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International Criminal Court

VALEDICTORY STATEMENT AND END OF MANDATE OVERVIEW

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[Including oral remarks delivered at the opening of the Session on 14 December 2020]

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Mr President and Vice-Presidents of the Assembly

Esteemed Heads of Delegations and Delegates

Madam Prosecutor

Mr Registrar

Madam Chairwoman of the Board of Directors of the Trust Fund for Victims

Excellencies

Ladies and gentlemen

It is an honour for me to address this Assembly for the third time during my mandate as President of the International Criminal Court.

This is the last time I will do so, as I approach the end of my term on 10 March next year.

I regret that due to Covid19 protocols, which the Court has continued to maintain in relation to physical gatherings, I am constrained to deliver this speech remotely, rather than by physical presence. At the Court, we also have had to use online remote appearances, in order to limit the number of people physically present in the courtroom during hearings. The rate of infections in the Netherlands has continued to go up, as it has in other countries. Although the Dutch Government's Covid19 rules exempt international organisations from holding meetings of more than 30 people in one physical space, it is always prudent to construe that exception in the light of the general rule that people should work remotely where possible, except where it is impossible to operate remotely. Here, it is possible to deliver the speech remotely—just in the same way that I was able to deliver remotely my annual speech to the UN General Assembly.

I. Gratitude

As this is my valedictory speech, it would be ideal to use the opportunity to review some of the achievements of the past three years when I served as the President of the Court, and reflect on some other areas where more work needs to be done. I could not do justice to that discussion in the allotted time of just 10 minutes reserved for the oral statements. I therefore engage in that fuller discussion in this written version of my statement.

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Suffice it to say now that I leave the Court with a sense of immense gratitude to all of you who gave me support and understood what drove me, both at the personal level and in my efforts to serve the Court's mandate. I have received immense support and encouragement from the

Secretary General and Deputy Secretary General of the United Nations, and various members of their Senior Management Team; Heads of State and of Government of many States; Cabinet Ministers of various States and their senior colleagues in governments; the ASP Presidency and Secretariat; Ambassadors here in The Hague and in New York, and their colleagues in the various missions; the Vice Presidents of the Court, my fellow Judges, the Prosecutor, the Deputy Prosecutor, the Registrar, staff of the ICC; counsel before the Court; members of civil society; academics of various countries—not only in countries that are States Parties to the Rome Statute, but also in countries that are not yet States Parties. I am bound to note in this regard that some of the strongest support and encouragement that I have received has come from academics in the United States.

For all this support and good will, I shall remain forever grateful. It is certainly true that the three years have been very exhausting at times, and there have been episodes of bottomless frustration, for which it is tempting to feel relief at the sight of light at the end of the tunnel.

All that pales in comparison to the immeasurable privilege of having served the Court as its President for the past three years and as a judge for nine. The experience has been infinitely rewarding, and I feel truly blessed to have had the chance.

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A few of you may already know this story, but many of you do not. 53 years ago, a four-year old boy was caught up in a brutal civil war in which many innocent human beings lost their lives. At the time of that war, that little boy had not yet started formal schooling, let alone harboured any dreams of his own to become a lawyer later in life.

Today, that little four-year old boy is a middle-aged man, humbled by the privilege of saying to you: thank you very much for giving me an opportunity to serve as a judge and as the President of this international court—a primary instrument for peace and human dignity in our world.

As I take my bow, I will pledge to you my commitment to seize every opportunity available to me to continue to advocate for support and strengthening of this Court, in order that it can continue to strive to achieve its fullest remit as an instrument of peace and human dignity in every corner of our world.

II. Some of the Achievements

In reviewing some of the achievements during my tenure as President, and reflecting on some other areas in need of more work, it is fair to say that there was never a dull moment—positive or negative—in the last three years.

Improved Understanding in Africa

The foremost goal that I had in mind to tackle, as President of the Court, was to foster greater public understanding of the Rome Statute, the Court and its work: in order to encourage greater

State cooperation, not only amongst the States Parties that have been indicating a crisis of confidence in the Court, but also to encourage more States to accede to the Rome Statute.

