The impact of a lack of consistency and coherence: How key decisions of the International Criminal Court have undermined the Court’s legitimacy

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1. Introduction

In April 2019,1 four previous Presidents of the International Criminal Court called for a review of the Court’s operations, stating, *inter alia*, that they were ’disappointed by the quality of some judicial proceedings, frustrated by some of the results and exasperated by the management deficiencies that prevent the court from living up to its full potential’.2 The concerns expressed by the previous Presidents are widely shared, as, across the board, there is a deep sense of disquiet with the Court’s operations.

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2 ibid

In the following it will be posited that a vital part of the crisis of confidence in the Court derives from its failure to appreciate the impact on its legitimacy⁴ of inconsistency and incoherence in its decision-making. It is, of course, understood that some degree of variation in the law’s interpretation may be expected when it is construed by different, and independent, judges. Yet, for any court system—much less a new court system seeking to establish and sustain its authority and legitimacy—the magnitude of such variation must be constrained. This is because the law derives much of its authority from legal certainty, and such certainty and predictability are at the core of the rule of law.⁶

⁴ Legitimacy is to be understood in the sociological sense as the perception of an institution’s authority as appropriately exercised and therefore worthy of respect and obedience; although the basis for the argument here that legitimacy is undermined turns upon an assessment of the legal legitimacy of the decisions being rendered by the Court. See RH Fallon Jr, ‘Legitimacy and the Constitution’ (2005) 118 Harvard L Rev 1787-1853. Fallon identifies three categories of legitimacy: sociological, moral and legal. Sociological legitimacy refers to the public’s view of the legal system and its institutions as worthy of respect and obedience; moral legitimacy refers to whether a legal regime should be treated as worthy of respect and obedience; and legal legitimacy refers to the correctness or reasonableness of judicial decisions as a matter of law (at 1794-1796). See also J Talberg, M Zürm (eds), ‘The Legitimacy and Legitimation of International Organisations: Introduction and Framework’ (2019) Rev Intl Organisations 581-606. Kersten defines legitimacy “as a measure of the distance between expectations and reality. The closer reality lines up to (or exceeds) expectations, the more legitimate the institution.” See also N Grossman, ‘Legitimacy and International Adjudicative Bodies’ (2009) 41 George Washington Intl L Rev 107, 110 (defining international courts as legitimate when their authority is perceived as justified).

⁵ Of course, a coherent decision can bolster perceptions of legitimacy without being consistent with past rulings and a decision that is consistent with past rulings without giving consideration to other, overriding values such as fairness can undermine perceptions of legitimacy. But the argument being advanced here is that both of these values, when present, contribute meaningfully to perceptions of the Court’s legitimacy, even if, in certain circumstances, they may not be followed in view of other meaningful principles like substantive justice.

⁶ Of course, the rule of law embodies many other values than just certainty and predictability in the application of law. According to the United Nations, for instance, ‘[...] the rule of law is a principle of governance in which all persons [...] are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equity before the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency’ (United Nations and the Rule of Law <un.org/ruleoflaw/what-is-the-rule-of-law/>). Nonetheless, consistency in judicial
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What is more, it is well-accepted that coherence in decision-making and the existence of adequate and persuasive reasoning are vital for the rulings of any court to be accepted as authoritative and that such well-reasoned decisions are essential to establish and sustain a court’s legitimacy as a judicial institution.

Unfortunately, the Court has struggled on both of these fronts, in part due to structural factors. The Statute itself allows for differing interpretations of the law at Article 21(2), which provides that ‘[t]he Court may apply the principles and rules of international law as interpreted in its previous decisions’. This provision empowers judicial discretion in decision-making by allowing a judge to render justice as he or she sees fit on the facts of a particular case without being constrained to follow past decisions. The possibility of variable interpretations of the law is further compounded by the fact that the Court’s judges come from different legal backgrounds and legal cultures and are regularly replaced due to the statutory limit on their terms of office. And while Article 74(5) speaks of the need for a full and reasoned decision to be rendered, this provision concerns evidentiary assessments more than interpretations of the law.

The Court has made efforts to promote greater consistency and coherence, such as through the Appeals Chamber’s determination not to
depart from earlier rulings without convincing reasons\textsuperscript{11} and through the Court’s adoption of the Chambers Practice Manual.\textsuperscript{12} The latter was the outcome of a series of retreats aimed at enhancing collegiality among judges that have been continued under the current Presidency.\textsuperscript{13} Additionally, while not required to do so, the Trial and Pre-Trial Chambers appear to voluntarily accept the rulings of the Appeals Chamber.\textsuperscript{14} Moreover, the Appeals Chamber’s ruling that a Trial Chamber’s failure to ‘clearly state the factual findings and the assessment of evidence’ constitutes a procedural error arguably aims towards enhancing coherence in decision-making.\textsuperscript{15}

Nonetheless, such self-imposed measures have proven insufficient to prevent radically different and, it will be argued, deficient decision-making by the Court’s judges, particularly in relation to interpretations of the primary source of applicable law.\textsuperscript{16} Indeed, while acknowledging

\textsuperscript{11} Reasons for the ‘Decision on the Request for recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo’s detention’, \textit{Prosecutor v Gbagbo and Blé Goudé} (ICC-02/11-01-01/15OA6) (31 July 2015) para 14 (‘Gbagbo Decision’).

\textsuperscript{12} This Manual sets out agreed procedural approaches to such issues as disclosure of evidence, conduct of the confirmation hearing, cumulative charging and the admission of victims as participants <www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf>.


\textsuperscript{15} Bemba Appeal Judgement paras 49-56.

\textsuperscript{16} Art 21 sets out the applicable law. Foremost are the Statute, the Elements of Crimes and the Rules of Procedure of Evidence, second appropriate treaties and principles and rules of international law, and failing both of these, general principles of law derived from national legal systems provided they are not inconsistent with the Court’s Statute. The ‘consistent’ jurisprudence of the Court on the applicable law is that resort can only be had to the second and third sources of the law when the following conditions are met: ‘(i) there is a lacuna in the written law contained in the Statute, the
the importance of predictability and certainty, the judges regularly deviate from past practice where they consider warranted by the object and purpose of the Rome Statute. Although Article 21(2) permits such deviations, this variable approach undermines the normative force of the law being applied, as the law appears to be contingent on the interpretation of the particular Chamber. Nor has the Court succeeded in adopting measures to ensure coherence in decision-making more generally. This is particularly evident when it comes to radical departures from previous approaches that are not persuasively grounded in a necessary correction to the interpretation of the applicable law.

Such differing and deficient interpretations of the statutory framework harm institutional legitimacy and open the door to both actual and perceived judicial arbitrariness, both of which have had deleterious effects on the Court. This is most starkly demonstrated in the Court’s reasoning with respect to its exercise of jurisdiction over non-States Parties but is also apparent in other important areas of the Court’s decision-making, from the early pre-investigative stage to the phase of appellate review. Following a review of certain exemplars of the Court’s decision-making, this article will conclude by considering steps that can be taken to ameliorate some of the problems identified.

