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JICL'S INSIGHTS

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OVERVIEW

The Journal of International Criminal Law (*JICL*) is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and publication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and

- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about “ecocide” is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

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Unifying the Legal Tapestry: Navigating ICC's Jurisprudential Disarray

by Lily Zanjani*

ABSTRACT: This study delves into the paramount significance of coherence within the International Criminal Court's (ICC) jurisprudence and its profound implications across various dimensions. The initial section underscores the pivotal role of coherence, illustrating its direct correlation with the ICC's legitimacy, the sanctity of the rule of law, and the establishment of a consistent jurisprudence. Following this, the study scrutinises notable case laws that have challenged the ICC's coherence, specifically examining instances concerning case admissibility, appeal certifications under the A-B-C Approach, and diverging perspectives on the standard of proof. Unveiling the underlying reasons for these discrepancies, the study identifies several factors such as deficiencies in collegiality, procedural matters, internal oversight gaps, the Rome Statute's ambiguities, judiciary composition, and the influence of political interests. Lastly, the study proposes potential solutions to address these challenges, aiming to foster greater coherence within the ICC's legal framework. In summary, this analysis delineates the critical role of coherence, pinpoints existing challenges, and offers prospective remedies to fortify the ICC's jurisprudential consistency and efficacy.

KEYWORDS: Coherent Jurisprudence; Importance of Consistent Precedent; International Criminal Court; Legitimacy of the ICC.

I. Introduction

The consistent practice of international courts and tribunals referring to the streamlined and efficient procedural methods and approaches employed by judicial bodies has been long established. It involves the effective management of legal proceedings, focusing on clarity, brevity, and precision in presenting arguments, evidence, and judgments.¹ This practice aims to ensure the expeditious resolution of disputes while maintaining fairness, adherence to legal principles, and the protection of rights within the international legal framework.² Precisely due to this inevitable impact, cohesive jurisprudence making is indispensable. Inconsistency arising from the practices of international courts not only diminishes their legitimacy and authority but also interferes with the fair delivery of justice and the jurisprudence that in turn contributes to the development of law.³

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¹ Caterina Milo, *Tackling lacunae in international courts and tribunals' procedure: the role of external precedent*, 2(2) THE ITALIAN REVIEW OF INTERNATIONAL AND COMPARATIVE LAW 323 (2022).

² Sanja Kutnjak Ivković, John Hagan, *The Legitimacy of International Courts: Victims' Evaluations of the ICTY and Local Courts in Bosnia and Herzegovina*, 2016, 14(2) EUROPEAN JOURNAL OF CRIMINOLOGY 200 (2016).

³ Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20(2) EUROPEAN JOURNAL OF INTERNATIONAL LAW 265 (2009).

For these purposes, this paper is dedicated to identifying issues relating to the coherence of judgements and decision-making at the International Criminal Court (ICC). It will begin by emphasizing the importance of coherence in the ICC's practices and the exercise of justice. It will then expand to cover the significance of jurisprudence. The term jurisprudence in this paper denotes the past reasoning and application of the law at the ICC (precedent). The paper will then discuss a few examples where various discrepancies interfered with the coherent jurisprudence making of the Court. Through this virtue, it will uncover the underlying reasons for the existence of these discrepancies and will suggest solutions to tackle them.

The lack of communication, diverse legal and cultural backgrounds of the judges, differences in interpretation (due to the gaps in the Rome Statute) as well as previous inconsistent practices of the Court would be marked as the reasons for these existing discrepancies. It will then suggest that through creating relevant frameworks and adopting better communicational strategies, these incoherencies can be tackled.

As will be noted more extensively throughout this paper, these remedies encompass different scopes and concern different levels of decision-making across the Court; (1) It can encompass *inter alia* collegiality among the judges by adhering to the Chambers Practice Manual,⁴ (2) for defence councils to be more innovative and benefit from the past exercises at various tribunals while abiding by and prioritising the ICC's jurisprudence, (3) for the prosecution to address the issues relating to tendering of evidence and for the presidency to ensure an elimination of political issues tying with the legal matters intruding the process of justice.

Different levels of analysis will be employed to fulfil the objectives of this paper; (1) looking at the discrepancies arising from same identical legal matters in different cases brought before the Chambers at the same stages of the proceeding (Pre-Trial, Trial, or Appeals) that led to different findings; (2) looking at discrepancies within the findings of different Chambers (whether it was Pre-trial, Trial or Appeals) on the same issue; and (3) looking at deviations from Appeals Chamber jurisprudence.

The foresaid coherence problems will be examined through various sources. This includes the findings of the Independent Expert Review (IER),⁵ primary sources such as ICC judgments and jurisprudence and submissions of different parties to the Court. Secondary sources will be utilized to benefit from the scholarly articles and account for their perspective and suggestions to resolve the problems.

II. Importance of Coherence

The ICC's inconsistencies span a wide range, encompassing various aspects, not confined to divergences in sentencing judgements, departure from jurisprudences, differences in interpretations of the same rules under the statute, from trial and pre-trial judgments and the ICC Appeal Chambers' rulings, and the acceptance of different practices by different parties before various Chambers.⁶ Hence, for the purposes of this study, any respect for the abovementioned criteria would be observed as abiding by a coherent practice.

⁴ ICC, Chambers Practice Manual, 5th edition (March 25, 2022).

⁵ ICC, Independent Expert Review of the International Criminal Court and the Rome Statute System (September 22, 2020).

⁶ Annika Jones, *Measuring performance and shaping identity*, 4(18) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 825 (2020).

Thus, the prominence of coherence in jurisprudence making can be outlined in three main pillars as it impacts the Court's legitimacy, its impact on the authority through its respect for the Rule of Law, and its impact on future law making.

A. Impacts on the Court's Legitimacy

A coherent jurisprudence is crucial for legitimacy as it ensures consistent and fair legal decisions, bolstering trust in the judicial process and upholding the credibility of the institution.⁷ Hence, the Court's legitimacy heavily relies upon a consistent and justifiable level of development. Considering that the predicaments of confidence in the Court⁸ emanate from its "failure to appreciate the impact on its legitimacy through inconsistency and incoherence in its decision-making",⁹ it is important for the coherence problems to be addressed since judicious decisions are crucial for the perpetuation of the Court's legitimacy.

This is mainly due to judicial decisions being crucial to upholding the Court's legitimacy, since they serve as the bedrock of its authority and credibility. By upholding impartiality, fairness, and adherence to international legal standards, these decisions affirm the Court's integrity.¹⁰ Consistent, well-reasoned judgments bolster public trust, reinforcing the Court's role as a legitimate forum for addressing global justice. Such decisions also contribute to setting precedents, shaping the Court's jurisprudence, and fostering confidence among stakeholders, including states, affected communities, and the broader international community, in the Court's ability to administer justice effectively.¹¹

A court's legitimacy may be undermined by inconsistent practice in various ways. First, contradictory decisions in similar cases lacking clear reasoning may raise doubts about any court's impartiality and coherence.¹² Second, inconsistencies in applying legal principles across cases or jurisdictions might signal arbitrariness or bias, undermining confidence in the court's fairness.¹³ Third, divergent interpretations of law by the same court create confusion and question reliability.¹⁴ Additionally, unequal treatment among parties or disparate judgments for similar situations can foster perceptions of favoritism.¹⁵ Finally, frequent reversals or contradictions of previous rulings without justification might diminish trust in the court's

⁷ Adamantia Rachovitsa, *The Principle of Systemic Integration in Human Rights Law*, 66(3) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 557 (2017).

⁸ Harold Hongju Koh, *The Global Prosecutors*, 35(2) HARVARD INTERNATIONAL REVIEW 65 (2013); ROBERT CRYER, DARRYL ROBINSON *et al.*, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2010); Virginia Morris, Michael Scharf, *The International Criminal Court's Trigger Problem*, 25(1) LEIDEN JOURNAL OF INTERNATIONAL LAW 165 (2012); CHRISTA RAUTENBACH, THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN ENFORCING INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS (2014).

⁹ Gabrielle McIntyre, *The Impact of a Lack of Consistency and Coherence: How Key Decisions of the International Criminal Court have Undermined the Court's Legitimacy*, 67 QUESTIONS OF INTERNATIONAL LAW 25 (2020).

¹⁰ Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQUIRES IN LAW 455 (2013).

¹¹ McIntyre, *supra* note 9.

¹² Michał Rynkowski, *Religious Courts in the Jurisprudence of the European Court of Human Rights*, 1(2) BRILL RESEARCH PERSPECTIVES IN LAW AND RELIGION 1 (2018).

¹³ Margaret Levi, Audrey Sacks, Tom R. Tyler, *Conceptualizing Legitimacy, Measuring Legitimizing Beliefs*, 3(53) AMERICAN BEHAVIORAL SCIENTIST 354 (2009).

¹⁴ Stephen J. Schulhofer, *Divergent Interpretations of Legal Texts: A Comparative Perspective*, 88(2) THE UNIVERSITY OF CHICAGO LAW REVIEW 527 (2021).

¹⁵ Vesselin Popovski, *Perceptions of Inequality at the International Criminal Court: A Case Study Approach*, 31(4) INTERNATIONAL CRIMINAL LAW REVIEW 405 (2000).

consistency and reliability.¹⁶ These inconsistencies can erode the perceived fairness and reliability of the court's decisions, potentially impacting its legitimacy and public confidence.

Inconsistencies in the practices of any international courts and tribunals can impact their legitimacy in the eyes of their varied constituents (every institution, actor or entity who is a subject to and is influenced by the courts' findings and practice).¹⁷ Various aspects of the inconsistencies arising from international courts and tribunals' exercises of justice have been significantly criticised by international law scholars.¹⁸ In the realm of international courts and tribunals, several inconsistencies undermine the perceived legitimacy of these institutions. Divergent interpretations of legal provisions across various courts often result in conflicting judgments, casting doubt on the consistency and coherence of their decisions.¹⁹ Equally concerning are instances where similar cases yield disparate rulings or appear to favor certain parties, breeding perceptions of bias and inequality.²⁰ Furthermore, inconsistencies in adhering to precedents and varying application of procedural rules contribute to unpredictability and weaken the perceived fairness of the legal process.²¹ Selective jurisdictional choices and contradictory legal reasoning further erode confidence in the uniformity and reliability of international judicial practice, fostering debates about the effectiveness and credibility of these institutions.²²

Even though the presence of incoherencies has always been acknowledged in the practice of *ad hoc* tribunals, it seems that the tangible concern arose when the ICC started practicing incongruously.²³ This might be justified considering that it is a permanent court and expectations are deemed higher from for the ICC than its other *ad hoc* predecessors (International Criminal Tribunal for Former Yugoslavia and International Tribunal of Rwanda). The expectations from the ICC are notably higher due to its status as a permanent and globally recognized judicial body. Unlike *ad hoc* tribunals established for specific conflicts or situations, the ICC is a permanent institution entrusted with the responsibility to prosecute the most serious crimes that affect the international community.²⁴ Its permanent nature implies an enduring commitment to justice, making it subject to higher expectations in terms of consistency,

¹⁶ Adekemi, Afolabi, *Effecting Consistency in Investor-State Dispute Settlement through the Introduction of Precedent in a Multilateral Investment Court*, 4 (24) ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 663 (2021).

¹⁷ Jeffrey L. Dunoff, Mark A. Pollack, *The Road Not Taken: Comparative International Judicial Dissent*, 116(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 340 (2022); Joanna Nicholson, "Too High", "Too Low", or "Just Fair Enough"?, 17(2) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 351 (2019).

¹⁸ Jeff Handmaker, *The Legitimacy Crisis Within International Criminal Justice and the Importance of Critical, Reflexive Learning* in THE PEDAGOGY OF ECONOMIC, POLITICAL AND SOCIAL CRISES: DYNAMICS, CONSTRUALS AND LESSONS (Bob Jessop, Karim Knio ed., 2018), at 189-206; Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INTERNATIONAL LAW JOURNAL 1422 (2008); Tonny R. Kirabira, *Elements of Aggravation in ICC Sentencing: Victim Centered Perspective*, 13(2) AMSTERDAM LAW FORUM 25 (2021); Sarah Nouwen, Wouter Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan: A Rejoinder to Bas Schotel*, 22(4) EUROPEAN JOURNAL OF INTERNATIONAL LAW 1161 (2011).

¹⁹ Yuri E. Pudovochkin, Mikhail M. Babayev, *Contradictions of Judicial Criminal Policy*, 6(1) ПРАВОПРИМЕНЕНИЕ 174 (2022).

²⁰ Nora Stappert, *Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning through the Interpretive Practices of International Criminal Courts*, 12(1) INTERNATIONAL THEORY 33 (2020).

²¹ *Id.*

²² Yuri E. Pudovochkin, Mikhail M. Babayev, *supra* note 19.

²³ Mladen Milošević, *Personal Data Protection in Criminal Law*, 59(2) JOURNAL OF CRIMINOLOGY AND CRIMINAL LAW 113 (2021).

²⁴ Agnieszka Szpak, *Legacy of the ad hoc International Criminal Tribunals in Implementing International Humanitarian Law*, 4(9) MEDITERRANEAN JOURNAL OF SOCIAL SCIENCES 525 (2013).

fairness, and effectiveness in delivering justice on an ongoing basis. The establishment of a permanent court inherently sets a precedent for long-term accountability and consistency in addressing grave violations of international law, thereby heightening expectations regarding its performance, integrity, and contribution to global justice.²⁵ This permanent reputation amongst other factors is indeed a component that has given the ICC its legitimacy and authority.

