecutor himself makes reference to in this interview. Although not for public distribution, the author has a copy on file.

<sup>419</sup> According to the New York Times “When Ms. Bensouda becomes the world’s most visible prosecutor for a single nine-year term, she may bring a change of style with her soft-spoken, low-key manner — a sharp contrast to her more publicity-conscious boss, who succeeded in quickly thrusting the new institution into the limelight after it opened its doors in 2002”. See: [http://www.nytimes.com/2011/12/13/world/europe/fatou-bensouda-becomes-lead-prosecutor-at-international-criminal-court.html?\\_r=0](http://www.nytimes.com/2011/12/13/world/europe/fatou-bensouda-becomes-lead-prosecutor-at-international-criminal-court.html?_r=0) - Last visited 02/06/2016.

<sup>420</sup> It should be remembered too, that Bensouda was the second highest ranking officer within the OTP for nearly the entire duration of the term of office of Ocampo and therefore a member of ExComm. She was familiar and one assumes, agreed with the original strategies adopted by the Office.

<sup>421</sup> Bensouda, Fatou, Lecture, “The International Criminal Court – Current Challenges and Future Prospects”, Co-hosted by the Department of Foreign Affairs and Trade and University College, Cork, 16 December 2013.

committed in Georgia,<sup>422</sup> which will likely present an example of ‘today’s challenges.’<sup>423</sup>

In this speech she told her audience: “We have moved to the concept of in-depth, open-ended investigations, while still maintaining a clear investigative focus”.<sup>424</sup> However here she clarifies, its ‘clear investigative focus’. It remains a little uncertain and it still does not explain what exactly she means. However, she goes on the point out that “[w]e will test our case hypotheses throughout investigations in order to strengthen decision-making in relation to prosecutions.”<sup>425</sup> This is a big shift because previously, the case hypothesis was developed very early on in the investigation phase and rarely changed as the investigation progressed. Nevertheless, it is still apparent that investigations cannot just go on indefinitely, and further it is unrealistic to consider that all crimes will be punished.<sup>426</sup>

In early 2016 the Prosecutor issued a draft policy on ‘case selection’ in order to give commentators the opportunity to provide the Office with feedback on how to choose its cases going forward.<sup>427</sup> This was a progressive move and demonstrated her desire to engage with civil society, something Ocampo did not really engage in, particularly later on in his tenure.

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<sup>422</sup> The application to open an investigation in Georgia was approved by the Pre-Trial Chamber on 27 January 2016 and will initially focus on alleged crimes against humanity and war crimes committed in the context of an international armed conflict between 1 July and 10 October 2008. The Prosecutor is seeking to investigate in and around South Ossetia. See: <https://www.icc-cpi.int/georgia> - Last visited 02/06/2016.

<sup>423</sup> To date all the cases before the Court have involved nations in Africa. The Georgia Situation is likely to consider some of the actions of Russian nationals, and it is not unreasonable to believe that Russia will not actively assist the OTP.

<sup>424</sup> *Ibid.*

<sup>425</sup> *Ibid.*

<sup>426</sup> The role of state cooperation is also crucial to comprehensive investigation and prosecution of crimes. South Africa, for example, allowing the Sudanese President, under indictment by the Court, to travel into its territory in June 2015 without arresting him, highlighted some of the challenges faced by the Court in relation to state cooperation.

<sup>427</sup> See: “ICC Prosecutor Fatou Bensouda, issues Draft Policy Paper on Case Selection and Prioritisation for comment” - <https://www.icc-cpi.int/legalAidConsultations?name=pr1238>.

## 5.5 Completing Investigations at the Time of the Confirmation of Charges

The second major policy shift announced by Prosecutor Bensouda, is her Office's intention to be all but done with the investigations by the time of the confirmation of charges hearings. Again, this is to be considered a big change. It is also a change the author considers to be an error, or at least that it is being done for the wrong reasons. This is discussed in greater detail in the chapter on Confirmation of Charges.<sup>428</sup>

Bensouda has said that “[i]n response to the expectations of the Judges and the standards we are setting for ourselves, we are endeavouring whenever circumstances permit, to be trial-ready by the time we bring cases before the Chambers. We are also seeking to bolster our collection of evidence from varied sources and to use enhanced state of the art methods of investigation.”<sup>429</sup> Although not obliged to do so, the Prosecutor will now aim to have the investigation all but complete at an earlier stage in the process. The impact of this policy will certainly add pressure to the investigation team and one has the impression that Ocampo would not have accepted this pressure from the Judges.<sup>430</sup>

This topic centres on the principle of the right of the accused to receive a fair trial.<sup>431</sup> In order to be fair, the Defence argue that they need to have all evidence disclosed at the earliest possible moment, in order for them to have sufficient time to defend against the allegations.<sup>432</sup> The question therefore is, should the Prosecution have collected all its evidence and all but completed its investigation by the time of the confirmation of charges hearing?

According to a former staff member of the OTP, Montserrat Carboni,<sup>433</sup> in an interview with IWPR,<sup>434</sup> “the OTP had a tendency to gather just enough evidence to

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<sup>428</sup> See: Chapter 4.

<sup>429</sup> *Ibid.*

<sup>430</sup> Moreno Ocampo was convinced in the idea of collecting only sufficient evidence to proceed to next stage of the process. The idea of having the investigation largely completed by the time of the confirmation of charges hearing was against his ideology.

<sup>431</sup> See: Article 67 of the Rome Statute.

<sup>432</sup> Usually a status conference with the parties before a judge will set out a timetable for the disclosure of evidence.

<sup>433</sup> Now a permanent representative to the ICC for the International Federation for Human Rights.

secure an arrest warrant. This would then be built on to confirm the charges, and then worked on again in order to clear the next hurdle in the case.”<sup>435</sup> The logic for the course of action was clear: different levels of burden of proof were required at the different stages in the judicial process.<sup>436</sup> The Prosecutor could therefore submit an application for an arrest warrant with a relatively small amount of evidence, and then go on to collect more in the event that she was successful, before going a step further following the confirmation of the charges against the accused. The new strategy seems to say that all, or at least the majority, of the evidence should be collected already at the second stage.

The debate about when the OTP should complete its investigative activity is more to do with a belief that the OTP is not presenting a strong enough case at the confirmation of charges hearings. According to Whiting “...some judges insisting that the prosecution complete its investigation appears to be a concern that the prosecution is not bringing strong enough cases, or that it is bringing cases with undeveloped evidence, with the hope of conducting substantial investigation as proceedings unfold.”<sup>437</sup> In fact there is no provision within either the Rome Statute or the Rules of Procedure and Evidence to compel the prosecution to complete its investigation prior to the pre-trial confirmation of charges hearing.

As discussed in Chapter 4, the Appeals Chamber in the *Mbarushimana*<sup>438</sup> case, said that “the investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber.”<sup>439</sup> However,

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<sup>434</sup> Institute for War and Peace Reporting.

<sup>435</sup> See “ICC Unveil New Investigation Strategy” - <https://iwpr.net/global-voices/icc-unveil-new-investigation-strategy> - Last visited 09/08/2015.