17 Gbagbo Decision para 14.
18 See discussions in Parts II B and C.
19 See eg RH Fallon Jr, ‘Legitimacy and the Constitution’ (n 4) 1828 who defines a court’s institutional legacy as residing ‘[…] in public belief that it is generally a trustworthy institution whose rulings deserve respect or obedience’. See also J Talberg, M Zürn (eds), ‘The Legitimacy and Legitimation of International Organisations: Introduction and Framework’ (n 4); E Voten, ‘Public Opinion and the Legitimacy of International Courts’ (2013) 14 Theoretical Inquiries in L 411.
20 The examples selected are examples where the failure to adopt a coherent and consistent approach undermined perceptions of the Court’s legitimacy. In other cases, it may be that adopting a consistent approach for the sake of consistency would undermine perceptions of legitimacy by valorizing consistency over other core
2. The Court and non-States Parties

While most situations before the Court have fallen squarely and without question within the Court’s jurisdiction, other situations have arisen that involve non-States Parties to the Rome Statute. While the Court should always strive to issue well-reasoned and persuasive decisions, the importance of the Court addressing jurisdictional questions concerning non-States Parties in a way that is juridically sound, well-reasoned and persuasive cannot be overstated.21

The Court’s Statute purports to create rights and obligations for non-States Parties in two specific situations: first, pursuant to Article 13(b), where the Security Council triggers the exercise of jurisdiction through a referral of a situation pursuant to Chapter VII of the United Nations Charter;22 and second, pursuant to Article 12(2)(a), where non-State party nationals are alleged to have committed crimes on the territory of a State party.23

As these provisions impact on the interests of non-States Parties, their application is bound to be politically fraught. Regrettably, while good rationales for the exercise of jurisdiction in such circumstances exist,24 the Court’s Chambers have repeatedly failed to set forth persuasive rationales.25 The lack of serious legal reasoning by the Court in addressing the basis for its exercise of jurisdiction in these circumstances has, principles, such as substantive justice or fairness in the circumstances of the particular case.

21 The Court is an institution established by treaty. As stipulated by art 34 of the Vienna Convention on the Law of Treaties, ‘[a] treaty does not create either obligations or rights for a third State without its consent’.
22 Art 13(b) of the ICC Statute reads: ‘A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.’
23 Art 12(2): ‘In the case of article 13, paragraph a) or c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.’
25 See eg (n 93).
unsurprisingly, resulted in detrimental ramifications for the Court and for perceptions of its legitimacy—ramifications that continue to negatively impact the Court’s operations. Each of these scenarios will be addressed in turn.

2.1. Security Council referral of the situation in Darfur

a. Decision of 27 April 2007

A momentous event occurred for the Court in 2005, when the Security Council referred the situation in Sudan to the Court by means of Security Council resolution 1593, adopted under Chapter VII of the United Nations Charter.26 This marked the first time the Security Council had referred a situation to the Court, and the first time the Court was faced with a situation taking place on the territory of a non-State party. Nonetheless, the significance of the referral and the legal complexities involved and the need to address them in a comprehensive and persuasive manner were not appreciated by the Court.

Notably, in making his first request for summonses to appear (or, in the alternative, warrants for arrest), the Prosecutor merely cited the referral and made no attempt to identify what the legal implications of the referral of a non-State party to the Court might be.27

In ruling on the request, the Pre-Trial Chamber acknowledged that Sudan was not a State party, but concluded that Article 12(2), which sets out the circumstances in which the Court can exercise jurisdiction, was inapplicable in circumstances where the exercise of jurisdiction was triggered by the Security Council acting under Chapter VII of the Charter pursuant to Article 13(b).28

27 ‘Prosecutor’s Application under Article 58(7)’ (ICC-02/05) Pre-Trial Chamber I (28 February 2007) para 1.
28 ‘Decision on the Prosecution Application under Article 58(7)’ Prosecutor v Ahmad Harun and Ali Kushayb (ICC-02/05-01/07) Pre-Trial Chamber I (27 April 2007) para 16. The Pre-Trial Chamber held that a Security Council referral under Chapter VII authorized the Court to exercise jurisdiction over crimes committed in the territory of States which are not party to the Statute and by nationals of States not party to the Statute).
Significantly, the Chamber did not acknowledge that Article 13(b) is silent on a Security Council referral of a non-State party. Moreover, the Chamber failed to explain the impact of that referral on the non-State party, leading the Court down a controversial path of inconsistent and incoherent decision-making when it came to the legal implications of its exercise of jurisdiction over non-States Parties.

Clarifying how the Rome Statute applied to non-States Parties was not only important for those States that were concerned that they, too, might find situations on their territories referred to the Court. It was also an issue of paramount importance to States Parties seeking to understand their obligations towards the Court when it came to the issue of cooperation in arresting the then sitting Head of State of Sudan, President Omar Al Bashir. The fact that the Court took some three years to address the issue of State party cooperation demonstrates a surprising

29 While the exercise of jurisdiction in this circumstance is widely accepted, there appears to have been no discussion of this situation at Rome. Given the consent-based nature of the Rome Statute coupled with the statutory silence, it was incumbent upon the Chamber to set out how the intent of the drafters of the Rome Statute supported its conclusion that, when it comes to Security Council referrals, consent to the exercise of jurisdiction was overridden by such a referral. This, however, was not done. See WA Schabas, The International Criminal Court: A Commentary on the Rome Statute (2nd edn, OUP 2016) 367 (‘It seems to be presumed that the Court may exercise jurisdiction anywhere to the extent that the “exercise of jurisdiction” is authorized by the Security Council. Nowhere, however, is this stated explicitly in the Statute’).


31 This was particularly so as the text of Security Council Res 1593 merely urged the cooperation of all States, while recalling that States not party to the Rome Statute had no obligation to cooperate (para 2).

lack of appreciation by the Court of the importance of providing a compelling, well-reasoned justification for such cooperation.

b. Decision of 4 March 2009

In its next decision in the situation of Sudan, involving the issuance of an arrest warrant for Al Bashir, the Pre-Trial Chamber reiterated its earlier conclusion that a referral under Article 13(b) brought a non-State party within its jurisdiction, again without offering any reasoning.\(^{33}\) However, it then proceeded to conclude—once again without providing any rationale—that non-States Parties made subject to the Court’s jurisdiction by virtue of a Security Council referral would necessarily come within the full ambit of the Court’s legal framework.\(^{34}\) Notably, in so concluding, the Chamber failed to explain what obligations were imposed on Sudan by the application of that statutory framework.

The Pre-Trial Chamber then went a step further, concluding that Al Bashir’s position as Head of State did not affect the Court’s jurisdiction.\(^{35}\) In so doing, the Chamber conspicuously failed to address either the customary international law of immunity or the relevant statutory provisions pertaining to this issue.\(^{36}\) The Court not only failed to explicitly address the legal relevance of the statutory provisions for non-State

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33 ‘Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir’ *Prosecutor v Al Bashir* (ICC-02/05-01/09) Pre-Trial Chamber I (4 March 2009) (‘Bashir Arrest Warrant Decision’).

34 In the words of the Chamber: ‘by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigations into the said situation, as well as any prosecutions arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.’ (Bashir Arrest Warrant Decision para 45).

35 Bashir Arrest Warrant Decision para 41.

36 In particular, while art 27 provides that the Rome Statute shall apply equally to all persons and that immunities which may attach to a person’s official capacity shall not bar the Court’s exercise of jurisdiction, art 98 makes plain that the Court cannot request a State party to proceed with a request for surrender when doing so would require the State to act inconsistently with its obligations under international law regarding a person’s immunities.
party Sudan; it also neglected to address the legal relevance of the provisions to State party cooperation under the circumstances at issue. 37

c. Decisions of 13 December 2011

The Pre-Trial Chamber’s failure to deal comprehensively and compellingly with the complexities of these issues in the 4 March 2009 ruling was thereafter compounded by its inconsistent and confusing approach in dealing with State party claims that Al Bashir was immune from arrest.

