A MODEL OF INTERNATIONAL JUDICIAL ADMINISTRATION? THE EVOLUTION OF MANAGERIAL PRACTICES AT THE INTERNATIONAL CRIMINAL COURT

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I
INTRODUCTION

One year after the tenth anniversary of the International Criminal Court (ICC or Court), it is almost impossible for the international legal scholar not to come across one of the many "stock takings" and assessments of the Court's[1] juridical performance so far, its achievements, impact, and challenges.[2] This development is highly fortunate because it creates the necessary momentum to galvanize further support for the Court, even from the many skeptics who predicted the Court would die an unnoticed and uneventful death within a couple years of its creation.[3] With its current 122 States Parties, the Court has come a long way since its inception with the sixtieth ratification in 2002.[4] Global support seems to be growing slowly yet steadily, with thirteen accessions since

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1. By the authors' request, the journal has agreed to deviate from conventional citation practice by capitalizing references to the Court, the States Parties, the Court's principal organs, and other entities capitalized in the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]. The States Parties referred to are the same as those referenced in the Rome Statute, *supra*, at pmbl., arts. 86–112.

2. A number of conferences have taken stock of the Court at its tenth anniversary. For example, a conference by the Grotius Center of International Legal Studies on September 26–27, 2012 in The Hague ("The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges"), and two conferences by the Academy Nuremberg Principles and Wayamo Foundation, on October 4–5, 2012 in Nuremberg ("Through the Lens of Nuremberg: The International Criminal Court at its Tenth Anniversary"), and on November 7–8, 2013 also in Nuremberg ("Building a Legacy – Lessons Learnt from the Offices of the Prosecutors of International Criminal Tribunals and Hybrid Courts").

3. *See* Christian Wenaweser, H.E. Ambassador, The Int'l Criminal Court after Ten Years – Achievements and Challenges (Mar. 21, 2012) (transcript available at http://www.regierung.li/fileadmin/dateien/botschaften/ny_dokumente/2012-03-21_Marrett_lecture_McGill_Univeristy_Montreal_02.pdf).

4. *See* Rome Statute, *supra* note 1.

only 2010. However, in this article we do not intend to examine the Court's performance, achievements, or shortcomings as a central player on the scene of international criminal justice. Rather, we will take a critical look behind the scenes of the Court, focusing on its institutional and administrative framework as an institution that is striving to become "[a] [m]odel of [p]ublic [a]dministration."[5]

In order to evaluate the merits and shortcomings of the Court's structure, as well as the approach taken by its senior management and stakeholders when fundamental decisions had to be made, we begin this article with a brief overview of the Court's institutional and administrative structure and a discussion of the relationship of the principal organs of the Court to one another. Subsequently, we discuss a small selection of elemental topics—most prominently among them the Court's financial management—with a view to evaluating the extent to which the members of the institution have been able to learn from their initial mistakes and revamp the Court's operations into those of an efficient and effective international criminal justice mechanism.

II
MANAGERIAL PRACTICES

The Court, like any other institution of comparable size and structure, heavily relies on managerial practices that have evolved over the past eleven years of its existence. Its administrative framework has developed in response to the growing demands of administrative regulation, in particular through Presidential Directives, Administrative Instructions, and Information Circulars.[6] The Court's practices, be they in conjunction with governing administrative norms or in the absence of any formal codification, remain a major driver of the Court's managerial dynamics.

In the abstract, managerial practices can best be described as the recurrent performances of material activities.[7] In a given normative and hierarchical framework, these routine contributions and activities serve to define the average scope and structure of operations, as well as relevant *modi operandi*. Managerial practices always stand in a specific relationship to the normative

5. Int'l Criminal Court, Assembly of States Parties, 5th Sess., Nov. 23–Dec. 1, 2006, *Strategic Plan of the International Criminal Court*, ¶ 39, ICC Doc. ICC-ASP/5/6 (Aug. 4, 2006) [hereinafter Int'l Criminal Court, *Previous Strategic Plan*], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-6_English.pdf. In early 2013, the ICC issued its revised *Strategic Plan 2013–2017*, in which it defined as part of its mission to "[b]e administratively transparent, efficient and accountable." Int'l Criminal Court, Tripartite Committee, *International Criminal Court Strategic Plan 2013–2017*, at 2 (Apr. 18, 2013) [hereinafter Int'l Criminal Court, *Strategic Plan 2013–2017*], *available at* http://www.icc-cpi.int/iccdocs/registry/ICC-Strategic-Plan-2013-2017-190413.pdf.

6. *See Vademecum of Administrative Issuances*, INT'L CRIM. COURT (Oct. 30, 2013), http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/vademecum/Pages/default.aspx ("provid[ing] the Court with a tool compiling all administrative issuances").

7. DAVIDE NICOLINI, PRACTICE THEORY, WORK, AND ORGANIZATION: AN INTRODUCTION 3f (2012).

framework in which operations are carried out. They define the relationship between (formal) rules and (informal) practices in a given operative context. The more detailed the normative framework that regulates the pertinent procedures and administrative structures, the more limited the scope for the development of practices that are not a mere *mise en oeuvre* of the authoritative legal context, but rather a pragmatic solution to a recurrent operational challenge. In particular, heavily hierarchical management structures with a strong concentration of decision-making resting upon a comparatively limited number of governing leaders will rely on governance structures that leave little space for the development of *pragmatic* practices. Examples of this can be found in the military.

However, where a governance structure is newly established it is highly unlikely that a comprehensive normative framework regulates all of its operations and processes in sufficient detail. Although this may be regarded as a deficiency from a purely security-oriented managerial standpoint (because not all processes are yet fully regulated and un- or underregulated processes can lead to disruptions of the system), from an efficiency-oriented standpoint it also represents a window of opportunity for good—and inventive—management. If and when senior and midlevel management become aware of gaps in the governance structure of a new program entailing a number of unforeseeable managerial challenges, leadership will be alert to possible problems. When a problem surfaces, the management will have the liberty to find a pragmatic, dynamic, and efficient solution and thus establish a practice tailored to the challenge and unimpeded by a preexisting normative framework; a preexisting framework may at times even represent an obstacle to the most effective and efficient solution to a given operational challenge.

Moreover, managerial practices can develop even in (partial) contradiction to the governing regulatory framework when that framework in fact poses an obstacle to efficient and effective management. In such cases the challenge is not so much in establishing the accurate and conducive practice but rather in speedily and transparently amending the normative framework to match the management practice—provided that this practice is indeed more appropriate. In contrast, the promulgation of a certain legal or administrative framework can be a means to rectify a prior erroneous managerial practice. In fact, codifying previous managerial practice is a golden opportunity for the senior management of an organization to optimize and amend the previous practice in some of its aspects. Finally, it must be emphasized that the balance between systematic regulatory codification and rigid managerial practice on the one hand, and flexible managerial practice within a more strategic administrative framework on the other, needs to be calibrated on a case-by-case basis by considering the specific mandate, field of operations, and general framework of the organization. As such, it can be safely said that the ICC's status as the first permanent international criminal court with jurisdiction over individuals accused of the worst international crimes makes it a truly unique institution operating within an equally unique setting of internal and external mandates

and responsibilities.

At the outset, the ICC's administrative structure in many essential areas such as human resources, procurement, and internal oversight was at best rudimentary, if not downright nonexistent. The Court's principal legal sources, the Rome Statute, the Elements of Crimes, and its Rules of Procedure and Evidence (RPE),[8] contain only limited guidance and instead mandate that the organs of the Court[9] issue secondary legal texts governing the institutional administrative structure. For example, article 44, paragraph 3 of the Rome Statute tasks the Registrar to draft staff regulations containing the fundamental conditions of service and the basic rights and obligations of the staff of the Court. Another crucially important set of rules is contained in the Regulations of the Court, whose adoption pursuant to article 52, paragraph 1 of the Rome Statute falls within the judges' competence.[10] Other essential texts governing important areas of the institution's management fall within the remit of competence of the Court's constitutive body, the Assembly of States Parties (ASP or Assembly). The Court's Financial Regulations and Rules (FRR),[11] as well as its Independent Oversight Mechanism,[12] are just two examples of such

8. *See* Rome Statute, *supra* note 1, at art. 21(1)(a); Int'l Criminal Court, Assembly of States Parties, 1st Sess., Sept. 3–10, 2002, *Official Records*, pt. II.A., ICC Doc. ICC-ASP/1/3 and Corr.1 (Sept. 9, 2002) [hereinafter Int'l Criminal Court, RPE], *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf (setting forth the ICC's Rules of Procedure and Evidence), *as amended by* Int'l Criminal Court, Assembly of States Parties, *Amendment of the Rules of Procedure and Evidence*, ICC-ASP/11/Res.2 (Nov. 21, 2012) [hereinafter Int'l Criminal Court, RPE Amendment], *available at* http://www.icc-cpi.int/ iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res2-ENG.pdf.

9. The "organs" of the Court are defined as the Presidency, the judicial Divisions, the Office of the Prosecutor (OTP), and the Registry. Rome Statute, *supra* note 1, at art. 34. However, for managerial and financial purposes, and therefore also for the purpose of this article, the Presidency represents the Judicial Divisions. *See, e.g.*, Int'l Criminal Court, Assembly of States Parties, 5th Sess., May 17–28, 2004, *Regulations of the Court*, regulation 3(1), ICC Doc. ICC-BD/01-01-04 (May 26, 2004) [hereinafter Int'l Criminal Court, Regulations of the Court], *available at* http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf (setting forth the ICC's regulations on internal representation); Int'l Criminal Court, Assembly of States Parties, *Proposed Programme Budget for 2014 of the International Criminal Court,* ¶ 53, ICC Doc. ICC-ASP/12/10 (July 29, 2013) [hereinafter Int'l Criminal Court, *Proposed Programme Budget for 2014*], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-10-ENG.pdf (external representation in administrative as well as financial matters).

10. Int'l Criminal Court, Regulations of the Court, *supra* note 9.

11. Int'l Criminal Court, Assembly of States Parties, 1st Sess., Sept. 3–10, 2002, *Official Records*, ICC Doc. ICC-ASP/1/3 and Corr.1 (Sept. 9, 2002) [hereinafter Int'l Criminal Court, FRR], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/publications/compendium/Compendium.4th.07.ENG.pdf. The ICC FRR are to be "adopted by the Assembly of States Parties." Rome Statute, *supra* note 1, at art. 113.

12. *See* Rome Statute, *supra* note 1, at art. 112(4). For the latest progress on the matter, see Int'l Criminal Court, Assembly of States Parties, 11th Sess., Nov. 14–22, 2012, *Report of the Bureau on the Independent Oversight Mechanism*, ICC Doc. ICC-ASP/11/27 (Nov. 27, 2012), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-27-ENG.pdf; Int'l Criminal Court, Assembly of States Parties, *Independent Oversight Mechanism*, Res. 4, ICC Doc. ICC-ASP/11/Res.4 (Nov. 21, 2012), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res4-ENG.pdf; Int'l Criminal Court, Assembly of States Parties, 11th Sess., Nov. 14–22, 2012, *II*

texts.

Upon the Court's commencement of operations, its principals (namely, the President, the Prosecutor, and the Registrar) had the challenging task of first drafting and then adopting the major administrative legislation containing guidelines of common interorgan importance such as the Staff Regulations,[13] as well as legal texts governing matters of a more organ-specific nature, such as the Regulations of the Registry[14] and the Regulations of the Office of the Prosecutor.[15] At the same time, the multitude of everyday challenges of both an intraorgan and interorgan nature led to the rapid development of managerial practices in a more-or-less-coordinated fashion. Many of these practices in fact represented major sources for ensuing codification. One of the benefits of managerial practice is that it not only has the potential to generate a viable framework for repetitive practice, but also has the flexibility to manage new challenges[16] by way of adaption and escalation structures. These structures usually result out of ad hoc solutions that, in hindsight, have proven to be accurate and effective, or that indicate the need for improvement. In this way, managerial practice can function as a "lessons learnt"[17] exercise allowing for a transition from managerial "ad hocism" to a codification of structures. The ICC has made use of this practice not only in the aforementioned regulations and rules,[18] but also in the development of an increasing network of administrative issuances.

In 2003, the Presidency of the Court issued its first Presidential Directive, stipulating the *Procedures for the Promulgation of Administrative Issuances*.[19] It

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Official Records, ICC Doc. ICC-ASP/11/20 (Nov. 20, 2012), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/OR/ICC-ASP-11-20-VolII-ENG.pdf.

13. Int'l Criminal Court, Assembly of States Parties, 2d Sess., Sept. 8–12, 2003, *Staff Regulations*, ICC Doc. ICC-ASP/2/Res.2 (Sept. 12, 2003), *available at* http://www.icc-cpi.int/NR/rdonlyres/3119BD70-DFB6-4B8C-BC17-3019CC1D0E21/140182/Staff_Regulations_120704EN.pdf.

14. Int'l Criminal Court, Assembly of States Parties, *Regulations of the Registry*, ICC Doc. ICC-BD/03-01-06-Rev.1 (Sept. 25, 2006) [hereinafter Int'l Criminal Court, Regulations of the Registry], *available at* http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/140149/ICCBD_030106_English1.pdf (pursuant to rule 14 of the ICC RPE).

15. Rome Statute, *supra* note 1, at art. 42(2); Int'l Criminal Court, Assembly of States Parties, *Regulations of the Office of the Prosecutor*, regulation 9, ICC Doc. ICC-BD/05-01-09 (Apr. 23, 2009), *available at* http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf [hereinafter Int'l Criminal Court, Regulations of the Office of the Prosecutor].

16. *See* NICOLINI, *supra* note 7, at 5–6.

17. *See* Int'l Criminal Court, Assembly of States Parties, 11th Sess., Nov. 14–22, 2012, *Study Group on Governance: Lessons Learnt: First Report of the Court to the Assembly of States Parties*, § I, ICC Doc. ICC-ASP/11/31/Add.1 (Oct. 23, 2012) [hereinafter Int'l Criminal Court, *Study Group Lessons Learnt Report 2012*], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-Add1-ENG.pdf.

18. The Regulations of the Registry, *supra* note 14, were only entered into force on March 6, 2006, almost four years after the commencement of the Court's operations; further, the Regulations of the Office of the Prosecutor, *supra* note 15, were issued only on April 23, 2009.

19. Int'l Criminal Court, President, *Procedures for the Promulgation of Administrative Issuances*,

clarified that the Court's administrative issuances may be promulgated as (1) Presidential Directives, (2) Administrative Instructions, or (3) Information Circulars.[20] General rules, procedures, and policies—which would arguably include the essence of managerial practices developed over time—may only be established by either Presidential Directives or Administrative Instructions.[21] As a fundamental feature of all administrative issuances, proper consultation amongst the organs and all major organizational units concerned is required for their promulgation.[22] In the ten years since then, a multitude of administrative issuances has been promulgated in as many as seventeen broad categories governing the Court's administration, from human-resources issues to professional conduct, disciplinary issues, security, procurement, rules applicable in field duty stations, and so on.[23]

However, despite these efforts to map its administrative framework, the Court has developed and maintained a number of important managerial practices in its operations that are not necessarily fully mapped and mirrored by administrative texts. These practices are testimony to the organs' interpretation of the ICC's normative framework on both the interorgan and organ-specific levels. In the following parts of this article, assessments of the Court's underlying administrative structure and institutional arrangements will be followed by brief subparts analyzing how managerial practices have (1) developed alongside, in contrast to, or in the absence of a normative framework, and (2) impacted the institution's operations.