<sup>436</sup> ‘Reasonable grounds to believe’, is the standard for the issuance of an arrest warrant; ‘substantial grounds to believe’ is the standard required for the confirmation of charges and ‘beyond a reasonable doubt’ is what is required for a conviction.

<sup>437</sup> Whiting, Alex, “Dynamic Investigative Practice at the International Criminal Court, Law and Contemporary Problems”, Vol. 76:163, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4374&context=lcp> - Last accessed 15/08/2015.

<sup>438</sup> *The Prosecutor v Callixte Mbarushimana*, Case No. ICC-01/04-01/10.

<sup>439</sup> *Ibid*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”, 30 May 2012 - <http://www.legal-tools.org/doc/6ead30/>, para. 44.

‘largely completed’ is not the same thing as ‘completed’, and even with a thorough examination of the Rules and the Statute, no evidence can be found by the author that such a requirement exists.

The Appeals Chamber in the *Lubanga* Case was clear in its vision, stating “ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing”.<sup>440</sup> Albeit in a dissenting opinion, and referring to the Majority decision, Judge Fernández said that “[r]egardless of the desirability of the ideal that investigations be largely completed before confirmation of charges, I find it problematic that a policy objective has been turned by the Majority into a legal requirement, something that cannot be done without amendments to the legal framework.”<sup>441</sup>

Some believe that the “pre-trial judges have gone too far in mandating that the Prosecution reach this stage by the confirmation hearing, unless it can show exceptional circumstances requiring additional investigation”.<sup>442</sup> It could be argued that even the *ad hoc* tribunals, who are often cited as the model to be followed by the OTP, never imposed such a rigid regime on the prosecution. Whiting asserts that while “it is essential that the core elements of the charges remain fixed so that the defence has proper notice, attempting to freeze in place the evidence at some point before the trial is unworkable and will ultimately undermine the goal of the Court to uncover the truth.”<sup>443</sup>

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<sup>440</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, para. 54 - <http://www.legal-tools.org/doc/7813d4/>.

<sup>441</sup> *The Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, Dissenting Opinion of Judge Silvia Fernández de Gurmendi, para. 15 - <http://www.legal-tools.org/doc/2682d8/>.

<sup>442</sup> Whiting, Alex, “ICC Prosecutor Announces Important Changes in New Strategic Plan”, Just Security, 24/10/2013, <https://www.justsecurity.org/2215/icc-prosecutor-announces-important-strategic-plan/> - Last visited 25/05/2015.

<sup>443</sup> *Ibid.*

## 5.6 Greater Emphasis on Forensic Evidence While Limiting the Witness Testimony Evidence

The Court has built an entire administrative and procedural framework around the management of witnesses. For example, within the OTP there is Unit called the Protection Strategies Unit (PSU) which seeks to ensure the safety and wellbeing of prosecution witnesses, in addition to a larger unit in the Registry called the Victim and Witness Section (VWS).<sup>444</sup> Nevertheless, the Court has experienced difficulties with witnesses in several cases, but especially in the Kenya Situation. “Prosecution witnesses in this [Kenya] case have been under siege. The Office of the Prosecutor has identified a network of individuals who have been working together to sabotage the Prosecution's case against Messrs. Ruto and Sang, by using bribes and/or threats to either dissuade witnesses from testifying in this case or influence Prosecution witnesses to recant their testimony.”<sup>445</sup>

Citing “[a]n unprecedented campaign on social media to expose the identity of protected witnesses in the Kenya cases” and a “[c]oncerted and wide-ranging efforts to harass, intimidate and threaten individuals who would wish to be witnesses”<sup>446</sup> the Prosecutor was clearly concerned for the safety of her witnesses.

The ICC was established with special consideration of the victims of the crimes it is investigating.<sup>447</sup> The Prosecutor, therefore, has two reasons to want to limit the exposure of victim witness to its judicial activity. The management of witnesses in a

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<sup>444</sup> The Victims and Witnesses Section (VWS) has a statutory mandate to provide protection, support and other appropriate assistance to witnesses and victims who appear before the Court. The Rules of Procedure and Evidence further stipulate that the Victims and Witnesses Section shall provide witnesses, victims who appear before the Court and others who are at risk on account of testimony with adequate protective and security measures and formulate long-and short-term plans for their protection; recommend to the organs of the Court the adoption of protection measures and assist witnesses when they are called to testify before the Court.

<sup>445</sup> “Statement of the Office of the Prosecutor regarding the reported abduction and murder of Mr. Meshak Yebei”, 19/01/2015 - <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-09-01-2015>.

<sup>446</sup> “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the status of the Government of Kenya’s cooperation with the Prosecution's investigations in the Kenyatta case”, 05/12/2014 - <https://www.icc-cpi.int/Pages/item.aspx?name=stmt-05-12-2014>

<sup>447</sup> See for example: Rome Statute, Article 68(3) “...the court shall permit their [victims] views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court...”.

Case which might never go to trial, or in the best case scenario, take many years is a logistical burden for the Court. In addition, the experience of witnesses taking the stand has been problematic for the Prosecution “it will also continue its strategy of prioritising the collection of evidence other than witness testimony, for example forensic and documentary evidence, voice and cyber communication, in order to minimise personal risk as well as the risk of further traumatising for the witnesses”.<sup>448</sup> Nevertheless, creating this environment and infrastructure will take time and it is a longer term strategy, to be implemented on newer situations rather than existing cases.

The Prosecutor has said that the issue of witness interference and intimidation is a “significant challenge facing [the OTP] and the court proceedings”.<sup>449</sup> The Court currently has Article 70<sup>450</sup> cases, concerning offences against the administration of justice, going on in two separate situations, Kenya<sup>451</sup> and the Central African Republic.<sup>452</sup> It seems logical that reducing reliance on witnesses would remove these problems. Additionally, the pervasive use of social media and mobile technologies in society, including conflict zones, presents opportunities to the OTP to gather and use computer generated evidence. In part to combat the specific challenges posed by the use of witness testimony, the OTP have advanced a great deal in recent times to create a capacity to collect and use electronic, forensic and open source, (or new

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<sup>448</sup> OTP Draft Strategic Plan 2013-2015, copy on file with author.

<sup>449</sup> Bensouda, Fatou, “The International Criminal Court – Current Challenges and Future Prospects”, a lecture hosted by the Irish Department of Foreign Affairs and University College Cork in the Royal Irish Academy, Dublin, 16 December 2013.

<sup>450</sup> Article 70 of the Rome Statute relates to offences against the administration of justice, subsections states corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence.

<sup>451</sup> On 02 October 2013 an arrest warrant was unsealed against Walter Osapiri Barasa for several offences against the administration of justice consisting in corruptly or attempting to corruptly influencing ICC witnesses. See: <https://www.icc-cpi.int/kenya/barasa>.

<sup>452</sup> On 11 November 2014, Pre-Trial Chamber II partially confirmed the charges against Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido, and committed the five suspects to trial for offences against the administration of justice allegedly committed in connection with the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*. See *The Prosecutor v. Jean-Pierre Bemba et al*, Case No. ICC-01/05/01/13, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014 - <http://www.legal-tools.org/doc/a44d44/>.



media), evidence. As with much of the new plans, only time will tell whether this strategy is successful.