In its first decisions dealing with State party failures to arrest Al Bashir on grounds of immunity in Malawi38 and Chad,39 the Pre-Trial Chamber asserted that customary international law creates an exception to Head of State immunity when an international court seeks a Head of State’s arrest for international crimes, thus rendering Article 98(1) inapplicable and, in effect, redundant.40

To buttress its conclusion, the Pre-Trial Chamber cited various precedents, though, as has been noted by others, the precedents relied upon did not, in fact, support the Chamber’s conclusion.41 Moreover,

37 As D Akande has emphasized, in issuing the arrest warrants to State Parties and Security Council members it was incumbent upon the Pre-Trial Chamber to establish that ‘it was not requiring those States to act inconsistently with their international obligations relating to immunity (D Akande, ‘Who is Obliged to Arrest Bashir?’ EJIL Talk! (13 March 2009) <www.ejiltalk.org/who-is-obliged-to-arrest-bashir/>.

38 ‘Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir’ Prosecutor v Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber I (13 December 2011) (‘Malawi Decision’).

39 ‘Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir’ Prosecutor v Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber I (13 December 2011).


41 The precedents relied upon did not concern the cooperation of national authorities, but instead, the right to assert immunity as a defence when someone is already before the relevant court. That the Chamber had not actually established the existence of a general exception to Head of State immunity in prosecutions before international courts was eventually conceded by a different Chamber in a later decision. See ‘Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir’
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the Pre-Trial Chamber failed to address the issue of the immunity from arrest of a Head of State of a non-State party that has not accepted Article 27, where such an arrest would be effected by other States acting at the request of an international court.\(^{42}\)

d. Decision of 9 April 2014

Three years later, in 2014, following the Democratic Republic of the Congo’s (DRC) failure to arrest Al Bashir and without making any reference to the Malawi and Chad decisions, a differently constituted Pre-Trial Chamber\(^{43}\) adopted yet another approach. This time, the Chamber recognized that Head of State immunities could be a bar to the Court’s exercise of jurisdiction and grounded the DRC’s obligation to arrest Al Bashir in an implied waiver by the Security Council of Al Bashir’s customary Head of State immunities.\(^{44}\)

The holding that a Security Council resolution can, by implication, waive customary international law norms was reached without identifying any legal foundation. Notably, if a referral is in compliance with the Rome Statute, Article 98(1) provides that it is the individual’s State of

\(^{42}\) It was this issue that was at the heart of the resolution of the African Union adopted on 3 July 2009, where it ‘[…] called upon all concerned states to respect international law and in particular the immunity of state officials in the exercise of universal jurisdiction’ and not to ‘[…] cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities for the arrest and surrender of President Omar El Bashir of The Sudan’ (Assembly/AU/Decl, 1-5 (XIII) paras 6 and 10).

\(^{43}\) 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court’ Prosecutor v Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber II (9 April 2014) (‘DRC Decision’).

\(^{44}\) The Pre-Trial Chamber, held that ‘[…] by issuing Resolution 1593 (2005) the Security Council decided that the “Government of Sudan […] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution […]”’ and that, as the immunities of Al Bashir as Head of State were a procedural bar to his prosecution before the Court, the cooperation ‘[…] envisaged in the said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities’ (DRC Decision para 29).
origin that must waive the immunities. Further, it is not apparent why a resolution imposing an obligation upon Sudan to fully cooperate with the Court also has the effect of abrogating legal obligations as between States Parties and Sudan.

e. Decision of 6 July 2017

A year later, yet another differently constituted Pre-Trial Chamber made an abrupt about-face in a decision on South Africa’s failure to arrest Al Bashir, this time explicitly rejecting the conclusion that the Security Council resolution waived Al Bashir’s immunities and the line of reasoning of the Malawi and Chad decisions.


46 Nonetheless, the Court followed this line of unsatisfactory reasoning in its decisions of 11 July 2016 concerning Uganda’s and the Republic of Djibouti’s failure to arrest Al Bashir. See ‘Decision on non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute’ Prosecutor v Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber Pre-Trial Chamber II (11 July 2016); ‘Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute’ Prosecutor v Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber II (11 July 2016) para 11.

47 In the decision, a majority of the Pre-Trial Chamber held that ‘[…] it sees no such “waiver” in the Security Council resolution and that, in any case, no such waiver – whether “explicit or implicit” – would be necessary’ (‘Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir’ Prosecutor v Al Bashir (ICC-02/05-01/09) Pre-Trial Chamber II (6 July 2017) para 96 (‘South African Decision’)).

48 The Chamber held that holding that it was ‘[…] unable to identify a rule in customary international law that would exclude immunity for Heads of States when their arrest is sought for international crimes by another State, even when the arrest is
Following the reasoning of an earlier decision issued with respect to the Security Council’s referral of Libya, the Pre-Trial Chamber held that the effect of the referral was the imposition of the Rome Statute upon Sudan and that Sudan was to be considered analogous to a State party, at least in terms of its obligations under the Statute. The result was that Article 27(2) applied to Sudan. Thus, vis-a-vis the Court, Sudan could not claim Al Bashir’s immunity and consequently, no immunity needed to be waived. Further, according to the Chamber, States Parties could exercise the Court’s request for arrest and surrender of Al Bashir without violating Sudan’s rights under international law.

This ruling, unlike many that preceded it, sought to offer a rationale for its conclusions. Nonetheless, there is much about the Pre-Trial Chamber’s reasoning that is unsatisfactory, particularly the concept that the Security Council can impose a treaty on a State via a resolution and in a manner that only imposes those parts of the treaty that set forth obligations.

Notwithstanding these deficiencies, the majority of the Pre-Trial Chamber confirmed this approach in its subsequent decision of 11 December 2017 with respect to Jordan’s failure to arrest Al Bashir, a decision that Jordan appealed.

sought on behalf of an international court, including specifically this Court’ (South African Decision para 68).

49 South African Decision para 85.
50 South African Decision para 83.
51 The Pre-Trial Chamber qualified the scope of the Statute’s application, excluding those provisions that did not fall within the parameters of the referral, such as the right to vote in the Assembly of States Parties. The Chamber also excluded the obligation to financially contribute to the Court in accordance with art 115 (South African Decision, para 89-90).
52 This ‘[…] render[ed] inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law’ (South African Decision para 91).
53 South African Decision paras 92-93.
54 Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al Bashir’ Prosecutor v Al Bashir (ICC-02/05-01/09-309) Pre-Trial Chamber II (11 December 2017). On 18 December 2017, Jordan sought leave to appeal the Pre-Trial Chamber’s decision and leave was granted by the Pre-Trial Chamber on 21 February 2018. See ‘The Hashemite Kingdom of Jordan’s Notice of Appeal of the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir; or, in the Alternative Leave to
f. Judgment of 6 May 2019

In the resulting appellate ruling, rendered some 14 years after the Security Council’s referral of the situation in Sudan to the Court, the Appeals Chamber sought to provide its own resolution.55

First, the majority of the Appeals Chamber explained that the primary issue is whether Bashir in his capacity as Head of State of Sudan enjoyed immunity before this Court which Jordan was obligated to respect in the absence of a waiver by Sudan.56 While acknowledging that the issue of immunity had led to inconsistent decision-making among differently composed Pre-Trial Chambers, the majority underplayed the impact of such inconsistency, positing that ‘[i]n the circumstances of this Court, it is possible to follow different structures of judicial reasoning that may yield reasonable answers to that question’.57

The majority of the Appeals Chamber went on to reject the Pre-Trial Chamber’s holding in the Jordan decision (and in the earlier South African decision) that a Head of State benefited from customary international law immunity before an international court. Instead, the majority agreed with the conclusions of the Malawi Pre-Trial Chamber that Head of State immunity was inapplicable when an arrest was sought by an international court.58 As no immunities existed under international law, nothing prevented a States party from executing a request from the Court to arrest Al Bashir.59

Moreover, while rejecting the notion that Sudan had become analogous to a States party, the Appeals Chamber majority endorsed the Jordan decision.56

Seek Such an Appeal’ Prosecutor v Al Bashir (ICC-02/05-01/09-312) Pre-Trial Chamber II (18 December 2017); ‘Decision on Jordan’s request for leave to appeal’ Prosecutor v Al Bashir (ICC-02/05-01/09-319) Pre-Trial Chamber II (21 February 2018).