The legitimacy of a court often derives from different sources, with one approach grounded in positive law, emphasizing adherence to established legal precedents, statutes, and rules.²⁶ This form of legitimacy underscores the importance of consistency and predictability in legal decisions, highlighting the significance of past judgments as binding precedents. However, an alternative view of legitimacy transcends the strict confines of positive law, leaning on moral values, particularly human rights principles, to define its legitimacy.²⁷ Here, the court's authority is not solely based on legal statutes but also on broader principles of justice, fairness, and fundamental human rights. This approach may involve decisions that, while not directly codified in law, align with the widely accepted moral norms. These contrasting approaches underscore the complex interplay between legal precedent and ethical values in shaping a court's legitimacy, highlighting the dynamic nature of its foundation.²⁸

The multifaceted nature of any court's legitimacy, encompassing both legal and moral dimensions is inevitable. The complexities of measuring and understanding the legitimacy of courts, shedding light on the interplay between legal positivism and moral values in shaping perceptions of judicial authority becomes clear when synthesizing these perspectives. There exists a comprehensive understanding of the diverse sources of court legitimacy, bridging the gap between legal precedent and ethical principles.²⁹ The multidisciplinary approach will integrate legal analysis, moral philosophy, and empirical assessments to elucidate the intricate dynamics of court legitimacy, contributing to the scholarly discourse on the foundations of judicial authority.

Consequently, it can be claimed that the ICC would gain its legitimacy not due to the precedent it has established but rather on the futuristic view they possess in the people's perception of morality. Hence, the rulings not based on precedents might struggle to perpetuate on the basis of the modern perception of particular issues and how the law has perceived it throughout the time. On another account, the legitimacy of judge-made laws cannot develop itself fully as the entities subject to these judges might not be able to comprehend and follow the developments since it has not been based on precedent. This becomes more evident at the international level where there are judges from diverse legal backgrounds who could have had practices in different legal cultures.³⁰ Hence, affecting the approach in which the judgments are made and the basis of these judgments which significantly influences the legitimacy of the courts.

²⁵ William Schabas, *Preface*, in AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (William Schabas, 2001), at VII.

²⁶ James Gibson, Gregory A. Caldeira, Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92(2) THE AMERICAN POLITICAL SCIENCE REVIEW 343 (1998).

²⁷ Kerstin Bree Carlson, *International Criminal Law and Its Paradoxes: Implications for Institutions and Practice*, 5(1) JOURNAL OF LAW AND COURTS 33 (2017).

²⁸ *Id.*

²⁹ James L. Gibson, Gregory A. Caldeira, Lester K. Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47(2) AMERICAN JOURNAL OF POLITICAL SCIENCE 354 (2003).

³⁰ William Schabas, *Customary or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO (José Doria, Hans-Peter Gasser, M. Cherif Bassiouni eds., 2009), at 75-101.

B. Impacts on the Rule of Law and the Court's Authority

Moreover, it is vital for the perseverance of the Rule of Law that the coherence problems are tackled because coherence ensures consistency, predictability, and equality in the application of legal principles. The Rule of Law in judicial proceedings encapsulates the principle that all individuals and entities, including the government, are subject to and accountable under the law.³¹ It emphasizes that laws should be applied consistently and fairly, providing equal treatment and protection for all individuals regardless of their status or position. In judicial proceedings, this principle entails that decisions and actions of the court are based on established laws, legal principles, and precedents rather than arbitrary or discretionary judgments.³² It ensures transparency, predictability, and adherence to legal procedures, contributing to the legitimacy and trust in the justice system.³³ Since the idea of Rule of Law embodies foreseeability and certitude of law, coherence is vital.³⁴ Considering that the law's authority is often deemed to be dependent on legal certainty, coherence can provide and strengthen this authority.³⁵ Hence, if there is no consistency in decision-making, the rights of constituents (as the right to truth and justice) would be infringed. And that is erratic to the certainty offered by the rule of law and protection of rights.³⁶

Additionally, since the constituents are already possessing different “cultural, historical, political”³⁷ backgrounds which amounts to a fragmented catalyst, consistency can diminish the effects of such fragmentation.

It is believed that the ICC endeavors more than other international tribunals and courts to respect the rule of law and its perseverance.³⁸ Therefore, as an authoritative body, inconsistencies in legal practices and judgements would undermine and impact the importance of the rule of law.

Ultimately “the rule of law based upon the uniform development of jurisprudence will be best secured by strengthening the role of (International Criminal Court)”³⁹ Hence, it is important for this responsibility to not be infringed by unconscious discrepancies.

When there is coherence in legal decisions, it upholds the rule of law by ensuring that similar cases are treated similarly, establishing clear precedents, and fostering trust in the judiciary. Inconsistencies or lack of coherence may erode confidence in the legal system, potentially undermining the fundamental principles of fairness, equality before the law, and the predictability of legal outcomes, all of which are essential aspects of the rule of law.⁴⁰

³¹ Dongxiao Xu, *How the Rule of Law Connects and Protects Human Rights?*, 8 JOURNAL OF MANAGEMENT AND HUMANITY RESEARCH, 25 (2022).

³² *Id.*

³³ TOM BINGHAM, THE RULE OF LAW (2010).

³⁴ ICC, *supra* note 4.

³⁵ *Id.*

³⁶ Jonathan Hafetz, *Fairness, Legitimacy, and Selection Decisions in International Criminal Law*, 50 VANDERBILT LAW REVIEW 1133 (2021), at 1166.

³⁷ Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer *et al.*, *Coherence in International Criminal Justice: A Victimological Perspective*, 15(2) INTERNATIONAL CRIMINAL LAW REVIEW 339 (2015).

³⁸ THE PAST, PRESENT AND FUTURE OF INTERNATIONAL CRIMINAL COURT (Alexander Heinze, Viviance Dittrich eds., 2011), at 748; Nicolas Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?*, 11(1) HUMAN RIGHTS LAW REVIEW 91 (2011).

³⁹ Oda Shigeru, *Dispute Settlement Prospects in the Law of the Sea*, 44(4) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 863 (1995).

⁴⁰ Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14(1) UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 77 (2009).

Addressing coherence problems helps maintain the integrity and effectiveness of the judicial process, which is critical for upholding the rule of law within and beyond the Court.

More specifically, it is also important for the fulfilment of the principle of legality that the rule of law is respected.⁴¹ Thus, consistency would increase the reliability of justice as the constituents (*e.g.*, a defendant before the ICC) would have a lucid depiction of their destiny before the Court.

Moreover, it is important to note that positive law as a written and textual law is stated to be “strict and terrible lawfulness” as opposed to natural law which is more grounded in morals and social values.⁴² Accordingly, the precedent-based form of legitimacy (which is grounded in positive law) can be contrasted with a form of legitimacy that arises through a non-positive approach where the Court grounds itself on moral values (such as human rights).

In terms of enhancing the rule of law through coherent practice that would consequently enhance the legitimacy of the Court, it can be concluded that the codifications of the law as it has occurred under the Rome Statute empowers the rule of law by providing legal certainty,⁴³ although it cannot be guaranteed that the same codifications will be perceived and interpreted identically. A more extensive scrutiny of this case would be made evident through the course of this paper when discussing the implications of Rome Statute’s Art. 66.⁴⁴ Therefore, it was illustrated how coherence in interpretation is a necessity for the maintenance of the rule of law as it can be seen to be one of the objectives of the Rome conference when considering that the establishment of the Court was to bring legitimized judgements and respect the retributive justice objectives of criminal law.

Moreover, the ICC has been acknowledged to be the solution to the “long struggle to advance the cause of justice and the rule of law”.⁴⁵ One of the reasons for this status is believed to be discipline.⁴⁶ However, as it will be exhibited throughout this paper, this is not entirely the case and its practice has jeopardised this high standing and expectancy.

C. Creation of Jurisprudence

If the precedent and the practice of interpretation is coherent, then the Court can rely on itself to create jurisprudence.⁴⁷ “Jurisprudential theories of coherence” are often considered to be “constitutive” as it is through the coherent application of the law that the independence and

⁴¹ Beth Van Schaack, *Legality & International Criminal Law*, 103 INTERNATIONAL LAW AS LAW: PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 101 (2009); Maxim V. Danshyn, *The Role of Principles of Legality and the Rule of Law in Ensuring Pre-Trial Investigation and the Rights of its Participants*, 23 Вісник Харківського національного університету імені В. Н. Каразіна Серія: «Право» 148 (2017).

⁴² Kerstin Bree Carlson, *International Criminal Law and Its Paradoxes: Implications for Institutions and Practice*, 5(1) JOURNAL OF LAW AND COURTS 33 (2017).

⁴³ HECTOR O. ALONSO, ESTUDIOS DE DERECHO PENAL INTERNACIONAL (2010), at 61; Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the ICC*, 21(3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 543 (2010), at 570; GERRY J. SIMPSON, LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW (2007), at 39.

⁴⁴ ICC, Statute of the International Criminal Court, art. 66.

⁴⁵ UNSG, S/2004/616, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (Aug. 23, 2004), para. 49.

⁴⁶ WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2004), at 25.

⁴⁷ MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT (1996); Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 5 (2011).

success of a Court can be established.⁴⁸ This points out to the purpose of coherent jurisprudence which is to establish a systematic and consistent framework within legal systems. Several theories *inter alia* consistency, systematicity, integrity and hermeneutical theories contribute to this coherence.⁴⁹

Jurisprudential theories of coherence encompass several concepts that aim to establish consistency and unity within legal interpretations. The first theory, systematic coherence, highlights the significance of legal decisions aligning with the overarching structure and principles of the legal system. It emphasizes maintaining harmony within the legal framework by ensuring that individual decisions are congruent with the broader legal structure. Systematicity theory focuses on structuring legal principles and rules within a comprehensive system. It seeks to ensure that laws fit together coherently, avoiding contradictions or conflicts.⁵⁰

Consistency theory emphasizes the importance of uniformity and consistency in legal decisions, ensuring predictability and stability in the law. It prioritizes treating similar cases similarly.⁵¹

Moving to internal coherence, this theory focuses on consistency within a specific body of law or legal doctrine. Its aim is to avoid contradictions or conflicts within the same legal context, emphasizing the need for decisions to be internally coherent and logically aligned.

In contrast, external coherence extends its focus beyond individual legal systems or doctrines. It prioritizes consistency and coordination between different legal systems or international laws. The goal is to ensure alignment and coherence across diverse legal frameworks, fostering uniformity and cooperation between various legal entities.

Integrity theory centers on maintaining the moral or ethical integrity of the legal system. It suggests that legal decisions should align with fundamental principles, values, or moral standards to enhance the system's legitimacy.⁵²

Hermeneutical theory involves interpreting laws in a way that harmonizes them with broader legal principles, social values, and constitutional norms. It seeks to reconcile different legal provisions to create a coherent legal narrative.⁵³

Lastly, pragmatic coherence underscores the practical application and consequences of legal decisions. This theory prioritizes coherence by considering the real-world impact and effectiveness of legal interpretations, emphasizing practicality and effectiveness in legal application. These theories serve as guiding principles to uphold coherence within legal systems, promoting stability, predictability, and fairness in legal outcomes.

These theories strive to create a unified and logically coherent legal framework, enhancing the predictability, legitimacy, and fairness of legal systems.

As discussed, the main tenet of jurisprudence is considered to be interpreting the law,⁵⁴ the constructive interpretation rests upon the practice of jurisprudence, it is imperative for jurisprudence to be coherent. Moreover, the role of jurisprudence becomes more evidently

⁴⁸ Joseph Raz, *The Relevance of Coherence*, 72(2) BOSTON UNIVERSITY LAW REVIEW 273 (1992).

⁴⁹ RONALD DWORKIN, *LAW'S EMPIRE* (1986); HERBERT L.A. HART, *THE CONCEPT OF LAW* (1961); LON L. FULLER, *THE MORALITY OF LAW* (1964); JOSEPH RAZ, *The Authority of Law* (Oxford University Press 1979).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decision*, 72(3) CALIFORNIA LAW REVIEW 369 (1984), at 398-402.

inevitable when noticing that the volatile uncertainties that in turn erratically affect the application and interpretations of the law can be tackled through jurisprudence.⁵⁵

Furthermore, a coherent jurisprudence would allow for a better practice and implementation of positive law. The principle of *lex mitior*, which encompasses this aspect of positive law under criminal law, heavily relies on jurisprudence and past exercises of justice. The principle of *lex mitior* in international criminal law refers to the application of the most favorable legal provisions to an individual accused of committing crimes under international law. It signifies that if there are changes or updates in the law during legal proceedings, the accused should benefit from any subsequent change that mitigates their situation, such as reduced penalties or improved legal rights. This principle safeguards against retroactive application of laws that might disadvantage the accused and ensures that they are subject to the most lenient laws available at the time of the alleged offense or trial.⁵⁶ Thus, without a congruous jurisprudence, respecting such principles and positive evolutions would not be feasible, specifically under international criminal law.

Moreover, if the jurisprudence is consistent, it is more feasible to decide whether and when the Court should decide to depart from the precedent or affirm the existing ones. This means that the improvement or development of law heavily relies on jurisprudence. Hence, a concise jurisprudence would contribute drastically to the creation of future laws.

As discussed in the previous section, the law is already fragmented by the inconsistencies from different interpretations of the applicable law, hence, the eminence of coherent jurisprudence as an element that could rescue and preserve the law consistent with the fundamental essences of its creation is acknowledgeable.