III
THE COURT'S INSTITUTIONAL AND ADMINISTRATIVE STRUCTURE UNDER SCRUTINY

Unlike the ad hoc International Criminal Tribunals of the United Nations for the former Yugoslavia and Rwanda (the ICTY and ICTR, respectively, or the ad hoc Tribunals if mentioned together), the Court is based on an international treaty, the Rome Statute.[24] The Court is thus not a UN organ, let alone a product of UN Security Council measures pursuant to Chapter VII of the UN Charter, as were the UN ad hoc Tribunals.[25] However, the Court

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ICC Doc. ICC/PRESD/G/2003/001 (Dec. 9, 2003), *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/vademecum/PD/Procedures%20for%20the%20Promulgation%20of%20Administrative%20Issuances.PDF.

20. *Id.* § 1.1.

21. *Id.* § 1.2.

22. *Id.* §§ 2.4, 3.3, 5.

23. For a comprehensive overview of (1) Staff Regulations, (2) Staff Rules, (3) Financial Regulations and Rules, (4) Presidential Directives, (5) Administrative Instructions, (6) Information Circulars, and (7) other relevant policies and guidelines, see the Court's *Vademecum of Administrative Issuances*, INT'L CRIM. COURT (Oct. 30, 2013), http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/vademecum/Pages/default.aspx

24. *See* Rome Statute, *supra* note 1.

25. *See* S.C. Res. 935, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]

cooperates quite closely with a number of UN agencies, in particular with regard to its field operations in the current eight situation countries. Furthermore, the Court and the UN have issued a "relationship agreement" governing the legal ties between the two international organizations.[26] Another quite remarkable difference remains between the Court and the UN ad hoc Tribunals, both vis-à-vis their stakeholders and in front of third parties from whom judicial or prosecutorial cooperation measures are sought: In the case of the ad hoc Tribunals, *every* UN member state is one of the Tribunals' stakeholders. When UN member states are asked to cooperate with the Tribunals, articles 25 and 103 of the UN Charter bind them to do so. Even in the case of conflicting duties under international treaties, the obligations under the UN Charter prevail.[27] By contrast, States Parties to the Rome Statute are bound only by weaker statutory provisions, such as articles 86 *et sequentes* of the Rome Statute, by virtue of the general international legal principle of *pacta sunt servanda*, as enshrined in article 26 of the Vienna Convention on the Law of Treaties of 1969.[28] In case the state whose assistance is sought has conflicting obligations under international law, the Rome Statute proves a far less powerful tool to enforce state cooperation than the UN Charter, as article 98 of the Rome Statute illustrates.[29]

From the treaty-based nature of the Court, as well as its relative independence from the UN system, flows its liberty to adopt an administrative framework that does *not* mirror existing UN agencies, suborgans, or otherwise related bodies. On the other hand, with liberty comes responsibility—and with a multilateral founding treaty comes diversity of opinions, interests, administrative cultures, and philosophies. The Rome Statute has been described as a "unique compromise"[30] between the many different legal traditions that sought to influence the Rome Statute in one way or another.[31] A similar

(establishing the ICTR); S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) [hereinafter ICTY Statute] (establishing the ICTY).

26. Int'l Criminal Court, Assembly of States Parties, *Negotiated Relationship Agreement Between the International Criminal Court and the United Nations*, Res. 1, ICC Doc. ICC-ASP/3/Res.1 (Apr. 10, 2004), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-01-ENG.pdf.

27. U.N. Charter art. 103.

28. May 23, 1969, 1155 U.N.T.S. 331.

29. For a discussion regarding the possible inapplicability of article 98(1) of the Statute with regard to immunities of heads of states, see Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, 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 (Dec. 13, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf; Dapo Akande*, ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong*, EJIL: TALK! BLOG EURO. J. INT'L L. (Dec. 15, 2011), http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/.

30. *See* Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 603 (2003).

31. Most prominently, a steady tension between those states favoring the inquisitorial approach to criminal legal doctrine and other states defending the adversarial approach continued to complicate

assessment can be made of the Court's institutional and administrative structure. Although certain elements of the UN, such as the United Nations Common System on Salaries and Entitlements, have been adopted or incorporated into the ICC's framework, the Court has gone in a new direction as regards its structure of administrative issuances. It has thus diverged in a number of aspects from one of its most natural points of reference, the ICTY across town.

A. Administrative Structure and Institutional Challenges

The Court has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression32 committed by individuals after July 1, 2002, at which point the Rome Statute entered into force.33 For the Court to exercise its jurisdiction, one or more statutory crimes must have either been committed in the territory of a State Party, or by a national of a State Party.34 Further, the Court has jurisdiction over crimes committed after July 1, 2002 in those situations referred to it by the UN Security Council regardless of any territorial or personal restriction.35 Finally, under the Court's principle of complementarity, a case is inadmissible before the Court if it is being or has already been investigated or prosecuted in a state with jurisdiction over the crime(s) of the individual(s), unless that state is "unwilling or unable genuinely to carry out the investigation or prosecution."[36]

The general structure of the Court broadly follows the logic applied by the UN Security Council when setting up the ICTY in 1994,[37] the ICTR in 1995,[38] the Special Court for Sierra Leone (SCSL) in 2001,[39] or any other

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negotiations leading to the adoption of the Rome Statute. *See* Morten Bergsmo & Frederik Harhoff, *Article 42: The Office of the Prosecutor*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 971, 973, ¶ 6 (Otto Triffterer ed., 2d ed. 2008) [hereinafter COMMENTARY]; Otto Triffterer, *Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality*, *in* COMMENTARY, *supra*, at 15, 18, ¶ 6; GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW ¶ 366 (2d ed. 2009).

32. Rome Statute, *supra* note 1, at art. 5. For the future activation of the Court's jurisdiction over the latter crime, see Int'l Criminal Court, Assembly of State Parties, May 31–June 11, 2010, *Resolution RC/Res.6*, U.N. Doc. RC/Res.6 (June 11, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

33. Rome Statute, *supra* note 1, at arts. 11(1) & 126.

34. *Id.* at art. 13.

35. *Id.* at art. 13(b).

36. *Id.* at arts. 1 & 17.

37. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

38. ICTR Statute, *supra* note 25.

39. The SCSL was established by an agreement between the United Nations and the government of Sierra Leone, U.N. Secretary-General, Letter dated Mar. 6, 2002 from the Secretary-General addressed to the President of the Security Council, attachment, U.N. Doc. S/2002/246, art. 11 (Jan. 16, 2002) [hereinafter SCSL Statute], as mandated by S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000). It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996. *Id.*

international(ized) criminal courts[40]: A separation between the judiciary (comprised of the Chambers and the Presidency), the Office of the Prosecutor (OTP), and the Registry.[41] The Prosecutor is independent from the other organs of the Court, a feature that is common among all international(ized) courts and tribunals.[42] The Registry operates as the service provider to both,[43] assisting with general administrative services, courtroom support, and witness- (and victim-) protection matters in ongoing judicial proceedings and (to a lesser degree) during the investigations by the Prosecutor.

However, the Court differs from the UN ad hoc Tribunals in a number of respects, which create certain knock-on effects for the institutional framework. Furthermore, due to the Court's unique structure and features, managerial practices have formed and developed in a different manner, giving the institution a different "spin" altogether.

1. The Role of the Organs and Their Relationship to One Another

a. The role of the President and Presidency. First, the Court consists of four organs: the Presidency, the judicial divisions, the OTP, and the Registry.[44] This contrasts with the ad hoc Tribunals as well as the SCSL in that the President and the Presidency receive a considerably more prominent role in the Court's institutional framework. Or, to be more precise, that the Court consists of a fourth organ, the Presidency, which represents a novel institutional arrangement.[45] Two distinct relationships merit specific attention in that regard, namely (1) the relationship between the Presidency and the President; and (2) the relationship between the President/Presidency on the one hand and the other organs of the Court on the other.

(1) The relationship between the Presidency and the President. Article 38 of the Rome Statute is the only statutory provision that explicitly mentions both the Presidency and the President, and it puts them into an institutional relationship. In particular, it stipulates that the Presidency consists of the President as well as a first and second Vice President.[46] Further, it outlines the

40. *See, e.g.*, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter STL Statute] (establishing the Special Tribunal for Lebanon (STL)).

41. Rome Statute, *supra* note 1, at art. 34; ICTR Statute, *supra* note 25, at art. 10; ICTY Statute, *supra* note 25, at art. 11; SCSL Statute, *supra* note 39, at art. 11. For an example of another international(ized) court, see STL Statute, *supra* note 40, at art. 7.

42. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, art. 6, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter ECCC Statute] (establishing, pursuant to G.A. Res. 57/228, U.N. Doc. A/RES/57/228 (May 22, 2003), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and, in article 6, declaring that "co-prosecutors shall be independent"); STL Statute, *supra* note 40, at art. 11(2); ICTR Statute, *supra* note 25, at art. 15; ICTY Statute, *supra* note 25, at art. 16; SCSL Statute, *supra* note 39, at art. 15(1). Note, however, that article 53 of the Rome Statute provides the Pre-Trial Chamber's with a (limited) power to review a decision of the Prosecutor not to proceed with an investigation. Rome Statute, *supra* note 1, at art. 53(3).

43. ICTR Statute, *supra* note 25, at art. 10; ICTY Statute, *supra* note 25, at art. 11.

responsibilities of the Presidency in its paragraph 3: "(a) [t]he proper administration of the Court, with the exception of the Office of the Prosecutor; and (b) [t]he other functions conferred upon it in accordance with [the Rome] Statute."[47] In particular, the first prong of paragraph 3, the proper administration of the Court, is filled with life in a number of provisions in the Court's RPE.[48] Pursuant to rule 4 *bis*(2), the Presidency decides on the assignment of judges to judicial divisions.[49] Rule 8 provides that the Presidency is to draw up a draft code of professional conduct for counsel before the Court.[50] Pursuant to rule 12, the Presidency prepares the election of the Registrar; it approves the Regulations of the Registry in accordance with rule 14. The Presidency also receives complaints in disciplinary proceedings and decides on the imposition of disciplinary measures for judges, the Registrar, and the deputy registrar. The list of the Presidency's administrative duties is long.[51]

An insight into the Presidency's internal decision-making procedure can be found in the Regulations of the Court, a legal text containing the administrative and procedural provisions for the proper application of the Statute and Rules. Pursuant to article 52 of the Statute, it is for the judges of the Court to establish the Regulations.[52] Regulation 11 stipulates that the members of the Presidency

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44. Rome Statute, *supra* note 1, at art. 34.

45. The ad hoc Tribunals only have a President who does not represent a separate organ of the Tribunals but is a member of the Chambers. *See* ICTR Statute, *supra* note 25, at art. 13; ICTY Statute, *supra* note 25, at art. 14; *see also* SCSL Statute, *supra* note 39, at art. 11.

46. Rome Statute, *supra* note 1, at art. 38(3). The Presidency is elected by the plenary of the judges. *Id.* at art. 38(1).

47. Rome Statute, *supra* note 1, at art. 38. Lastly, article 38 of the Rome Statute provides that in case the President is unavailable or disqualified from a case pursuant to article 41, the First Vice President shall act in place of the President, and in case of the unavailability of the latter, the Second Vice President is to take over. *Id.*

48. Int'l Criminal Court, RPE, *supra* note 8.

49. *See* Rome Statute, *supra* note 1, at art. 39(1). Note that the ICC RPE was only recently amended to include rule 4 *bis*. *See* Int'l Criminal Court, Assembly of States Parties, *Amendments to Rule 4 of the Rules of Procedure and Evidence,* Res. 1, ICC Doc. ICC-ASP/10/Res.1 (Dec. 20, 2011) [hereinafter Int'l Criminal Court, Amendments to Rule 4], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.1-ENG.pdf.

50. Rule 8 of the ICC RPE provides that the draft code is based on a proposal prepared by the Registrar; the draft code is then submitted to the ASP and adopted in accordance with article 112(7) of the Rome Statute. Int'l Criminal Court, RPE, *supra* note 8.

51. Other presidential administrative duties are contained in rule 37(1) (addressing a judge's resignation), rule 41 (regarding the working languages of the Court), and rule 21(3) (providing that the Presidency reviews the Registrar's decision on the assignment of counsel). Int'l Criminal Court, RPE, *supra* note 8. However, the Presidency's *review* of administrative decisions issued by the Registrar is not counted among the presidential administrative functions; it is rather a *judicial* function of the Presidency which falls under article 38(3)(b) of the Rome Statute, *supra* note 1. Lastly, rules 211–222 vest the Presidency with several tasks regarding the enforcement of sentences, fines, forfeiture measures and reparation orders, and supervision and transfer of convicts. Int'l Criminal Court, RPE, *supra* note 8; *see also* Jules Deschênes & Christopher Staker, *Article 38: The Presidency*, *in* COMMENTARY, *supra* note 31, at 951, 953, ¶ 6.

52. Pursuant to rule 4(5) of the ICC RPE, *supra* note 8, the Regulations are adopted by the judges of the ICC in plenary sessions. However, unlike at the UN ad hoc Tribunals, the judges of the Court cannot adopt rules of procedure and evidence themselves. Article 51 of the Rome Statute, *supra* note 1,

shall attempt to achieve unanimity in any decision made in the course of carrying out their responsibilities under article 38(3) of the Statute, and that, failing unanimity, such decision shall be made by majority.[53]

In contrast to the role defined in the Statute, Rules, and Regulations of the Court for the Presidency, the Statute confers an equally prominent role on the President in that pursuant to article 43(2) of the Statute, the Registrar shall exercise his or her functions as principal administrative officer of the Court "*under the authority of the President of the Court*."[54] This provision stands in direct tension to article 38(3)(a), which places the proper administration of the Court into the hands of the Presidency. Further, pursuant to regulation 11(1) of the Regulations of the Court, the Presidency has authority to *overrule* the President on questions within the regulatory scope of article 38(3)(a). However, article 43(2) vests the President with the sole authority to oversee the Registrar's functions—an activity which prima facie falls squarely within the remit of the "proper administration of the Court."[55]

How to resolve this ambiguity between two provisions in the same (founding) document of the Court? To interpret the term "the President of the Court" in article 43(2) to be synonymous with "the Presidency of the Court" would be inaccurate, because it would not take into account that the President has additional personal functions elsewhere in the Statute.[56] Also, the logic of article 38(1) and (2) of the Statute would be negated if the President had no genuine functions linked to his title. Another interpretation could be that the only administrative duties that fall within the remit of the Presidency are those that are directly assigned to the Presidency in the Court's founding texts, such as where the latter make explicit reference to "the Presidency." This interpretation, however, would stand in conflict with the wording of article 38(3) of the Statute, which defines the Presidency's responsibilities as the proper administration of the Court *and* other functions conferred upon it in accordance with the Statute. The reference to the proper administration of the Court would be devoid of any content if only those functions explicitly indicated in the Statute fell within the Presidency's competence.