### **5.7 Draft OTP Strategic Plan 2016-2018**

On the 8<sup>th</sup> July 2015 the Prosecutor published a draft version of her latest strategic plan and invited interested “external partners, including States, intergovernmental and non-governmental organisations, academia and affected communities”<sup>453</sup> for their comments. The Prosecutor stated that “even as we see the positive impact of our 2012-2015 Strategic Plan, we continue our efforts to consolidate the high performance of the Office and to address challenges”<sup>454</sup> While the latest plan builds on the previous one, there are some new developments, namely:

1. The impact of the in-depth investigations on the ability to react to other priorities
2. Creation of a Basic Size model (The Basic Size Model of the Office of the Prosecutor has two fundamental objectives: First, is to ensure that the Office has the requisite resources to fully meet its mandate under the Rome Statute; and, secondly, to offer States Parties a reasonable stable basis for budgetary planning)<sup>455</sup>
3. Creation of a coordinated investigative and prosecutorial strategy to close the impunity gap.

The 2016-2018 Strategic Plan begins with some statistical data which shows that in the previous reporting period, the OTP has seen an improvement in its success rate of confirmation of charges decisions. It then goes on to say that “[i]t is anticipated that the new strategy will yield similarly positive effects on conviction rates for cases over the next few years”<sup>456</sup>. Their data is somewhat selective, as it only focuses on confirmation of charges, not including the results of fully completed trials,

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<sup>453</sup> “ICC Prosecutor Fatou Bensouda issues draft OTP Strategic Plan 2016-2018, for comment”, Press release ICC-OTP-20150708-PR1129, 08/07/2015, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1129&ln=en>.

<sup>454</sup> *Ibid.*

<sup>455</sup> OTP Internal Document, Basic Size of the OTP, 7 August 2015. Copy on file with the author.

<sup>456</sup> [OTP Strategic Plan 2016-2018](#), p5, 06/07/2015.

outstanding arrest warrants or any other metrics that could demonstrate the productivity or efficiency of the Office. An informed observer might not therefore share the same optimistic view of the results achieved by the OTP, and might even consider them unrealistic.

## **5.8 Impact of In-depth Investigations on the Ability to React to Other Priorities**

The current draft plan sets out clearly that the balance between quality and quantity has been considered carefully:

“The positive results achieved by the Office in the past three years have come at a cost. The speed at which the Office has been able to respond to situations calling for its intervention has been affected by its need to prioritise quality over quantity of work. Some necessary investigations have had to be postponed. This has impacted on the Office’s ability to react to ongoing crimes; negatively influenced the perception of the Office; and forced the Office to overstretch its resources creating undue, prolonged pressure on its staff”.<sup>457</sup>

Ever since its creation, the OTP has had to make choices and resources have always been limited. However, the OTP is now taking great care to set out what it can and cannot do with its available resources. It is therefore important for the OTP to be true to itself and not be swayed by criticism. Now is the moment for Bensouda to deflect criticism and continue in accordance with her strategy. The criticism will likely never disappear.

“We solved the big issues; in other aspects people will always have their opinions. Do they know the facts? Not always. Human Rights Watch questioned how many cases we are doing, without mentioning the policy we adopted in 2003. It’s my fault? No. But it’s okay. People make comments. I think it’s showing the interest in the Court. I’m not trying to please people. I’m trying to respect the law. And on this, no one can say I’m doing illegal things. That’s why I’m proud. I managed to open seven situations, fully respecting my mandate. No one can challenge that my cases are not grave enough, or my cases are including the most serious crimes. We had to challenge, to discuss, to appeal, but we are winning our cases. So, I’m doing what I have to do, and respect for people who have different views is part of my duty.”<sup>458</sup>

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<sup>457</sup> *Ibid*, p.7.

<sup>458</sup> *Ibid*.

The OTP receives a vast amount of communications requesting the Prosecutor to act, and while many of those who communicate with the Office will likely not read the draft Strategic Plan, it is an effort to manage the expectations of the most influential actors, namely the State Parties and the NGO's with a specific interest in the Court's activities.

## **5.9 Creation of a Basic Size model**

The OTP created an additional document in mid-2015 called the 'Basic Size of the OTP 2016-2018'. Its primary purpose was to forecast the basic required size of the Office for the coming period in order to "create financial predictability for States and a level of stability within the Office"<sup>459</sup>. Again, it is a way of justifying its resources to the States. This is a new approach by the OTP and it was probably requested by the Committee on Budget and Finance (CBF).

The idea is to create a vision longer than the usual annual budget cycle, and build the foundation for an increase in budget over the planned period. The Office highlights that it is "proposing a phasing in of the required resources to achieve the forecasted basic size over a period of three years."<sup>460</sup>

The Office had to deal with calls for a zero growth budget between 2009 and 2011 because "some ICC member countries ... raised concerns about the potential [of] spiralling costs and inefficiency in many aspects of the Court's work"<sup>461</sup>. This pressure, placed on the Prosecutor to choose where to allocate her resources was considered by some to be a 'capacity crisis' which "threatens not only the ICC's effectiveness, but also its legitimacy".<sup>462</sup>

The concept has two main objectives:

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<sup>459</sup> OTP Strategic Plan 2016-2018, *supra* note 455, p.7.

<sup>460</sup> *Ibid.*

<sup>461</sup> Evenson, Elizabeth and O'Donohue, Jonathan, "The International Criminal Court at Risk" - <http://www.opendemocracy.net>.

<sup>462</sup> *Ibid.*

1. Ensure “the OTP has sufficient resources to fulfil its mandate under the Rome Statute, based on past experience and a reasonable forecasting of what lies ahead”<sup>463</sup>
2. Offer “States Parties a reasonably stable basis for budgetary planning.”<sup>464</sup>

The OTP plans to phase-in the model over a number of years. The Office makes an effort to justify its proposals, and the document is based on the underlying considerations. Additionally, the financial implications are also clearly laid out: the OTP’s annual budget rising from 42.2 million Euro in 2015 to 60.6 million Euro by 2018.<sup>465</sup>

### **5.10 Creation of a Coordinated Investigative and Prosecutorial Strategy to Close the Impunity Gap**

The final important goal of the latest Strategic Plan certainly sounds ambitious. Expectation management is discussed below in this chapter, and such headings do not serve to help observers understand the limitations of the Court. This is the ninth strategic goal of the OTP: Develop with partners a coordinated investigative and prosecutorial strategy to close the impunity gap.<sup>466</sup>

The idea appears to be that crime is often not committed in isolation. In much the same way as ‘organised’ criminals often carry out multiple crimes, those who commit crimes under the Rome system might also be committing other offences, for

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<sup>463</sup> OTP basic size 2016-2018, International Criminal Court, Office of the Prosecutor, 14 July 2015, Executive Summary.

<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.*, p.7. The basis for the projections are: from experience gained that teams start off small but grow and develop over the duration of the case, again based on actual experience, the workload undertaken by the OTP and the final consideration being the reasonable projection of future activity based on its current assessment of the workload.

In terms of expectation management this document is very important. Figures are justified and costed and it will in due course, receive the scrutiny of the CBF and ASP. In many ways it is sound management by the current regime and firmly places responsibility back in the hands of the Court’s funders. What better excuse than to say that resources were requested but, for whatever reason, were denied. Looking to the future of the OTP, detailed engagements with the states, like this will help to build and keep trust between the two partners.