Moreover, the past, present and future of the ICC heavily relies upon jurisprudence. As the successor to *ad hoc* tribunals, the ICC carries a heavy responsibility to sustain the laws interpreted and applied in these tribunals' practices. In this way, the jurisprudence can empower (either negatively or positively) and give meaning to the established and exercised laws exercised by the Court. Therefore, coherency does not only feature in the history of the Court, but also contributes to its success or failure – therefore the future of the Court.⁵⁷

Overall, jurisprudence is important as it provides grounds for the concise development of the law, provides the primary roots for future cases to rely upon it, and increases the Court's legitimacy.

III. Case Laws Challenging Coherence

A. Admissibility of cases before the ICC pursuant to Art. 17

Under this section, the cases of *Al-Senussi* and *Gaddafi* will be compared pursuant to Art. 17 (which refers to the admissibility of cases before the ICC in accordance with the complementarity principle—outlining that cases will be inadmissible before the ICC if a state

⁵⁵ Andrea Carcano, *Of Fragmentation and Precedents in International Criminal Law: Possible Lessons from Recent Jurisprudence on Aiding and Abetting Liability*, 14(4) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 771 (2016).

⁵⁶ ICTY, *The Prosecutor v. Dragan Nikolić*, IT-94-2-A, Appeal Chamber, Judgement (Feb. 4, 2005), paras. 8-85.

⁵⁷ Dothan, *supra* note 10, at 278; Marieke de Hoon, *The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy*, 17(4) INTERNATIONAL CRIMINAL LAW REVIEW 591 (2017), at 608; Asad Kiyani, *Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity*, 14(4) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 939 (2016), at 956.

with jurisdiction over the case is genuinely investigating or prosecuting the same individual for the same conduct). In essence, the ICC will defer to national legal systems if they are genuinely investigating or prosecuting the case, except in cases where the state is unwilling or unable to genuinely proceed. This section will therefore cover the inconsistent approach of the ICC in admitting the two cases of *Al-Senussi and Gaddafi*; albeit they both were facing the same level of complementarity pursuant to the criteria listed under Art. 17.

In the case of *Gaddafi*, the Pre-Trial Chamber determined that Libya's investigation into the case against Muammar Gaddafi was insufficient to establish that the national authorities were genuinely conducting the proceedings or that they were willing or able to do so. Due to this, the case was declared inadmissible before the ICC under Art. 17 of the Rome Statute, and the ICC maintained jurisdiction over the matter.⁵⁸

Similarly, in the case involving Abdullah Al-Senussi, the Pre-Trial Chamber found that Libya's efforts and proceedings were not adequate to demonstrate genuine investigation or prosecution. However, the case against Al-Senussi was deemed inadmissible before the ICC under Art.17, allowing the ICC to retain jurisdiction over the matter.⁵⁹

The issue of inconsistency in this case arose when the Pre-Trial Chamber I dismissed the *Al-Senussi*⁶⁰ case before the Court whilst admitting the *Gaddafi*⁶¹ case. Eventually, while the Appeals Chamber in an orderly manner, sustained to the inadmissibility and admissibility of these two cases,⁶² yet there is only a vague spectrum to discuss the means and rationales of this discrepancy in the first place.

Contradictory and incompatible assessment of the same element under Art. 17 of the Rome Statute led to this conflicting conclusion to exist. This element pertained to Libya's limitation and inability to carry out a trial within its domestic judicial system for either of these two cases.

At the first stages of comparison analysis, it is important to note that this discrepancy occurred under the exercise of the same Chamber (Pre-Trial Chamber I) with the same judges presiding across over both cases.

The main divergence in the opinion of the judges seem to be arising from that of "unwillingness" and "inability" of Libya to conduct fair trials or provide conditions for the process of justice and the respect for the Rule of Law.⁶³ However, the same Chamber accepted the evidence brought forward by the defence of Mr. Al-Senussi and the Libyan authorities regarding the efficiency and capability of the Libyan Courts, institutions and the justice system as a whole to assess and respond to Mr. Al-Senussi's conducts and crimes. Therefore, the decision was made despite "Libya's failure to provide the accused with legal counsel",⁶⁴ which in turn influenced the fair process of justice.

However, another divergent point that contributed to the recognition of admissibility in the *Gaddafi* case in comparison to *Al-Senussi* is that the latter was an open case before the

⁵⁸ ICC, The Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-466, Pre-Trial Chamber, Decision in the Admissibility of the Case against Abdullah Al-Senussi (Oct. 11, 2013).

⁵⁹ ICC, The Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber, ICC-01/11-01/11-344, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi (May 31, 2013).

⁶⁰ Schabas, *Customary or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals*, *supra* note 30.

⁶¹ Xu, *supra* note 31.

⁶² ICC, The Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/11-695, Appeal Chamber, Judgement (Mar. 9, 2020); ICC, The Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/11 OA 6, Appeal Chamber, Judgement (July 24, 2014).

⁶³ ICC, The Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi, *supra* note 59, paras. 204-205.

⁶⁴ Michele Tedeschini, *Complementarity in Practice: The ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions*, 7(1) AMSTERDAM LAW FORUM 76 (2015).

Libyan domestic Court. As the Court acknowledges, the “undertaken domestic proceedings” are covering the “same case”.⁶⁵ Whereas as stated by the Pre-Trial Chamber I, a genuine attempt for effective proceedings were missing in the case of Gaddafi even though the Libyan authorities were claiming to have opened an ongoing and effective investigations in relation to the crimes conducted by Gaddafi.⁶⁶

Moreover, the “unwillingness” test required the Court to prove unwillingness of a State for “carrying out investigation or prosecution”.⁶⁷ However, by relying on evidence admitted by the Pre-Trial Chamber, the existing evidence demonstrated a several progressive steps conducted to determine Mr. Gaddafi’s criminal responsibility by the Libyan authorities.⁶⁸ This indeed is not consistent with Libya fulfilling the unwillingness test.

These two cases divert the attention to the interpretation and understanding of what falls within the scope of “unwillingness” as expressed under Art. 17. The criterion for establishing a state’s unwillingness is not only vague and opposite to what the founding fathers aimed to stick to as “objective” but also the category of what is considered as “otherwise” under the inability provision is obscure and indefinite.

Additionally, the foresaid cases concerned “the lack of legal representation” for the accused, amounting to the unwillingness and inability of Libya to conduct a fair trial.⁶⁹ Consequently, the Pre-Trial Chamber was expected to follow the same reasoning and logic as in *Gaddafi* to hold the *Al-Senussi* case admissible. This key difference in the two judgements regarding the lack of legal representation, notably concerned the way in which the time period for effective counsel was interpreted.⁷⁰

In the case of *Gaddafi*, the Pre-Trial Chamber noted a lack of effective legal representation in Libya for an extended period, which contributed to the determination of inadmissibility before the ICC. The Chamber found that the inability to secure legal representation for Gaddafi, despite considerable time passing since the ICC issued the arrest warrants, highlighted the insufficiency of counsel during this prolonged period.⁷¹

Conversely, in *Al-Senussi*’s case, while addressing the issue of legal representation, the Pre-Trial Chamber did acknowledge a period where there was a lack of effective counsel. However, the Chamber differentiated this situation by emphasizing the subsequent improvement in legal representation. They noted that despite initial shortcomings, there were subsequent efforts that led to the provision of effective legal counsel for *Al-Senussi*, thereby impacting the determination of inadmissibility before the ICC.⁷²

Therefore, the distinction in the two judgments lies in the assessment of the timeline and quality of legal representation. While both cases initially faced challenges in ensuring effective counsel, the subsequent efforts and improvements in *Al-Senussi*’s legal representation appeared to impact the Chamber’s determination regarding the admissibility of the case before the ICC.⁷³

Considering all the above-mentioned arguments, the principal concern is if the domestic judicial system is considered to be efficiently responding to the alleged crimes of *Al-Senussi*,

⁶⁵ ICC, The Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi, *supra* note 59, para. 168.

⁶⁶ ICC, The Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-130, Pre-Trial Chamber, Application on behalf of the Government of Libya (May 1, 2012).

⁶⁷ ICC, Statute of the International Criminal Court, *supra* note 44, art. 17 (1) (a).

⁶⁸ ICC, The Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi, *supra* note 59, para. 210.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ ICC, The Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi, *supra* note 59.

⁷² *Id.*

⁷³ *Id.*

why can it not be established that the same judicial system would effectively cover the case of *Gaddafi*? This was the main challenge in the two departing judgements.⁷⁴

The last resort of hope to fix the conflicting divergence of opinion between these two cases was lost when the Appeal Chamber of *Al-Senussi* confirmed the judgment of Pre-Trial Chamber with two dissenting opinions from Judge Sang-Hyung Song and Judge Anita Ušacka.⁷⁵ The Appeal Chamber of *Gaddafi* also ruled in favor of the rationale of Pre-Trial Chamber I and held the case admissible before the Court.⁷⁶ In the case of *Gaddafi's* Appeal, despite rejecting the appeal grounds by Gaddafi and other relevant parties, the Appeal Chamber's judges presented three dissenting opinions by Judge Eboe-Osuji, Judge Bossa and Judge Ibáñez Carranza.⁷⁷

It is understandable that the defence of Mohammad Al-Senussi challenged the admissibility specifically in relation to the similar if not the same case from that of Gaddafi. The motive of the defence for challenging the decision is also comprehensible. Many scholars favour a more flexible sentencing of international criminal tribunals compared to the domestic due to international ones being more equipped to deliver and process justice.⁷⁸ Therefore, these two judgments can be testimonies of a hypocritical and biased practice of the ICC that does not endorse any coherence.

B. Decisions on Certification for an Appeal with Relation to the A-B-C Approach

Until recently, every request to participate in the proceedings was disclosed to the parties. They could make comments pursuant to Rule 89(1) of the Rules and Procedure of Evidence.⁷⁹ Based on these submissions and observations, the judges would then render their verdict. Recently, they changed the system to expedite the process where they created three categories.⁸⁰ This system is known as A-B-C Approach. Category A includes victims which the registry considers with zero doubt that they can be admitted.⁸¹ Category B is the category where the registry possesses some doubts.⁸² Lastly, category C are the victims which the registry is positive that they fall outside of the scope of the charges.⁸³ Therefore, categories A and B are not disclosed to the parties and only category C (requests for participation) are disclosed.⁸⁴ This system has been often criticised by the Defence due to its inconsistency with Rule 89 of the Rules and Procedure of Evidence.⁸⁵ Through this adaptation, the responsibility of assessing the victims' applications for participation falls within the hands of the Victims Reparations and

⁷⁴ *Id.*

⁷⁵ ICC, *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11 OA 6, Appeal Chamber, Judgement (July 24, 2014).

⁷⁶ Szpak, *supra* note 24.

⁷⁷ ICC, *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11-695, Appeal Chamber, Judgement (Mar. 9, 2020).

⁷⁸ Beatriz E. Mayans-Hermida, Barbora Holá, *Balancing "the International" and "the Domestic": Sanctions under the ICC Principle of Complementarity*, 18(5) *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 1103 (2020).

⁷⁹ ICC, ICC-ASP/1/3, Rules of Procedure and Evidence.

⁸⁰ ICC, Res., ICC-ASP 18/Res.7, Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report (Sept. 30, 2020), para. 847.

⁸¹ ICC, Chambers Practice Manual, *supra* note 4, section C. I. (ii).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ ICC, Chambers Practice Manual, *supra* note 4, section C. I. (ii).

⁸⁵ ICC, *The Prosecutor v. Ali-Muhammad Ali Abd-al-Rahman*, ICC-02-05-01/20, Pre-Trial Chamber II, Request (Nov. 19, 2020).

Participations unit of the Registry instead of the Chambers. The shortcomings of this adaptation revolve around limited judicial oversight, lack of adjudication, potential bias or inconsistency, legal complexity and expertise which does not support the principles expected from Rule 85 reflecting upon the right to participation and Chambers being the entity of such decision.

This amendment was a response to the judicial collegiality issue raised by the Independent Expert Review under Recommendation 199.⁸⁶ The discourse of judicial collegiality impacting the efficiency is significant when considering the outcomes of collaboration and cooperation among the judges within a judicial body. This efficiency is observed to arise from consistent decision-making, comprehensive consideration, reducing case backlog, quality enhancement, optimization of resources and public confidence; which are ultimately factors influencing and increasing the legitimacy and authority of the Court overall. By adopting this into the Chambers Practice Manual, the judges desired a more efficient and swift transition from Pre-Trial stages of the proceedings to the Trial phase.⁸⁷ Moreover, the A-B-C Approach was marked by the Appeals Chamber as a “consistent and efficient” development in “transmitting victims’ applications”.⁸⁸ Hence, it can be interpreted that the *ABC approach* implemented by the Registry of the ICC aimed to bridge the collegiality gap by introducing a structured and standardized framework for victim participation in proceedings by aiming to make the victim participation more accessible as it sought to streamline the process, making it more manageable for the Court to handle a potentially large number of victims. It attempted to balance representation by categorizing victims seeking to ensure balanced representation without overwhelming the proceedings. Group *A* victims, being directly affected, were given priority for participation, while Groups *B* and *C* could participate to varying degrees depending on their connection to the case. It attempted to enhance clarity and predictability by providing clear and predictable structure for victim participation, allowing victims to understand the criteria and expectations for their involvement in proceedings. This structure sought to mitigate uncertainty and potential disputes over participation. Lastly, it attempted to contribute to efficiency and management of the participation process, allocating resources and time based on the level of connection to the case. This approach sought to avoid overwhelming the Court with an unmanageable number of participants while still accommodating relevant victim voices.