It would appear that the judges of the Court were guided by noble concerns when they drafted regulation 11, probably intending to constrain the President by requiring the Presidency to make all decisions by majority. However, the

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clarifies that the ASP adopts the Court's RPE. *Cf.* STL Statute, *supra* note 40, at art. 28; ICTR Statute, *supra* note 25, at art. 14; ICTY Statute, *supra* note 25, at art. 15; SCSL Statute, *supra* note 39, at art. 14(2) (adopting own rules of procedure and evidence).

53. Int'l Criminal Court, Regulations of the Court, *supra* note 9.

54. Rome Statute, *supra* note 1, at art. 43(2) (emphasis added).

55. *Id.* at art. 38(3)(a).

56. See articles 2 and 3 of the Rome Statute, pursuant to which the President, on the Court's behalf, concludes the Relationship Agreement with the United Nations as well as the Headquarters Agreement with the Host State. *Id.* at arts. 2 & 3. Further, pursuant to article 112(5) of the Rome Statute, "the *President* [. . .] may participate, as appropriate, in meetings of the Assembly and of the Bureau." *Id.* at art. 112(5) (emphasis added).

Statute remains nebulous when one attempts to discern which of the Court's administrative duties would require a majority decision of the Presidency pursuant to article 38(3) of the Statute, and which of the duties would be within the President's exclusive remit of authority pursuant to article 43(2). Article 43(1) of the Statute describes the Registrar's scope of responsibility as the "non-judicial aspects of the administration and servicing of the Court." These aspects, however, would appear to be encompassed in the general term of the "proper administration of the Court,"[57] thus providing no conclusive guidance. Yet a drafting suggestion at the Preparatory Committee to the Rome Statute which spelled out the Presidency's "supervision and direction of the Registrar" was finally rejected and the matter was settled in today's article 43(2), providing for the President's authority, rather than the Presidency's.[58] This historic fact allows for the conclusion that a certain ambit of the Registrar's responsibilities was intended to remain in the President's sole authority, rather than automatically the Presidency's oversight.

In practice, the ideal effect of this classic example of statutory-provision ambiguity may simply be that the Presidency will discuss the matter and come to a strategic solution agreeable to all members of the Presidency regarding which of the Registrar's core functions fall under the President's sole authority and which items would be within the Presidency's remit under article 38(3)(a). The potential for gridlock, however, is real. Thus, one could ask whether Court regulation 11(1) does not in fact contravene article 43(2) of the Statute if the latter were to be read in a way that the President's authority under article 43(2) is merely part of the general administrative oversight exercised by the Presidency and thus subject to majority ruling. In this case regulation 11(1), and with it the majority voting arrangement, would contradict the wording of article 43(2) speaking of the President's (not Presidency's) authority and thus be inapplicable as the "inferior" legal norm.[59] However, the wording of regulation 11(1), referring to article 38(3) alone (and not article 43(2)) would rather seem to support the solution that article 43(2) contains an ambit under the President's sole authority. Only the content of that ambit remains unclear.

Managerial practice within the Presidency has led to a pragmatic solution of the issue. Periodic meetings between the President and the Registrar serve as a platform for the Registrar to seek strategic guidance on all those nonjudicial aspects of the Court's administration that merit the President's awareness. Separately, periodic meetings between the President and his two Vice-Presidents provide an independent forum to discuss matters that concern the

57. Rome Statute, *supra* note 1, at art. 38(3)(a).

58. Deschênes & Staker, *supra* note 51, at 952, ¶ 5 (citing Rep. of the Preparatory Comm. on the Establishment of an Int'l Criminal Court, Mar. 25–Apr. 12 and Aug. 12–30, 1996, Vol. I, U.N. Doc. A/51/22 (Vol. I); GAOR, 51st Sess., Supp. No. 22 (1996).

59. Pursuant to article 21(1)(a), the Statute as the principal legal instrument adopted by the States Parties takes precedence over other applicable legal texts such as the Regulations of the Court, which are a creation of the judges of the Court. Rome Statute, *supra* note 1, at art. 52(1).

proper administration of the Court. Issues discussed in the first forum may be brought to the other for further discussion and vice versa. Staff of the Office of the President render advice in both fora and support the President, as well as the Presidency, where necessary. This transparent and dynamic practice has in fact achieved a sound harmony between articles 38(3)(a) and 43(2). It connects the rather active duty of the Presidency (who "shall be responsible") with the passive role of the President (for whom the Registrar acts, albeit "under the authority of the President") through a flexible arrangement guided by effective and efficient communication between all concerned. Furthermore, the involvement of Presidency staff in the principals' communication and coordination guarantees that institutional knowledge can be passed from the outgoing to the incoming Presidency every three years.[60] This in turn provides for continuity and minimal disruption after each changing of the guard. Finally, the current managerial practice is of such a straightforward nature that its codification would threaten overregulation more than it would promise to provide legal certainty when there is none.

(2) The relationship between the Presidency and the Judicial Divisions. The judicial divisions consist of eighteen judges organized into the Pre-Trial Division, the Trial Division, and the Appeals Division.[61] Judges are assigned to the Pre-Trial and Trial Divisions for a period of three years, but remain there until the completion of any case that has already commenced.[62] The Appeals Division is composed of the President of the Court and four other judges. The Trial Division and the Pre-Trial Division have at least six judges each. The judges assigned to the Appeals Division serve exclusively in that division for their entire term of office.[63]

Apart from the fact that the Presidency consists of members of the judicial divisions, the Presidency as such has practically no material role to play in deciding the merits of ongoing judicial proceedings before the chambers—with the exception of the judicial review of administrative decisions of the Registrar. This may have a certain effect on the administrative aspects of a case before the Court, depending on the subject of contention. Issues include detention conditions of a detained accused, issues dealing with his or her legal representation, or any other administrative matters impacting the parties in the proceedings.[64] However, the most important judicial functions of the Presidency vis-à-vis the judicial divisions lie in the institutional arrangements that have to be fixed before a chamber starts hearing a case. The Presidency assigns judges to divisions[65] and decides on the composition of chambers as well as the

60. *See id.* at art. 38(1).
61. *Id.* at arts. 34(b), 36(1) & 39.
62. *Id.* at art. 39(3)(a).
63. *Id.* at art. 39(2), (3) & (4).
64. *See* Int'l Criminal Court, RPE, *supra* note 8, at r. 21(3).
65. *Id.* at r. 4 *bis*; *see* Rome Statute, *supra* note 1, at arts. 36(3) & 39(1).

assignment of situations and cases to chambers. The Presidency can also decide to temporarily attach a judge of the Trial Division to the Pre-Trial Division and vice versa if the workload of the Court so requires.[66] Similarly, it can temporarily attach a judge to the Appeals Chamber if appropriate.[67] Finally, the Presidency decides when to call newly elected judges to full-time service if at the time of the judges' election there is insufficient workload to call them then.[68]

With regard to the criteria for selecting judges for the judicial divisions, article 39(1) of the Rome Statute provides some guidance:

> The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law.

This sentence suggests that each of the three judicial divisions may need a different proportion of criminal and international lawyers. The distinction between these two areas of law stems from article 36(3)(b), which defines two general determinative competence areas for judges. Further, article 39(1) provides that the Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal-trial experience. This reflects the great need for judges with hands-on procedural experience in (domestic) criminal-law cases in the Pre-Trial and Trial Divisions. Both the importance and possible effects of the judges' assignment to divisions should not be underestimated. It is of crucial importance that the pretrial judge in particular,[69] and later the presiding—or single[70]—judge, on the case be firmly versed in the general principles applicable to criminal proceedings, as well as the specific legal and procedural framework of the Court.

Up until 2011, rule 4 of the RPE provided that the decision on the assignment of the newly sworn-in judges to the divisions was to be taken by the judges in plenary session.[71] However, in an effort to enhance the efficiency and effectiveness of the Court (and in this case the judiciary in particular), the ASP amended rule 4 and added a new rule 4 *bis*, which stipulates in relevant part that "[a]s soon as possible following its establishment, the Presidency shall, after consultation with the judges, decide on the assignment of judges to divisions in accordance with article 39, paragraph 1."[72] This amendment increased the Presidency's competencies and also placed a fair amount of responsibility on its

66. *Id.* at art. 39(4).

67. Int'l Criminal Court, Regulations of the Court, *supra* note 9, at regulation 12.

68. *See* Rome Statute, *supra* note 1, at art. 35(3).

69. Article 39(2)(b)(iii) of the Rome Statute provides for the possibility that a single judge will rule on a number of routine and procedural matters. *Id.* at art. 39(2)(b)(iii); *see also* Int'l Criminal Court, RPE, *supra* note 8, at r. 7.

70. *See* Int'l Criminal Court, RPE, *supra* note 8, at r. 132 *bis*. Rule 132 *bis* was added to the RPE by amendment. Int'l Criminal Court, RPE Amendment, *supra* note 8.

71. Int'l Criminal Court, RPE, *supra* note 8.

72. Int'l Criminal Court, Amendments to Rule 4, *supra* note 49 (internal quotation marks omitted).

shoulders to find administratively and strategically sound arrangements, while being mindful of the statutory selection criteria detailed in particular in article 36.

Other assignment decisions of the Presidency follow no explicit criteria, be they on the composition of Chambers or on the assignment of situations and cases to Chambers. As a prerequisite to the temporary re-assignment of judges between Pre-Trial and Trial Divisions, article 39(4) of the Statute states that in the Presidency's view the temporary reassignment must be required by "the efficient management of the Court's workload."[73] States thus left the matter to the discretion of the Presidency with the sole postulate that it exercise its discretion efficiently. Further, the judges decided in regulation 12 that a temporary attachment to the Appeals Chamber must be "in the interests of the administration of justice."[74] The slight difference in the legitimizing criteria may be founded in the consideration that although the temporary assignment of a judge pursuant to regulation 12 may indeed—as with article 39(4)—be a mere efficiency measure, the temporary attachment of a judge to the Appeals Chamber to replace another colleague in case of an interlocutory appeal may have the consequence of blocking that judge for a later deployment into that case on the pretrial or trial level.[75]

Fortunately, in their exercise of management oversight pursuant to article 112(2)(b) of the Statute, States Parties have given the Presidency the appropriate managerial autonomy and have, also on a more general level, not sought to micromanage the Court. The Presidency's leeway has been solidified with managerial practice that has been carefully fine-tuned over the years. With regard to the general communication between the Presidency and the other fifteen judges of the Chambers, periodic formal and informal meetings of all judges have been instituted. This fosters a dynamic exchange between the different divisions, as well as between the judges and the Presidency. With the rising caseload in all divisions and the many administrative issues with judicial components, the necessity of regular informal information exchanges between all judges has become ever more pressing. These meetings provide a more general and flexible informal discussion platform than the plenary sessions of all judges that are provided in the Court's regulatory framework.[76] Furthermore, as regards the Presidency's competence regarding the assignment of judges to

73. Rome Statute, *supra* note 1, at art. 39(4). The provision clarifies, however, that "under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case." *Id.* Similarly, regulation 12 of the Regulations of the Court provides for the temporary assignment of a judge to the Appeals Chamber "in the interests of the administration of justice." Int'l Criminal Court, Regulations of the Court, *supra* note 9, at regulation 12.

74. Int'l Criminal Court, Regulations of the Court, *supra* note 9, at regulation 12. Article 52 of the Rome Statute, *supra* note 1, stipulates that the judges adopt, by absolute majority, the Regulations of the Court. *See also* Int'l Criminal Court, Regulations of the Court, *supra* note 9, at regulation 1.

75. Int'l Criminal Court, Regulations of the Court, *supra* note 9, at regulation 12.

76. *See, e.g.*, Rome Statute, *supra* note 1, at art. 41(2); Int'l Criminal Court, RPE, *supra* note 8, at rs. 4, 12, 29 & 100.

divisions, chambers, and cases, the absence of formally predefined criteria and guidelines has left the past and present Presidencies with the task of establishing a sound and adequate practice, tailored to the specific circumstances at hand. In particular, when it comes to the assignment of judges to divisions, it is up to the Presidency to carefully tailor an arrangement by which as few judges as possible risk being conflicted in a given case as well as foreseeable future cases due to prior involvement at a different stage. Likewise, the constitution of a chamber has to be made while mindful of the length of the respective judges' remaining terms, amongst other factors. In its managerial practice, the Presidency has identified a large array of different criteria for each and every one of its constitutive tasks; these criteria must be carefully applied to the case at hand, keeping in mind the case's specific ramifications. It could certainly add to procedural transparency and administrative certainty if the catalogues of criteria applied were codified as general guidelines. However, any such guidelines would have to remain at a high level of generality in order to leave space for case-specific considerations and flexible solutions. In any initiative to add more predictability and regulatory framework to the Presidency's operations, the decision-makers would be well-advised not to issue an all-too-rigid set of guidelines that could stand in the way of sound and effective case-oriented practice.

(3) The relationship between the President and Presidency and the Registry. Article 43 of the Rome Statute stipulates that the Registry "shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor."[77] The nonjudicial aspects of administration encompass not only the bulk of all in-court support functions for the other organs of the Court, but also the establishment of a Victims and Witnesses Unit,[78] external communication on relevant items, and general administration including human resources, information technology, procurement, and security, among many other duties.[79] Pursuant to rule 14 of the ICC RPE, the Registrar has put in place regulations to govern the operations of the Registry.[80] Further, all administrative services for the judiciary are centralized in the Registry.

One of the major improvements of the ICC over the ICTY and ICTR was the clear delineation of the relationship between the organs, and more specifically of the relationship between the Presidency and the Registrar. In the regulatory framework of the UN ad hoc Tribunals, the Registrar is appointed by the Secretary-General,[81] while the Prosecutor is appointed by the Security

77. Rome Statute, *supra* note 1, at art. 43(1).

78. *Id.* at art. 43(6); Int'l Criminal Court, RPE, *supra* note 8, at rs. 17 & 18.

79. Int'l Criminal Court, RPE, *supra* note 8, at rs. 13, 15, 20, 21 & 22 (regarding the Registrar's responsibilities relating to the rights of the defense); *see also* Int'l Criminal Court, Regulations of the Court, *supra* note 9, at regulations 40, 69, 70, 71, 72, 73, 75, 76, 77, 79, 81, 83, 84, 85 & 90.