<sup>466</sup> OTP Strategic Plan, *Supra* note 455, p.31.

example “transnational, financial [and] terrorism”.<sup>467</sup> This goal seeks to enhance cooperation with other law enforcement actors in what one commentator calls ‘complementarity 2.0’.<sup>468</sup> The Office, by virtue of its mandate, can only ever address a “handful of cases”<sup>469</sup> and therefore to successfully plug the impunity gap, other global, regional and national organisations need to play a role. To achieve this end, the OTP “invites relevant jurisdictions and organisations to take the lead on addressing these other crimes”.<sup>470</sup> The Office might be able to share certain information and evidence with its partners. Thus, analysing the relationship between crimes generally, the OTP is seeking to assist in addressing certain associated criminal activity outside of its mandate.

The OTP set out how this collaboration might take place. For instance, it could build relationships with first responders, create knowledge centres, assist with the creation of open source data-bases and generally collaborate, much in the same way as state agencies might do in a domestic level.<sup>471</sup>

### **5.11 Expectation Management**

Before we move on to the next section, on the budget of the ICC, it may well be worth considering the sentiment expressed by Justice Jackson at the beginning of the Nuremberg trials. A court like the ICC came to give hope to many that the end of impunity is in sight and in many ways promoters of the new court could be accused of getting swept along in the euphoria of the new institution:

“May I add that your personal encouragement and support have been a source of strength and inspiration to every member of my staff, as well as to me, as we go forward with a task so immense that it can never be done completely or perfectly, but which we hope to do acceptably”.<sup>472</sup>

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<sup>467</sup> *Ibid*, para. 92, p.31.

<sup>468</sup> See Whiting, Alex, Justsecurity.org article, *supra* note 293.

<sup>469</sup> OTP Strategic Plan, *supra* note 455, para. 96, p31.

<sup>470</sup> *Ibid*, para. 94, p31.

<sup>471</sup> For instance, when the famous gangster Al Capone was arrested in Chicago 1931, it was for, among other things, income tax charges.

<sup>472</sup> Justice Robert H Jackson, “Justice Jackson’s report to the President on Atrocities and War Crimes”, June 7 1945 - [http://avalon.law.yale.edu/imt/imt\\_jack01.asp](http://avalon.law.yale.edu/imt/imt_jack01.asp) - Last visited 27/07/2015.

The management of expectations was never included in any strategy and, to a certain extent, the Court is now paying the price for this. Three years after the installation of Prosecutor Bensouda, there have been no new Situations.<sup>473</sup> Describing the Situation in the Ivory Coast, one commentator notes that the “victims’ high expectations for impartial justice before the ICC—fuelled by the fear, especially among the victims of crimes by the Ouattara-allied forces, that they would never get it at home—have given way to frustration regarding a lack of progress in prosecuting all sides”.<sup>474</sup> High expectations were created when Bensouda assumed control and now the reality is beginning to set in. Ensuring that people understand the limitations of the Office should be a key feature of any future strategy. Not merely pandering to those who fund the Court, but explaining to those who the Court was set up to serve.

### **5.12 Is the Cost of International Justice Too High?**

Before we leave this chapter, it can be noted that there is a growing chorus of voices who believe that the idea of an international criminal court is out of time. This is not necessarily without merit. In the summer of 2016 the British people voted to leave the European Union, largely on the basis that it was too expensive and ineffective in protecting their borders. This event led to serious conversations about the future of the Union. Therefore, we must give due regard to those who have concerns about the cost of the ICC.

The effectiveness of the ICC has been the subject of close scrutiny ever since its creation in 2002. In the following years, the Court faced continuing criticism, particularly directed at where trials have gone on for too long and in some cases, the Court’s most high profile suspects continue to evade capture<sup>475</sup>. It has been described as “inefficient, expensive and perhaps useless.”<sup>476</sup> Moreover, it has been suggested that the credibility of the Court may suffer, as a “high-profile suspect like al-Bashir

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<sup>473</sup> A second situation was opened in the Central African Republic, but this has not received much attention as it was already listed as a ‘Situation’.

<sup>474</sup> Evenson, Elizabeth, “ICC success depends on its impact locally”, [www.opendemocracy.net/openglobalrights/elizabeth-evenson/icc-sucess-depends-on-its-impact-locally](http://www.opendemocracy.net/openglobalrights/elizabeth-evenson/icc-sucess-depends-on-its-impact-locally).

<sup>475</sup> For example, Joseph Kony in Uganda and Sudanese President Omar Al-Bashir.

<sup>476</sup> Dicker, R., Evenson, E., “ICC Suspects Can Hide — and That Is the Problem”, JURIST - Hotline, 24 January 2012 - <http://jurist.org/hotline/2013/01/dicker-evenson-icc-suspects.php> - Last accessed 03/08/2016.

who continues to function in a senior position, ostentatiously conducting official visits to other capitals and hosting high-level visitors, flouts the warrant”.<sup>477</sup> Such assertions are frustrating for the Court’s officials, as it is well known to those commentators that the Court lacks the capacity to ensue the capture of some of those seeking to evade the Court’s jurisdiction.

These accusations against the effectiveness and efficiency of the Court, gain traction and raise questions about the Court’s financial independence and bias. For example, D. Hoile, Director of the Africa Research Centre and author of “Justice Denied: The Reality of the International Criminal Court” expresses “deep concerns not just about the ICC’s acute financial dependence upon western European funding corrupting the court’s legal independence but also on the all too obvious inefficiencies in how that money is used.”<sup>478</sup>

Another commentator reflects upon the economical and ideological dimensions of the Court’s practice. In a study entitled “Commodifying Global Justice, Economies of Accountability at the International Criminal Court” she urges actors of international criminal law to become the “stakeholders of ‘global justice’”<sup>479</sup> and highlights some of the market-based terms being used by the Prosecutor: “return on our investment is effective deterrence and saving millions of victims’ lives”.<sup>480</sup>

The article “The Failings of Ad hoc International Tribunals” considers the experience of the International Criminal Tribunal for the Former Yugoslavia, and highlights its drawbacks in order to learn from them in the future. The author emphasises the role of the ICTY in creating a “new culture of human rights and human responsibility, in which there can be no impunity”<sup>481</sup> for genocide, war crimes and crimes against humanity. However, Zacklin believes that the ICTY, as well as the ICTR, has encountered a number of problems that have “seriously

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<sup>477</sup> *Ibid.*

<sup>478</sup> Hoile, D., “Justice Denied: The Reality of the International Criminal Court”, The Africa Research Centre, p.19.

<sup>479</sup> Kendall, S., “Commodifying Global Justice. Economies of Accountability at the International Criminal Court”, *Journal of International Criminal Justice* (2015) 13 (1): 113-134, Oxford University Press, p.117.