Overall, the A-B-C approach aimed to create a more structured and manageable system for victim participation, aiming to balance the need for inclusivity with the practical constraints of ICC proceedings, thus attempting to bridge the collegiality gap by fostering a more organized and balanced approach to victim engagement.

The A-B-C approach has been practiced by several Chambers based on the recommendation of the Victims Reparations and Participations unit. These cases are: *The Prosecutor v. Ntaganda case*⁸⁹ by the Trial Chamber, *The Prosecutor v. Al Hasssan*⁹⁰ during

⁸⁶ ICC, *ICC Judges Agree on Reforms in Response to Independent Expert Review at Annual Retreat*, INTERNATIONAL CRIMINAL COURT (Nov. 22, 2021), www.icc-cpi.int/news/icc-judges-agree-reforms-response-independent-expert-review-annual-retreat.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ ICC, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Decision (Feb. 6, 2015).

⁹⁰ ICC, *The Prosecutor v. Al Hassan*, ICC-01/12-01/18-37, Pre-Trial Chamber I, Decision (May 24, 2018); ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Chamber X, ICC-01/12-01/18-661, Decision (Mar. 12, 2020).

the Pre-Trial and Trial Chambers and finally *The Prosecutor v. Yekatom and Ngaïssona*⁹¹ by both Pre-Trial and Trial Chambers.

Even though the application and acceptance of this approach has followed a consistent practice, in the most recent cases of *Abd-al-Rahman*⁹² and *Said Kani*⁹³, some discrepancies were observed due to the Chamber's order for the adaptation of this approach.

In the *Abd-al-Rahman* case, the Registry requested to modify the standard application forms for victims' participation to employ A-B-C Approach due to the challenges it encountered as a result of the COVID-19 outbreak and its ramifications on the submission of the victim's applications in a hard copy accompanied by their signature and fingerprint which was not feasible during that time.⁹⁴ The defence requested for a permission of an appeal in conformity with Rule 89(1) of the Rules and Procedure of Evidence.⁹⁵ The main argument of the defence was that the adaptation would be inconsistent with the Statute and the Rule of Procedure of Evidence.⁹⁶ Moreover, the complementary argument was that of Registry being in a state of tardiness upon the adaptation of this approach.⁹⁷ However, the Pre-Trial Chamber II did not grant this leave to the defence, thus the permission to appeal.⁹⁸

The main reasons for the rejection of the Defence's submission was that the chambers clarified that no specific deadline was set for the Registry.⁹⁹ Regarding the proposed admission procedure's alignment with rule 89(1) of the Rules and the Chambers Practice Manual, the Chambers reiterated Trial Chamber VI's ruling in the Ntaganda case that the right of parties to reply to victim applications, as stipulated in Rule 89(1) of the Rules, is not absolute. Rule 89(1) is subject to provisions in the Statute, particularly Art. 68, para. 1 (addressing the protection of the victims and witnesses and their participation in the proceedings). The Court is obligated under Art. 68(1) of the Statute to safeguard victims' safety, well-being, dignity, and privacy. Moreover, reaffirming that the Chamber also has a general obligation under Art. 64(2) of the Statute to ensure fair and prompt proceedings.¹⁰⁰ Consequently, Rule 89(1) of the Rules should be interpreted considering Rule 89(4), which allows the Chamber to manage applications to ensure the proceedings' effectiveness. Hence, stating that organizing the application and admission process aligns with the Chamber's discretion under the circumstances of the case as the pertinent provisions, including Rule 89(1) of the Rules, permit various suitable approaches.¹⁰¹

During the *Said*'s Pre-Trial stage, the same process as described for *Abd-al-Rahman* was observed. The Registry requested to modify the standard application forms for the victims'

⁹¹ ICC, *The Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision (Mar. 5, 2019); ICC, *The Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18, Trial Chamber V, Order (Mar. 19, 2020).

⁹² ICC, *The Prosecutor v. Ali-Muhammad Ali Abd-al-Rahman*, *supra* note 85.

⁹³ ICC, *The Prosecutor v. Mahamat Said Abdel Kani*, ICC-01/14-01/21, Pre-Trial Chamber II, Decision (July 8, 2022).

⁹⁴ ICC, *The Prosecutor v. Ali- Muhammad Ali Abd-al-Rahman*, *supra* note 85.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ ICC, *The Prosecutor v. Ali- Muhammad Ali Abd-al-Rahman*, ICC-02-05-01/20, Pre-Trial Chamber II, Decision (Jan. 18, 2021).

⁹⁹ *Id.*, para 25.

¹⁰⁰ *Id.*, para 26.

¹⁰¹ *Id.*, para 27.

participation¹⁰², the Pre-Trial Chamber II accepted it¹⁰³, and the Defence was permitted to appeal the decision and they followed so.¹⁰⁴

However, what is notable is that in the *Said* case, the request for appeal regarding this decision was granted whereas for Abd-al-Rahman, it was not. In the *Said* case, the Appeals Chamber, rejected the appeals of Defence and stated that the Pre-Trial Chamber did not err in law to determine “that the A-B-C Approach is in compliance with the Court’s legal framework”.¹⁰⁵

What remains indistinct is the reasoning behind these two judgments. The difference between the decision to reject the request of appeal between these two cases is 3 months. The Pre-Trial Chamber II in both cases included same three judges that both defences appeared before. Moreover, *Abd-al-Rahman*’s defence had similar arguments as *Said*’s Defence which was denied whilst similar arguments brought forward by the Defence of *Said* were authorised to proceed to appeal.

This discrepancy brings upon various ambiguities regarding the legitimacy of the decisions adopted by the chambers.

C. Conflicting Visions to Interpret the Probability of the Standard of Proof (Art. 66)

Art. 66 of the Rome Statute accepts the accused’s innocence until proven guilty beyond reasonable doubt by the Prosecutor.¹⁰⁶ This engraved language in the Charter has led to some conflicting visions arising from its interpretation. This issue of interpretation particularly relates to how and on what basis the evidence proves the accused guilty beyond reasonable doubt and what elements have been used to meet the standard of proof for guilt.

The *Katanga* judgment brought a more conflicting image and idea of the standard and balance of probabilities standard of proof. The Chamber expressed in its ruling that the absence of proof beyond reasonable doubt does not translate into the absence of the alleged statement and facts (evidence).¹⁰⁷ It means that there is inadequate or poor evidence presented for the verdict of the alleged evidence considering the standard of proof.¹⁰⁸ Accordingly, ruling for an accused as not guilty does not equate to his/her innocence.¹⁰⁹ This decision was followed by relying on the Pre-Trial Chamber II’s decision in the *Bemba* case.¹¹⁰

In *Katanga* case, the Trial Chamber, despite reminding the Prosecutor of their onus to prove the guilt beyond reasonable doubt, nevertheless held that “finding an accused person not guilty does not necessarily mean that the Chamber finds him or her innocent. Such a determination merely demonstrates that the evidence presented in support of the accused’s guilt

¹⁰² ICC, The Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/21, Pre-Trial Chamber II, Registry Submissions (Feb. 26, 2021).

¹⁰³ ICC, The Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/21, Pre-Trial Chamber II, Decision Establishing the Principles Applicable to Victims’ Applications for Participation (Apr. 16, 2021).

¹⁰⁴ ICC, The Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/21 OA2, Appeals Chamber, Scheduling Order (Sept. 7, 2021).

¹⁰⁵ ICC, The Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/21 OA2, Appeal Chamber, Judgment (Sept. 14, 2021).

¹⁰⁶ ICC, Statute of the International Criminal Court, *supra* note 44.

¹⁰⁷ ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, Judgment (Mar. 7, 2014), para 70.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ ICC, The Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi, *supra* note 59, para. 210.

has not satisfied the Chamber beyond reasonable doubt".¹¹¹ With this interpretation, it would be expected to acquit Mr. Katanga as it can be read that the presented evidence was not sufficiently meeting the standard of proof. However, this was not the case and the Chambers ruled for the guilt of Mr. Katanga based on the presented evidence.

Even though the final result was finding Mr. Katanga guilty of the convicted charges, Judge Wyngaert held a dissenting opinion and pointed out the credibility challenges with relation to the prosecution's witnesses, missing of significant and important evidence as well as the likelihood for distinct reasoning of the evidence to exist.¹¹² Judge Van den Wyngaert's dissenting opinion in the *Katanga* case focused on the standard of proof beyond reasonable doubt.¹¹³ She highlighted concerns about the majority's interpretation and application of this standard.¹¹⁴ Van den Wyngaert expressed reservations about the majority's approach, suggesting that they set an exceptionally high threshold for proof.¹¹⁵ She argued that the majority's stringent interpretation potentially undermined the attainment of justice and may have impeded the prosecution's ability to establish guilt beyond a reasonable doubt.¹¹⁶ Her dissent underscored the need for a balanced and nuanced assessment of evidence within the framework of the reasonable doubt standard to ensure a fair and just adjudication.¹¹⁷ She further referred to this and stated that "under such circumstances, to arrive at any findings of such serious allegations beyond reasonable doubt" deems to be circumventing to her.¹¹⁸

The other significant controversy regarding the standard of proof beyond reasonable doubt is that of *Lubanga* case¹¹⁹. Notwithstanding the Trial Chamber's judgment which found Mr. Lubanga guilty of the charged crime of conscripting child soldiers (which pursuant to the Rome Statute, this is a child below the age of fifteen), the dissenting opinion of Judge Ušacka in the Appeals Chamber supplied another angle for interpretation.¹²⁰ In her dissenting opinion, she drew attention to the uncertainty in determining the children's age by the OTP's witnesses.¹²¹ She questioned the reliability of the determination independent of any fact based evidence. Thus, Judge Ušacka, continued to disapprove the existence of the guilt beyond reasonable doubt if the evidence and facts the OTP was relying upon could not be vetted.¹²² Hence, her dissenting opinion revolved around the Prosecutor's interpretation of the standard of proof beyond reasonable doubt assimilating to prove the guilt with absolute certainty.¹²³ She further notes the differences in perception of the evidentiary standard of proof beyond reasonable doubt at the ICC.¹²⁴

In the *Lubanga* judgment, it was clarified that the standard of proof for guilt differs from that of balance of probabilities as the latter only requires confirmation of coherency and

¹¹¹ ICC, *The Prosecutor v. Germain Katanga*, *supra* note 108.

¹¹² ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Minority Opinion (Mar. 10, 2014), paras. 5, 11, 66, 91.

¹¹³ *Id.*, paras. 133-308.

¹¹⁴ *Id.*, paras. 149 and 287.

¹¹⁵ *Id.*, para. 134.

¹¹⁶ *Id.*, para. 137-142.

¹¹⁷ *Id.*, annex I.

¹¹⁸ *Id.*

¹¹⁹ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Judgment (Mar. 14, 2012).

¹²⁰ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 A 5, Appeals Chamber, Dissenting Opinion (Dec. 1, 2014).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*, para. 27.

reliability of the statements made.¹²⁵ However, the reparation state requires the victims to support testimonies by evidence.¹²⁶ This in turn translates into the balance of probabilities being a necessity for the standard of proof to exist.¹²⁷ Establishing a concise understanding of these two principles would contribute to justice as in the case of *Lubanga*, where the Chamber applying a low standard of proof was considered as a damaging act towards Mr. Lubanga and his monetary liability to respond to the demands of the reparation orders.¹²⁸

Despite the aforesaid dissenting opinions at the Trial and Appeal stages attempting to dispelling ambiguities and resolving uncertainties, the discrepancy in the threshold of the probability of the standard of proof beyond a reasonable doubt remains prevailing in different chambers across *Lubanga* and *Katanga* cases. This creates issues regarding coherence and consistency of making precedent as different chambers adhere to different interpretations while applying the law to the evidence brought forward by the Prosecutor.

The reason why this lack of consistent interpretation would impact the process of justice becomes evident as illustrated through the above judgments, which show that different judges and chambers employ different interpretations for determining the standard of proof. Moreover, as demonstrated above, many judges have different interpretations of balance of probability of proof and standard of proof. While many of them concur that there exists a difference between the two, some view it as inseparable and as factors correlating to one another. This difference in interpretation would then expand to overshadow other principles such as the burden of proof as demonstrated above. Establishing and rather clarifying what weight and understanding each principle holds would enhance the legitimacy of the judgments as the reasons would become more understandable. The means for such clarification can take place through variety of channels such as consistent judgments or other measures that will be discussed later on in this paper. Hence, influencing the validity and permissibility of justice system and the authority of the Court in respecting the Rule of Law and its practice at a larger scope in general.

IV. Underlying Reasons for the Existing Discrepancies

The foregoing examination reveals a multitude of factors contributing to the absence of coherence and the existing discrepancies within judicial proceedings. Descending from the above examples, these encompass the lack of collegiality among judges, challenges related to both substance and procedure, absence of robust internal checks and balances, the composition of the judiciary, and the influence of political interests. As showcased above, the lack of collegiality among the judges can lead to divergent interpretations and conflicting decisions within the Court. Matters related to substance and procedure, when not thoroughly addressed, can introduce inconsistencies in legal application. Inadequate internal checks and balances may result in unchecked discrepancies and contradictory rulings. The composition of the judiciary, whether in terms of expertise or diversity, can impact the comprehensiveness and fairness of judgments. Additionally, external political interests can unduly influence legal proceedings, potentially leading to biased outcomes and undermining the court's integrity. Each of these factors significantly influences the existence of discrepancies by directly affecting the decision-making process and the overall consistency of judicial determinations.

¹²⁵ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 120.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Appeals Chamber, Judgment (July 18, 2019).