80. Int'l Criminal Court, Regulations of the Registry, *supra* note 14.

81. ICTR Statute, *supra* note 25, at art. 16(3); ICTY Statute, *supra* note 25, at art. 17(3).

Council,[82] and the judges are elected by the General Assembly.[83] Although the appointment of the Registrar has to follow the Secretary-General's "consultation with the President of the International Tribunal," the final prerogative rests with the Secretary-General.[84] All three organs of the ad hoc Tribunals[85] thus have in common that their principals are elected or appointed by an external authority. Further, although the Tribunals' statutes prescribe that the Registry is "responsible for the administration and servicing of the International Tribunal,"[86] nowhere do they establish an explicit *hierarchy* between the organs. Instead, the Tribunals' Rules of Procedure and Evidence, adopted by the judges themselves, merely dictate that the President supervises the activities of the Registry and that the Registrar acts "[u]nder the authority of the President."[87] This suggests not only a certain lack of clarity as regards the (in)dependence of the Registrar from the President, but also that the Registrar may in fact be accountable to an *outside* actor, and not to any organ *inside* the institution.[88] An audit of the administrative and institutional arrangements of the ICTR in 1997 (known as the *Paschke Report*) discovered "mismanagement in almost all areas of the Tribunal and frequent violations of United Nations rules and regulations."[89] It further noted the following with regard to one perceived reason for the mismanagement:

> The Registrar acknowledged that both the Chambers and the Office of the Prosecutor have raised questions with him concerning decisions he has taken which impact on their functions. The Rules of Procedure and Evidence provide the President of the Tribunal with authority over the Registrar and provide the Prosecutor with independence of decisions. However, the Registrar argued that the Rules were subsidiary to the statute and therefore could not subject the Registrar to the supervision of another organ of the Tribunal. The Registrar has declined to meet administrative requests from the judges or the Office of the Prosecutor where in his judgement they were insufficiently justified. The disputes over the authority of the

82. ICTR Statute, *supra* note 25, at art. 15(4); ICTY Statute, *supra* note 25, at art. 16(4).

83. Both permanent and *ad litem* judges are elected from a list submitted by the UN Security Council. ICTR Statute, *supra* note 25, at arts. 12 *bis*, 12 *ter*; ICTY Statute, *supra* note 25, at arts. 13 *bis*, 13 *ter*.

84. ICTY Statute, *supra* note 25, at art. 17(3).

85. Pursuant to art. 11 of the ICTY Statute, *supra* note 25 (and art. 10 of the ICTR Statute, *supra* note 25), the Tribunals consist of the Chambers, the Prosecutor and the Registry.

86. ICTR Statute, *supra* note 25, at art. 16(1); ICTY Statute, *supra* note 25, at art. 17(1); *see also* ICTR Statute, *supra* note 25, at art. 10(c); ICTY Statute, *supra* note 25, at art. 11(c).

87. Int'l Criminal Tribunal for the former Yugoslavia, 2d Sess., Jan. 17–Feb. 11, 1994, *Rules of Procedure and Evidence*, rs. 19(A) & 33(A), ICTY Doc. IT/32/Rev. 49 (May 22, 2013) [hereinafter Int'l Criminal Tribunal for the former Yugoslavia, RPE] (first adopted on Feb. 11, 1994), *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf; Int'l Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, r. 19(A) (Apr. 10, 2013) (first adopted on June 29, 1995), *available at* http://www.unictr.org/Portals/0/English/Legal/Evidance/English/130410amended%206_26.pdf.

88. *See* David Tolbert, *Article 43: The Registry*, *in* COMMENTARY, *supra* note 31, at 981, 986, ¶ 9.

89. Karl Th. Paschke, Under-Secretary-General for Internal Oversight Services, *Rep. of the Office of Internal Oversight Services on the Audit and Investigation of the International Criminal Tribunal for Rwanda*, *Annex to the Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, ¶ 7, U.N. Doc. A/51/789 (Feb. 6, 1997) [hereinafter Paschke, *Paschke Report*].

> Registrar need to be addressed. As currently perceived by him, he can - and does - overrule decisions on substantive administrative matters taken by the judges and the Office of the Prosecutor. According to the Registrar, he has absolute authority when it comes to any matter with administrative or financial implications. Because of this perception, almost no decision can be taken by the other organs of the Tribunal that does not receive his review and agreement or rejection.[90]

In response to the *Paschke Report*, the Secretary-General proceeded to replace the Registrar. Presumably, the Secretary-General was also guided by the general submission that the Registrar indeed "service[s] both the Chambers and the Prosecutor"[91] and cannot be an entity operating independently from the others.[92] However, the lack of institutional clarity concerning the Registrar's role in the ad hoc Tribunals' statutes remains a fact.

Aware of this statutory weakness and of the resulting threat of inefficiencies, the drafters of the Rome Statute supplied statutory provisions entrusting the Presidency with the responsibility for the proper administration of the Court. Even more explicitly, they stipulated the President's authority over the Registrar.[93] Further underlining the Registrar's subordination, the Rome Statute provides that the Registrar be elected (and can be removed from office) by the judges.[94] The lesson learned from the UN ad hoc Tribunals was that if the administration is to serve the mission of the Court as a whole, it needs to be accountable to the ultimate authorities in the courtroom, namely the judges.

Despite the institutional guidance of the statutory framework, the powers and competencies of the Registrar vis-à-vis the President and Prosecutor were the subject of discussions in the first years of the Court's existence. There was a perceived lack of clarity in the delineation of competencies between the organs of the Court resulting in some resistance in implementing the statutory framework in practice. However, in 2010, the Court issued a report describing the relevant aspects of its corporate governance framework in an effort to increase clarity with respect to the responsibilities of the Court's organs.[95] The so-called *Governance Report* addresses what the heads of organs had previously identified as the major potential risks the Court should avoid or contain: (1) lack of effectiveness or quality of the Court's operations, (2) divisions inside the Court, and (3) the loss of external support for the Court.[96] It outlines the most

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90. *Id.* ¶ 8.

91. ICTR Statute, *supra* note 25, at art. 10(c); ICTY Statute, *supra* note 25, at art. 11(c).

92. *See* Int'l Criminal Court, RPE, *supra* note 8, at r. 19(A) (of both ad hoc Tribunals).

93. Rome Statute, *supra* note 1, at arts. 38(3)(a) & 43(2).

94. *Id.* at art. 43(4) (for the election); *id.* at art. 46(3) (for the removal). The Registrar can be removed for reasons of "serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence." *Id.* at art. 46(1)(a).

95. Int'l Criminal Court, Assembly of States Parties, 9th Sess., Dec. 6–10, 2010, *Report of the Court on Measures to Increase Clarity on the Responsibilities of the Different Organs*, ICC Doc. ICC-ASP/9/34 (Dec. 3, 2010) [hereinafter Int'l Criminal Court, *Governance Report*], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-34-ENG.pdf.

96. *Id.* ¶¶ 1, 15.

significant measures taken to date and others remaining to be taken in order to assess and manage these risks. These measures include, among others, (1) a series of court-wide administrative issuances establishing a "common, unified system for the setting of Court rules, policies and procedures,"[97] (2) the Court's Coordination Council, (3) the Court's strategic planning in operational core areas,[98] (4) a number of interorgan coordination groups and mechanisms,[99] and (5) the Court's Audit Committee.[100]

Most importantly, however, the *Governance Report* delineates the roles and responsibilities of the Presidency and the Registry for all areas of the Registry's activities with interorgan relevance, adding clarity to the distinction between the Court's administrative and judicial functions.[101] Further, in order to achieve effective strategic supervision of the Registry, appropriate management as well as reporting mechanisms and tools are necessary to ensure that the Presidency has adequate assurance and control. To this end, the Court adopted its corporate governance statement on February 25, 2010, clarifying the roles and responsibilities of the different organs at a general level.[102] Furthermore, a comprehensive, integrated management-control system covering all areas of the Registry is currently being developed.

In essence, the *Governance Report* demonstrates that the Court has been able to devise a proper structure and equilibrium between the organs by assessing the major risks to the institution, identifying measures to reduce or control these risks, and putting these measures in place. Specifically regarding the relationship between the Presidency and Registry, effective strategic supervision of the Registry will be greatly facilitated once the management-control system becomes fully operational.

However, managerial practice remains the most relevant means to facilitate communication and coordination between the President and the Registrar. Periodic meetings between the President and the Registrar continue to be the most direct and effective forum to discuss all administrative matters of strategic concern for the President or Presidency. In addition, staff of the respective immediate offices liaises frequently in order to facilitate a swift and flexible information exchange.[103] The steady increase in activities over the past five years has made efficient communication between the President and the Registrar all

97. *Id.* ¶ 16.

98. *Id.*

99. For a comprehensive overview of standing interorgan working groups, see *id.* ¶ 25.

100. *See* Int'l Criminal Court, President, ICC. Doc. ICC/PRESD/G/2008/001 (Aug. 4, 2008), *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/vademecum/PD/Audit%20Committee%20(2008).PDF.

101. Int'l Criminal Court, *Governance Report*, *supra* note 95, ¶¶ 27–30.

102. *Id.* at annex I.

103. Int'l Criminal Court, Assembly of States Parties, 10th Sess., Dec. 12–21, 2011, *Report of the Court on the Implementation and Operation of the Governance Arrangements*, ¶ 11, ICC Doc. ICC-ASP/10/7 (June 17, 2011), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-7-ENG.pdf.

the more essential. In particular, informal communication on the operational level has proven to be indispensable to disposing of the multitude of items arising on a daily level that require mutual information and coordination. Current practice is based on a common understanding between both organs as to which issues fall within the remit of consultation and coordination and which issues are part of routine administration and thus do not merit express discussion between the President and the Registrar. It remains a challenge to maintain this common understanding in light of the often rapid pace of events, multiple assignments for all involved, and occasional personnel changes. In particular, for comparatively small structures such as the Presidency and the Registrar's Immediate Office (which have no more than a handful of persons on each side dealing with all matters of managerial relevance on a strategic level), it is crucial that managerial practice is backed up by a high degree of flexibility and professionalism, as well as the capacity to quickly produce common solutions to often unconventional and unexpected problems.

Managerial practice has produced a number of operations-level interorgan working groups in order to address recurrent administrative issues. These groups facilitate effective coordination and cooperation not only between the Presidency and Registry, but also with the OTP. The Court's Budget Working Group, External Relations Working Group, and Tripartite Committee (the main body at the operational management level dealing with managerial issues of interorgan concern) are just some illustrative examples of such interorgan groups. These interorgan coordination bodies necessarily represent the practical translation of the constitutional requirements of the Court's legal and constitutive framework. In other words, managerial practice has created the operational arrangements to fulfill the institutional postulates.

(4) The relationship between the Presidency and the Prosecutor. Although both the President and the Prosecutor are independent from each other—and this independence is a crucial instance of the segregation of the Court's powers into distinct pillars of Court judicial credibility[104]—it is obvious that the President and Prosecutor must collaborate in the course of discharging their duties. The Presidency is responsible for the proper administration of the Court[105] while the Prosecutor has authority over the management of the staff and other resources of his or her office.[106] Hence coherence in the approach to individual matters such as conditions of service, administrative practices and policies, and other strategic items is necessary to ensure that the Court does not act inconsistently from organ to organ. Article 38(4) of the Rome Statute sets a clear obligation for the Presidency (and, *mutatis mutandis*, a corresponding obligation for the Prosecutor) to seek the Prosecutor's concurrence on matters related to the administration of the Court. This principle of concurrence rather

104. Int'l Criminal Court, *Governance Report*, *supra* note 95, ¶ 10.

105. Rome Statute, *supra* note 1, at art. 43(2).

106. *Id.* at art. 42(2).

than a principle of hierarchy underpins the fact that both the President and the Prosecutor operate on "eye level," while the Registry is ultimately subordinate to the President.[107]

Just as managerial practice has facilitated the relationship between the President and the Registrar, it has also led to a sound and pragmatic communication practice more generally. Although bilateral meetings between the President and the Prosecutor occur on an ad hoc basis, the communication on the senior-management and operational levels is constant and effective. For one, the aforementioned interorgan working groups cover a large array of topics that require coordination. Separately, frequent informal consultations have led to an efficient communication network for essential items. Finally, communication of all three heads of organs in the Court's Coordination Council[108] serves as one of the most powerful means to comply with the requirements of article 38(4) of the Statute with practice arrangements on different levels.[109]

(5) The Coordination Council of the Court. In practice, it is obvious that all three organs[110] need to closely cooperate to ensure smooth nonjudicial administration. The Court has therefore established the Coordination Council, as defined in regulation 3 of the Regulations of the Court:

> 1. There shall be a Coordination Council comprised of the President on behalf of the Presidency, the Prosecutor and the Registrar.
>
> 2. The Coordination Council shall meet at least once a month and on any other occasion at the request of one of its members in order to discuss and coordinate on, where necessary, the administrative activities of the organs of the Court.[111]

The Coordination Council is not intended to be a decision-making body, but rather serves as the coordination platform on all managerial and strategic issues of interorgan concern within the Court.[112] Agreements between all three organs, which is the desired outcome of discussions on all matters of common concern, are made in the Coordination Council. In practice, such agreements have a binding effect, and any intention of any of the organs to deviate from such agreements would need to be brought again before the Coordination Council.[113] The institution of the Coordination Council has proven extremely useful and in almost all matters a common understanding can be reached between the organs.

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107. Int'l Criminal Court, *Governance Report*, *supra* note 95, ¶ 11; *see also* Tolbert, *supra* note 88, at 986, ¶ 9.

108. *See infra* Part III.A.1.a.v.

109. Regulation 3 of the Regulations, *supra* note 9, arguably does *not* encompass all matters that fall within the ambit of "matters of mutual concern" of the Presidency and the OTP regarding the proper administration of the Court. *See* Rome Statute, *supra* note 1, at art. 38(4).

110. The Presidency represents the judicial divisions internally in all nonjudicial administrative matters. Int'l Criminal Court, Regulations of the Court, *supra* note 9, at regulation 3(1); Deschênes & Staker, *supra* note 51, at 953, ¶ 6.

111. Int'l Criminal Court, Regulations of the Court, *supra* note 9, at regulation 3.

112. Int'l Criminal Court, *Governance Report*, *supra* note 95, ¶ 21.

113. *Id*.

Further, in the few instances where a unanimous position cannot be reached between the organs, the Coordination Council is vested with an escalation mechanism.[114] It has therefore ensured that the Court's principals have a common approach to administrative issues, possibly in response to the frequent demands of external stakeholders.[115]

The Coordination Council has repeatedly proven to be the appropriate forum for discussing and agreeing upon the major strategic items in the Court's governance framework. In the context of the various governance and internal control mechanisms of the Court, the Coordination Council is the most significant body charting the Court's course. It is supported on the operational level by the Tripartite Committee. The Tripartite Committee carries out all managerial tasks that are either delegated by the Coordination Council or that must be completed before Coordination Council discussion.