<sup>480</sup> *Ibid.*

<sup>481</sup> Zacklin, R., “The Failings of Ad hoc International Tribunals”, *Journal of International Criminal Justice* (2004) 2 (2): 541-545, p. 541.

undermined confidence in the Tribunals and raised questions as to whether they can effectively promote respect for international justice and the rule of law”.<sup>482</sup> He characterises the issues as: the decentralisation of power and accountability, heavy bureaucratic structures, problems with outreach and reception by the victims. Zacklin concludes the article with his opinion on the Tribunals as “too costly, too inefficient and too ineffective.”<sup>483</sup>

British journalist Helena Cobban not only argues about the ineffectiveness of the international criminal tribunals, she believes they are actually a bad influence on the situation in the countries where the atrocities occur. She asserts that the idealists who created the international tribunals and the International Criminal Court hoped that these bodies would help check the power of governments and improve the well-being of people who suffered under the atrocities of violent conflict. However, she says, if you ask the people living in the former Yugoslavia or Rwanda, they are unlikely to say that the Tribunals have brought about any sort of reconciliation. Moreover, she argues that the work of the Tribunals has been too expensive,<sup>484</sup> reflecting a now all too common theme.

Another critical approach towards the ICC is formulated by McCargo,<sup>485</sup> who researches transitional justice, and comes to the conclusion that this model does not work. The reason for such a conclusion is the political bias of the transitional justice industry. The author turns to the study “International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation” by Peskin, who believes that the “tribunal’s ability to deliver justice hinges on how politically skilled its leadership is.”<sup>486</sup> Hence, “since all supranational transitional-justice arrangements are essentially political, they lack the legitimacy to effect real change.”<sup>487</sup> McCargo

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<sup>482</sup> *Ibid* p.542.

<sup>483</sup> *Ibid*. p.545.

<sup>484</sup> Cobban, H., “Think Again: International Courts”, 20 October 2009 - <http://foreignpolicy.com/2009/10/20/think-again-international-courts/> - Last accessed 10/08/2016.

<sup>485</sup> McCargo, D., “Transitional Justice and Its Discontents”, *Journal of Democracy*, April 2015, Volume 26, Number 2, pp. 5-20.

<sup>486</sup> Peskin, V., “International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation”, New York: Cambridge University Press, 2008, 236–237.

<sup>487</sup> *Supra* note 484, p.9.



believes that the international community should find a way to reach the goals of accounting for the past and preventing future mass violence, seeking for more “creative” decisions.<sup>488</sup>

One creative solution is to prosecute more international crimes domestically, or by supporting countries with universal jurisdiction to prosecute these crimes.

### 5.13 Conclusion

According to Alison Cole,<sup>489</sup> “[i]t is clearly an understatement to conclude that the ICC has a busy year ahead. It will be a year caught up in transition as the results of the past 10 years finally come to judgement, in the midst of an acknowledgment by OTP that new methods are needed. Yet the results of new approaches adopted now may not come fully to fruition for several years. The challenge will be to navigate the time until then, with technical skill, transparency, and accountability.”<sup>490</sup>

There can be no doubt that the ICC has come a long way in its first fourteen years, especially considering its many challenges. Remember the onslaught from the United States administration of George W. Bush, which campaigned for the ICC to “wither and collapse”, according to the former United States Ambassador to the United Nations, John Bolton.<sup>491</sup> It was natural, therefore for the Court to go through a growing stage and make mistakes from which, it is hoped, were learned.

Today it may still be too soon to judge however, it is important to look at what the OTP says about its own future, to try and appreciate if there is an understanding of what did and did not work in the past. As is frequently pointed out in these pages, the Court is new and many of those in leadership positions at the OTP gained much of their experience within the Court itself and sometimes this can lead to a blinkered view of the risks and opportunities. It is also important to analyse the excuses

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<sup>488</sup> *Ibid* p.18.

<sup>489</sup> Cole is a frequent commentator on the OTP. She was previously a Special Assistant to Luis Moreno Ocampo, an OTP Investigator, held roles in other international tribunals and for the Open Society Justice Initiative.

<sup>490</sup> Cole, Alison, “Upcoming Challenges for the ICC”, Commentary, International Justice Monitor, 05 March 2014 - <https://www.ijmonitor.org/2014/03/upcoming-challenges-for-the-icc/>.

<sup>491</sup> Kaufman, Paula, R., “Bolton is on Duty as America’s Sentry”, Insight on the News, 22 July 2002, at 3639, available at 2002 ML 8338907.

offered, as Dov Jacobs says: it can't all be about the Judges or the lack of resources. The ICC's Registry recently underwent a painful 'reVision' process where they looked at its entire structure, and abolished more than a hundred staff positions.

At the time of writing, the Court is under scrutiny as never before. Many of the Court's greatest supporters are questioning its legitimacy and if in the next few years the OTP opens Situations or Cases which implicate 'first world' nations, then this scrutiny will only increase.<sup>492</sup>

The ICC Prosecutor's Office clearly believes that it needs greater resources to carry out its work and is astute enough to know that this will involve a campaign to convince its paymasters to fund it.

The combination of the strategic plan, the forecasted basic size and corresponding proposed budget, the performance indicators and the risk management plan offers State Parties and other stakeholders a comprehensive and integrated picture of the way forward for the Office in the next strategic period, allowing them to evaluate how their investment in the OTP as a leading international institution in the fight against impunity is returned.<sup>493</sup>

Although, the author is of the view that there is not yet sufficient evidence that 'universal jurisdiction' trials, as a substitute for the ICC, would work. Furthermore, the principle of complementarity means that the ICC should always be a court of last resort. Therefore, if a State is willing and able to prosecute a case itself, it should be free to do so.

While it is difficult to calculate if the Court represents 'value for money' the representatives of Assembly of States Parties (ASP) charged with approving the Court's budget every year, spend considerable effort scrutinizing the accounts. A sub-group of the ASP, called the Committee on Budget and Finance (CBF), is active

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<sup>492</sup> For example, the scrutiny in which William Schabas found himself placed under when he accepted, in 2014, the position as Head of a UN Committee investigating the role of Israel in the 2014 Israel-Gaza conflict shows that high profile roles in these very politicized situations will lead to serious infringements in the privacy of individuals concerned. There is no reason to believe that the same will not apply to the ICC Prosecutor, who held important positions in the Gambian administration, prior to joining the ICC and ICTR.

<sup>493</sup> OTP Strategic Plan 2016-2018, pp.7-8, *supra* note 455.

at different times during the year looking to ensure that Court is well managed. For example, any new permanent positions as well as post reclassifications must first meet the approval of the CBF and then of the Assembly.

Having considered specifically the legal culture of the Court, the challenges surrounding the confirmation of charges hearings and the future strategic direction of the Office of the Prosecutor relating to the research question of this thesis, the following chapter will offer the author's overall conclusions including relevant recommendations.

# Chapter 6 – Conclusion

## 6.1 Introduction

The goal of this thesis was to identify where the Court needs to establish a firm framework in order to build on its success and learn from its mistakes. Because much has been written about the Court, the author focused on specific areas that were not widely commented upon, in an effort to address the Research Question ‘What are some of the biggest challenges remaining to ensure the long term success of the International Criminal Court?’

From the research conducted for this thesis, the author concludes that the culture of both the Court and the OTP is developing in a multi-cultural, public organisation, way. Despite the strong focus on Africa in terms of the caseload, the Court seems to be more strongly influenced by a western culture, if not at an executive level, then certainly at a managerial level. In terms of the legal culture, this is also developing all the time and there is now a substantial body of law created by judicial decisions. As time goes by, the case law from the *ad hoc* tribunals will become less important and the ICC will create a substantial body of settled law. There is a sufficient mix of lawyers from different jurisdictions for now, but it appears that there are more and more Common Law attorneys joining the OTP, although this might just be coincidence and it could rebalance again over time.