55 The Appeals Chamber made a call to States Parties, the United Nations, Regional Organisations and professors of international law to file amicus curiae briefs in the appeal of Jordan against a finding that it had an obligation to arrest Al Bashir. See ‘Order inviting submissions’ Prosecutor v Al Bashir (ICC-02/05-01/09 OA2) Appeals Chamber (25 May 2018).

56 ‘Judgment in the Jordan Referral re Al Bashir Appeal’ Prosecutor v Al Bashir (ICC-02/05-01/09 OA2) Appeals Chamber (6 May 2019) para 97 (‘Jordan Appeal’).

57 According to the Appeals Chamber, ‘[…] nothing thus turns ultimately on the complaint that different compositions of Pre-Trial Chamber may have used various paths of judicial reasoning to answer that question’ (Jordan Appeal para 97).

58 Jordan Appeal para 113.

59 Jordan Appeal para 114.
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Dan Pre-Trial Chamber’s holding that the Security Council referral granted the Court jurisdiction in accordance with the Court’s Statute. In this respect, the duty to cooperate with the Court imposed on Sudan constituted the same duties of cooperation as a States party. This included the obligation to abide by Article 27(2). As a result, in the majority’s view, Sudan could not invoke Head of State immunity.

Unsurprisingly, the Appeals Chamber’s judgment in the Jordan appeal did not resolve the controversy over the issue of non-States party Head of State immunity before the Court. Nor did it impact the resolve of the African Union not to cooperate with the Court.

While the Appeals Chamber justified the inconsistency of decision-making among the differently composed Pre-Trial Chambers, the Al Bashir saga exemplifies, at best, the efforts of different Pre-Trial Chambers to resolve matters as they considered most appropriate, with or without coherent reasoning to support them and with a marked heedlessness about the impact of these varying decisions on perceptions of the Court’s legitimacy. The central determination that there was an obligation to arrest Al Bashir—which was agreed across the Pre-Trial Chambers—lost its authority as a result of the inconsistency, insufficiency and incoherence of the different paths of legal reasoning. And the inconsistency, insufficiency and incoherence gave credence to the African Union’s position with respect to the actual state of the law,

60 Jordan Appeal para 142.
61 Jordan Appeal paras 120, 149.
62 Indeed, the judgment is subject to the same criticism that applied to the earlier Pre-Trial Chamber decisions that it relied upon, as set out in the preceding discussion. For an excellent overview of criticisms made, see V Pergantis, ‘The Relationship between the UN Security Council, the International Criminal Court and Third States: Some Thoughts on the Al-Bashir Case’ (n 45).
63 Assembly/AU/Dec.738 (XXXII) Decision on the ICC-Doc. Ex. CL/1138 (XXXIV) para 2(c) <au.int/sites/default/files/decisions/36461-assembly_au_dec_713_748_xxxii_c.pdf>. Although the recent removal of Al Bashir from the Presidency of Sudan has rendered the issue of immunity from arrest moot in this case. Notably, the African Union has also requested the removal of its request for an advisory opinion from the International Court of Justice from the agenda of the United Nations General Assembly, Assembly/AU/Dec.789 (XXXIII), Declaration on the International Criminal Court, EX.CL/1218(XXXVI) para 12; <au.int/sites/default/files/decisions/38180-assembly_au_dec_749-795_xxxiii_c.pdf>.
64 See eg RH Fallon Jr (n 4) 1828 regarding authoritative legitimacy of decision making.
namely that non-States party sitting Heads of State were immune from arrest under customary international law.\(^{65}\)

Ultimately, these differing interpretations, unanchored in any cogent analysis of the Statute or of legislative intent, resulted in the solidification of opposition to and distrust of the Court by many of its African States Parties\(^{66}\). More broadly, perceptions of the Court as a court of law were damaged, as it was missing the hallmarks inherent in such an institution.

2.2. The situation in Afghanistan

The second situation in which the Rome Statute purports to create rights and obligations for non-States Parties involves the exercise of jurisdiction over non-States party nationals where they are alleged to have committed crimes within the Court’s jurisdiction on a States party’s territory. This was the situation in Afghanistan, a State party, where the Prosecutor’s preliminary examination into crimes committed on its territory included the examination of alleged crimes committed by non-States party nationals, including nationals of the United States.\(^{67}\)

From the outset of the Court’s operations, the United States consistently made clear that it would consider any attempts by the Court to

65 AU Assembly 12\(^{th}\) Ordinary Session, ‘Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan’ AU Assembly Doc. Dec. 221 (XII) 3 (1-3 February 2009).


67 ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’ (ICC-02/17) Pre-Trial Chamber II (12 April 2019) (‘Afghanistan Decision’).
exercise its jurisdiction over American nationals illegitimate. 68 Against this backdrop and following on some 13 years of proceedings, the Pre-Trial Chamber’s decision not to authorize an investigation into the situation of Afghanistan—the first such refusal in the Court’s history—was bound to give rise to controversy. Yet, rather than adopting an approach grounded in past practice and meticulously explained, the Chamber instead reached a decision that contradicted more than one ‘settled’ legal issue, 69 including through a marked departure from previous approaches to the application of Article 15(4). 70


69 See Afghanistan Decision. Firstly, although previous Pre-Trial Chambers had been content to grant wide latitude to the Prosecutor in defining the potential scope of her investigation, the Pre-Trial Chamber adopted a restrictive approach, holding that ‘[t]he scope of the Chamber’s scrutiny must remain confined to the incidents or category of incidents and, possibly, the group of alleged offenders referred to by the Prosecution’ (Afghanistan Decision para 39). The only possible additions that could be made by the Prosecutor to those incidents presented in the request are those that are ‘closely linked’ to the authorized situation as opposed to the previous standard fairly consistently applied by Pre-Trial Chambers of ‘sufficiently linked’ (Afghanistan Decision para 40).

‘Sufficiently linked’ was the standard applicable in all previous cases with the exception of Kenya. See ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya’ (ICC-01/09) Pre-Trial Chamber II (31 March 2010) para 63 (‘Kenya Authorisation Decision’). In the Kenya Authorisation Decision paras 207-209, the Pre-Trial Chamber limited the subject matter to crimes against humanity, the category referred to by the
Prior to the Afghanistan decision, Pre-Trial Chambers had accepted—in line with the position advocated by the Prosecutor—that if the criteria of Article 53(1) subparagraph (a) (jurisdiction) and subparagraph (b) (admissibility) are satisfied, there is a presumption in favor of an investigation absent reasons showing that an investigation would not be in the interests of justice.\textsuperscript{71} This approach is based on the plain lan-

Prosecutor, and the temporal scope to the date of the Request. See also ‘Decision on the Prosecutor’s request for authorization of an investigation’ (ICC-01/15) Pre-Trial Chamber I (27 January 2016) paras 62-64 (‘Georgia Authorisation Decision’); Public Redacted Version of ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi ICC-01/07-X-9-US-Exp, 25 October 2017’ (ICC-01/17-X) Pre-Trial Chamber III (9 November 2017) paras 192-193 (‘Burundi Authorisation Decision’). The Pre-Trial Chamber in the Afghanistan Decision rejected the approach of the Georgia Authorisation Decision and Burundi Authorisation Decision as ‘[…] tantamount to equating the authorization of a blank cheque’ and held that its more restrictive approach was necessary ‘[…] to preserve the filtering and restrictive function of proceedings under article 15.’ Consequently, if the Prosecutor seeks to extend the investigation to cover additional crimes, or to include crimes that occurred after her request for authorization to investigate, she would have to seek a further authorization from the Pre-Trial Chamber pursuant to art 15(3). See Afghanistan Decision paras 41-42.