Because the Coordination Council consists of only the heads of organs and some of their senior managers, managerial practice over the past years has reinforced the Coordination Council's strategic importance as a forum for the heads of organs to have an informed discussion on all issues that go to the very heart of the institution's operations. It has also secured the council's role as the forum in which to resolve interorgan disagreements with final determinations. This practice, backed up by the Court's governance framework, has provided the ICC with a dynamic and meaningful communication and coordination structure at the highest strategic level.

b. The role and independence of the Prosecutor. The Rome Statute contains a built-in structural bipolarity, with the Prosecutor and the judiciary (comprising the Presidency and Chambers) on equal—and independent—footing. Article 42(1) of the Statute provides that the OTP shall act independently as a separate organ of the Court. This institutional arrangement is identical in the UN ad hoc Tribunals and other international(ized) criminal courts such as the SCSL, the Special Tribunal for Lebanon (STL),[116] and (though the similarity of the arrangement is less explicit in the relevant statute) the Extraordinary Chambers in the Courts of Cambodia (ECCC).[117]

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114. Although every effort is made to achieve unanimity of all participants in the Coordination Council, agreements reached between the President and the Prosecutor are binding on the Registrar by virtue of the President's authority over the Registrar. *Id*.

115. The principle of all organs of the Court to seek concurrence on the central issues of common administrative concern is part of the Court's governance framework and part of what is generally referred to as the "One-Court-Principle." *See* the Court's *Previous Strategic Plan*, *supra* note 5, ¶¶ 14–16.

116. STL Statute, *supra* note 40, at art. 11(2); ICTR Statute, *supra* note 25, at art. 15(2); ICTY Statute, *supra* note 25, at art. 16(2); SCSL Statute, *supra* note 39, at art. 15(1) (second sentence); *see also* Bergsmo & Harhoff, *supra* note 31, at 972, ¶ 4.

117. Article 6 of the ECCC Statute, *supra* note 42, provides that "[t]he co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source," but does not explicitly state that the Prosecutor's office operates as a separate organ of the ECCC. This, however, is made explicit on the ECCC's homepage: "The Office of

The OTP's statutory core function is to trigger the Court's judicial activities.[118] This is a significant function, because the Court's activities begin well before trial. As a general matter, before any case against an individual can be brought before the chamber, the Court must first establish its jurisdiction in a situation brought before it—following the parameters as outlined above.[119]

The exact investigative sequence will vary slightly depending on whether a situation is referred to the Court or the Court begins investigation of its own accord.[120] When a potential situation is referred by a State Party or the Security Council, the Prosecutor independently analyzes the information received by way of a preliminary examination.[121] During this phase the Prosecutor determines whether or not there is a basis to begin an investigation.[122] If the Prosecutor then decides that there is a reasonable basis to commence an investigation, she will initiate the investigative activities of her office.[123] However, if the Prosecutor decides to launch a *proprio motu* investigation following her preliminary examination into a situation, the Rome Statute imposes an additional requirement before the Prosecutor may begin. Authorization must be sought from a Pre-Trial Chamber of three judges, which will assess the Court's jurisdiction and the Prosecutor's conclusion that there is a reasonable basis to begin an investigation.[124] This provision is of particular importance because it adds an institutional hurdle for the Prosecutor to justify her case, and thus provides an extra safeguard against politically motivated investigations and prosecutions.[125] Further, although the OTP carries out its investigations independently, during the investigation phase the Pre-Trial Chamber may exercise a number of critical functions including authorizing special investigative steps or taking measures to protect evidence.[126]

As regards the OTP's administrative structure, a certain difference from the UN ad hoc Tribunals' arrangements catches the eye: The ICC OTP unites in its general Services Section (SS) a number of fundamental administrative support

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the Co-Prosecutors (OCP) is an independent office within the ECCC." *Office of the Co-Prosecutors*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, http://www.eccc.gov.kh/en/organs/topic/4 (last visited July 22, 2013).

118. Rome Statute, *supra* note 1, at arts. 13, 14 & 15.

119. *See supra* Part III.A.

120. Rome Statute, *supra* note 1, at art. 13.

121. Situations may come before the Court by way of one of the three so-called trigger mechanisms for the Court's jurisdiction: (1) a State Party may refer a situation to the Prosecutor, (2) the Security Council may refer a situation to the Prosecutor, or (3) the Prosecutor may begin an investigation *proprio motu*, on her own initiative. *See* Rome Statute, *supra* note 1, at arts. 13 & 15.

122. In order to determine whether there is a reasonable basis to proceed with an investigation, article 53(1)(a)–(c) of the Rome Statute, *supra* note 1, provides that the Prosecutor shall consider jurisdiction, admissibility (complementarity), gravity, and whether an investigation would serve the interests of justice.

123. *Id.* at art. 18(1).

124. *Id.* at art. 15(3), (4); Int'l Criminal Court, RPE, *supra* note 8, at r. 50.

125. Morten Bergsmo & Jelena Pejić, *Article 15: Prosecutor*, *in* COMMENTARY, *supra* note 31, at 591, art. 15 ¶ 27.

126. Rome Statute, *supra* note 1, at arts. 56 & 57(3).

services such as the Information and Evidence Unit, the Knowledge Base Unit, and language services, as well as the General Administration Unit, which deals, inter alia, with the preparation of the OTP budget. The SS operates independently from similar support sections of the Registry, serving the proceedings in general, and the judiciary in particular. This separation and parallel system of partially identical services is based to a large extent on negative experiences from the UN ad hoc Tribunals. According to the *Paschke Report* (which was, recall, a 1997 audit of the ICTR's then-existing administrative and institutional arrangements), the majority of the administrative support for the Prosecutor's activities was provided by the Registry.[127] Staff carrying out important assignments for the Prosecutor's office did not report to the Prosecutor but to the Registrar, thus depriving the former of its administrative—and possibly institutional[128]—independence.[129] In its conclusion, the *Paschke Report* found it imperative that the ICTR "maintain the separate, specifically assigned authority and responsibilities unique to each organ, particularly as between the Registry and the Office of the Prosecutor."[130] Further, it recommended that the ICTR "should set forth clearly the role, scope and reporting relationships of the Registrar, within the definitions established by the statute, so that the independence of the Chambers and the Office of the Prosecutor are fully recognized and the service function of the Registry is emphasized and guided."[131] Lastly, the report recommended that the ICTR's Victims and Witnesses Unit, previously located in the Registry, be located within the OTP.[132]

The *Paschke Report* illustrates that although cooperation and resource sharing can be efficient, independence is necessary. Article 42(2) of the Statute stipulates that the Prosecutor shall have "full authority over the management and administration of the Office, including the staff, facilities and other resources thereof."[133] This provision serves as the legal basis for the Prosecutor's "own" independent administrative support services.[134] The provision stands in tension with the ICC's strategic goal of having an efficient and effective administrative support structure.[135] To find the right balance is very

127. Paschke, *Paschke Report*, *supra* note 89, ¶¶ 56–59.

128. The *Paschke Report*, *supra* note 89, makes the following finding regarding the situation in the ICTR Office of the Prosecutor in 1997: "In OIOS discussions with the Deputy Prosecutor, when questions concerning deficiencies in the operations of the Office of the Prosecutor were raised and he was asked what he had done to address them, he repeatedly responded that he did not have the authority to do so. This position effectively abolished the independence of the Prosecutor's Office and reduced it to yet another section of the Registry." *Id.* ¶ 58.

129. Thomas Patrick & Cherif Bassiouni, *Organization of the International Criminal Court: Administrative and Financial Issues,* 25 DENV. J. INT'L L. & POL'Y 333, 337 (1997).

130. Paschke, *Paschke Report*, *supra* note 89, ¶ 71.

131. *Id.* ¶ 78.

132. *Id.* ¶ 99.

133. Rome Statute, *supra* note 1, at art. 42(2).

134. Tolbert, *supra* note 88, at 986, ¶¶ 6–7.

135. Int'l Criminal Court, *Previous Strategic Plan*, *supra* note 5, ¶¶ 41–44; Int'l Criminal Court,

complicated, and can only be achieved through frequent policy checks and structural revisions. A past dispute at the ad hoc Tribunals over language services, the administrative support service responsible for interpretation and translation, provides an illustrative example of possible points of contention. In 1998, the Secretary-General called a group of experts (expert group) to conduct a review of the effective operation and functioning of the UN ad hoc Tribunals.[136] On November 11, 1999, the expert group submitted its report,[137] acknowledging that the Prosecutor's dependence on the Registry's language services had led to friction and a struggle for resources. It therefore recommended that the Prosecutor's offices in both ad hoc Tribunals receive administrative responsibility for their own language staff.[138]

Partly as a result of these conclusions of the expert group, the OTP's and Registry's language services at the ICC have, in practice, been separated, with the latter's services assisting other Registry clients as well as the Judiciary. Occasional challenges to this arrangement have not yet indicated any advantage to reverting back to a joint language-support section for the whole ICC. Indeed, the UN ad hoc Tribunals' joint language-support sections were found to be suboptimal in 1999. In order to avoid possible duplication between the two, constructive coordination and cooperation between the sections and organs is of the essence.

The statutory independence of the Prosecutor further provides that she has full managerial autonomy over the administration and management of staff and nonstaff resources like recruitment, funds for travel, equipment, security of information and evidence, and so forth.[139] Against this, article 43(1) of the Rome Statute determines that the Registry shall be responsible for the "non-judicial aspects of the administration and servicing of the Court, *without prejudice to the functions and powers of the Prosecutor in accordance with article 42*."[140] This leads to dual responsibility for these resources, a feature that, to this date, is reflected only cursorily in the Court's legal framework: In the FRR,[141] regulation 1.4 provides that

> [t]hese Regulations shall be implemented in a manner consistent with the responsibilities of the Prosecutor and of the Registrar as set out in articles 42, paragraph 2, and 43, paragraph 1, of the Rome Statute. The Prosecutor and the Registrar shall cooperate, taking into account the independent exercise by the Prosecutor of his or her functions under the Statute.

Strategic Plan 2013–2017, *supra* note 5, at 6–7 (Goal 2: Managerial).

136. G.A. Res. 53/213, ¶ 6, U.N. Doc. A/RES/53/213 (Dec. 18, 1998); G.A. Res. 53/212, ¶ 6, U.N. Doc. A/RES/53/212 (Dec. 18, 1998).

137. Rep. of the Expert Grp. to Conduct a Review of the Effective Operation and Functioning of the Int'l Criminal Tribunal for the Former Yugoslavia and the Int'l Tribunal for Rwanda, U.N. Doc. A/54/634 (Nov. 22, 1999) [hereinafter Report of the Expert Group].

138. *Id*. ¶¶ 251–252 (documenting that the expert group also recommended that the OTP receive administrative responsibility over its own public information and witness protection staff).

139. Bergsmo & Harhoff, *supra* note 31, at 974–75, ¶ 11.

140. Rome Statute, *supra* note 1, at art. 43(1) (emphasis added).

141. Int'l Criminal Court, FRR, *supra* note 11.

The FRR, however, leave undefined the manner by which the Prosecutor's independence shall be implemented. Financial rule 101.1(b) sets out the Registrar's responsibility to ensure compliance with the FRR. Addressing the administrative functions falling under the authority of the OTP, it references "appropriate institutional arrangements" to be made between the Prosecutor and the Registrar. However, to date no such arrangements have been published, and the Registrar only mentioned them in the financial statements for the year 2011;[142] in none of the previous statements had this been the case. It is hoped that the institutional arrangements mentioned in the 2011 financial statements adequately and sustainably regulate an area where a lack of proper arrangements may lead to conflicts, resulting eventually in inefficiencies in the Court's operations—a task that pertains to both organs.[143] Further, the 2011 financial statements do not specify where and in what manner the Registrar can actually ensure the required compliance. The lack of notification of such arrangements could constitute a weakness in the controls safeguarding the financial management of the Court. Ultimately, this may be an issue for the Court's financial auditor[144] to assess.

On a general level, practical arrangements between all organs have struck a balance between the independence of the OTP and the Court's need to react to outside pressures and challenges in a united fashion. All Court-internal interorgan bodies and groups that affect the rights and interests of the OTP contain an OTP staff member. Those consultative and management bodies that operate on a strategic level—such as the Coordination Council, the Tripartite Committee, and the Budget Working Group—are comprised of members from each of the organs and follow the statutory postulate of judicial and prosecutorial independence, as well as the Registrar's neutrality.[145]

2. Major Features of the Administrative Structure

a. Quasi-Judicial role of the Registry. The Registry is headed by the Registrar, who is supported by the Immediate Office.[146] It is composed of two divisions, which reflect the scope of its work. The Common Administrative Services Division (CASD) is dedicated to the nonjudicial administration of the ICC, including human resources, budget and finance, information technologies, and general services.[147] The Court Services Division (CSD) provides the Court

142. Int'l Criminal Court, Assembly of States Parties, 11th Sess., Nov. 14–22, 2012, *Financial Statements for the Period 1 January to 31 December 2011*, at 3, ICC Doc. ICC-ASP/11/12 (Aug. 28, 2012), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-12-ENG.pdf.

143. *See* Int'l Criminal Court, Regulations of the Office of the Prosecutor, *supra* note 15, at regulation 20 (institutional arrangements with the Registry).

144. *See* Int'l Criminal Court, FRR, *supra* note 11, at regulation 12.1 ("The Assembly of States Parties shall appoint an Auditor, which may be an internationally recognized firm of auditors or an Auditor General or an official of a State Party with an equivalent title.")

145. *See* Rome Statute, *supra* note 1, at arts. 40(1), 42(1), 43(1) & 43(2).

146. Int'l Criminal Court, *Proposed Programme Budget for 2014*, *supra* note 9, ¶¶ 277–280.

147. *Id.* ¶¶ 348–450.

with judicial proceedings–management support, language support, and witness protection and support.[148] The CSD also facilitates victim participation in the proceedings through its Victim Participation and Reparation Section.[149]

As has been established above, the Registry is responsible for the nonjudicial aspects of the administration and the servicing of the proceedings. However, at the same time, the role of the Registry goes beyond the role of a mere service provider to the judges and the Prosecutor. As one of the organs of the Court, it has a quasi-judicial role in certain areas like detention, legal aid, and, most importantly, witness protection through its Victims and Witnesses Unit.[150] This dual role has created frictions in several instances, in particular between the Registry and the OTP regarding questions of witness protection. Similar to the current situation at the ICTY, the task of the protection of witnesses is entrusted to the Registry.[151] However, the OTP also has a large number of contact points with victims and potential witnesses, especially during its investigations.[152] Pursuant to article 68(1) of the Rome Statute, it is even subject to a statutory obligation to take appropriate measures to protect the safety of victims and witnesses during the investigation and prosecution of statutory crimes. This has led to legal arguments between the OTP and the Registrar before the Court's chambers. It was ultimately the Appeals Chamber in the case of *Prosecutor v. Katanga & Ngudjolo* that decided on the distribution of roles and responsibilities between the two organs, curtailing the Prosecutor's role with regard to the preventive relocation of witnesses.[153] The Chamber highlighted the particular need for cooperation between the organs in this field.[154]

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148. *Id.* ¶¶ 451–580.