With regard to the OTP strategic plan and style, it will not really be possible to properly evaluate its success in the short term. However, it appears confident enough to request more resources from the States Parties and it is investing heavily in developing its electronic and forensic evidence gathering capacity, in line with its strategic goals<sup>494</sup> (no. 4).

The third element to the research question is related to the confirmation of charges stage. The OTP needs to be relatively certain that the merits of the Cases approaching the confirmation of charges stage, are matching the expectations of the

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<sup>494</sup> OTP’s Strategic Goal Nr. 4 states: “*further adopt the Office’s investigative and prosecutorial capabilities and network to the scientific and technological environment in which it operates*”, OTP Strategic Plan 2016-2018. Copy on file with the author.

Pre-Trial Chamber. The aspiration to have the investigation completed by this time can be a goal, but cannot become a rule. There will undoubtedly be times in the future where, for strategic reasons, the OTP will move to secure the arrest of a suspect and it simply will not be practical to have the investigation stage completed. It should also be noted that even at a late stage, new evidence might come to light, which the Prosecutor is obliged to examine, which could lead to long delays.

The challenges for the Court and the OTP are, of course, not confined to just these topics. As stated by Ferencz:

“Nuremberg was little more than a beginning. Its progress was paralyzed by cold war antagonisms. Clear laws, courts and a system of effective enforcement are vital prerequisites for every orderly society. The matrix for a rational world system has countless parts that are gradually and painfully being pressed into place. The ICC is part of this evolutionary process. It is a new institution created to bring a greater sense of justice to innocent victims of massive crimes who seek to live in peace and human dignity. That’s what the ICC is all about.”<sup>495</sup>

This thesis was born from the simple view that the OTP made some mistakes in the early years, and that as it matures, it will learn from these mistakes and put in place a solid infrastructure. Tested through experience and properly funded, it will eventually produce an institution which will live up to the high expectations attached to an international court tasked with prosecuting the most heinous of crimes.

“In writing the history of the ICC one has to carefully distinguish between its operations and ideas. The legal bedrock of the court is its concept of individual responsibility for war crimes. This was first pioneered in the Nuremberg Trials 1945 and thus makes the court itself a distinctly modern and post-WWII phenomena. The idea of an international criminal law regime, however, goes back centuries.”<sup>496</sup>

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<sup>495</sup> Benjamin B. Ferencz, a life long advocate of a permanent, international criminal court, at the swearing in ceremony of Luis Moreno Ocampo as the ICC’s Prosecutor, The Hague, June 16<sup>th</sup> 2002.

<sup>496</sup> Neureiter, Katharina, “When it all Began – Tracing the Birth of the ICC”, 10<sup>th</sup> January 2013, Justice in Conflict, <http://justiceinconflict.org/2013/01/10/where-it-all-began-tracing-the-birth-of-the-icc/> - Last visited 02/04/2014.

## 6.2 Key Conclusions and Recommendations

In order for the ICC to achieve its full potential and emerge as a successful institution capable of investigating and prosecuting crimes under its jurisdiction the author proposes the following recommendations:

1. *The Prosecutor should pro-actively re-affirm why the Office is active in Africa.*

The power and limitations of the Court remain misunderstood and despite much valid criticism and commentary, there is a misperception about what the court can and cannot do. As the organ responsible for initiating preliminary examinations and later full investigations, the Office of the Prosecutor has a role to play in ‘managing expectations’. The Prosecutor, for example, needs to raise her voice in addressing persistent questions about the Court’s involvement in Africa. This issue was, at least partially, laid to rest when the Court’s Pre-Trial Chamber granted the Prosecutor permission to open an investigation in the Georgia Situation on 27<sup>th</sup> January 2016.<sup>497</sup> In any case it needs to be highlighted.

2. *The Court should develop a strategy for developing the local implementation of International Criminal Law.* The cost running the court is rising every year and there is a concern that the cost of administrating international criminal law through a single institution based in The Netherlands is no longer the most efficient model. The Court has yet to support the use of international criminal law trials in national jurisdictions, for example by sharing evidence. While to be fair, to date this probably has not been a practicable solution, the OTP should begin exploring the opportunities to engage in positive complementarity with state parties.

3. *The Court must move towards ensuring it creates a geographically diverse and gender balanced work-force.* The ICC follows the United Nations Common System for its administrative framework. This means, for example, that the staff grades and job specifications are similar to those employed by the UN. However, it is not obliged to follow this system. To date the administrative culture of the organisation has evolved without much planning. An organisation with staff drawn from so many different countries, with differing cultural centres needs to pay a great deal of attention to the well being of its staff. Looking to the future the Court should

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<sup>497</sup> <https://www.icc-cpi.int/georgia?ln=en>.

develop new policies on its treatment and development of staff to ensure they are capable of meeting the challenges of the institution in the 21<sup>st</sup> century. Future recruits must be drawn from different regions of the world and the over representation of certain jurisdictions must be realigned.

4. *All organs of the Court should promote legal training of International Criminal Law.* The legal culture of the Court is also developing and therefore adequate support infrastructures are required to ensure that lawyers from all over the world appreciate the different nuances of the law. Defence counsel need a solid and funded association of members who can receive training and mentoring on this new area of law. Judges must be selected apolitically based solely on their abilities, with due regard for gender and geographical distribution requirements.

5. *The OTP must focus on building trust in its operations, through transparency and predictability.* According to the OTP's 2013 – 2015 strategic plan:

“During its initial years, the OTP tested different approaches by relying on the diverse experience of staff members who came from different professional backgrounds. That experience applied within the very specific context and mandate of the OTP resulted in the development of the OTP Operations Manual which, inter alia, defines the investigative standards of the office. Since then the Office has continued, formally and informally, to review and improve its practices and standards based on its experiences. As part of its strategy to enhance prosecutorial results, the OTP is, amongst other things, analysing the Court's decisions in relation to its investigative practices to determine whether further changes to its investigative strategies, practices and standards, are required.”<sup>498</sup>

Bensouda has made it clear that “one of the main goals of [her] tenure as Prosecutor is to strengthen trust and respect for the Office and its crucial mandate by ensuring further transparency and predictability in our operations. This goal is clearly

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<sup>498</sup> Office of the Prosecutor Strategic Plan 2013 – 2015, 08 March 2013, Strategic Goal 2.2: “Further improve quality and efficiency of investigations”, p.7 - Draft copy on file with author.

reflected in our strategic plans, and demonstrated in how we fulfil our responsibilities under the Rome Statute.”<sup>499</sup>

Reviewing the performance of first Prosecutor and considering who should replace him, one commentator said that “[t]o achieve the ICC’s promise as a global court, the parties to the Rome Statute must select a prosecutor who can meet the court’s most serious challenges: concluding trials; convincing governments to arrest fugitives; conducting credible investigations in difficult places, such as Libya and Sudan; and expanding the ICC’s reach beyond Africa. This may be a lot to ask for, but the future of the ICC depends on it.”<sup>500</sup> This assessment moves away from Ocampo’s abstract model to a more conventional system.