When I arrived at the Court, the primary issue of State cooperation confronting the Court concerned ruptured relations with the African Union. That rupture dated back to 2009, long before my arrival at the Court. The AU had adopted a resolution forbidding African States from cooperating with the Court in key aspects of its work. The rupture continued to expand in troubling ways that affected other aspects of cooperation. At about 2015, things took the urgent turn of a strident agitation for an AU resolution for the mass withdrawal of the 34 African States comprising the largest regional bloc of Parties to the Rome Statute.¹

The primary reason that I offered to serve as the Court's President in 2018 was the need to engage with African States in a manner that would resolve this difficulty, but do so without compromising the Court's proper mandate in any way whatsoever. I had some specific ideas that I thought we should explore.

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As I leave the Court, I am happy to report that due to coordinated and deliberate efforts made by all of us at the Court in the last three years, relations with African leaders have vastly improved. There have been no more talks of mass withdrawal. As part of those efforts to improve relations, I extended an invitation to His Excellency **President Muhammadu Buhari** of Nigeria, to visit the Court on the 20th Anniversary of the adoption of the Rome Statute, in July 2018. He attended and gave a most magnificent keynote speech. In it, he urgently reminded the world of the continuing value of the Rome Statute, and he urged all states to ratify the Rome Statute as a matter of priority in foreign policy, if they had not already done so. That call fully retains its urgency, even as I leave the Court.

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Notably, the next year, 2019, President Buhari reciprocated the gesture of goodwill, when, as the Chairperson of the Authority of Heads of State and Government of the Economic Community of West African States, he invited me to address their gathering. It was the first such invitation ever extended to an ICC President. Beyond my speech, I held bilateral meetings with many of the Heads of State who attended the conference, during which they expressed appreciation for the Court's work.

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During the hearing of the Appeals Chamber in the *Al-Bashir Immunity* Case, the Legal Counsel of the African Union participated in the hearing with a team of lawyers and made submissions, as some of the *amici curiae*. In the particular context of that event, it is not necessary to put too fine a point on what the term *amici curiae* means in Latin. Nevertheless, it was significant that the

¹ Currently, there are 33 African States Parties to the Rome Statute, Burundi's withdrawal having taken effect on 27 October 2017.

AU accepted our invitation to appear before the Court and made submissions, after many years of extremely limited formal contacts with the Court.

In June 2019, I also attended a sensitisation seminar organised in Addis Ababa between the ICC and State representatives to the African Union. It was the first such visit by the President of the Court. Many of the Ambassadors who attended the event were very generous in their appreciation of the ICC's work.

All these developments resulted from carefully coordinated efforts, in which the senior leadership of the Court, especially the Prosecutor, fully played their own part.

Accessions to the Rome Statute

During the last three years, we also gained Kiribati as a new State Party, following their accession to the Rome Statute on 26 November 2019. Upon my assumption of office in March 2018, I immediately joined the efforts already afoot to encourage **Kiribati** and other States (not yet parties) to accede to the Rome Statute. To that end, I must express immense gratitude to **H E Mr Taneti Maamau**, the **current President of Kiribati** and **H E Mr Teburoro Tito** (the **former President of Kiribati** and current **Permanent Representative** of Kiribati to the United Nations), for granting me a succession of meetings in 2018 to discuss and encourage Kiribati's accession to the Rome Statute. I also express gratitude to the officials of another State from that region with whom I met for the same purpose. I must commend **Parliamentarians for Global Action** who had been long engaged in sustained efforts to encourage increased accession to the Rome Statute, including with regard to Kiribati.