Notably, this restrictive approach was rejected in full by a subsequent decision of Pre-Trial Chamber III in its decision authorizing an investigation into the situation in Bangladesh/Republic of the Union of Myanmar. See ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar’ (ICC-01/19) Pre-Trial Chamber III (14 November 2019) paras 126-130. The restrictive approach was also overturned by the Appeals Chamber on appeal. See ‘Judgement on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan’ (ICC-02/17 OA4) Appeals Chamber (5 March 2020) paras 56-64 (‘Afghanistan Appeal Judgement’).

\textsuperscript{70} Office of the Prosecutor, ‘Public redacted version of “Request for authorization of an investigation pursuant to Article 14’”’ (ICC-02/17-7 Red) (20 November 2017) (‘Afghanistan Request’). Pursuant to art 15(3), the Prosecutor can initiate \textit{pro proprio motu} investigations within an ongoing preliminary examination subject to obtaining the prior authorization of a Pre-Trial Chamber. Authorization has been granted with respect to all previous applications, ie, Kenya, Cote d’Ivoire, Georgia and Burundi.

\textsuperscript{71} Art 53(1) lays down certain criteria to be considered, but it does not define ‘interests of justice’. Notably, the Prosecutor’s Office has issued policy papers on the meaning of the term. In its Policy Paper, the Prosecutor states that ‘The interests of justice test is a countervailing consideration that might produce a reason not to proceed even when the first two are satisfied’. It is only in exceptional circumstances where the interests of justice would militate against the opening of an investigation and in those circumstances the Prosecutor must present evidence to rebut the presumption that an
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language of the Statute. Article 15(4) states that if the Pre-Trial Chamber, upon examination of a request, ‘considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court it shall authorize the commencement of an investigation’. Article 53(3)(b) further provides that only a negative interests of justice determination is subject to mandatory review by the Trial Chamber. 72

In accordance with these provisions, past Pre-Trial Chambers, in reviewing prosecutorial requests to open investigations and considering the criteria of Article 53(1), had not delved into the Prosecutor’s determination as to the interests of justice once jurisdiction and admissibility were established. 73 Indeed, previous Pre-Trial Chambers had disavowed the authority to review the Prosecutor’s determination, 74 or at minimum, been content to defer to the Prosecutor on this point. 75

However, the Pre-Trial Chamber in the Afghanistan decision adopted a different approach. Underscoring the importance of its role under Article 15(4) to filter out ‘manifestly ungrounded investigations’ 76, it proceeded to recast that role by asserting that it also allowed the Court, ‘through the filtering role […] and the requirement to determine that the investigation would serve the interests of justice, to


72 Art 15(4) ICC Statute.
73 Georgia Authorisation Decision para 58; Burundi Authorisation Decision para 190.
74 ‘Decision on Application under Rule 103’ (ICC-02/05) Pre-Trial Chamber 1 (4 February 2019) paras 19-24; Kenya Authorisation Decision para 63.
75 Accordingly, the Prosecutor was not—prior to the ruling on the situation in Afghanistan—required to demonstrate that an investigation is in the interests of justice. See Georgia Authorisation Decision para 58; Burundi Authorisation Decision para 190.
76 Afghanistan Decision para 32.
avoid engaging in investigations which are likely to remain inconclusive.\textsuperscript{77}

In expanding the role of the Pre-Trial Chamber to require a positive assessment that an investigation would be in the interests of justice\textsuperscript{78}, the Chamber acknowledged that, in line with previous practice, the Prosecution had not presented detailed submissions on the interests of justice.\textsuperscript{79} Nonetheless, the Chamber claimed that the investigation’s consistency with the interests of justice was a factor governing the Prosecutor’s exercise of discretion pursuant to Article 53 and, accordingly, a factor that ‘falls within the scrutiny mandated to the Chamber over that discretion for the purpose of determinations under article 15.’\textsuperscript{80} The Chamber thereafter emphasized the importance of considering the requirement with the utmost care, given the potential impact of an inaccurate assessment on ‘[…] the paramount objectives of the Statute and hence the overall credibility of the Court, as well as its organizational and financial sustainability’.\textsuperscript{81}

Finding that there was no statutory definition of the interests of justice, the Pre-Trial Chamber proceeded to identify criteria from the objectives underlying the Statute. It deemed those objectives to be ‘the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities’.\textsuperscript{82} Based on these objectives, it examined whether authorizing the opening of an investigation into the situation of Afghanistan would favor them.\textsuperscript{83} It identified a number of particularly relevant factors to be considered: ‘(i) the significant time elapsed between the alleged crimes and the request; (ii) the scarce cooperation obtained by the Prosecutor throughout […]; (iii) the

\textsuperscript{77} Afghanistan Decision para 33.

\textsuperscript{78} Afghanistan Decision para 33. According to the Pre-Trial Chamber this is an assessment for which the potential inconclusiveness of an investigation would be a key consideration.

\textsuperscript{79} Afghanistan Decision para 87 (‘[It] simply states that it has not identified any reason which would make an investigation contrary to the interests of justice’).

\textsuperscript{80} Afghanistan Decision para 88.

\textsuperscript{81} Afghanistan Decision para 88.

\textsuperscript{82} Afghanistan Decision para 89. The Pre-Trial Chamber noted that all three elements supported the notion that an investigation would only be in the interests of justice if it appears the investigation would be effective and result in prosecutions within a reasonable time.

\textsuperscript{83} Afghanistan Decision para 90.
likelihood that both relevant evidence and the potential relevant suspects might still be available and within reach of the Prosecution’s investigative efforts and activities at this stage.\textsuperscript{84} Having weighed these factors, the Chamber reached a negative conclusion as to the feasibility of any prospective investigation and prosecution.\textsuperscript{85} Taking into account the Court’s resource restrictions, the Chamber determined it would not be in the interests of justice to authorize the opening of an investigation into the situation into Afghanistan.\textsuperscript{86} In the Chamber’s view, those limited resources would be better applied to situations with a more realistic prospect of success.\textsuperscript{87}

Needless to say, this ruling has been subject to sharp criticism.\textsuperscript{88} Among the myriad bases for criticism is the fact that, while the Pre-Trial Chamber attempted to give a detailed and reasoned explanation for its departure from precedent, it failed to follow Article 53(1) (c) itself, which provides that only after weighing the gravity of crimes and

\textsuperscript{84} Afghanistan Decision para 91.
\textsuperscript{85} Afghanistan Decision paras 93-94.
\textsuperscript{86} Afghanistan Decision para 95.
\textsuperscript{87} Afghanistan Decision paras 95.
the interests of victims could the Chamber proceed to consider whether there were countervailing interests of justice against an investigation.99 Indeed, it was only once the Pre-Trial Chamber had determined that an investigation would not serve the interests of justice that it turned to consider the impact on victims.90 As a result, not only did the Chamber base its determination upon its own assessment of the feasibility of the investigation as central to the interests of justice (an assessment that the Prosecutor was arguably best placed to make) but it also made assumptions that are at odds with the statutory framework.91

More generally, and perversely, the Pre-Trial Chamber’s grounding of its reasoning in the objectives of the Rome Statute actually undermine those objectives. The Chamber’s approach risks short-circuiting many other situations at, or potentially coming to, the Court, thus undermining overall efforts to end impunity.92 Such an outcome seems at odds with any reasonable interpretation of the interests of justice. And

89 Art 53(1)(c): ‘Taking into account the gravity of the crimes and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.’