6. *The Court must continue to target states who remain, for whatever reason, outside the Rome treaty, to join the Court and to actively promote its mandate. A failure to secure convictions will certainly have an impact on the reputation of the Court going forward. While the OTP and Fatou Bensouda retain a lot of good will and the ad hoc tribunals took time to get established, there is a limit on the amount time available to set the Court on its permanent course.*

Speaking before the creation of the ICC, in 1997, the then UN Secretary General, Kofi Annan said “[t]he establishment of an International Criminal Court will ensure that humanity’s response will be swift and will be just.”<sup>501</sup> While the sentiment expressed is understandable, the reality has shown us that implementing international criminal law is a challenge. This thesis has described some of those challenges but, as ever, it is more complicated in practice than in theory.

It has been argued that the rationale for creating an international criminal tribunal which is “meant to exert a potent moral authority that will deter current and future

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<sup>499</sup> See: “ICC Prosecutor Fatou Bensouda, issues Draft Policy Paper on Case Selection and Prioritisation for comment” - <https://www.icc-cpi.int/legalAidConsultations?name=pr1238>.

<sup>500</sup> Kayne, David, “Who’s afraid of the International Criminal Court - Finding the Prosecutor Who Can Set It Straight”, *Foreign Affairs*, May/ June 2011, <https://www.foreignaffairs.com/Articles/2011-04-18/whos-afraid-international-criminal-court> - Last accessed 25/05/2015.

<sup>501</sup> See: <http://www.ngos.net/un/icc.html>. - Last accessed 28/08/2016



leaders from engaging in terrible criminal acts”,<sup>502</sup> was that this could not be achieved by national courts. However, a significant problem is that many of the more powerful nations are absent and probably unlikely to ever feel the wrath of the Court. There are also States within the Rome system, such as the United Kingdom and France, which probably believe that they, as mature democracies, would not face the impact of charges brought by the Prosecutor because they largely fund the Court, and have sufficient trust in their national systems that should an allegation ever be made against someone in their jurisdiction, that they would have the ability to prosecute those responsible. There are also those within the system, who believe they have been treated unfairly, and they will surely loudly claim that the Court is not fit for its purpose, further damaging its reputation.

*7. The Court should strive to create a culture of introspection and learn from its mistakes.* Although widely seen as the successor of the *ad hoc* tribunals, the ICC must find its own way. The author remains cautiously optimistic about the future. If the Court can learn from the lessons of its early years, for example in the Lubanga case, and assuming that it has not as an institution become too embedded in its ways, and that it continues to get the support required from the States Parties, then the Court will go on to create a substantial body of law, enabling it to chart a more successful course.

International criminal law, therefore, is really a child of the 20<sup>th</sup> century. That is to say, it was born and grew up in that period. Lessons were learnt and the political and legal debate eventually shaped the final product. Now, in a new century, it will mature and develop. At least that is the hope. Nothing is guaranteed and the success of the ICC<sup>503</sup> over the next decade will have a critical impact on the future

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<sup>502</sup> McCargo, D., “Transitional Justice and Its Discontents, *Journal of Democracy*”, April 2015, Volume 26, Number 2.

<sup>503</sup> Defining success in the case of the ICC is complicated. According to the Court, the “primary mission of the International Criminal Court is to help put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes.”, “Understanding the International Criminal Court”, p.1, <http://www.iccc-pi.int/iccdocs/PIDS/publications/UICCEng.pdf> - Last accessed 25/05/2014. This is in keeping with a sentiment often expressed by Luis Moreno Ocampo, who claimed his goal was no cases before the Court because there was no one to punish, that is to say global peace. This utopian view would certainly be welcomed over a position that

development of international criminal law. According to Luis Moreno Ocampo, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.<sup>504</sup>

An option that could be explored by the Court is to develop the capacity of national courts to prosecute international crimes. This is not a new proposal, however, to date it is one that has not been considered by the Court. In the book *The International Criminal Court in Search of its Purpose and Identity*, the author focuses on the challenges faced by the Court in building capacity on a national level. The lack of resources and skills in addition to the complicated nature of the criminal procedure itself, certainly presents hurdles to the national prosecuting bodies.<sup>505</sup> Bekou recommends advancing the positive complementarity of the Court to provide the basics for building the national capacity. To enable national investigations and prosecutions, it is necessary to provide the assistance from the ICC and build the bridge between the Court and the operational realities in the State Parties.<sup>506</sup> To combat the funding issue she suggests linking the capacity building to the development aid goals and increase accessibility of grants to fit this purpose.<sup>507</sup> Although this is a realistic option, it is not likely to happen in the short term. There are many difficulties that would need to be addressed, not least the issue of witness protection.

### 6.3 Future Research

During the course of this research project a number of issues came to the interest of the author who was unable to explore the topic in further detail which however,

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there were no cases before the ICC because of a lack of referrals or an inability to bring suspects to face trial. While hard to define what success is, failure is easier to measure.

<sup>504</sup> Statement by Mr. Luis Moreno-Ocampo, June 16, 2003, Ceremony for the Solemn Undertaking of the Chief Prosecutor. See <http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> - Last visited 02/04/2015.

<sup>505</sup> Bekou O., "Building National Capacity of the ICC"; Mariniello T., "The International Criminal Court in Search of its Purpose and Identity", pp. 134-146, Routledge Oxon 2015, p.134.

<sup>506</sup> *Ibid* p.145.

<sup>507</sup> *Ibid* p.144.

merit further analysis, and it is hoped that others will find it sufficiently interesting to carry on the work.

In many ways the possibilities for further research for the Court are endless. Scholars could focus on any part of the Court, or the Statute, or Rules and they would have new and fertile opportunities to contribute new thought. Topically right now is the threat posed from ISIS and there are a few scholars who are considering if the Court could have a role to play in this field. Also interesting is the debate around the crime of aggression, which was included as a theoretical possibility at the Uganda conference in 2011.

A reoccurring theme throughout this thesis is the part played by the culture of the organisation and the legal culture of the individuals who make up the Court. This is a fascinating topic.

The lack of geographical diversity in certain parts of the Court is surely shaping how it develops. The data is not easy to locate, but it is available. Even under Bensouda, who is said to encourage the hiring of non-western female staff, the trend is towards appointing western (WEOG) candidates, making both gender balance and geographical distribution -both requirements of the Rome Statute-<sup>508</sup>, to remain distorted.

Art. 70 investigations are now part of the landscape of the Court and while there is not yet much case material available to the public, other cases will come on stream and this would be a good area for a researcher to pick as a topic now, because we are likely to see much more development in this area in the next few years. Picking a topic early will allow someone to start understanding their area and develop with it. This is certainly a growth area.