Kiribati's accession to the Rome Statute brought much consolation to the Rome Statute supporters, in the wake of Malaysia's deposit of instrument of accession on 4 March 2019, followed shortly by Malaysia's announcement of withdrawal of the instrument on 5 April 2019, a month before the accession took effect. As with Kiribati's accession, much effort was invested by civil society and successive Presidencies of the Court to encourage Malaysia to join the Rome Statute. Following Malaysia's withdrawal of her instrument of accession, resulting from domestic questions about the implications of the accession, I planned an official visit to the country, in order to assist with public education—and answer questions—about the Court and to allay the concerns that had been indicated as the reason for the withdrawal. Regrettably, I had to cancel the visit shortly ahead of its due date, because of the Covid19 pandemic and travel restrictions introduced by various countries.

As indicated already, one of my cardinal objectives in offering to serve as President was to promote better understanding of the Court and the Rome Statute, not only in hopes of correcting misinformed views of the Rome Statute, the ICC and its work, but also with the view to encouraging increased accession to the Rome Statute. To that end, I had several other bilateral meetings with Heads of State and Government and senior officials of States not Parties to the Rome Statute, at the margins of the UN General Assembly and other places. I received several invitations for State visits, in order to engage with different national stakeholders. Unfortunately, those travel plans also had to be cancelled due to the pandemic.

Improvements at the Court

The second reason that I offered to serve as President was to try to lead efforts in needed improvements in the management and judicial processes of the Court, however small or farther reaching. A key aspect of those improvements concerned the wellbeing of staff and their sense of belonging in the institution that they serve. One of the first things we did under my tenure was to introduce, for the first time, the practice of holding periodic **Town Hall** meetings. The idea is that all officials and staff of the Court should gather in one place every six months and share views, concerns and some bonding time. We were able to do this in person, before the pandemic intervened. But, we didn't allow Covid19 to defeat us. We took the Town Hall online, as we have done with some aspects our judicial hearings, and as is the case with much of the ASP session this year.

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It was also in the last three years that the Court had its first staff wellbeing survey. An effort to gauge precisely how the staff feel about different aspects of their working life, so that appropriate measures could be taken to address reasonable concerns.

One of the troubling concerns that we picked up from the survey concerned interpersonal relations all across the Court, specifically in the manner of bullying and harassment. I note here that a significant aspect of the report of the Independent Expert Review recently conducted on the Court reiterated the same concerns. It is a clear signal that we must do better.

Bullying and harassment do occur in almost every workplace. At the ICC, they remain aberrant behaviours. We do not allow them to become the norm—or the workplace 'culture' at the ICC. It would be false to claim zero-occurrence. But, we have a zero-tolerance for such odious behaviours.² They are not the culture at the ICC. A culture suggests general acceptance or licence. Then again, bullying and harassment need not rise to the level of 'culture' to compel the need to deny them all possible room. At the ICC, we are not free to plead only the excuse that bullying and harassment occur in almost every workplace. We have an obligation to continue to strive to ensure an atmosphere in which everyone at the Court feels safe to work there. Staff must have unquestioned confidence in the available avenues for addressing any inappropriate behaviour, so that it does not remain unreported and unaddressed.

Immediately following the results of the workplace survey, we commenced a programme of focused attention on the problem of bullying and harassment. For instance, the very next retreat of Judges was held with staff of the judiciary—for the first time. At that retreat, we invited a professional who led a training session on the subject of bullying and harassment in the workplace. This was in addition to similar trainings held in various sections of the Court, one of

² In the nature of things, there will always be the occasion when a superior must require a subordinate to do their work, to do it on time, and to do it as preferred by the superior rather than by the subordinate. For those and other reasons, conflicts and difficulties are frequent occurrences in human relationships—even in the workplace. But, such occurrences warrant neither bullying or harassment nor claims of such behaviour that is unsupported by the facts.

which I had also personally attended. The Court shall continue to hold sensitisation trainings on the subject.

I have initiated discussions with the Prosecutor and the Registrar on how to further strengthen the existing mechanisms concerning bullying and harassment, and whistle-blower protection.

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Earlier this month, we took an important step toward making the Court a more equitable and respectful workplace. At the Court's Coordination Council, we took a decision to create a Focal Point on Gender Equality for the Court. We expect to conduct the recruitment for this important new position very soon.