90 The Chamber held that an investigation, ‘[…] far from honoring victim’s wishes and aspirations that justice be done, would result in creating frustration and possibly hostility vis-à-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve’ (Afghanistan Decision para 99).

91 For example, the Chamber found that the difficulties in obtaining cooperation would prove ‘even trickier in the context of an investigation proper’, which makes little sense given that the cooperation obligations of the Statute only become applicable when the investigation proper is opened. See Afghanistan Decision para 94. See also ICC Statute, Part 9, International Cooperation and Judicial Assistance, art 86. In addition, the Pre-Trial Chamber considered as a relevant factor the resources needed for the conduct of an investigation, arguably encroaching upon the Prosecutor’s financial independence, contrary to the Statute. Art 42(2): ‘[…] The Prosecutor shall have full authority over the management and administration of the office, including the staff, facilities and other resources thereof.’

92 As has been noted by other commentators, the decision of the Pre-Trial Chamber sends a strong message that non-cooperation with the Court will be rewarded with inaction on the part of the Court. See eg D Jacobs, ‘ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision’ Spreading the Jam (12 April 2019) <doi:jacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/>; T Buchwald, ‘The International Criminal Court Decision on Afghanistan, Time to Start a New Conversation’ Just Security (13 April 2019) <www.justsecurity.org/63622/the-international-criminal-court-decision-on-afghanistan-time-to-start-a-new-conversation/>.
if the difficulty of exercising jurisdiction over nationals of non-States Parties—including of powerful non-States Parties like the United States—was at the real heart of the Pre-Trial Chamber’s decision, the opportunity presented to address this issue in a comprehensive and compelling manner was also missed.93

The controversy surrounding the Pre-Trial Chamber’s decision clearly opens the Court up to the allegation that political pressure moti-

93 There were valid legal issues concerning the Court’s exercise of jurisdiction over non-States Parties that were addressed by the Prosecutor in her request to open an investigation but dealt with by the Pre-Trial Chamber in a relatively superficial manner, including the right of a State party to delegate its territorial jurisdiction to an international court and the impact of bi-lateral agreements entered into by States parties with non-States parties undertaking not to exercise criminal jurisdiction over that non-States parties’ nationals.

For example, in the Afghanistan Request, the Prosecutor submitted that the Rome Statute was “[…] not unique among treaty regimes in envisaging the exercise of criminal jurisdiction by a party to a treaty over the nationals of another State.” In support she listed a number of multi-lateral treaties dealing with issues such as piracy, hijacking and sabotaging of aircraft and noted that “[t]hose treaty regimes do not exclude nationals of states that are not parties to the relevant treaty. Indeed, such crimes attract universal opprobrium and thus demand repressions by each of the members of the international community as a whole.’ She thereafter claimed that ‘[n]or is the conferral or delegation of jurisdiction by a party to a treaty to an international jurisdiction in itself novel, this already having been the basis for the establishment of the Nuremberg Tribunal’ (Afghanistan Request para 45). The Chamber in its ruling did not address the submission that had been made by the Prosecutor. It merely asserted that pursuant to Article 12(a), ‘[…], conduct that has allegedly occurred in full or in part on the territory of Afghanistan or of other State parties, fall under the Court’s jurisdiction, irrespective of the nationality of the offender. The Court has jurisdiction if the conduct was either completed in the territory of a State party or if it was initiated on the territory of a State party and continued in the territory of a non-State party or vice versa’ (Afghanistan Decision para 50). See also the Prosecutor’s submissions on the impact of Article 98 agreements (Afghanistan Request para 46) and the Chambers response to those submissions (Afghanistan Decision para 59).

vated the Chamber’s approach. Whatever the Chamber’s motivation, its radical and confusing departure from past practice has profoundly and negatively impacted the Court’s credibility.

Recently, the Pre-Trial Chamber’s decision was overturned by the Appeals Chamber and the Prosecutor’s investigation in Afghanistan authorized. But while welcomed by many, the Appeals Chamber’s decision has also provoked its own controversy. In a clear departure from the practice of all previous Pre-Trial Chambers, the Appeals Chamber premised its conclusions on a finding that the provisions of Article 53(1)(a)-(c) were not applicable to the determination of prosecutorial requests to open an investigation pursuant to Article 15(4). As a result, the Pre-Trial Chamber erred in giving any consideration to the factors identified under Article 53(1)(a)-(c), including the interests of justice. In the Appeals Chamber’s view, the Pre-Trial Chamber’s sole mandate was to determine ‘whether there is a reasonable factual basis for the

Ironically, in taking the decision that it did, the Pre-Trial Chamber appeared motivated to preserve the institutional integrity of the Court, as evidenced by its assessment that it was by focusing on investigations where the prospects for success are ‘serious and substantive […] and the Court will ultimately succeed’ (Afghanistan Decision para 90). See also A Whiting, ‘The ICC’s Afghanistan Decision: Bending to the U.S or Focusing Court on Successful Investigations?’ Just Security (12 April 2019) <www.justsecurity.org/63613/the-icc-afghanistan-decision-bending-to-us-or-focusing-court-on-successful-investigations/>. See eg JC Yoo, ‘In Defence of the Courts Legitimacy’ (2001) The University of Chicago Law Review 774, 782. The Court maintains legitimacy by making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted. Only by acting in a manner that suggests that decisions are a product of law rather than politics can a court maintain its legitimacy.

This impact was compounded by the recent decision of a differently constituted Pre-Trial Chamber in the situation in Bangladesh/Myanmar, which reverted to the previous practice. See ‘Public Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar’ (ICC-01/09) Pre-Trial Chamber III (13 December 2011) para 127 (‘Bangladesh/Myanmar Authorisation Decision’).

Afghanistan Appeal Judgement.


Afghanistan Appeal Judgement para 45.
Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) resulting from such investigation would appear to fall within the Court’s jurisdiction. Not only has the decision been criticized for undermining the ‘careful balance of power between the OTP and PTC that states negotiated at Rome’, it is also claimed that the authorities relied upon by the Appeals Chamber to buttress its approach offer no such support.

3. The Bemba appeal judgment

The Court’s troubling track record is not limited to the challenging questions of jurisdiction over non-States Parties. The problem is likewise found in rulings on foundational components of the Court’s work. The majority decision in the Bemba appeal judgment—which rejected the deferential standard of appellate review for errors of fact—represents another example of incoherent decision-making and the Court’s seeming disregard for the value of certainty and predictability in the law’s application and their centrality to the law’s authority.

This widely criticized ruling—which involved a three/two majority—represented a radical departure from the standard of appeal for

100 Afghanistan Appeal Judgement para 46.
101 KJ Heller, ‘The Appeals Chamber Got One Aspect of the Afghanistan Decision Very Wrong’ (n 97).
102 Bemba Appeal Judgement paras 38-40.
104 The controversy concerning the Bemba Appeal Judgment does not end with the standard of review. The Appeal Judgment also represented the first time—as
alleged factual errors previously and consistently applied by the Appeals Chamber and all other international criminal courts.\textsuperscript{105}

As noted above, Article 21(2) provides that ‘the Court may apply principles and rules of law as interpreted in its previous decisions’. Accordingly, the Appeals Chamber is not bound to follow its previous decisions. However, acknowledging the importance of ‘predictability of the law and the fairness of adjudication to foster public reliance on its decisions’, the Appeals Chamber has held that, absent convincing reasons, it will not depart from its previous decisions.\textsuperscript{106} As the Bemba mi-

emphasized by the majority—that art 74(2), which states that conviction decisions shall not exceed the facts and circumstances described in the charges, was interpreted by the Appeals Chamber and the Appeals Chamber took a restrictive view. It held that the Pre-Trial Chamber must confirm each underlying criminal act alleged to have been committed by Bemba’s soldiers, or the Prosecution must seek an amendment prior to the start of trial to include each specific allegation, for the accused to be accorded sufficient notice of the allegations. This was the holding made by the majority without consideration of whether any prejudice had accrued to Bemba by the specification and it appears to run contrary to the earlier jurisprudence of the Appeals Chamber in the ‘Judgement on the appeal of Mr. Thomas Lubanga Dyilo against his conviction’, \textit{Prosecutor v Lubanga Dyilo (ICC-01/04-01/06 A5)} Appeals Chamber (1 December 2014) paras 114-137.