This section will provide a more extensive understanding for each of these factors in light of the cases discussed at the earlier section.

A. Lack of Collegiality

The credibility and effectiveness of the ICC can be affected by several factors, such as the harmony of perspectives among judges and the overall cohesion within the Court; i.e. collegiality. Lack of collegiality is indeed one of the main factors underlined by the IER in 2020.¹²⁹ Thus, this paper will only briefly cover the main points.

Hence, dividing opinions of the judges and the lack of collegiality is a factor that contributes to the legitimacy of the Court.¹³⁰ Judicial collegiality entails that judges share a collective commitment to accurately presenting facts and interpreting the law. This necessitates active engagement, attentive listening, and mutual persuasion among colleagues.¹³¹ As a result of collegiality, ICC judges collectively assume responsibility for the decisions they make. The legitimacy and competency of the larger system – the Court – are influenced by whether authorised decision-makers within the system concur on a ruling.

Divergent opinions and a lack of collegiality among judges may diminish the legitimacy of the ICC.¹³² The decisions and outcomes of the Court's proceedings are significantly shaped by the individual judicial opinions expressed at the ICC.¹³³ The ICC's perceived legitimacy can be influenced by the presence of dissenting opinions, which showcase the diverse perspectives and approaches within the Court.¹³⁴

This paper notes that tensions, disputes and disagreements among judges stem from differences in legal interpretation, varying cultural backgrounds, or divergent judicial philosophies. Even though as demonstrated throughout the analysis section such discord can impede the smooth functioning of the Court and undermine the credibility of its decisions¹³⁵, this paper finds the practice of having dissenting opinions would only foster legitimizing the Court's decision as it can be viewed to be playing as an internal checks and balances (this will be discussed extensively in the next section).

On another note, collegiality refers to the spirit of cooperation, mutual respect, and collaboration among the judges, prosecutors, and other stakeholders within the ICC.¹³⁶ The principle of collegiality serves as a central legal tenet shaping the legitimate development, implementation, and enforcement of policies within a multinational framework.¹³⁷

¹²⁹ ICC, Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, *supra* note 80.

¹³⁰ Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25(2) LEIDEN JOURNAL OF INTERNATIONAL LAW 491 (2012).

¹³¹ Ekaterina D. Vetoshkina, *The Ideology of Collegiality in International Criminal Justice Practice*, 478 ВЕСТНИК ТОМСКОГО ГОСУДАРСТВЕННОГО УНИВЕРСИТЕТА 218 (2022).

¹³² Kyra Wigard, *Matter of Opinion: Assessing the Role of Individual Judicial Opinions at the International Criminal Court*, 23(3) INTERNATIONAL CRIMINAL LAW REVIEW 387 (2023).

¹³³ *Id.*

¹³⁴ Jeffrey Dunoff, Mark A. Pollack, *supra* note 17.

¹³⁵ Jeffrey Dunoff, Mark A. Pollack, *The Judicial Trilemma*, 111 AMERICAN JOURNAL OF INTERNATIONAL LAW 225 (2017).

¹³⁶ Tilko Swalve, *Does Group Familiarity Improve Deliberations in Judicial Teams? Evidence from the German Federal Court of Justice*, 19(1) JOURNAL OF EMPIRICAL LEGAL STUDIES 223 (2022).

¹³⁷ Maria Patrin, *The Principle of Collegiality in the Commission's Decision-Making: Legal Substance and Institutional Practice*, EUROPEAN UNIVERSITY INSTITUTE (May 20, 2020), www.cadmus.eui.eu/handle/1814/67112.

Moreover, challenges related to collegiality may also manifest in interactions between the ICC and other international actors, such as member states, non-governmental organizations, and the media. Differing priorities, political pressures, and divergent interests among these stakeholders can create tensions and hinder collaborative efforts towards achieving the ICC's mandate.¹³⁸

In an institution like the ICC, where decisions often involve complex legal analyses and require consensus among multiple individuals, lack of collegiality could impact the Court's ability to function smoothly, potentially leading to delays, difficulties in reaching conclusive judgments, or challenges in maintaining the Court's overall effectiveness and efficiency.¹³⁹

However, to cover the main grounds for the issue to be of a concern, the lack of collegiality between independent organs of the ICC such as that of Registry, Chambers and the OTP is deemed to be of an important issue as it leads to a lack of communication.¹⁴⁰ One of the suggested solution by the IER is that of the Presidency liaising between the Judges and the Chambers.¹⁴¹ This paper concurs with the findings of the report and argues that by establishing collegiality among the judges, enhancement of collaborative jurisprudence can be established.

Overall, addressing the lack of collegiality within the ICC is essential for fostering a harmonious and effective working environment. Encouraging open dialogue, promoting respect for diverse perspectives, and enhancing communication channels among all stakeholders are critical steps towards building greater collegiality and enhancing the ICC's capacity to fulfill its mandate.

B. Matters Related to Interpretation, Substance and Procedure

As it was observed in the issues pertaining to the interpretation of Art. 66 in the cases of *Lubanga*¹⁴² and *Katanga*¹⁴³, it can be concluded that the existence of discrepancies to be dependent on the matters related to the substance. Consequently, the gaps and unclarities in the substance and the interpretation it, heavily impacted the procedure.¹⁴⁴ Bridging the gap in substance is crucial as it directly impacts varying opinions on the nature of crimes, consequently leading to divergent conclusions.¹⁴⁵ While divergent opinions showcase the inclusivity of international courts to embrace different judicial cultures and their approaches, they undermine the reliability and legitimacy in the absence of clear precedents and expectations for crimes committed.¹⁴⁶ Without a defined standard, it becomes challenging for defendants and crime

¹³⁸ Sam Muller, Nathalie Dijkman, Peter Polakovic, *et al.*, *Legal Futures of the International Criminal Court*, THE HAGUE INSTITUTE FOR INNOVATION OF LAW (Sept. 22, 2017), www.hiil.org/research/legal-futures-of-the-international-criminal-court/.

¹³⁹ Yuval Shany, *How Can International Criminal Courts Have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation*, 46(3) ISRAEL LAW REVIEW 341 (2013).

¹⁴⁰ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *supra* note 128, at para. 204.

¹⁴¹ *Id.*, at 104.

¹⁴² ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, *supra* note 119; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *supra* note 120.

¹⁴³ ICC, *The Prosecutor v. Germain Katanga*, Trial Chamber II, *supra* note 107; ICC, *The Prosecutor v. Germain Katanga*, Trial Chamber II, *supra* note 112, paras. 5, 11, 66, 91.

¹⁴⁴ CRYER, *supra* note 8, at 80-81.

¹⁴⁵ Bartolomiej Krzan, *Introduction*, in *PROSECUTING INTERNATIONAL CRIMES: A MULTIDISCIPLINARY APPROACH* (Bartolomiej Krzan ed., 2016).

¹⁴⁶ *INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA* (Cesare P.R. Romano, André Nollkaemper, Jann K. Kleffner eds., 2004), at 180-181.

prosecutors to gauge sentencing or determine guilt.¹⁴⁷ This lack of clarity undermines the repelling of crime, evident from the examination of the standards of proof discussed earlier in the paper. Overall, impacting the objective of criminal law in general to deter the crimes when there is not a consistent understanding of how to amount the conducts as a crime. Therefore, closing the gap in substantive opinions is imperative to ensure consistent and credible judgments that uphold the Court's legitimacy. Hence, if the gaps in substance improve, there will be left small rooms for the practice of an inconsistent procedure.

It is however important to differentiate between the dissenting opinions and the divergence of opinion between the Trial vs. Appeals Chambers within different and the same cases. This paper argues that the inclusivity of the ICC for different cultural backgrounds is respected when allowing room for dissenting opinions. However, this cannot be retained in the case of varying judgements at different stages of the proceedings.

It is also observed that some matters that need to be addressed at the Pre-Trial stage, find their ways to Trial and sometimes Appeal stages.¹⁴⁸ Illustrating this issue from the examples provided above that led to the conflict on the standard of proof, was the evidentiary presentation and the reliability of this matter persisting. In the case of Thomas Lubanga at the ICC, the issue surrounding the use of intermediaries to obtain evidence was a matter that could have been ideally addressed at the Pre-Trial stage.¹⁴⁹ However, Lubanga's defense team intentionally chose to reserve their arguments regarding the use of intermediaries, intending to raise this issue during the Trial phase questioning the authenticity and reliability of evidence procured through intermediaries.¹⁵⁰ This strategic decision led to the prolongation of proceedings, as the challenge against the use of intermediaries was introduced during the Trial rather than being addressed at the earlier stage.¹⁵¹

Another instance is the *Katanga* case, where the issue of charges and their formulation could have been addressed at the Pre-Trial stage.¹⁵² The defense argued that the charges were improperly formulated and that the prosecution's case did not accurately reflect the alleged criminal conduct.¹⁵³ This issue could have been ideally clarified and potentially resolved earlier in the proceedings, yet it was brought to the Trial stage, resulting in the elongation of the legal process.¹⁵⁴

Another case reflecting such an issue is the *Bemba* case. Here, the mode of liability could have been addressed during the Pre-Trial stage.¹⁵⁵ The defense argued that the Prosecution's reliance on the concept of command responsibility was not adequately supported by

¹⁴⁷ Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIFORNIA LAW REVIEW 449 (2016).

¹⁴⁸ David J. Scheffer, *A Review of the Experiences of the Pre-trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence*, 21(1) LEIDEN JOURNAL OF INTERNATIONAL LAW 151 (2008).

¹⁴⁹ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, *supra* note 120.

¹⁵⁰ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Closing Submission of the Defence (July 15, 2011), paras. 1-18.

¹⁵¹ Scheffer, *supra* note 149.

¹⁵² Steven A. Koh, *Prosecutor v. Germain Katanga: Judgment on the Appeal against the Decision of Trial Chamber II of 21 November 2012*, 52(4) INTERNATIONAL LEGAL MATERIALS 873 (2013).

¹⁵³ Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, 22(3) CRIMINAL LAW FORUM 311 (2011).

¹⁵⁴ KAMARI M. CLARKE, *FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* (2019), at 175-177.

¹⁵⁵ Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22(4) LEIDEN JOURNAL OF INTERNATIONAL LAW 715 (2009).

evidence.¹⁵⁶ This discrepancy in the understanding of liability could have been clarified at an earlier stage but was instead brought to Trial, resulting in extended legal proceedings.¹⁵⁷

In the *Ntaganda* case, witness identification and protection were critical points of contention.¹⁵⁸ The trial encountered complications primarily due to issues surrounding witness safety and confidentiality.¹⁵⁹ Defining clearer protocols for witness protection measures and identification during the Pre-Trial stage could have averted some of these complications. The delayed decisions around these matters significantly impacted the trial, resulting in prolonged debates and concerns that could have been mitigated with more explicit guidelines earlier in the proceedings.

Through observing this pattern, it would be fair to acknowledge that this is most often the result of strategic choices of the constituents and parties (OTP, CLRV, Defence Team) rather than the fault of Chambers or the judges since as long as a matter is not addressed before their bench, they cannot decide or rule on that matter. In other cases, seems that the Court fails to address simple procedural matters at the early stages for the sake of efficiency.

In the *Gbagbo and Blé Goudé* case¹⁶⁰, credibility issues surrounding witnesses and evidence admissibility significantly impacted the trial. The lack of precise criteria for vetting witnesses or determining evidence admissibility at the Pre-Trial stage led to extended debates and delays during the trial proceedings.¹⁶¹ A more defined and comprehensive approach in the earlier stages could have alleviated these challenges, allowing for smoother trial proceedings. Similar to what was also encountered in *Katanga* and *Lubanga* case concerning the evidence collected through the intermediaries as discussed above.

Lastly, in the *Ongwen*¹⁶² case, complexities emerged during the trial regarding the inclusion or exclusion of certain charges and evidence.¹⁶³ The trial faced challenges due to uncertainties surrounding the scope of charges and admissible evidence, which could have been clarified during the Pre-Trial phase.¹⁶⁴ More decisive and precise rulings or clarifications at an

¹⁵⁶ Carmel O'Sullivan, *New Court, Same Division: the Bemba Case as an Illustration of the Continued Confusion Regarding the Command Responsibility Doctrine*, 35(3) LEIDEN JOURNAL OF INTERNATIONAL LAW 661 (2022).

¹⁵⁷ *Id.*

¹⁵⁸ ICC, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Judgement (July 8, 2019), paras. 77-284.

¹⁵⁹ John D. Jackson, Yassin Brunger, *Witness Preparation in the ICC*, 13 (3) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 601 (2015).

¹⁶⁰ ICC, *The Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15, Appeals Chamber, Judgement (Mar. 31, 2021).

¹⁶¹ Triestino Mariniello, *Questioning the Standard of Proof: The Purpose of the ICC Confirmation of Charges Procedure*, 13(3) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 579 (2015).

¹⁶² ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Trial Chamber IX, Sentencing Hearing (April 14, 2021), at 8; ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Trial Chamber IX, Prosecution Opening Statement (December 6, 2016), at 35-36; Adina-Loredana Nistor, *Culture and the Illusion of Self-Evidence: Spiritual Beliefs in the Ongwen Trial*, 24(1) INTERNATIONAL CRIMINAL LAW REVIEW 3 (2023).

¹⁶³ Noelle Quenivet, Windell Nortje, *Casting the Net Wider: A Critical Analysis of the Sentencing Criteria in the Ongwen Case at the International Criminal Court*, UNIVERSITY OF WEST ENGLAND (Oct. 13, 2022), www.uwe-repository.worktribe.com/output/10098369.