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Another milestone that I must recall here was that in 2019, Judges of the Court adopted a set of guidelines on time limits for the rendering of judgments and key decisions. This was indeed a significant achievement for the Court. While it is true that such guidelines do indeed exist in some States, many other States do not have them. More importantly, this was the first time that an international court of law adopted such a set of guidelines.

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Still on the positive achievements of the last three years, I must count the **Independent Expert Review** among the defining achievements at the Court during my tenure as President.

There is no paradox in the suggestion that it is a positive achievement, as it were. The Court itself volunteered for the Review. No one imposed it upon the Court against our will. I personally was a strong and primary advocate of it. I am grateful to my colleagues in the Court's **Coordination Council** for welcoming the idea with an open mind, when I first urged it to them.

Why did we volunteer for it? You have heard me say many times that the Court, like any human institution, is not perfect, and must strive for continuous improvement. We do not accept the proposition that there is a judicial system anywhere in the world that needs no improvement. On the international stage, there have been review reports that identified areas in need of improvement at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda,³ the Special Court for Sierra Leone,⁴ the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Section of the State Court in Bosnia-Herzegovina, the Special Panels for Serious Crimes in East Timor, and the Special

³ See UN General Assembly, Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Doc No A/54/634 of 22 November 1999, see [here](#); and UN General Assembly, Security Council, Evaluation of the methods and work of the International Tribunal for the Former Yugoslavia, Doc No A/70/873-S/2016/441 of 12 May 2016, see [here](#).

⁴ Special Court for Sierra Leone, Report on the Special Court for Sierra Leone - Submitted by the Independent Expert Antonio Cassese, 12 December 2006, see [here](#).

Tribunal for Lebanon.⁵ Some of the oldest and most experienced legal systems in the world have continued to need justice sector reforms in order to serve their communities better and improve public confidence in the judicial systems. This is the case in the Netherlands (the Court's host country),⁶ in the United Kingdom⁷ and in the United States⁸ (two of the oldest models amongst contemporary justice systems of the world) and in Europe generally.⁹ That is to say, the ICC is not alone as a justice system in continual need of improvement.

We did not invite the review out of a concern that our own needs for improvement are greater or more numerous than those of any other human institution or judicial system. Rather, our need to invite the review upon ourselves was compelled by our own desire to confront in good faith longstanding questions about possible steps that could be taken, growing pains as it were, to strengthen the Court by improving its operations—both at the Court and at the ASP levels—for better delivery of justice for the victims of atrocities. Rather than continue to engage in piecemeal reforms as we had done all along at the Court, a comprehensive review was deemed more desirable.

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I have had occasion, in the past, to recall that as my colleagues and I were discussing whether we should do a review, the concern was raised that the exercise may attract unpleasant attention to the Court and may be politicised. Fully acknowledging those concerns, we remained of the view that the exercise will be good for the system in the long run—if done right and appreciated in the proper light. Naturally, anyone needing a root canal would find it a painful procedure. Done right, however, it is wholly worth the pain. Whether or not the surgeon drilled well enough is a worry to be dealt with on its own merits.

On that note of pain, it helps to keep in mind the well-known phenomenon that psychologists call '**negativity bias**' or '**negativity effect**'. When things are of equal substance or intensity, those that strike a chord of negativity tend to be more successful in arresting imagination and dominate attention: more so than the neutral or positive elements. Tabloids that peddle salacious rumours and gossips about the peccadillos of the high and the mighty do better business than journals that tell pious tales of angels and saints. And the one unkind act or critical word (even in constructive criticism) resounds much more than a lifetime of the kindest treatment and the most uplifting compliments.

⁵ See the International Center for Transitional Justice, *Committing to Justice for Serious Human Rights Violations Lessons from Hybrid Tribunals* (2018), see [here](#).

⁶ Stejn Franken, 'Finding the Truth in Dutch Courtrooms: How does one deal with miscarriages of justice' see [here](#).