What is particularly uncertain is the impact this holding will have on other cases ongoing at the Court. It is also unclear whether the Prosecutor will be prevented from seeking to rectify any pleading failures as a result of this decision. The minority disagreed with the restrictive approach of the majority. Notably, one of the majority, in his separate opinion, while concurring with the majority opinion that the conviction exceeded the scope of the charges in this case, left open the possibility of the Trial Chamber amending the indictment once the trial had commenced. Thus, some 17 years after the commencement of the Court’s operations, it is still not clear whether the Prosecutor is entitled to amend an indictment after the conclusion of the pre-trial proceedings or not. See Concurring Separate Opinion of Judge Eboe-Osuji (ICC-01/05-01/08-3636. Anx 3 14-06-2018 1/117 EC A) para 96-150.

Further controversy surrounds the Appeals Chamber’s consideration of art 28. See <iccforum.com/responsibility>. 

\textsuperscript{105}Dissenting Opinion of Judge SM Monageng and Judge P Hofmansi (ICC-01/05-01/08-3636-Anx 1-Red 08-06=2018 1/269 ECA) (8 June 2018) para 3 <<www.icc-cpi.int/RelatedRecords/CR2018_02987.PDF>>.

\textsuperscript{106}Reasons for the ‘Decision on the Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo’s detention’ \textit{Prosecutor v Gbagbo and Ble Goude} (ICC-02/11-01/13OA6) (31 July 2015) para 14. See also Dissenting Opinion of Judge SM Monageng and Judge P Hofmansi (n 105) (‘Minority Judgment’) para 4. In the view of the Bemba minority, ‘[…] predictability of
nority recognized, however, the Bemba majority provided no such reasons for their decision to depart from the well-established standard of appellate review previously applied in all appellate cases.\textsuperscript{107}

Instead, the majority focused on the Appeals Chamber’s need for sufficient autonomy from the trier of fact to do justice in every case, taking note of the absence of any statutory requirement for deference to the Trial Chamber.\textsuperscript{108} In the majority’s opinion, this means that ‘the idea of a margin of deference to the factual findings of the Trial Chamber must be approached with extreme caution’\textsuperscript{109} and that the Appeals Chamber ‘may interfere with factual findings of the first instance chamber whenever the failure to interfere may occasion a miscarriage of justice’ and not ‘only in the case where [the Appeals Chamber] cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.’\textsuperscript{110}

Despite the majority’s efforts to explain their approach, it is difficult to discern what standard of appellate review the majority is advancing.\textsuperscript{111} In rejecting deference to the Trial Chamber, the majority has effectively abandoned the standard of assessing whether no reasonable trier of fact could have reached the Trial Chamber’s decision in favor of the law is essential for any court, especially for the ICC that has a complex framework and only a limited number of cases: parties and participants should be able to assume that the interpretations of the law by the Appeals Chamber will not be lightly changed’ (Minority Judgment para 5).

\textsuperscript{107} The standard of review for factual errors that had been applied in every interlocutory and judgment appeal is as follows: ‘When a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence de novo with a view to determining whether it would have reached the same factual finding’ (Minority Judgment para 2).

\textsuperscript{108} Bemba Appeal Judgment, para 10 (‘The Appeals Chamber must be careful not to constrain the exercise of its appellate discretion in such a way that it ties its own hands against the interests of justice, particularly in circumstances where the Rome Statute does not provide for the notion of appellate deference or requires the Appeals Chamber to apply that particular notion.’).

\textsuperscript{109} Bemba Appeal Judgment para 38.

\textsuperscript{110} Bemba Appeal Judgment para 40. Primarily, according to the majority, ‘the Appeals Chamber must be satisfied that factual findings that are made beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale’ (Bemba Appeal Judgment para 45).

\textsuperscript{111} Minority Judgment para 4 (‘the modifications appear to lead to inconsistencies which will make it difficult for anyone to understand the standard of review that the majority has followed’).
a standard whereby the Appeals Chamber assesses whether it would have reached that finding itself. By implication, the well-established concept that reasonable minds may differ has been discarded, for the Appeals Chamber must agree with the actual factual finding made and, indeed, must be convinced beyond reasonable doubt of the accuracy of the Trial Chamber’s findings.

How the Appeals Chamber is meant to make that assessment is unclear. What is clear is that it will not undertake a de novo review. The Appeals Chamber will instead rely upon its assessment of each relevant Trial Chamber finding by reference to the particular evidence the latter relied upon to make that finding and the underlying reasoning it provided.

In essence, the standard of appellate review adopted by the majority is both incoherent and indeterminate. Such an approach not only opens the way to judicial arbitrariness but also, by abandoning the constraints introduced by the well-established standard of appellate deference, sacrifices institutional values of certainty and predictability, value

112 The Appeals Chamber denies that this is so, stating that ‘[w]hen a factual error is alleged the Appeals Chamber will not assess the evidence de novo with a view to determining whether it would have reached the same factual conclusion of the Trial Chamber; in this connection the Appeals Chamber deems it is necessary to clarify that it will determine whether a reasonable Trial Chamber properly directing itself could have been satisfied beyond reasonable doubt as to the finding in question based on the evidence before it’ (Bemba Appeals Judgment para 42). But if deference has been abandoned in the Appeals Chamber’s assessment, then effectively the Appeals Chamber is determining for itself whether the standard of proof has been satisfied on the evidence presented.

113 Bemba Appeals Judgment para 42.
114 Bemba Appeals Judgment para 42.
115 Bemba Appeals Judgment paras 43-45.
116 The Bemba majority, in rejecting the appellate standard of deference, asserts that the Appeals Chamber is better able to determine the cogency of evidence than the trier of fact without establishing why this is so. Moreover, by failing to provide convincing reasons for its departure from precedent as required under the Appeals Chamber’s own jurisprudence, the majority missed an opportunity to persuasively demonstrate that the application of the traditional standard of review could not accommodate the appellate interference the majority deemed necessary.

117 While particular countervailing factors such as principles of fairness and substantive justice may warrant departing from these values in other circumstances, it is not at all clear that such countervailing values propelled the majority approach here. For instance, fairness as perceived by the majority in the particular case could well have
ues that are critical to an institution that has yet to establish its legitimacy and authority.\textsuperscript{118}

4. Conclusion

There are many factors that are outside the Court’s control that impact on its efficiency and effectiveness in the discharge of its mandate and its legitimacy and credibility as an institution. However, its decision-making is something within its control and is, in many ways, also determinative of its legitimacy and authority. While Article 21(2) permits a Chamber to disregard the rulings of another Chamber, the intention of the Statute’s drafters was not unpredictability in the law.\textsuperscript{119} To the contrary, judicial discretion was to be fettered by leaving legislative authority solely in the hands of the Assembly of States Parties and the freedom of the judges limited to their good faith interpretation of the Rome system’s legal framework in accordance with established principles of interpretation.

As the discussion above demonstrates, however, the Court has repeatedly failed to produce a coherent, well-reasoned body of jurisprudence or to demonstrate a commitment to the value of certainty and predictability in the law\textsuperscript{120}, elements that are fundamental to the integrity been administered without departure from the well-established standard of appellant review.