149. *See Participation of Victims in Proceedings*, INT'L CRIM. COURT (July 26, 2013), http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/participation/Pages/participation%20of%20victims%20in%20proceedings.aspx.

150. *See* Rome Statute, *supra* note 1, at art. 43(6); Int'l Criminal Court, RPE, *supra* note 8, at rs. 16, 17, 18 & 19.

151. At the ICTY, the Victims and Witnesses Section of the Registry supports and protects all witnesses, whether they are called by the Prosecution, Defense, or Chambers. The section acts as an independent and neutral body, providing logistical, psychological and protective measures. *See* ICTY Statute, *supra* note 25, at art. 22; Int'l Criminal Tribunal for the former Yugoslavia, RPE, *supra* note 87, at r. 75.

152. *See, e.g.*, Rome Statute, *supra* note 1, at arts. 53(1)(c), 53(2)(c), 54(1), 54(3)(f) & 68(1).

153. Case No. ICC-01/04-01/07, Judgment on the Appeal of the Prosecutor Against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, ¶¶ 98–103 (Nov. 26, 2008), http://www.icc-cpi.int/iccdocs/doc/doc602198.pdf. (Mathieu Ngudjolo Chui was originally a coaccused in this case; those proceedings have since been severed, *Prosecutor v. Katanga & Ngudjolo*, Case No. ICC-01/04-01/07, Decision on the Implementation of Regultion 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons (Nov. 21, 2012), and are now on appeal, *Prosecutor v. Ngudjolo*, Case No. ICC-01/04/02/12, Decision on the Presiding Judge of the Appeals Chamber in the Appeal of the Prosecutor Against the Decision of Trial Chamber II Entitled "Jugement rendu en application de l'article 74 du Statut," (Jan. 16, 2013).)

154. *Id.* ¶ 101.

With the steady increase of operations in the field to as many as eight different situations by the end of 2013, the managerial practice of coordination between relevant sections of the OTP and the Registry has gone a long way towards reconciling both organs' positions and finding workable solutions in the field. These solutions differ due to the sometimes-high variance of conditions on the ground. Even when discussion is still ongoing at a strategic policy level (as it has been in the past) practice has resulted in solving matters on the ground.

b. The Common Administrative Services Division of the Registry. For general administrative matters relevant to all organs, a separate division has been created. It is comprised of the Human Resources Section, the Budget and Finance Section, the IT Section, the General Services Section, and the Field Operations Section. With this setup, the ICC follows the administrative structure of the UN ad hoc Tribunals almost identically. The ad hoc Tribunals themselves follow the structure of the UN, its agencies, and its peacekeeping missions.

In other words, instead of revising this structure with regard to its efficiency and appropriateness for a treaty-based Court of a permanent nature, the ICC copied an existing model. This is somewhat surprising given that the UN itself had doubts about the efficiency and effectiveness of the ad hoc Tribunals' structure,[155] and that practitioners argued for a different structure that ensured the necessary flexibility for the ICC in terms of its administration and financing.[156] However, although the expert group had already stated in 1999 that the hybrid construction of the ad hoc Tribunals would create frictions, in particular between the Registry and the OTP,[157] a model of central services for all organs of the Court was created. This was clearly done in the spirit of avoiding duplication of services and saving costs.[158]

The initial plan was to somehow separate the CASD (which, at the time, was called the "Common Services Division") from the rest of the Registry in order to underpin its character as a court-wide and neutral service provider. The President and the Prosecutor would cooperate in the management of that division, especially during times when the Registrar was not yet elected.[159] The neutral approach of the CASD was further underpinned by an attempt to create different budgets for the organs, administered by the division. The official

155. *See* G.A. Res. 53/213, *supra* note 136; G.A. Res. 53/212, *supra* note 136; *see also* Report of the Expert Group, *supra* note 137.

156. Hans Holthuis, Registrar, Int'l Criminal Tribunal for the former Yugoslavia, Address to the Plenary of the Preparatory Commission of the International Criminal Court During Its Seventh Session (Mar. 6, 2001) (transcript available at http://www.icty.org/sid/8011).

157. Report of the Expert Group, *supra* note 137, ¶ 22.

158. Tolbert, *supra* note 88, at 983, ¶ 3.

159. Int'l Criminal Court, Assembly of States Parties, 1st Sess., Sept. 3–10, 2002, *Official Records*, pt. III, ¶ 97, ICC Doc. ICC-ASP/1/3 (Sept. 9, 2002), available at http://www.icc-cpi.int/NR/rdonlyres/ADB79E04-77FF-40E9-B8F6-E030AFE77110/140185/asp_official_recs_1_2_res_en.pdf.

records of the first ASP read as follows: "It is envisaged that the CASD would be granted a sub-budget by both the Registrar (on behalf of the Presidency) and the Prosecutor (for the Office of the Prosecutor) to provide the administrative support which each of them requires and would have budgeted for."[160] However, despite this clear separation, the CASD became a full part of the Registry without organ-specific subbudgets. All staff resources, as well as nonstaff resources like furniture, IT equipment, general utilities, and others, were budgeted within the budget of the Registry (as set forth in Major Programme III).[161] None of the subordinate budgets specified the organ-specific amounts in those areas. This amalgamation of the CASD into the Registry has cast some doubt on whether it could service the OTP as neutrally as would be necessary and appropriate while at the same time being true to its own mandates, which may overlap with the operations of the OTP.[162]

The practical solution to this problem has been the establishment of the aforementioned General Services Section of the OTP, which carries out a number of OTP-support tasks independently from the Registry. For those administrative functions that the CASD continues to cover for the OTP, managerial practice has again filled the gap. Ad hoc bilateral arrangements between both organs have created precedents over time on how to tackle certain issues that occur periodically or else have solidified a practice. Further, interorgan bodies on a managerial level such as the Tripartite Committee or the Budget Working Group have served to calibrate the organs' roles and functions on all routine administrative matters of interorgan concern—and provide a forum for discussion of all novel and unforeseen items.

c. The financial management of the Court. The annual budget of the ICC is drafted by the different organs and sections of the Court under the coordination of the Registrar, and is approved by the ASP.[163] Prior to its submission to the Assembly, it is submitted to the Committee on Budget and Finance (CBF) for budgetary and financial review.[164]

160. *Id.*

161. Int'l Criminal Court, *Proposed Programme Budget for 2014*, *supra* note 9, ¶¶ 348–450. The subdivision of the Court's budget into Major Programmes has been followed since the adoption of its second yearly budget. Int'l Criminal Court, Assembly of States Parties, 2nd Sess., Sept. 8–12, 2003, *Official Records*, pt. I.A, ¶¶ 48–51, ICC Doc. ICC-ASP/2/10, *available at* http://www.icc-cpi.int/NR/rdonlyres/524487BC-0DC1-4FBD-B4CA-44D06C4E796A/140196/ICCASP2_EN.pdf.

162. Again, the field of witness protection can be highlighted. *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment on the Appeal of the Prosecutor Against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, ¶¶ 98–103 (Nov. 26, 2008), http://www.icc-cpi.int/iccdocs/doc/doc602198.pdf.

163. Int'l Criminal Court, FRR, *supra* note 11, at regulation 3.1 & r. 103.2(1).

164. *Id.* at r. 103.2(2).

(1) The Committee on Budget and Finance. The CBF was established by the Assembly during its first plenary meeting on September 3, 2002 as a subsidiary body to the ASP.[165] Its mandate as set forth in article 112(2)(b), (d), and subparagraph (4) of the Rome Statute encompasses the technical examination of any document submitted to the Assembly that carries financial or budgetary implications or contains any other matter of a financial, budgetary, or administrative consequence. In particular, this includes the consideration of the Court's proposed budget, which the Court usually submits to the CBF in July of the preceding year.[166] The CBF is composed of twelve members who are international experts of recognized standing and experience in financial matters.[167] Shortly prior to each Assembly meeting, the CBF meets with the Court and seeks further clarifications on the proposed budget and additions when appropriate. At the end of the session a CBF report is submitted to the Assembly with a recommendation concerning the final appropriation of the Court's proposed budget.

(2) The Court's budget development over the years. The Court's budget has developed dynamically. In the fiscal year 2009 the overall budget crossed the mark of €100 million per annum. As is typical for international organizations, staff costs form the major part of the budget. Contrary to many other organizations, until 2012 the Court did not have to pay for its accommodations because the host state the Netherlands had offered to house the Court during its first ten years free of cost. However, this period came to an end in 2012 and it was unclear for some time that year whether the host state would continue to cover the rent for the Court until the Court's permanent premises are ready to be occupied. After some negotiations, the host state finally declared it would cover fifty percent of the yearly rent up to a ceiling of €3 million until the Court moves into its new permanent premises in 2015.[168]

During its first years, the Court produced significant financial surpluses due to its inability to implement the approved budget in full. This was mainly the result of overly optimistic planning; the first budget for the ICC (for the period from October 2002 until December 2003) estimated €30.8 million in expenditures. This estimate assumed an eventual approved staffing table of 202 posts (excluding elected officials) with a "core staffing" of 49 posts to be

165. Int'l Criminal Court, Assembly of States Parties, *Establishment of the Committee on Budget and Finance*, Res. 4, ICC Doc. ICC-ASP/1/Res.4 (Sept. 3, 2002), *available at* http://untreaty.un.org/cod/icc/asp/1stsession/report/english/part_iv_res_4_e.pdf.

166. *Id.* ¶ 3. The CBF also considers reports of the Auditor concerning the financial operations of the Court and transmits them to the Assembly. Int'l Criminal Court, FRR, *supra* note 11, at regulation 12.9.

167. *Id.*

168. Int'l Criminal Court, Assembly of States Parties, *Programme Budget for 2013, the Working Capital Fund for 2013, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2013 and the Contingency Fund*, pt. C, ICC Doc. ICC-ASP/11/Res.1 (Nov. 21, 2012) [hereinafter Int'l Criminal Court, *Programme Budget for 2013*], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res1-ENG.pdf.

recruited in 2002 alone.[169] Given that by the end of the regular session no judges and no Prosecutor had been elected, and that resumption of the session would not take place before February 2003, it was already obvious that the Court would by no means be able to implement its budget in the absence of substantive judicial or prosecutorial activity. Further, it would be impossible to recruit so many staff in such a short period of time. However, during both resumptions this surplus of resources seemingly remained unnoticed and no one asked for a realistic reduction of these amounts. Consequently, the first financial period of the Court ended with a cash surplus of €10.4 million, or one-third of the total approved budget for that period.

The second budget, approved by the ASP in September 2003, continued this optimistic approach. The Court was granted a budget of €53.07 million and an approved staffing of 375 posts for the fiscal year 2004. This budget was also not implemented in full, although the surplus was less significant than in the first financial period. Again, the main reason for the underimplementation was the fact that it was not possible to recruit as many people as posts that had been established, in particular in the OTP, because the Prosecutor had only taken office in June 2003. Before that date, recruitments in the OTP were not possible, because by virtue of article 42 of the Rome Statute it is only the Prosecutor who is able to appoint staff to his or her office.

Apart from overly optimistic planning, the main reason for the initially low implementation of the budget was the fact that the Prosecutor did not open investigations before mid-2003. After the referrals of two situations (the Democratic Republic of the Congo (DRC) and Uganda) by the corresponding governments, the Prosecutor opened investigations into the situation in the DRC on June 23, 2004[170] and into the situation in Uganda on July 29, 2004.[171] Given that prior to this decision it would have been unwise to recruit larger numbers of investigators, the budget implementation had necessarily been delayed to avoid what in the worst case would have involved hiring investigators who lacked necessary skills, namely language skills.

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169. Preparatory Comm'n for the Int'l Criminal Court, 10th Sess., July 1–12, 2002, *Report of the Preparatory Commission for the International Criminal Court*, add., pt. 1, U.N. Doc. PCNICC/2002/2/Add.1 (July 1, 2002) (Draft Budget for the First Financial Period of the Court); *see also* Preparatory Comm'n for the Int'l Criminal Court, 10th Sess., July 1–12, 2002, *Draft Resolution of the Assembly of States Parties Relating to Budget Appropriations for the First Financial Period and Financing of Appropriations for the First Financial Period*, U.N. Doc. PCNICC/2002/2, annex III (July 24, 2002).

170. Press Release, Office of the Prosecutor, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation, ICC Press Release ICC-OTP-20040623-59 (June 23, 2004), *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx.

171. Press Release, Office of the Prosecutor, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda, ICC Press Release ICC-OTP-20040729-65 (July 29, 2004), *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20nothern%20uganda.aspx.

The CBF reviewed the situation during its third session in August 2004. It noted that a particular reason for the low implementation of the budget was the fact that the Prosecutor had started investigations only recently, and therefore the recruitment of investigators had been—rightly—delayed.[172] As has been evident in the context of the ad hoc Tribunals, the major cost driver for any court is the caseload brought before it, which is hard and sometimes impossible to predict. This creates a dilemma: On the one hand, the Court and particularly the OTP must be equipped with (at least financial) resources to react immediately (as it would need to react, for example, to a referral of a situation from the UN Security Council), but on the other hand the contributing states hope to keep the budget as realistic as possible to avoid surpluses. In other words, a contingency that is needed cannot be properly provided by a regular budget without risking surplus.

As a remedy to this dilemma, the Court proposed to the CBF the creation of a "Contingency Fund" that would serve as a source for additional funding over and above the approved yearly budget. The Fund would exist as a standing reserve and not be limited to a particular fiscal year.[173] However, in designing the Contingency Fund, the Court needed to ensure that the Prosecutor as well as the other organs could obtain certain funding—for example, funding for necessary investigations—without undergoing a prohibitive authorization process. After all, such a process would risk infringing on the independence of the Prosecutor. Thus, for three limited types of expenditures the Contingency Fund was made accessible upon mere notification to the CBF (but without the requirement of the Committee's prior authorization): (1) costs associated with an unforeseen situation following a decision by the Prosecutor to open an investigation, (2) unavoidable expenses for developments in existing situations that could not be foreseen or could not be accurately estimated at the time of adoption of the budget, and (3) costs associated with an unforeseen meeting of the ASP.[174] To date, the ICC is the only international court with such an instrument. All other institutions draw on their regular budgets or on extrabudgetary funds raised on an as-needed basis. As an example, upon apprehension of Mr. Radovan Karadžić, and later again when Mr. Radko Mladić was arrested, the ICTY was forced to submit supplementary budgets to the Fifth Committee of the UN General Assembly in order to secure adequate funding to carry out the highly resource-intensive proceedings against the two accused in addition to the workload anticipated in the ICTY's biennial budget.

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172. Int'l Criminal Court, Assembly of States Parties, 3d Sess., Sept. 6–10, 2004, *Report of the Committee on Budget and Finance*, ICC Doc. ICC-ASP/3/8 (Aug. 13, 2004), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-3-18-_CBF_report_English.pdf.

173. *Id*. ¶ 28.