⁷ UK National Audit Office, *Efficiency in the Criminal Justice System* (2016), see [here](#); UK National Audit Office, *The Criminal Justice System Landscape Review* (2014), see [here](#). Also see [here](#).

⁸ See Centre for American Progress, *Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts* (2019), see [here](#).

⁹ The need for continual improvements in the quality and efficiency of the European judicial systems, thereby strengthening the court users' confidence in those systems, led the Committee of Ministers of the Council of Europe to establish the European Commission for the Efficiency of Justice (CEPEJ) in 2002. It was an initiative of the European Ministers of Justice who met in London (2000). See [here](#)

We must keep that phenomenon of **negativity bias** firmly in mind as we read and process the IER report. There will be those who will see the report as a litany of negativity about the Court. Observations that suggest shortcomings and wrongful conduct will be latched upon, generating much excitement. Such contents in the IER report will bring obvious joy to the Court's detractors who will readily weaponise them in their political attacks against the Court. They will depress the Court's best well-wishers. But that is to misunderstand the point of the exercise.

When my colleagues and I volunteered to invite the independent review, our purpose was to strengthen the Court. Great care must now be taken by all to avoid the review being used to achieve precisely the opposite effect. It is a gross error either to politicise the report or to weaken the Court's independence—intentionally or unwittingly.

The ICC is a strong force that betters the lot of our humanity and our shared civilisation. It has done much to acquit itself in that regard. The Prosecutor has been resolute in insisting that inquiries, investigations and resulting prosecutions must take place, whenever there is credible reason to engage such processes. The Judges have repeatedly rendered judgments that insist that accountability must not bow to power, even of Heads of States, when there are allegations of crimes that shock the conscience of humanity. It is important to stress that the IER report does not question such values and contributions of the ICC.

But, it must also be stressed that the mandate of the IER was not to catalogue the positive aspects of the ICC's work, in order to promote its value to the whole world. Their task, rather, was to examine the Rome Statute system as best they could and make suggestions about what could be done to improve the Court's performance as that force for good—within its existing legal framework and without creating danger for its independence.

It is therefore in the very nature of the exercise that it *needs* to—not should or may—be critical. Whether or not particular criticisms are truly constructive or fair or within the terms of reference is a different question. Any such complaints will be dealt with in the proper way and in due course. But the IER group would have failed in their mandate had they produced a report that tells the Court that all is well with this human institution. That was not what we wanted them to do.

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While questions linger about the thoroughness of the exercise and appropriateness of some of the observations and recommendations—for instance, see [here](#)—there is still much in the exercise that is extremely valuable for the intended purpose. The Judges of the Court have already commenced work on some matters that now form part of the recommendations from the IER report. At our retreat last month, we agreed to a set of amendments to the Judicial Code of Ethics. We also agreed to key elements for the induction of new Judges, which we are busy preparing for the arrival of new colleagues in March.

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I am also happy to report that the Judges have also adopted a set of principles applicable to the elections into the three positions that make up the Court's Presidency. It is important to note

that this matter was already pending before the Judges prior to the IER report, which also made a recommendation to that effect. A key feature of the new guidelines is the elimination of the scope for campaigning during the Presidency elections, to the extent that such campaigns come in the form of discussions amongst the Judges urging the election of a particular candidate. Henceforth, any such discussion may only take place openly in the presence of all 18 Judges of the Court. Violation will now be subject to accountability as a breach of the Court's Judicial Code of Ethics. But, why adopt the new guidelines? We did so because of the perennial phenomenon, observed since the Court's first Presidency elections, to the effect that campaigns during those elections tend to result in challenges to collegiality in the period afterward. Such challenges come mostly in the form of strained relations between colleagues. Also, following ICC Presidency elections there have sometimes been unkind rumours—whether from within or from outside the Court—the aim of which was to delegitimise the results by some who may not have liked the outcome. It is for these reasons that the Judges finally decided to adopt the new guidelines, in order to minimise the emotional by-products of passionate campaigns to win the election, either by the candidates themselves or by those supporting them.