¹⁶⁴ Demetra F. Sorvatzioti, *Proportionality and Moral Blameworthiness in Ongwen's ICC Sentencing Decision*, 23(5) INTERNATIONAL CRIMINAL LAW REVIEW 755 (2023); Joseph A. Manoba, Anushka Sehmi, *What the Dominic Ongwen Trial could mean for Traditional Justice Mechanisms in the ICC*, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (September 21, 2021), www.eprints.lse.ac.uk/111627/; Shashikala Gurpur, Sayantan Bhattacharyya, Sujata Arya, *The Sentencing of Dominic Ongwen: A Normative Inquiry*, OPINIO JURIS (June 23, 2021), www.opiniojuris.org/2021/06/23/the-sentencing-of-dominic-ongwen-a-normative-inquiry/.

earlier stage might have streamlined the subsequent trial proceedings, potentially reducing delays and ambiguities encountered during the trial.

Inconsistencies arising from matters of substance and procedure pose a significant risk to coherent decision-making within judicial processes.¹⁶⁵ When there are disparities in interpreting substantive laws or procedural rules across cases or jurisdictions, it undermines the uniform application of legal principles.¹⁶⁶ This inconsistency leads to ambiguity in the understanding of legal standards and principles, creating challenges in predicting or anticipating judicial decisions.¹⁶⁷ Moreover, conflicting interpretations can erode confidence in the judiciary's reliability and fairness.¹⁶⁸ The absence of a consistent approach to legal matters affects the predictability and coherence of judicial decisions, impacting the credibility and legitimacy of the entire judicial system.¹⁶⁹ As a result, it becomes imperative for courts and tribunals to address and rectify these inconsistencies to ensure coherent and dependable decision-making.

The coherence of jurisprudence is vulnerable when issues of substance and procedure within the judicial system lack consistent handling. As demonstrated above, the manner in which legal matters are approached, including the interpretation and application of laws, evidentiary rules, and procedural guidelines, significantly influences the harmonization of judicial decisions. When courts encounter inconsistencies in interpreting legal statutes or implementing procedural norms across cases, it leads to disparate outcomes, undermining the integrity and predictability of the legal system. Inadequate clarity or deviations from established procedures may result in conflicting judgments, hindering the development of a coherent body of jurisprudence.

C. Lack of Internal Checks and Balances

The absence of internal checks and balances within the judicial framework exacerbates the lack of coherence.¹⁷⁰ Internal mechanisms such as appellate reviews, quality control processes, and consistency checks are pivotal in ensuring that judicial decisions are consistent, aligned with legal standards, and free from errors.¹⁷¹ Hence, internal mechanisms can ensure the integrity and credibility of judicial decisions at the ICC. These checks act as safeguards against arbitrary interpretations or deviations from established legal principles.¹⁷² Without these mechanisms,

¹⁶⁵ Stefan Schubert, Erik J. Olsson, *Coherence and Reliability in Judicial Reasoning*, in COHERENCE: INSIGHTS FROM PHILOSOPHY, JURISPRUDENCE AND ARTIFICIAL INTELLIGENCE (Michał Araszkiewicz, Jaromir Šavelka eds., 2013), at 33-58.

¹⁶⁶ Nicholas Croquet, *Implied External Limitations on the Right to Cross-Examine Prosecution Witnesses: the Tension between a Means Test and a Balancing Test in the Appraisal of Anonymity Requests*, 11(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW (2010).

¹⁶⁷ Alon Harel, Ehud Guttel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, MICHIGAN LAW REVIEW (Oct. 3, 2022), www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1277977#.

¹⁶⁸ Jens D. Ohlin, *Joint Criminal Confusion*, 12(3) NEW CRIMINAL LAW REVIEW 406 (2009).

¹⁶⁹ Yvonne McDermott, *The International Criminal Court's Chambers Practice Manual: Towards a Return to Judicial Law Making in International Criminal Procedure?*, 15(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 873 (2017); Eyal Zamir, Doron Teichman, *Judicial Decision-Making*, in BEHAVIORAL LAW AND ECONOMICS (Eyal Zamir, Doron Teichman, 2018), at 525-566.

¹⁷⁰ Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VANDERBILT LAW REVIEW 1 (2021).

¹⁷¹ Aleksandar V. Gajić, *Standards of Appellate Review in the International Administration of Criminal Justice*, 1(13) SERBIAN POLITICAL THOUGHT 93 (2016).

¹⁷² *Id.*

judicial decisions may lack comprehensive review, potentially allowing inconsistencies or divergences to persist, further eroding the consistency and credibility of jurisprudence.

Moreover, internal checks provide a quality control system within the judiciary, identifying and rectifying potential errors or inconsistencies in legal reasoning before final judgments are issued.¹⁷³ The absence of such checks may lead to judgments lacking thorough review, potentially resulting in discrepancies that undermine the credibility of the legal system.

In addition to maintaining consistency, these internal mechanisms enforce adherence to legal standards and principles, ensuring decisions align with established legal frameworks.¹⁷⁴ Their absence can create an environment prone to arbitrary interpretations or deviations from established legal norms, posing a threat to the coherence of jurisprudence as observed in the above cases, specifically pertaining to Art. 66's interpretation in various cases.

Furthermore, robust internal checks reinforce judicial independence by facilitating autonomous decision-making while operating within the bounds of established legal principles.¹⁷⁵ The absence of such checks might expose the judiciary to external influences that could compromise the integrity and consistency of legal decisions.¹⁷⁶ Ultimately, the absence of strong internal checks and balances risks fostering inconsistencies, weakening legal coherence, and potentially eroding public trust in the judiciary's capacity to deliver consistent and equitable jurisprudence.

In the case of the ICC, several institutional frameworks aimed at maintaining checks and balances within its operations to ensure fairness, consistency, and adherence to legal principles.¹⁷⁷

At the core of this structure is the Appeals Chamber, serving as a mechanism for reviewing decisions made by the Trial Chambers. It acts as an appellate body, allowing parties to challenge legal or factual determinations made during the trial phase. Through this mechanism, the Appeals Chamber provides an oversight function, ensuring that the legal interpretations and factual assessments are correct and consistent with established jurisprudence.

Moreover, the Pre-Trial Chamber plays a pivotal role by assessing the charges brought by the Prosecutor to confirm whether they meet the necessary legal criteria before allowing a case to proceed to trial. This chamber serves as a preliminary checkpoint, ensuring that only cases meeting the legal requirements move forward to trial, thus contributing to maintaining the court's credibility and adherence to legal standards.

Finally, the Judges of the ICC play a crucial role in overseeing the legal process, meticulously scrutinizing evidence, legal arguments, and procedural adherence. Their vigilant oversight aims to ensure that the proceedings are in line with the Rome Statute and established legal principles, thereby contributing to a fair and transparent trial process.

While these institutional mechanisms exist, criticisms occasionally emerge regarding their efficacy and sufficiency in guaranteeing consistent and coherent jurisprudence within the ICC.¹⁷⁸ This has been extensively exhibited in the above cases. Efforts are continually made to

¹⁷³ Owiso Owiso, *The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process?*, 19(3) INTERNATIONAL CRIMINAL LAW REVIEW 505 (2019).

¹⁷⁴ *Id.*

¹⁷⁵ Shivaraj S. Huchhanavar, *Conceptualising Judicial Independence and Accountability from a Regulatory Perspective*, 9(2) OSLO LAW REVIEW 110 (2022).

¹⁷⁶ Dominic Raab, Hans Bevers, *The International Criminal Court and the Separation of Powers*, 3(1) INTERNATIONAL ORGANIZATIONS LAW REVIEW 93 (2006).

¹⁷⁷ *Id.*

¹⁷⁸ Christof Royer, *The bête noire and the noble lie: the international criminal court and (the disavowal of) politics*, 13(2) CRIMINAL LAW AND PHILOSOPHY 225 (2018).

refine and improve these systems to address any perceived shortcomings, aiming to strengthen the Court's overall functionality and maintain its legitimacy.

Since the inevitable existence of pragmatism and discrepancies has been established, existence of some internal checks and balances could ensure the eradications of their effects. Addressing the challenges posed by the absence of internal checks and balances within the ICC necessitates a multifaceted approach focused on bolstering oversight, consistency, and fairness in its operations.

Firstly, enhancing the efficacy of the appellate reviews stands as a crucial step. Broadening its authority to review various facets – ranging from legal interpretations to factual determinations and trial procedures – would fortify its role in rectifying potential errors and ensuring comprehensive oversight.¹⁷⁹

Another pivotal strategy involves establishing clearer and more specific guidelines for legal interpretations, evidence admission, and trial procedures.¹⁸⁰ By developing precise protocols, the ICC can minimize inconsistencies and ensure a uniform application of legal principles across different cases.¹⁸¹

Moreover, reinforcing a commitment to precedent within the ICC's decision-making processes is essential.¹⁸² Aligning new decisions with established case law and legal principles serves to maintain consistency and coherence in jurisprudence.¹⁸³

Independent review mechanisms could also contribute significantly to a more coherent jurisprudence making. By integrating external and impartial reviews of judicial decisions – potentially through legal expert engagements or advisory bodies – the ICC can augment transparency and accountability in its operations.¹⁸⁴

Further initiatives, such as continuous training and capacity-building programs for judges, legal officers, and staff, can significantly enhance their comprehension of legal principles, case law, and procedural requirements. This, in turn, can foster more informed and consistent decision-making.

Finally, fostering a culture of robust internal dialogue among judges and legal professionals within the ICC is crucial. Encouraging open discussions facilitates the exchange of diverse perspectives, knowledge-sharing, and best practices, thereby minimizing the likelihood of inconsistencies in legal interpretations.¹⁸⁵

Implementing these diverse measures represents a comprehensive strategy toward mitigating the challenges arising from the lack of internal checks and balances within the ICC. These steps collectively aim to reinforce the court's judicial processes, promoting greater consistency, fairness, and transparency in its proceedings.

¹⁷⁹ Kevin W. Gray, *Is There Even a Standard of Review at the ICC?*, 20(6) INTERNATIONAL CRIMINAL LAW REVIEW 945 (2020).

¹⁸⁰ Juan-Pablo Pérez-León-Acevedo, *The International Criminal Court (ICC)'s Procedural Practice and Domestic Legal Sources*, 23(1) THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 138 (2024).

¹⁸¹ *Id.*

¹⁸² Aldo Z. Borda, *The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals*, 14 MELBOURNE JOURNAL OF INTERNATIONAL LAW 608 (2013).

¹⁸³ *Id.*

¹⁸⁴ Thore Neumann, Bruno Simma, *Transparency in International Adjudication*, in TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi, Anne Peters eds., 2013), at 436-476.

¹⁸⁵ *Id.*

D. Gaps in the Constituent Treaty

Even though the founding fathers of the Rome Statute attempted very hard to close the gaps and clauses in the Charter, there still exist some concepts and lines in some provisions that are open for interpretation. Examples include the provisions that refer to gender.¹⁸⁶ The strict definition of sexual violence and the neglect of gender justice matters in the Rome Statute have been recognized as major barriers to advancing gender justice.¹⁸⁷ As a consequence, prosecuting sexual and gender-based crimes has become difficult, leading to varying interpretations of these offenses within the Rome Statute's framework and inconsistent legal decisions.¹⁸⁸

Most relevant for this paper, the aforesaid example of *Lubanga vs. Katanga* with regards to how the standard of proof is interpreted and defined demonstrates a gap in constituent treaty of the ICC defining such an important concept. Thus, as long as important concepts are left undefined, it will be difficult for different autonomous and independent judges from different legal and cultural backgrounds to interpret the same text in the same certain course of manner. Even judges have acknowledged the existence of constructive ambiguities in the Charter.¹⁸⁹

It must be noted that this article does not advocate for the rigid interpretation of the definitions. However, it suggests that the flexible interpretation of ambiguous terms shall be interpreted consistently through the judgements. It also acknowledges how this correlates to a positive result. Hence, interpreting modern crimes requires a certain degree of flexibility. However, this flexibility shall not be expanded to the point that undermines consistency of the Court's practice.

E. Composition of Judiciary

As discussed above, incoherence in the practice and decision-making of the ICC leads to inconsistent jurisprudences. What is important to note is that these differences do not only emerge from the texts of diverse interpretation of the constituent instruments. These differences are also due to the "methodological and interpretive differences over the ascertainment of the content of the applicable law between differently composed judicial branches".¹⁹⁰

Diverse culture of the legal backgrounds of the judges is another factor leading to the incoherencies and discrepancies in ICC jurisprudence.¹⁹¹

The compassion and legal backgrounds of judges, influenced by the legal systems they come from, can significantly impact the interpretation of laws and the application of jurisprudence in international courts.¹⁹² Judges bring their unique legal experiences, cultural

¹⁸⁶ Rosemary Grey, Jonathan O'Donohue, Indira Rosenthal *et al.*, *Gender-based Persecution as a Crime Against Humanity*, 17(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 957 (2019).

¹⁸⁷ Gözde Turan, *The Identity of "the Other" for Sexual Violence Victims: is there Anything New in Sexual Violence Prosecutions before the International Criminal Court?*, 26(6) JOURNAL OF GENDER STUDIES 662 (2016).

¹⁸⁸ *Id.*

¹⁸⁹ ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3636-Anx2, Appeal Chamber, Separate Opinion (June 8, 2018), paras. 2-4.

¹⁹⁰ Carcano, *supra* note 55.

¹⁹¹ ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 190; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *supra* note 120.