174. Int'l Criminal Court, Assembly of States Parties, *Programme Budget for 2005, Contingency Fund, Working Capital Fund for 2005, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court and Financing of Appropriations for the Year 2005*, Res. 4, ICC Doc. ICC-ASP/3/Res.4 (Sept. 10, 2004), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-04-ENG.pdf; *see also* Int'l Criminal Court, FRR, *supra* note 11, at regulation 6.6.

In practice, when extraordinary and unbudgeted needs arise during the year, the Registrar of the Court submits a detailed supplementary budget notification to the CBF through its chairperson, specifying the maximum amount that could be required until year end.[175] However, in practice the Court will only withdraw money from the Fund once it has implemented one hundred percent of its regular budget.

It was not until 2010 that the Contingency Fund was actually needed by the Court. In all previous years, the budget had not been utilized to its full extent. The implementation rates generally grew over those years, with an overall budget implementation of 81.4% in 2004, 83.4% in 2005, 79.6% in 2006, 90.5% in 2007, 93.3% in 2008, and 95% in 2009.

In 2010, the overall expenditures, which included the Court's use of the Contingency Fund, amounted to €107.4 million, or €754,000 above the approved budget. In 2011, the Court's expenditures exceeded the approved budget by €3.8 million.[176] In 2013, this expense, together with the excess expenditures of the previous year, substantially reduced the amount available for unforeseen operations of the Court. In its budget resolution at the tenth assembly meeting in December 2011, the Assembly decided to replenish the Fund up to the threshold of seven million euros—three million euros below the Contingency Fund's original level.[177] A similar practice was upheld in 2012.[178] Should it turn out that the Court uses the resources of the Contingency Fund during a year, the Court's budgetary implementation rate at year's end will determine whether funds will have to be withdrawn from the Contingency Fund or not.[179] However,

175. Int'l Criminal Court, FRR, *supra* note 11, at regulation 6.7. Note that the term "detailed" was only inserted into the provision by Int'l Criminal Court, Assembly of States Parties, *Programme Budget for 2011, the Working Capital Fund for 2011, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2011 and the Contingency Fund*, Res. 4, pt. VI, ICC Doc. ICC-ASP/9/Res.4 (Dec. 10, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf.

176. The expenditures totalled €107.4 million, instead of the €103.6 million approved.

177. Int'l Criminal Court, Assembly of States Parties, *Programme Budget for 2012, the Working Capital Fund for 2012, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2012 and the Contingency Fund*, Res. 4, pt. E, ICC Doc. ICC-ASP/10/Res.4 (Dec. 21, 2011) [hereinafter Int'l Criminal Court, *Programme Budget for 2012*], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.4-ENG.pdf; *see also* Int'l Criminal Court, Assembly of States Parties, *Programme Budget for 2010, the Working Capital Fund for 2010, scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for the Year 2010, the Contingency Fund, Conversion of a GTA Psychologist Post to an Established One, Legal Aid (Defence) and the Addis Ababa Liaison Office*, Res. 7, pt. E, ICC Doc. ICC-ASP/8/Res.7 (Nov. 26, 2009), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.7-ENG.pdf.

178. Int'l Criminal Court, *Programme Budget for 2013*, *supra* note 168, pt. F.

179. *See* Int'l Criminal Court, Assembly of States Parties, 12th Sess., Nov. 20–28, 2013, *Report of the Committee on Budget and Finance on the Work of its Twenty-First Session*, ¶¶ 22–27, ICC Doc. ICC-ASP/12/15 (Nov. 4, 2013), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-15-ENG.pdf. For 2013, the Court did not have to access the Contingency Fund due to an implementation rate lower than 100%, allowing the Court to "back-fill" the Contingency Fund through unspent regular-budget resources.

in the current financial climate, the risk of increasing reluctance among states to replenish the Contingency Fund is becoming ever more real.

(3) The Court: budget driven or mandate driven? Linked to the question of whether the ICC should have financial flexibility is the more general question of whether the Court should act as a demand-driven or a resource-driven institution. Applying the former principle would mean that the Court would react to any situation falling within its mandate and that additional resources would have to be provided as needed. By contrast, a resource-driven approach would mean that the Court would—in the worst case—have to ignore situations and cases or at least postpone their investigation, prosecution, and trial proceedings until such time as the required resources become available. The Statute of the Court would appear to give a clear answer to this question—namely, that its budget should be driven by its activities. The preamble stipulates that the States Parties to the Statute are "[d]etermined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes."[180] Further, the Rome Statute's regulatory framework regarding jurisdiction[181] and admissibility,[182] as well as the Prosecutor's investigative mandate,[183] are based on the premise that the Court determines the level of its activities based on the following factors: (1) whether a crime of sufficient gravity been committed, (2) whether the Court has jurisdiction over the crime(s) allegedly committed, and (3) whether the case is admissible.[184] The Statute leaves no room for budgetary considerations in this context, but rather seems to suggest that the Court's budgetary calculations should be guided by these underlying statutory assumptions.

The Court's budgetary situations in 2011, 2012, and 2013, however, have demonstrated that the issue of resources increasingly affects the Court's strategic considerations. At a time when states issue austere domestic budgets and cut out-of-state spending—and their contributions to international organizations in particular—the Court cannot remain unaffected. This reality together with the fact that the Court increasingly reaches regular-budget implementation rates approximating one hundred percent due to its rather conservative budgeting philosophy[185] render the Contingency Fund the last guarantor of the Court's flexibility. The Contingency Fund allows the Court to react to judicial developments despite the absence of regular budget funds, and thus to remain true to its mission: to fight impunity without pecuniary caveat.

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180. Rome Statute, *supra* note 1, pmbl. ¶¶ 4–5.

181. *See id.* at art. 13.

182. *See id.* at art. 17.

183. *See id.* at arts. 14 & 15.

184. Otto Triffterer, *Article 1: The Court*, *in* COMMENTARY, *supra* note 31, at 49, 59–60, ¶ 22.

185. *See* Int'l Criminal Court, Assembly of States Parties, *Proposed Programme Budget for 2012 of the International Criminal Court*, ¶ 12, ICC Doc. ICC-ASP/10/10 (July 21, 2011), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf.

Therefore, although not mentioned in the Court's legal framework, the resources available to the Court will ultimately influence its workload. The first Prosecutor of the ICC reflected on the reality of limited resources in his first policy paper in 2003.[186] According to the policy in the paper, which has only recently been supplemented and updated by the OTP's new *Strategic Plan*,[187] the limited resources at the OTP's disposition require it to focus investigations on those who bear the greatest responsibility, while at the same time making every effort to strengthen national proceedings. The need for capacity building and a proactive approach to the principle of complementarity is today commonly recognized.[188]

Although the current economic reality and the financial situation of the States Parties must be accepted, the risk that the only permanent criminal court in the world suffers from a lack of resources, just as many domestic courts do, leaves one with mixed feelings. The Court's funding troubles might lead to a vicious circle where cases become admissible before the ICC precisely because domestic judicial systems are—as a result of a lack of resources—unable to investigate and prosecute the relevant crimes, and yet the Court is likewise unable to try these cases for the very same reason. Put another way, the Court's lack of funding might lead to an impunity gap. This puts an enormous burden on the Prosecutor who ultimately might have to explain to a victim community that she is unable to bring to justice those who have murdered hundreds of community members because somewhere else thousands of members of another community have also been killed. This example shows that a strictly resource-driven Court faces consequences that may not have been in its founders' minds. The Contingency Fund is a remedy to ensure the judicial ability to react at all times to emerging situations. It needs to be preserved and its funds must be very carefully spent—under the tight rein and scrutiny of the CBF.

(4) Application of the UN Common System of Salaries. Following the Preparatory Commission's deliberations and recommendation that the Court be part of the UN Common System and that it join the United Nations Joint Staff Pension Fund (UNJSPF),[189] the Assembly recommended that the Court

186. OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR (2003), *available at* http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

187. OFFICE OF THE PROSECUTOR, STRATEGIC PLAN JUNE 2012–2015 (2013) [hereinafter OFFICE OF THE PROSECUTOR, STRATEGIC PLAN], *available at* http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf; *see also* OFFICE OF THE PROSECUTOR, DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS (2010), *available at* http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf.

188. *See generally* ACTIVE COMPLEMENTARITY: LEGAL INFORMATION TRANSFER (Morten Bergsmo ed., 2011), *available at* http://www.fichl.org/fileadmin/fichl/documents/FICHL_8_Web.pdf.

189. *See* Preparatory Comm'n for the Int'l Criminal Court, Inter-Sess., Mar. 11–15, 2002,

participate in the UNJSPF in accordance with the pension fund's regulations.[190] It requested the Registrar to take the necessary steps for the ICC to apply for membership in the pension fund, and to conclude an agreement with the pension fund's board pursuant to article 3, paragraph (c), of the regulations of the fund.

The alignment of the Court's salary structure with the UN Common System has not been disputed in the first years, and consequently the Staff Rules prescribe that the salaries should be paid in conformity with the UN Common System.[191] In 2012, some States Parties questioned this, with a view to reducing the Court's expenditures on salaries, and requested an examination of whether this system includes discretionary elements.[192] This development was of high concern for the Court and was perceived as putting the Court at a significant risk. It is legitimate for the Court's stakeholders to request that discretionary benefits be reduced or cancelled in order to alleviate the financial burden. However, the question of whether the conditions of service under the UN-Common-System scheme are overgenerous in times of financial austerity must be discussed with the UN and the International Civil Service Commission (ICSC), not with an individual international organization that applies this scheme as the result of the expressed will of all its member states. A unilateral deviation from this system—in particular on a nondiscretionary item—not only would be legally questionable (at least, the Assembly would have to alter the Staff Rules and Regulations), but also would be fatal for the Court because it would make the only permanent international criminal court in the world a second-class employer. The Court would be offering less favorable conditions of service than the two UN ad hoc Tribunals as well as the Mechanism for International Criminal Tribunals (MICT),[193] the most immediately comparable institutions, or any other UN mission or agency applying the UN Common System. In short, the ICC would run the risk of deterring the best available talent.

Provisional Internal Rules and Regulations of the International Criminal Court: Inter-Sessional Meeting of Experts Held at The Hague From 11 to 15 March 2002, U.N. Doc. PCNICC/2002/INF/2, annex I (Mar. 21, 2002).

190. Int'l Criminal Court, Assembly of States Parties, 1st Sess., Sept. 3–10, 2002, *Participation of the International Criminal Court in the United Nations Joint Staff Pension Fund*, ICC Doc. ICC-ASP/1/Decision 3 (Sept. 9, 2002), *available at* http://legal.un.org/icc/asp/1stsession/report/english/annex_iii_e.pdf.

191. Int'l Criminal Court, Assembly of States Parties, 4th Sess., Nov. 28–Dec. 3, 2005, *Staff Rules of the International Criminal Court (Annex to ICC/AI/2005/003)*, rs. 103.2 & 103.3, ICC Doc. ICC-ASP/4/3 (Aug. 25, 2005) [hereinafter Int'l Criminal Court, Staff Rules], *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/vademecum/vademecum/Staff%20Rules.pdf. As the Staff Rules were approved by the Assembly of States Parties, so was the alignment with the UN Common System.

192. Int'l Criminal Court, *Programme Budget for 2012, supra* note 177, pt. I.

193. The UN Security Council established the MICT on December 22, 2010, "to carry out a number of essential functions of the [ICTR and the ICTY] after the completion of their respective mandates" in July 2012 and July 2013, respectively. *About*, UNITED NATIONS MECHANISM FOR INT'L CRIM. TRIBUNALS, http://www.unmict.org/about.html (last visited Nov. 16, 2013).

As a member organization of the pension fund, the Court has assumed all obligations and responsibilities under the UNJSPF regulations, including the obligation to adhere to the common standards, methods, and arrangements that are applied to salaries, allowances, and benefits for international civil-service staff.[194] Salaries, benefits, and pensionable remuneration scales must thus be those in force within the Common System as determined by the ICSC and approved by the General Assembly.

Although there is no alternative to applying the UN Common System (because the UN Common System is the only existing worldwide scheme for employment of international staff and has become the de facto standard for international civil service that operates globally), the system does have some elements that are not necessarily favorable. The system is quite rigid, and does not allow for tools commonly used in corporate human resources, in particular performance-based pay such as bonuses or other incentives. However, the ICC has always striven to be effective and result-oriented in order to attract the best candidates to the best jobs. One practical example is that the ICC does not request a formal test if a staff member from the general service category wants to apply for a position in the professional category.[195]

Other elements such as the Court's performance-appraisal system or the length and conditions of contracts have been subject to managerial practice that, again, was inspired by the practice of UN or other Common System members. Recently, the Court has formalized these practices in Administrative Instructions in order to create more certainty and transparency within the system, which is of particular benefit to the institution's employees.[196]

B. Administrative Accountability of the Court Vis-à-Vis the Assembly

As previously outlined, the Registrar, being the principal administrative officer, exercises his role under the authority of the President.[197] However, there is no direct link to the Assembly, which itself provides management oversight over the President, the Prosecutor, and the Registrar.[198] More importantly, the Assembly decides on the budget for the Court,[199] and therefore, as a practical matter, defines the scope of activities and resources of the Court. It seems unusual that the Assembly can exercise budgetary authority over the Court, but

194. Int'l Criminal Court, Staff Rules, *supra* note 191, ch. III.

195. *Id.* at r. 103.9.

196. *See* Int'l Criminal Court, Registry, *Probationary Period and Performance Appraisal*, ICC Doc. ICC/AI/2013/004 (Apr. 5, 2013), *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/vademecum/AI/Probationary%20period%20and%20performance%20appraisal.PDF (amending Int'l Criminal Court, Registry, *Duration and Extension of Fixed-term Appointments Against Established Posts*, ICC Doc. ICC/AI/2013/005 (Apr. 5, 2013), *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/vademecum/AI/Duration%20and%20extension%20of%20fixed-term%20appointments%20against%20established%20posts.PDF).

197. Rome Statute, *supra* note 1, at arts. 38(3)(a) & 43(2).

198. *Id.* at art. 112(2)(b).