In one study conducted on 2003, a Senior Trial Lawyer of the ICTY stated “at the ICTY the police, rather than the lawyers, were given responsibility over investigations and strategy. This was, I believe, somewhat problematic and has been corrected to some degree in recent years. The nature of the investigations and

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<sup>508</sup> Articles 44(2) and 36(8) of the Rome Statute and Assembly of State Parties Resolution ICC-ASP/1/Res.10.

prosecutions at the ICC will require legal direction and coordination from the beginning. The investigators should report to the lawyers who will be presenting the cases at trial and confirmation.”<sup>509</sup> However, the OTP waited nearly twelve years before following this lead and placing their Senior Trial Attorneys at the top of the hierarchal structure.<sup>510</sup> If someone could gain access to the OTP, it would certainly be worthwhile examining its ‘learning culture’, understanding what it says and what it does.

As one commentator puts it, “[t]he Court is a work-in-progress, an amalgam of normative commitments, legal understandings, political interests, diplomatic bargains, and organization dynamics. It embodies idealistic conceptions of experts from the end of World War II onwards, shaped by diplomatic bargains and pushed by non-governmental organisations”<sup>511</sup>.

As previously mentioned, it is often interesting to draw comparisons between the Nuremberg tribunal and the ICC. In the present context of looking to the future, it is noteworthy that even though the world has changed a lot in the years since the Second World War, the way international criminal law proceedings are conducted has not changed much. Investigators gather evidence in much the same way and prosecutors conduct the trials in a very similar fashion. Even the law itself did not develop much since, until the early 1990’s, although it did develop quickly as a result of the ICTY, ICTR and the other *ad hoc* tribunals.

It has been noted in the IMT trial that proceedings were, for the most part, document driven<sup>512</sup>. That is to say that the use of witness testimony was not so significant. Although this differs when it comes to the NMT trials in which witness testimony played a much greater role. The OTP are likely to exploit social media and forensic

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<sup>509</sup> Schrag, M., “Expert consultation process on general issues relevant to the ICC Office of the Prosecutor: Lessons Learned from ICTY Experience: Notes for the ICC Prosecutor”, 20 March 2003 - [https://asp.icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/Schrag.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/Schrag.pdf).

<sup>510</sup> At the ICC, for the first 12 years, each Situation had a Joint Team organizational structure made up of an Investigation Team Leader, a Jurisdiction, Cooperation and Complementarity Adviser and a Senior Trial Lawyer who each had joint authority, which was designed to shift naturally as the case progressed. It was a model that generally was regarded as problematic.

<sup>511</sup> Schiff, *supra* note 184.

<sup>512</sup> See: Persico, J. E., “Nuremberg: Infamy on trial” 92 (200).

intelligence gathering capabilities, however it is unlikely that ICC trials will be able to significantly move away from a heavily witness dominated proceeding.

#### **6.4 The Kenya Situation**

It is not possible to write a thesis on the ICC at this moment without at least mentioning the Kenya Situation, which regrettably could not be examined in depth in this thesis.<sup>513</sup> The Case presented several significant challenges for the OTP and although it is still too early to fully understand what went wrong in this situation, of the six suspects<sup>514</sup> at the beginning of the process, not a single trial was finished. In the Kenyatta case, summonses to appear were issued on March 2011 and the confirmation of charges hearing opened on 21 September 2011. Charges were then confirmed against Mr Muthaura and Mr Kenyatta but not for Mr Ali<sup>515</sup>, and the Case against him dropped. Citing a lack of evidence, the charges against Muthaura were dropped on 11 March 2013. The same outcome occurred for Kenyatta the following year when on 5 December 2014, the charges against him were finally dropped. On 13 March 2015, proceedings formally ended<sup>516</sup>.

It was a hugely embarrassing defeat for the Prosecutor. In the other Case in the Kenya Situation, the Ruto and Sang Case, the OTP fared a little better, but only in as much as the proceedings continued for longer. Summonses to appear were issued on March 2011<sup>517</sup> and the confirmation of charges hearing began on April 2011. Charges were not confirmed for Kosgey, but were for Ruto and Sang<sup>518</sup>. Consequently, the trial began on 10 September 2013 and ran until 5 April 2016. The

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<sup>513</sup> The Kenya Situation will be a very interesting topic for researchers. It is regrettable that the Ruto and Sang Case collapsed when it did, because the author had already completed his research. In any event the topic may not be quite ready to write about, as the OTP have not really discussed the case much yet.

<sup>514</sup> The Kenyan press dubbed them the 'Ocampo six'

<sup>515</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012 - <http://www.legal-tools.org/doc/4972c0/>.

<sup>516</sup> <https://www.icc-cpi.int/kenya/kenyatta>.

<sup>517</sup> None of the six accused was ever in the custody of the ICC, all appeared voluntarily when required to do so.

<sup>518</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 44 - <http://www.legal-tools.org/doc/96c3c2/>.

Case finally ended when the Trial Chamber accepted a ‘no case to answer’ motion issued by the Defence.

There might be a single positive aspect emerging from the Kenyan Situation, according to Mark Kersten: “[t]he only silver lining, and an important one to recognize, is that the institution’s investigators and prosecutors seem to be learning from this failure and are committed to building much stronger and resilient cases in the future.”<sup>519</sup> The Kenya situation as a whole has been challenging for the OTP. In due course the Office will certainly review the different stages of the proceedings and will need to reflect on what went wrong in the cases. In the short term it is a setback in terms of the future success of the Court, however with honest introspection and remedial action the institution may emerge a stronger organisation. This case will certainly generate much comment and would be an interesting topic for further research.

### **6.5 Resources: An On-going Challenge**

One of the challenges that many organisations face, is the capacity to raise the resources required to carry out their mission. In this regard the ICC is no different from the situation faced by many publicly funded institutions in the national jurisdictions of the States who fund the Court. While the funding of the Court’s activities comes from its States Parties, in fact many countries pay nothing at all and others very little. The majority of the funding comes from some of the wealthier countries. However, the global financial crisis meant that even these wealthy countries did not have budget surpluses and were forced to review their spending commitments, “[d]espite improvements in Office resources over the past two years, resources are still insufficiently aligned with the demands placed upon the Office for intervention.”<sup>520</sup>

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<sup>519</sup> Kersten, M., “A Missed Trial or a Mistrial? The End of the ICC Cases against Ruto and Sang”, Justice in Conflict, 07 April 2016, <https://justiceinconflict.org/2016/04/07/a-missed-trial-or-a-mistrial-the-end-of-the-icc-cases-against-ruto-and-sang/> - Last accessed 02/05/2016.

<sup>520</sup> OTP Strategic Plan 2016-2018, *supra* note 455, para. 3, p.6.

## **6.6 Final Observations**

The Court, including the OTP, has developed well in its first generation. Setbacks are only to be expected in a new organisation, nevertheless good progress has been made. With strong leadership, which pays attention to the cultural diversity of the institution and which adheres to its strategic roadmap, then this author is confident that the future success of the Court is secured. As the case law becomes settled the OTP and other participants will have greater certainty over legal and procedural matters and thus, become more effective at carrying out their mandate.

While the author is optimistic for the future of the Court, success is by no means guaranteed. Despite many positive developments in 2016, there were also less positive instances, for example the collapse of the Kenya situation. By demonstrating objective analysis of breaches of International Criminal Law and by choosing its cases transparently, the OTP will build trust in its work. The Court must continue to develop its staff to ensure the quality of its investigation and prosecutions are conducted professionally. Finally, if the Court continues to engage with civil society and promotes its work, and even admitting its mistakes, then over the long term history will judge it a success.

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