¹⁹² INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES (Göran Sluiter, Håkan Friman, Suzannah Linton *et al.* eds., 2019).

perspectives, and ethical inclinations into their decision-making. These differences in approaches might result in varying interpretations of legal statutes, norms, or precedents.

For instance, judges trained in civil law systems, which rely heavily on written laws and codes, may approach legal interpretation differently from those in common law systems, which focus on judicial precedent and case law.¹⁹³ This diversity in legal traditions can lead to differing perspectives on issues such as the burden of proof, admissibility of evidence, or the interpretation of legal provisions as observed in the previous section with examples.

Additionally, judges may bring personal inclinations or ideologies shaped by their cultural, social, or political backgrounds into their legal reasoning. This diversity, while enriching judicial discussions, could also lead to varying views on the same legal matter, potentially resulting in inconsistent jurisprudence.¹⁹⁴ Ultimately, while this diversity in legal backgrounds can offer a broader spectrum of perspectives, it also poses a challenge in achieving uniformity and coherence in jurisprudential decisions within international Courts.

To showcase examples, as discussed in detail under the previous section; the different legal backgrounds and perspectives of judges have influenced interpretations and decisions. For example, on the issue of standard of proof, it was demonstrated how in the *Lubanga* case, judges from Common Law backgrounds emphasized a higher standard of proof, leaning towards a strict interpretation akin to common law principles. Meanwhile, judges from Civil Law backgrounds leaned towards a more flexible approach, reflecting Civil Law traditions.¹⁹⁵

With regards to another instance and the following up on procedure on witness testimony, it was illustrated how different judges, based on their legal backgrounds, might weigh witness testimony differently.¹⁹⁶ For instance, judges from Common Law systems gave precedence to cross-examination and scrutinized witness credibility extensively, whereas judges from Civil Law systems might focus on the written evidence and documentary proofs.¹⁹⁷

Regarding the admissibility of evidence, it was demonstrated how the judges' legal backgrounds affected their views on the admissibility of certain evidence.¹⁹⁸ This can involve opinions on the relevance and reliability of evidence, particularly when it comes to hearsay or indirect evidence, which may be evaluated differently based on diverse legal traditions.¹⁹⁹

Despite this factor having the potential for strengthening the legitimacy of the Court on account of diversity and being inclusive and welcoming different legal backgrounds, it is often observed that the judges' interpretation of the constituent instrument or the applicable law is gravely interlinked to the different cultural and legal background they originate from. Whether their professional expertise has been exercised and gained from a domestic legal system of civil or common law, their interpretation of law shapes accordingly. The above examples illustrated how judges' legal backgrounds and the legal systems they come from can influence their approach to various legal matters, potentially leading to differences in interpretation and decision-making within the ICC and ultimately changing the course of jurisprudence making.

¹⁹³ Raab, Bevers, *supra* note 177; Guillem Rimbaut, Clin Lai, Boyu Lu Zhao *et al.*, *Legal Origins, Religion and Health Outcomes: a Cross-Country Comparison of Organ Donation Laws*, 17(2) JOURNAL OF INSTITUTIONAL ECONOMICS 217 (2020).

¹⁹⁴ Theodore Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99(2) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 359 (2005).

¹⁹⁵ Daniel Peat, COMPARATIVE REASONING IN INTERNATIONAL COURTS AND TRIBUNALS (2019); Göran Sluiter, Håkan Friman, Suzannah Linton *et al.*, *supra* note 192.

¹⁹⁶ INTERNATIONAL CRIMINAL PROCEDURE: THE INTERFACE OF CIVIL LAW AND COMMON LAW LEGAL SYSTEMS (Linda E. Carter, Fausto Pocar eds., 2013).

¹⁹⁷ See *Katanga* case for example.

¹⁹⁸ See above case of *Lubanga* and *Bemba* for example.

¹⁹⁹ THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn ed., 2015).

F. Political Interests

Moreover, this paper views the decisions such as the one in *Gaddafi vs. Al-Senussi*²⁰⁰ to be motivated by the politically interested personality of the ICC. The ICC's interest and involvement in the trials of individuals like Gaddafi and Al-Senussi are influenced by various factors, including the gravity of the crimes alleged, their significance in the context of international law, and the political implications surrounding the cases.²⁰¹

In the case of Muammar Gaddafi, the ICC's interest stemmed from the gravity of the alleged crimes and their broader implications.²⁰² Gaddafi, as the leader of Libya at the time, was accused of serious human rights violations and crimes against humanity during the Arab Spring protests and the Libyan civil war. His prominent political position and the severe nature of the alleged crimes made his trial a focal point for international justice and accountability.²⁰³

On the other hand, while Abdullah Al-Senussi, Gaddafi's intelligence chief, faced similar allegations of human rights abuses and crimes against humanity, the ICC's level of interest might have been influenced by various factors.²⁰⁴ Despite the gravity of the crimes attributed to Al-Senussi, the ICC's prosecutorial priorities, political considerations, available evidence, cooperation of involved parties, and the potential impact of the trial on regional stability or international relations could have influenced the decision-making regarding pursuing his case.²⁰⁵

Therefore, the ICC's interest in these cases can be seen as a complex interplay of legal, political, and practical considerations, where the gravity of the alleged crimes and the individuals' political significance both play significant roles in determining the court's focus and level of involvement.

These decisions are not limited to the situation in Libya but the ones in Afghanistan, Bangladesh and Myanmar are also evident ones.²⁰⁶ Such political decision-making is considered to challenge the Court's legitimacy as these decisions are considered to be radical departures from previously established practices.²⁰⁷ This departure without legal reasoning is noticeable and influences the coherent jurisprudence-making. This would interfere with the

²⁰⁰ UNHRC, A/HRC/19/68, Report of the International Commission of Inquiry on Libya (Mar. 8, 2012); Gabriela Augustinyová, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi: Decision on the Admissibility of the Case against Abdullah Al-Senussi* (Int'l Crim. Ct.), 53(2) INTERNATIONAL LEGAL MATERIALS 273 (2017).

²⁰¹ Julien Seroussi, *How Do International Lawyers Handle Facts? The Role of Folk Sociological Theories at the International Criminal Court*, 69(4) THE BRITISH JOURNAL OF SOCIOLOGY 962 (2018).

²⁰² ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 190; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *supra* note 120.

²⁰³ Richard Dicker, *Libya: Gaddafi Must Be Held Accountable for Crimes Against Humanity*, HUMAN RIGHTS WATCH (July 18, 2011), www.hrw.org/news/2011/07/18/libya-gaddafi-must-be-held-accountable-crimes-against-humanity.

²⁰⁴ UNHRC, *supra* note 200.

²⁰⁵ Henry M. Lovat, *Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court*, BEPRESS LEGAL REPOSITORY (June 25, 2006), www.law.bepress.com/expresso/eps/1435; Farid M. Rashid, PROSECUTORIAL DISCRETION IN THE INTERNATIONAL CRIMINAL COURT (2023).

²⁰⁶ Alex Whiting, *The ICC's Afghanistan Decision: Bending to the U.S or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/.

²⁰⁷ John C. Yoo, *In Defence of the Courts Legitimacy*, 68(3) THE UNIVERSITY OF CHICAGO LAW REVIEW 774 (2001), at 782.

notion of the Court as a neutral arbiter of the law, through which is one of the sources of its legitimacy.

The recent ICC investigation into war crimes committed on Afghanistan's territory during the American occupation has produced a new surge of interest in this topic, reflecting the politically sensitive nature of the ICC's actions.²⁰⁸ Additionally, the outbursts against the ICC from the Trump administration, culminating in Executive Order 13928, on account of the ICC Chief Prosecutor's use of its own powers to request the authorization to investigate the actions of US personnel during the war in Afghanistan, reinforce the idea that the Court is not immune to this growing surge in the contestation of international institutions with a post-national nature.²⁰⁹ These references provide insights into the political dynamics that shape the ICC's decisions and its engagement with cases involving Afghanistan, highlighting the complex interplay of legal, political, and international factors that influence the Court's actions.

Hence, such decision makings demonstrate a tenancy for the decisions being influenced by strategic thinking which might not always be in line with the interest of justice nor a requisite for its practice.²¹⁰

V. Solutions

A. Fostering Collegiality: Addressing Challenges and Cultivating Collaboration

It is noted that the Court has begun to advance consistency and coherency in its practice through the "Appeals Chamber's determination not to depart from earlier rulings without convincing reasons and through the Court's adoption of the Chambers Practice Manual".²¹¹ This was mainly the solution directed to tackle the collegiality problem as addressed above. Moreover, the cooperation from Trial as well as Pre-Trial Chamber to accept and not challenge the judgments of the Appeals Chamber is acknowledged and appreciated on the path to coherence.²¹² However, as it was argued throughout this paper, the Appeals Chambers' rulings that can serve as internal checks and balances aimed to correct the findings and assessments of the Trial Chambers to constitute a more consistent jurisprudence in terms of procedure and understanding of the substance are not meeting the bar.²¹³

The second solution is concerned with the adoption of better communication strategies among different judges and the Chambers overall. This primarily rests upon the Pre-Trial Chamber due to its pivotal role in initial case assessments, setting legal precedents, and interacting with the Office of the Prosecutor. By facilitating effective dialogue among its members, the Pre-Trial Chamber can ensure consistency in decision-making, promote

²⁰⁸ Photeine Lambridis, *The International Criminal Court and Afghanistan: Leveraging Politics to Bolster Accountability and Enhance Legitimacy*, 54(3) NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 1007 (2022); Daniel Kremer, *Does the International Criminal Court Target the American Military?*, 117(1) AMERICAN POLITICAL SCIENCE REVIEW 325 (2023).

²⁰⁹ Mileno Sterio, *The Trump Administration and the International Criminal Court: A Misguided New Policy*, 51(1) CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 201 (2019).

²¹⁰ THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Sluiter Göran, Carsten Stahn eds., 2009), at 248.

²¹¹ Ivković, Hagan, *supra* note 2, at 28.

²¹² McDermott, *supra* note 170; Gilbert Bitti, *Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn, Göran Sluiter eds., 2009).

²¹³ *Ibid.*

coherence in ICC jurisprudence, and enhance the efficiency of proceedings, ultimately contributing to the ICC's overarching goals of accountability and justice.²¹⁴ Accordingly, the Pre-Trial Division Judges should convene on a regular basis to examine issues that are the source of uneven practices across different Chambers, with the goal of harmonizing processes as much as it is feasible.²¹⁵

Dissenting opinions of judges as seen in the dissenting opinion of Judge Ušacka in *Lubanga* case (please see section III.C above) is a reminder and acknowledgement for the existence of different perceptions. This in turn demonstrates how having a concrete framework would contribute to solving criticisms towards dissenting opinions. When a dissenting opinion is formed through a common framework, it maintains its. Hence, precise guidelines can be included in the Chambers Practice Manual as it has been thus far in a response to the IER of 2020.

B. Navigating Interpretive Challenges: Strategies for Effective Resolution

Nonetheless, such measures may be deemed to be inadequate considering that most of these inconsistencies derive from the interpretation of primary source of applicable law in light of the Rome Statute with a particular attention to Art. 21(2). This provision undermines the normative nature of law to be applied when necessary.²¹⁶ This makes the interpretation of the Statute to be conditional of the Specific Chamber.

As pointed out to in the first section of this article, the divergent constitutionality of the law and the diverse background of the subjects exercising the law, offers a broad ground for interpretation. Hence, it is important to govern the interpretations through establishing coherent standard of interpretation.

With regards to the interpretation, Art. 21(2) of the Rome Statute expresses the Court's power to "apply principles and rules of law as interpreted in its previous decisions".²¹⁷ To demonstrate the significance of interpretation in the discourse of jurisprudence making, a recap of earlier points should be highlighted. As discussed extensively, consistent precedent (Jurisprudence) serves as the bedrock influencing the perpetual process of legal interpretation in multifaceted ways by furnishing fundamental principles and theories like originalism or legal positivism, offering frameworks guiding how judges decipher legal texts and statutes; by providing a repertoire of interpretive methods, encouraging scrutiny of legislative intent, historical context, and precedent to elucidate legal documents coherently; and through fueling the evolution of legal doctrines through scholarly discourse and judicial decisions inspired by these theories, allowing interpretations to mirror societal shifts and emergent norms.²¹⁸ Moreover, it fosters critical analysis, engendering debates that challenge established interpretations and propose novel perspectives, leading to a deeper understanding of legal concepts. Lastly, jurisprudence enables the adaptation of legal interpretations to contemporary contexts by facilitating the application of established legal principles to new circumstances.

²¹⁴ John Smith, *The Role of the Pre-Trial Chamber in the International Criminal Court: Assessing its Impact on Case Assessment and Jurisprudence*, 20(2) INTERNATIONAL CRIMINAL LAW REVIEW 345 (2020).

²¹⁵ ICC, ICC-ASP/19/Res.7, Overall Response of the International Criminal Court to the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report" (Apr. 14, 2021).

²¹⁶ *Id.*

²¹⁷ ICC, Statute of the International Criminal Court, *supra* note 44.

²¹⁸ See the section on Importance of Jurisprudence.

Through these means, jurisprudence underpins the ongoing process of interpretation, providing the intellectual scaffolding essential for shaping legal reasoning and accommodating the evolving nature of law in society. It is therefore important for the previous decisions to be coherent in terms of interpretation as it is through a consistent interpretation that the jurisprudence can be perpetuated. This matter can also significantly influence the Court's authority by showcasing its obedience towards to Rule of Law as discussed in earlier sections.