199. *Id.* at art. 112(2)(c).

has no finer tool at hand for expressing whether the President, the Registrar, or the Prosecutor have fulfilled their respective obligations in administrative—and in particular in financial—matters. In other words, even if matters in those areas were to go grossly wrong, the Assembly, despite having budgetary authority and broad oversight over the Court's administration, has no narrower means to correct things. It cannot, for example, replace the officials in charge where necessary. The Assembly can only remove an official from office pursuant to the strict criteria in article 46 of the Rome Statute. One of the article 46 criteria is serious misconduct, and neither that article nor the corresponding rules 24 and 25 of the RPE mention administrative or financial mismanagement as serious misconduct.[200]

The discussion over many years on the creation as well as the—as of 2014, effective—operationalization of an independent oversight mechanism (IOM)[201] may finally provide a solution. In 2013, the working group has focused not only on procedural and practical questions regarding the establishment and general mandate of an oversight mechanism, but in fact submitted an *Operational Mandate of the Independent Oversight Mechanism* to the ASP.[202] The possibility of an investigation regarding (serious financial) mismanagement by the heads of organs could arguably be covered by the IOM's mandate.[203]

Further ways could be found to strengthen the position of the budgetary authority while at the same time preserving the independence of the Court and its organs, most importantly the judicial and prosecutorial independence. One model for such a strengthened position of the budgetary authority could be the EU Parliament's procedure for discharging the EU Commission (and, by analogy, the directors of the EU agencies).[204] Although the parliament does not appoint or remove the commissioners or the directors of the EU agencies, it can, by granting or refusing the discharge, formally confirm the legality and regularity of all financial transactions[205] and thus express its judgment that financial management has been exercised in accordance with the legal framework. The Parliament's observations on financial-management legality take on practical importance because it is the obligation of the institution under

200. Further, neither article 46 of the Rome Statute, *supra* note 1, nor rules 24 and 25 of the ICC RPE, *supra* note 8, explicitly provide for the removal of the President from office; however, because the President and both Vice Presidents are judges of the Judicial Divisions, the removal in their judicial function is implicitly encompassed in those provisions. Rome Statute, *supra* note 1, at art. 46; Int'l Criminal Court, RPE, *supra* note 8, at rs. 24 & 25.

201. It is expected that the Independent Oversight Mechanism, foreseen in art. 112(4) of the Rome Statute, *supra* note 1, will be operationalized by the ASP in its twelfth session. *See* Int'l Criminal Court, Assembly of States Parties, 12th Sess., Nov. 20–28, 2013, *Report to the Bureau on the Independent Oversight Mechanism*, ICC Doc. ICC-ASP/12/27 (Oct. 15, 2013), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-27-ENG.pdf.

202. *See id.* at app., pt. II.C.

203. *Id.* at app., ¶¶ 27–30.

204. Council Directive 1605/2002, Financial Regulation Applicable to the General Budget of the European Communities, art. 145, 2002 O.J. (L 248) 1, 34 (EC).

205. *Id.* at art. 146(2).

discharge to take action on those observations.[206] This ensures that recommendations of the auditors or the Parliament itself do not remain unimplemented. After all, an official's refusal to discharge a commissioner or director in the wake of a parliamentary recommendation to do so would manifest a serious mismanagement, and would consequently require action by those in charge of removal from office or disciplinary proceedings against the official concerned. Such a discharge procedure could be implemented in the Financial Regulations and Rules of the Court, namely through an amendment of financial regulation 12, which addresses the Court auditor's financial statements and accounts. An amendment of the Statute would arguably not be necessary because the discharge procedure would not alter any responsibility regarding the election and removal of Court officials.

C. Ability to Improve the Efficiency of its Judicial Proceedings

Judicial proceedings in an international criminal trial are by definition immensely complicated. For one, they encompass elements of the world's leading procedural systems and philosophies. Moreover, the nature of crimes concerned and the position of the most responsible perpetrators is often far removed from the physical commission of crimes. This makes proceedings complex and extensive, at times involving hundreds of witnesses, thousands of pages of relevant documentary evidence, and a plethora of procedural issues subject to interlocutory motions and litigation. In such an environment, it is important that the Court retain the capacity to react to systemic problems inherent in the procedural framework in an expedited manner in order to keep proceedings fair, efficient, streamlined, and expeditious. One way to achieve this would be to amend the procedural framework using the statutory means available. Article 51 of the Rome Statute provides that the ASP is responsible for adopting or amending the Court's RPE.[207] At the ICC, States Parties have clearly deviated from the practice of the UN ad hoc Tribunals, where it is the responsibility of the judges in plenary session to amend the Tribunals' RPE. At the ICTY, ICTR, and SCSL, judges have made extensive use of this statutory right[208] on many occasions.[209] This has led to a dynamic and efficient refinement

206. *Id.* at art. 147(1).

207. *See* Rome Statute, *supra* note 1, at art. 51(2).

208. ICTR Statute, *supra* note 25, at art. 14; ICTY Statute, *supra* note 25, at art. 15; SCSL Statute, *supra* note 39, at art. 14; *see also* Int'l Criminal Tribunal for the former Yugoslavia, RPE, *supra* note 87, at r. 6.

209. For example, the ICTY RPE have been amended approximately forty-seven times since their adoption on February 11, 1994. *See Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sid/136 (last visited Sept. 28, 2013). The ICTR Rules of Procedure and Evidence have been amended more than twenty times since their adoption on June 29, 1995. *See Rules of Procedure and Evidence*, INT'L CRIM. TRIBUNAL FOR RWANDA, http://www.unictr.org/Legal/RulesofProcedureandEvidence/tabid/95/Default.aspx (last visited Aug. 3, 2013). Finally, the SCSL's Rules of Procedure and Evidence have been amended fourteen times since their adoption on January 16, 2002. *See* SCSL, *Rules of Procedure and Evidence*, *available at* http://www.sc-sl.org/

of the UN ad hoc Tribunals' as well as the SCSL's rules, reflecting the growing wisdom and lessons learnt from their daily application in the courtroom.

Although it is understandable that States Parties want to keep a higher level of control over the more detailed and complex rules of procedure and evidence applicable at the Court, with this desire comes a certain lack of flexibility. Any change or amendment of the Rules must be proposed to the Assembly by either a State Party, an absolute majority of the judges (which would in itself already suffice for an amendment of a rule at the ad hoc Tribunals),[210] or the Prosecutor. Subsequently, a two-thirds majority of the members of the Assembly is required for a change's adoption.[211] Because the Assembly meets in ordinary session only once per year in November or December, any amendments can therefore be reasonably expected only at a yearly interval, and only *if* all procedural steps can be taken in time.

At the conclusion of the Court's first criminal case in *Prosecutor v. Lubanga,* and in light of the judicial and prosecutorial experience gained over the lifetime of the Court, the judiciary started a systematic "lessons learnt" exercise.[212] The exercise is aimed at identifying potential improvements in the Statute, Rules, Regulations, and judicial practice in order to increase the efficiency of the Court's judicial process as a whole. Specific conclusions and amendments to the Court's legal framework where necessary are likely to emerge progressively over the years. This initiative will ensure that the Court retains the capacity to react to perceived inefficiencies in its current procedural framework on the one hand and to the dynamic development of international criminal law on the other. From a practice perspective, this initiative is highly relevant because it represents the judges' self-reflection on their practices in and around the courtroom to date. The classification of potential practice modifications—into those that will require a rule change versus those that merely require a common agreement amongst the judges affected—is reflective of the unique environment that the Court represents. Rules and practices need to be constantly tested for their legitimacy and effectiveness. If and when processes are ineffective or inefficient, the institution has to find a solution, often

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LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176 (last amended May 31, 2012).

210. *See* Int'l Criminal Tribunal for the former Yugoslavia, RPE, *supra* note 87, at r. 6 (requiring an agreement by "not less than ten permanent Judges at a plenary meeting of the Tribunal"). Pursuant to article 12(1) of the ICTY Statute, *supra* note 25, the Chambers are composed of a maximum of sixteen permanent judges. The ICTR has a similar arrangement. *See* sources cited *supra* notes 25, 209.

211. Rome Statute, *supra* note 1, at art. 51(2). However, in urgent cases, when the present rules do not provide for a specific situation before the Court the judges may, by a two-thirds majority, draw up provisional rules to be applied until adopted, amended, or rejected at the next ordinary or special session of the ASP. *Id.* at art. 51(3).

212. Int'l Criminal Court, *Study Group Lessons Learnt Report 2012*, *supra* note 17; Int'l Criminal Court, Assembly of States Parties, 12th Sess., Nov. 20–28, 2013, *Study Group on Governance: Working Group on Lessons Learnt: Second Report of the Court to the Assembly of States Parties*, annex I.A, II.A., ICC Doc. ICC-ASP/12/37/Add.1 (Oct. 31, 2013), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-Add1-ENG.pdf.

involving a multitude of stakeholders.[213] In the same vein, the current "lessons learnt" exercise at the Court involves not only the judges as the driving force, but also the OTP, the Registry, and counsel before the Court.[214] Further, it is being facilitated in close cooperation with the ASP.[215] Finally, the exercise represents an illustrative example of how the Court has grown into a mature organization, analyzing its administrative, managerial, and legal practices, and creating appropriate bodies in order to harmonize its institutional framework with established operational practices.

IV
CONCLUSION

The Court's legal and institutional framework provides the senior managers of the institution with clear guidance as regards the general pillars and foundational arrangements. However, many areas that were left unregulated at the outset have required managerial practice over time to establish appropriate informal structures, procedures, and *modi operandi* on a variety of different topics, on both an in*tra-* and in*ter*organ level. Further, the Rome Statute and other legal texts issued by the Assembly defining the Court's institutional framework contain some ambiguous provisions, which has left the Court with the daunting task of finding the practically achievable arrangements that best approximate optimal arrangements within the confines of the Rome Statute system. Most prominently, the institutional and governance arrangements between the organs of the Court evidence the intelligence of a managerial practice that has made the best of its inherent features: Arrangements are often of an informal nature, leaving the stakeholders with a sufficient degree of flexibility to react to new challenges while at the same time fostering a regulatory framework that may lead to a more solid codification if and when a codification would be suitable. The specific—and managerially complex—institutional layout of the ICC with its three organ heads involved in complex

213. For instance, the Court's Advisory Committee on Legal Texts, which considers the details of amendments to legal provisions applicable in the Court's proceedings, consists of representatives from the Judiciary, the OTP, Registry, and Counsel. *See* Int'l Criminal Court, Regulations of the Court, *supra* note 9, at regulation 4(1).

214. Int'l Criminal Court, *Study Group Lessons Learnt Report 2012*, *supra* note 17, § I ¶ 7. The lessons learnt initiative is facilitated and coordinated internally by the Presidency of the Court. Judge Sang-Hyun Song, President, Int'l Criminal Court, Statement to the Committee on Juridical and Political Affairs of the Organization of American States 7 (Apr. 12, 2013) (transcript available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr897/130412-ICC-President-Remarks-to-OAS.pdf).

215. The liaison between the Court and the assembly is facilitated in a separate "cluster" in the assembly's subgroup to its Hague Working Group, the so-called "Study Group on Governance." *See* Int'l Criminal Court, Assembly of States Parties, *Establishment of a Study Group on Governance*, Res. 2, ICC Doc. ICC-ASP/9/Res.2 (Dec. 10, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.2-ENG.pdf; *see also* Int'l Criminal Court, Assembly of States Parties, 11th Sess., Nov. 14–22, 2012, *Report of the Bureau on the Study Group on Governance*, ¶ 10, ICC Doc. ICC-ASP/11/31 (Oct. 23, 2012), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-ENG.pdf.

and multiple interrelations has evidenced over the past decade that, in the case of a novel institution, managerial practice can be conducive to a relatively swift definition of (near-)optimal arrangements in the many different areas of interactions. Also, *despite* an occasional lack of clarity as to what the overarching arrangement should be, managerial practice has proven to be instrumental in keeping the Court's operations going while the organ heads try to sort out institutional obstacles and disagreements.

With regard to the institutional arrangements of the Court as outlined in the Statute, managerial practice in the execution of statutory exigencies has validated a number of underlying strategic and institutional assumptions: The institutional and administrative independence of the Prosecutor has proven to be preferable to the initial setup of the UN ad hoc Tribunals wherein the Prosecutor was partially dependent on the Registry, both operationally and administratively. The institutional setup between the President, the Prosecutor, and the Registrar, with the latter operating under the President's guidance and authority, has, together with the establishment of the Coordination Council, proven to be a better model than having a Registrar appointed by and accountable to an authority outside the Court.

The cost of an international court is high, and growing budgets, particularly in times of financial austerity, are of great concern for funding entities, in the case of the ICC, the States Parties to the Rome Statute. Internal governance and (budgetary) control tools like the management control system, the Office of Internal Audit, and measures to increase "analytic accountability" (for instance by providing a methodology of cost accounting and cost planning) are steps in the right direction. However, they do not mitigate the unpleasant fact that international criminal justice comes with a price tag,[216] particularly when the underlying legal framework requires the strict application of high legal standards.

With the Court becoming a more and more mature institution and with a budget implementation level nearing one hundred percent, the Court's flexibility depends on the availability of contingency funds. In the absence of these funds, the Court would not be able to react in a timely manner to situations brought before it, if it reacted at all. As desirable as the referral of yet another situation by the UN Security Council would be for the legitimacy, perception, and universal reach of the Court, if such a referral does not include a cost solution it will potentially do more harm than good for the Court. Solutions must be found in the future, and the extent of States Parties' willingness to support and fund the Court will be the decisive factor.[217]

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216. Bergsmo & Harhoff, *supra* note 31, at 975, ¶ 12.

217. The UN General Assembly, recalling the Security Council's referrals of situations to the Court, invited all States to consider contributing funds to cover the Court's investigation- or prosecution-related expenses, including expenses in connection with situations referred to it by the UN Security Council. Press Release, UN General Assembly, General Assembly Welcomes Inter-Parliamentary Union's Strengthened Support to UN; Encourages Close Cooperation in Peace and

All in all, the Court has steadily improved structurally and performance-wise over the years. Some deficiencies may already have been neutralized by senior management, and others will continue to be a challenge for the institution. For these remaining items, there are no quick fixes—solutions must be well thought-out and need to be sustainable. As a principle, anyone proposing for a change in the Court's administrative and institutional framework should bear the burden of proof that the proposal will improve matters. In that regard, a simple three-prong test can be applied to all proposals: Would their implementation allow the ICC to perform its functions (1) quicker, (2) with higher quality results, and (3) with fewer resources? If there is any doubt that at least one of the three elements will be met, the Court should tread carefully. It is hoped that current efforts to improve the OTP's efficiency as well as the Registry's current structural layout[218] will be guided by these criteria.

Managerial practice will remain an essential driver in optimizing processes at the Court and in verifying whether the regulatory framework may need amendments in order to increase performance. In particular, a dynamic institution like the ICC with its internal and—increasingly—external pressures and challenges needs the comfort level that comes with coordinated internal flexibility within the boundaries of its institutional framework and statutory mandates. Managerial practices can provide some powerful tools to achieve this objective.

Security, Development, Human Rights, U.N. Press Release GA/11245 (May 29, 2012); *see also* Judge Sang-Hyun Song, President, Int'l Criminal Court, Remarks at United Nations Security Council Open Debate: Peace and Justice with a Special Focus on the Role of the International Criminal Court (Oct. 17, 2012).

218. *See* Int'l Criminal Court, Assembly of States Parties, 12th Sess., Nov. 27, 2013, *Programme Budget for 2014, the Working Capital Fund for 2014, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2014 and the Contingency* Fund, Res. 1, pt. H, ¶¶ 2–3, ICC Doc. ICC-ASP/12/Res/1 (Nov. 27, 2013), *available* at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res1-ENG.pdf; OFFICE OF THE PROSECUTOR, STRATEGIC PLAN, *supra* note 187, ¶¶ 96–100.