\textsuperscript{118} In their separate opinion, Judges Van den Wyngaert and Morrison state that ‘it is important to recognize that the strong divergence in how we evaluate the Conviction Decision is not just a matter of difference of opinion, but appears to be a fundamental difference in the way we look at our mandates as international judges. We seem to start from different premises, both in terms of how the law should be interpreted and applied and in terms of how we conceive of our role as judges […] it is probably fair to say that we attach more importance to strict application of the burden and standard of proof. We also seem to put more emphasis on compliance with due process norms that are essential to protecting the rights of the accused in an adversarial trial setting’ (in 9 para 4).

\textsuperscript{119} See G Bitti, ‘Study on article 21 of the Statute’ (n 14); G Bitti, ‘Article 21 and the Hierarchy of Sources of Law before the ICC’ (n 14).

\textsuperscript{120} The examples relied upon are examples where disregard of these values impacted upon perceptions of the Court’s legitimacy. In other cases, other countervailing values may need to take precedence and, in doing so, will preserve and promote perceptions of the Court’s legitimacy. In that respect, it is important to
ty and authority of a judicial system. While the Appeals Chamber could well play a role in enhancing the consistency, coherency and predictability of the Court’s decision-making, it has also shown itself to be part of the problem, as exemplified by the Bemba Appeals Judgement and its controversial departure from all previous Pre-Trial Chambers’ rulings in its consideration of the Afghanistan appeal.121

So, what is there to be done? One issue that has long been identified is to improve the quality and capacity of the judges being elected by the Assembly of States Parties to serve at the Court. Much has already been written about this and proposals made to address the issue, from improvements in selection at the national level to the institution of training.122 The nomination and election of judges is the responsibility of the Assembly of State Parties, which has already resolved to strengthen the role of the Advisory Committee on Nomination of Judges and directed the implementation of more stringent assessment criteria of judicial suitability.123

There is no question that the institutional reputation of the Court could be greatly strengthened through the adoption of a rigorous, merit-based nomination and election process that would, through its pro-

underscore that certainty and predictability in the law are not the only elements fundamental to the integrity and authority of a judicial system.

121 There is also a reported reluctance on the part of some members of the Court to even subject their decision-making to appellate review, which means that important issues may not reach the Appeals Chamber until the appeal against final judgment. See KJ Heller, ‘Problematic Statements by the French Judge at the ICC’ Opinio Juris (3 May 2019) <opiniojuris.org/2019/05/03/problematic-statements-by-the-French-judge-at-the-ICC/>. See also art 82 of the Statute (setting out the limited grounds of appeal as of right). For all issues not specified, art 82(d) requires the Pre-Trial or Trial Chamber to determine that ‘A decision […] involves an issue that would significant affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.’


123 ICC-ASP/18/Res.4.
cess, confer initial legitimacy and authority on those obtaining the role of a judicial officer. However, care should be exercised in identifying the qualities necessary to serve effectively as an international judge. In particular, it is not as apparent, as is routinely claimed, that what the Court needs is only judges with experience in criminal procedure.\(^{124}\) Indeed, it has been judges from the so-called List A that have issued some of the most controversial decisions of the Court.\(^{125}\) Moreover, if one thinks of the greats in international criminal law, for example, Antonio Cassese and Theodor Meron, both came from academic backgrounds.\(^{126}\)

It is more than just the quality of candidatures that drives the success of the judicial decision-making of the Court, however. Judges as social actors must share a common interest in the Court’s success as an institution and understand their own appointment as less an individual opportunity to make their mark and more a social responsibility.\(^{127}\)

\(^{124}\) Art 36(3)(b)(i): ‘Every candidate for election for the Court shall: (a) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity in criminal proceedings[…].’


\(^{126}\) Both would clearly fall within art 36(3)(b)(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law on human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. This is not to suggest, however, that either have been immune from controversy for decisions they have participated in. See eg M Milanovic, ‘Special Tribunal for Lebanon Delivers Interlocutory Decision on Applicable Law’ EJIL Talk! (16 February 2011) <www.ejiltalk.org/special-tribunal-for-lebanon-delivers-interlocutory-decision-on-applicable-law/>; M Milanovic, ‘The Self-Fragmentation of the ICTY Appeals Chamber’ EJIL Talk! (23 January 2019) <www.ejiltalk.org/the-self-fragmentation-of-the-icty-appeals-chamber/>.

\(^{127}\) See ICTY, Prosecutor v Naser Orić (IT-03-68-A) Judgment, Declaration of Judge Shahabudeen (3 July 2008) 65-69 para 14 (‘A decision to reverse turns upon more than theoretical correctness: it turns upon larger principles concerning the maintenance of jurisprudence, judicial security and predictability.’). See also S Vasiliev, ‘Consistency of Jurisprudence, Finality of Acquittals and Ne Bis In Idem’ Centre for Int’l Crim Justice (7 February 2014) <cijc.org/2014/02/consistency-of-jurisprudence-finality-of-acquittals-and-ne-bis-in-idem/>; ML Wells, “Sociological Legitimacy” in Supreme Court Opinions’ (2017) 64 Washington & Lee L Rev 1015 (‘In any given case, and especially
strengthen institutional legitimacy, the Court’s judges must seek to develop a sense of shared vision and legal culture, including a more regimented approach to decision-making, whereby each ruling systematically addresses the law and anchors itself in more than the particular view of the relevant Chamber. In this respect, the judges would be well-served by giving more concerted thought to the institutional impact of different lines of judicial reasoning on the law’s (and the Court’s) authority and to setting a high bar to justify deviations from consistent past practice at all stages of the proceedings. A common understanding by all Chambers that any deviations from the law as interpreted by other Chambers must be suitably addressed could contribute to a unified legal culture and establish more consistency and coherence in the Court’s jurisprudence. Although Article 21(2) may still set a discretionary standard, the Court can constrain itself voluntarily.

In this respect, the Appeals Chamber must take up its responsibility to settle the jurisprudence of the Court, including through careful consideration of the merit of departures from its own jurisprudence and from the consistent jurisprudence of the lower Chambers. Likewise, the Appeals Chamber must be allowed to perform its ‘key mandate to safeguard judicial harmony in the case law’ and lower Chambers must be prepared to submit contentious issues for appellate review.

By taking affirmative steps to create a shared culture and set of expectations, the Court can make it easier to communicate that culture and those expectations to incoming judges from different legal traditions and backgrounds. By adopting a predictable approach to judicial decision-making, where consistency and coherence of jurisprudence are valued, the Court’s judges would not be constrained to engage in bad decision-making for the mere sake of uniformity. Rather, this paradigm shift calls for recognition that ‘there is an important group of values in the most prominent ones, the Court must take care to behave in a way that inspires or maintains public confidence’ while speaking of the United States Supreme Court, the same applies to the ICC.

128 See Morrison and Van Den Wyngaert Separate Opinion (n 9) para 4.
129 For example, to only depart where countervailing values of fairness or justice necessitate that departure and to reason that departure coherently.
130 S Vasyliev, ‘Consistency of Jurisprudence, Finality of Acquittals and Ne Bis In Idem’ (n 127).
131 But they would be required to reason from past decisions and to explain the basis for their departure in the particular case.
ues – predictability of result, uniformity of treatment (treating like cases alike), and fear of granting unlettered discretion to individual decision makers […] – the legal system, especially, thinks it valuable to preserve’. 132 A judicial commitment to coherency, certainty and predictability may not always guarantee perceptions of the Court’s legitimacy but it does make an important step in that direction.

132 F Schauer, Thinking Like A Lawyer - A New Introduction to Legal Reasoning (Harvard UP 2009) 35.