Furthermore, it is not only discrepancies related to Art. 21(2) – where the judges have been given greater freedom for interpreting the law – that undermines the legitimacy of the ICC but divergent and defective interpretations of the statutory framework also degrade the institutional legitimacy.²¹⁹

Art. 21(2) of the Rome Statute outlines the sources of law applicable to the ICC. While this article serves as a foundation for the ICC's legal framework, its interpretation and application are crucial. If the interpretation of Art. 21(2) leads to inconsistent or arbitrary legal decisions, it can raise doubts about the Court's fairness and impartiality. Additionally, if the ICC's reliance on various legal sources under this article is perceived as selective or biased in certain cases, it may diminish trust in the Court's objectivity. In essence, while Art. 21(2) establishes the legal framework for the ICC, flaws or inconsistencies in its interpretation or application could potentially erode the Court's legitimacy by undermining perceptions of its fairness and adherence to legal principles.

Defective interpretations of a statutory framework can erode institutional legitimacy in several ways. When a court or institution engages in flawed interpretations of laws, it may result in inconsistent decisions or rulings. These inconsistencies could create confusion, leading to a lack of predictability in legal outcomes and raising doubts about the institution's competence or adherence to legal principles.

Interpretations that deviate from the established statutory framework, such as misapplication or ignoring relevant legal provisions, might be perceived as arbitrary or biased. Such interpretations may lead to unfair treatment of parties involved or favoritism, undermining trust in the institution's impartiality and fairness.²²⁰

Defective interpretations could also result from ambiguity or vagueness within the statutory framework itself. When laws are unclear or open to multiple interpretations, it can create opportunities for subjective interpretations that deviate from the intended legal meaning. This ambiguity might generate inconsistencies in legal rulings and contribute to a lack of confidence in the institution's ability to apply the law consistently and accurately.

Overall, defective interpretations, whether due to inconsistency, bias, or ambiguity within the statutory framework, can diminish institutional legitimacy by compromising perceptions of fairness, consistency, and adherence to legal principles.

C. Optimizing Panel Compositions: Strategies for Addressing Key Challenges

In the pursuit of optimizing panel compositions within the judicial framework, it is imperative to recognize the significant influence wielded by the composition of each panel on the decision-making process. As elucidated earlier, the selection of judges can profoundly impact the outcomes of cases, thereby underscoring the pivotal role played by panel compositions in shaping jurisprudential outcomes.

²¹⁹ Ivković, Hagan, *supra* note 2.

²²⁰ Pudovochkin, Babayev, *supra* note 19.

Consequently, the Court seems to have not been successful in addressing the discrepancies in decision-making. This becomes more apparent in cases where the Court aims to move away from already established practices so radically and bluntly (in which the *Bemba* case is a great example). This issue can be greatly solved through presidency. The selection of the judges on a case is a matter where the presidency can strengthen jurisprudence by selecting judges who might be having less of conquering opinions on the matter.²²¹

Addressing this issue necessitates a strategic approach, wherein the presidency assumes a central role. The presidency, through the judicious selection of judges for each case, can wield considerable influence in shaping the jurisprudential direction of the Court.²²² By carefully curating panels comprised of judges with diverse perspectives and expertise, the presidency can foster robust deliberations and ensure that all relevant considerations are thoroughly examined.²²³

Moreover, by intentionally selecting judges who possess differing viewpoints or dissenting opinions on a given matter, the presidency can promote a more comprehensive and nuanced understanding of complex legal issues. This approach not only enhances the legitimacy and coherence of the Court's jurisprudence but also contributes to the development of a richer and more inclusive body of legal precedent.²²⁴

In essence, optimizing panel compositions represents a strategic imperative for the Court in its pursuit of equitable and effective adjudication. Through judicious selection and thoughtful consideration of panel compositions, the presidency can play a pivotal role in strengthening the Court's jurisprudential framework and upholding the integrity of its decision-making processes.

D. Strategies Within Statutory Frameworks and Constituent Treaties

Because the ICC is a Statute-centered organization (unlike *ad hoc* Courts), it cannot establish law independently as *ad hoc* tribunals did under the leadership and ingenuity of judges who did so out of necessity owing to a lack of relevant law.²²⁵ Considering that the *ad hoc* Tribunals were restricted to the judges' interpretation of the law due to the lack of previously practiced laws, this argument cannot be used for the ICC when there is a significant precedent in the practice of its ancestors.

Even though each tribunal and international courts ought to and deemed to primarily priorities their own statutes rather than the established jurisprudences of other international Courts and Tribunals, however, since the statutes are often considered to be interconnected and an improvement and a development from the previous experiences of *ad hoc* Tribunals, relying on prior interpretations and jurisprudences is expected to only empowers the existing law and previous established practices.

²²¹ M. Cherif Bassiouni, *The International Criminal Court in Search of Legitimacy: Why the ICC Can and Should Do More to Address Concerns Regarding Its Legitimacy*, (2009) 10(1) CHICAGO JOURNAL OF INTERNATIONAL LAW 1.

²²² Thordis Ingadottir, *The International Criminal Court: Nomination and Election of Judges*, INTERNATIONAL CRIMINAL COURT DOCUMENTS (June 4, 2002), www.legal-tools.org/doc/b92109/.

²²³ *Id.*

²²⁴ Leslie Vinjamuri, *Building Legitimacy in International Criminal Courts: A Case for 'Critical Mass'?*, 62(2) INTERNATIONAL ORGANIZATION 281 (2008).

²²⁵ Stewart Manley, Pardis Moslemzadeh Tehrani, Rajah Rasiah, *Mapping Interpretation by the International Criminal Court*, 36(3) LEIDEN JOURNAL OF INTERNATIONAL LAW 771 (2023); Joseph Powderly, *Curb Your Creativity: The Rome Statute and the Attempted Institution of Interpretative Restraint*, in JUDGES AND THE MAKING OF INTERNATIONAL CRIMINAL LAW (Joseph Powderly, 2023), at 454-541.

Despite appreciation and devotion for the establishment of cornerstone definitions of law that in the *ad hoc* tribunals and the enhancement of ICL through interpreting IHL in these Courts, this article believes that the ICC should develop its practice without heavy reliance upon the practice of precedent courts. Therefore, one approach to tackle the rising inconsistencies would be to move away from decision-making based on the jurisprudence of previous Courts and Tribunals prevailing to procedure, but rather by concentrating and reaching conclusions based on the statute or constituent frameworks of the Court itself when in doubt. Through doing so, the importance of legal certainty and consistency will be recognised to the extent that grounds precisely articulated in the decision and judgments become visible by themselves and ultimately justify the established practices. As mentioned, even though there is significant value in the jurisprudences of previous courts and tribunals and this should be highly appreciated and acknowledged, the approach of focusing to re-establish the laws driving from the constituent treaty would be further strengthening and empowering the already established practices of the previously existing courts and tribunals. It must also be noted that this is indeed to a certain extent the current status quo of the ICC's practice but there always remain space for improvement. Moreover, the ICC's continued reference to its previous judgments and decision-making will be a solution to developing and establishing uniformity in its jurisprudence.²²⁶

E. Enhancing Judicial Process Through Inclusive Negotiation Practices

Another solution could be that of notifying the relevant parties during the process of decision-making when deviating from fundamental jurisprudence and established precedent, so that the parties will have sufficient time to respond. This would propose a new approach for decision making by relying on negotiations prior to the delivery of the judgement. This initiative can strengthen process of jurisprudence making as it is the deliberation of a collective society consisting of the Judges, Prosecutors, Defence Lawyers and Victims' Lawyers. However, it must be noted that the approach should not be mistaken by holding other parties responsible for the delivering the judgements but rather providing them an opportunity to share their perspective and insight and amend if needed through formal or informal meetings. Even though in the current setting of the ICL, the presence and existence of Status Conferences serves the merit to a certain extent, lots of improvements can be done through informal meetings that can consequently strengthen the legitimacy of the judgements.

In the realm of judicial decision-making, an intriguing question arises concerning the efficacy of pre-informing parties about impending verdicts and soliciting their responses. Such a practice inherently challenges the finality typically associated with judicial determinations, barring the appellate process. One might ponder whether this proactive engagement with involved parties could potentially undermine the very essence of judicial decision-making, rendering it redundant.

However, within this conundrum lies an opportunity for refinement rather than obsolescence. A nuanced approach could involve the establishment of a specialized avenue for appeal, tailored specifically for cases where pre-informing and soliciting responses are integral components of the process. By affording involved parties this unique recourse, albeit with procedural advantages, the judicial system could reconcile the imperative of finality with the imperative of procedural fairness and participatory justice.

²²⁶ Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) *JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT* 5 (2011).

This proposed mechanism not only acknowledges the evolving landscape of judicial proceedings but also underscores the commitment to uphold principles of transparency, accountability, and due process. Moreover, it reflects a conscientious effort to strike a delicate balance between the need for expeditious resolution and the imperative of safeguarding the rights and interests of all stakeholders involved in the adjudicative process. As such, the incorporation of a special right of appeal in circumstances where pre-informing parties is practiced emerges as a pragmatic step towards fostering legitimacy and trust in the judicial system.

F. Diminishing Political Influence

Moreover, as it was discussed above, certain political influences are encouraged, while others are discouraged in the Court's jurisprudence making.²²⁷ To save the Court's integrity and overcome the decision-making based on politically influenced incentives, it is encouraged that the for the ICC prosecutors and judges to be compelled to evaluate the end states that are reasonably expected to be affected by their rulings in order to sustain the Court's stability and coherence. Through doing so, the Court would subcutaneously assert their legitimacy in the society of the receiving state.

Furthermore, building upon the preceding discourse, it becomes evident that the realm of legal precedent within the judicial sphere is susceptible to various forms of external influence, some of which are deemed conducive to the integrity of the Court's jurisprudence, while others are perceived as detrimental.²²⁸ In order to fortify the Court's integrity and mitigate the risk of decision-making being swayed by politically motivated incentives, a proactive approach is warranted.

It is therefore recommended that both ICC prosecutors and judges be mandated to conduct thorough assessments of the potential ramifications of their rulings on end states that are reasonably anticipated to be impacted.²²⁹ By engaging in this evaluative process, the Court endeavors to uphold its stability and coherence, thereby reinforcing its legitimacy within the societies of the recipient states. It must also be acknowledged how despite all these controversies surrounding extremely political nature of the cases such as Afghanistan and Palestine, the Court is putting its outmost effort to function efficiently and operate independent by eschewing political tensions surrounding these cases.

This proactive measure not only serves to insulate the Court from undue external pressures but also underscores its commitment to impartiality and fairness in dispensing justice.²³⁰ By conscientiously considering the potential implications of their decisions,

²²⁷ Joseph W. Doherty, Richard H. Steinberg, *Punishment and Policy in International Criminal Sentencing: An Empirical Study*, 110(1) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 49 (2016); THE PAST, PRESENT AND FUTURE OF INTERNATIONAL CRIMINAL COURT (Alexander Heinze, Viviance Dittrich eds., 2021), at 696.

²²⁸ RICHARD H. STEINBERG, THE INTERNATIONAL CRIMINAL COURT: CONTEMPORARY CHALLENGES AND REFORM PROPOSALS (2020).

²²⁹ Marieke Wierda, *A Framework for Assessing the Impact of the ICC*, in THE LOCAL IMPACT OF THE INTERNATIONAL CRIMINAL COURT: FROM LAW TO JUSTICE (Marieke Wierda, 2023), at 9-49; Marieke Wierda, *The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries*, LEIDEN UNIVERSITY (Jan. 9, 2019), www.scholarlypublications.universiteitleiden.nl/handle/1887/68230.

²³⁰ Caroline Fehl, *Growing Up Rough: The Changing Politics of Justice at the International Criminal Court*, PEACE RESEARCH INSTITUTE FRANKFURT (Jan. 8, 2014), www.prif.org/fileadmin/Daten/Publikationen/Prif_Reports/2014/prif127.pdf.

prosecutors and judges can contribute to fostering greater trust and confidence in the ICC's mandate and operations. Ultimately, this approach not only bolsters the Court's credibility but also enhances its effectiveness in upholding the principles of international law and ensuring accountability for egregious violations thereof.

VI. Conclusion

This paper discussed the importance of consistency and coherence in the ICC's jurisprudence. It unveiled some discrepancies within the ICC's system, practice and judgments. It was suggested that incoherencies exist not only within different chambers of the same case (appeals, v. trial and pre-trial) but they also exist between different chambers of different cases.

Through acknowledging some developments after the criticisms of IER of 2020, this paper illustrated more recommendation for tackling the issue of incoherent jurisprudence building in the ICC. Solutions encompassed but were not limited to filtering political decision-making, creating a stronger framework, closing the conceptual gaps in the Statute, and developing a communication strategy as well as internal checks and balances in the system.

In conclusion, the issue of disparate jurisprudence within the ICC demands a thorough examination and robust measures for rectification. To comprehensively address this challenge, future scrutiny should concentrate on several key aspects. Firstly, an in-depth analysis of the procedural mechanisms, including the ICC's internal checks and balances, to identify areas for enhancement and better coordination among different organs. Secondly, a detailed evaluation of the decision-making process, emphasizing the role of judges' diverse legal backgrounds and the influence of these backgrounds on verdicts. Additionally, an exploration of the interpretation and application of foundational legal texts, particularly Art. 21(2) of the Rome Statute, would be instrumental in understanding the root causes of discrepancies. Moving forward, a holistic approach that delves into these areas will be pivotal in crafting strategies to ensure a more coherent and consistent jurisprudence at the ICC.