But, I must stress that this change did not result from any sense amongst the Judges that the unsubstantiated rumours and gossips captured in relevant passages of the IER report as 'concerns' and 'suggestions' are true, in connection to the 2018 Presidency election. I take this opportunity to reassure you immediately that those are quite simply mischievous rumours and gossips, with no truth at all to them. It has become normal to encounter such rumours and gossips, and it is partly for that reason that the Judges adopted the new guidelines, in the hope of limiting the scope of their occurrence in future Presidency elections.

III. Some of the areas in need of more work

Political Attacks

Turning now to some of the areas in need of more work, I should begin by expressing pride in the resilience the Court's personnel have shown in the face of the unprecedented political threats and attacks directed against the Court within the last three years. Those attacks even came in the more acute form of coercive measures against the Court this year.

All along, the Court has stood united. We have been clear that threats and measures against any organ or official of the Court represent an attack on the institution as a whole. But, I must especially recognise the particular brunt of these attacks that the Prosecutor, **Ms Fatou Bensouda**, and one of the senior members of her staff, **Mr Phakiso Mochochoko**, have had to bear at a very personal level. That so, for no other reason than that they did their job on behalf of the Court and humanity. **Ms Bensouda**, and **Mr Mochochoko** are **martyrs of justice** to whom much gratitude is owed by this Court, its member States, and any member of the international community who cares for accountability when human rights are violated grossly.

In the face of these attacks, we have remained undeterred in the pursuit of our mandate as an independent international court of law. That insistence to remain undeterred was no mere

show of obduracy. It is important that victims of atrocities are not allowed to think that the ICC would readily abandon the ship of accountability and leave victims on their own, whenever the ship encounters the rough waters of politics. Through it all, I insisted in my messaging to colleagues and to the world that this Court was established—as we are reminded in the preamble to the Rome Statute—because ‘millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.’ We, the officials and staff of the Court, are truly not free, then, to favour the trappings of our own economic comfort over the plight of any of the victims of genocide, crimes against humanity, war crimes and the crime of aggression, at whose instance the Court was established to insure against impunity.

In my statement to you a year ago, I warned about the danger that the US threats posed, and I urged the Assembly to do all that was necessary to counter those threats. Now that the threats have materialised, the States Parties must live up to their obligation to afford the Court the political and diplomatic protection that only the States Parties can give. We believe that there remained much more that could have been done at the united front of the ASP to shield the court from these attacks and their effects.

I thank the numerous States Parties who on their own—or in groups—raised their voices in the Court’s defence during this difficult time. I urge them to continue to do all that is possible for them. I will specifically request all ICC States Parties to intercede with the incoming Biden-Harris Administration and urge them to reverse without delay the coercive actions taken against the Court, the Prosecutor and a member of her senior staff.

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As part of my commitment to make the Court better understood, I felt called upon to engage in public education, to try to contain and counter the political campaign of misinformation that accompanied these attacks and accusations against the Court. The effort involved a series of opinion pieces in some of the major news media, as well as print or audio-visual interviews. Such were the incompatibilities between the judicial function and such exercises, that I felt constrained to withdraw in advance from the appeal in the Afghanistan case, in order to engage meaningfully in the project of trying to correct the political misinformation being used to discredit the Court in the context of that case. It was indeed an extraordinary and uncomfortable step for a judge to take. But, that extraordinary step was necessary, given the attacks against the Court and its officials that were more than extraordinary.

In addition to the public education effort made in the media, I have also reached out to friends old and new to urge them to help the Court in its hour of need. More work remains. And much of it belongs to the ASP—to be done in a manner that does not compromise the mandate of the Court in any way.

Indeed, as part of the lessons learnt from the experience, it is critical that both the Court and the States Parties should set up strong structures of public communication strategies that will protect the Court appropriately and robustly from political attacks of that kind. Such an

arrangement would make it unnecessary for the President of the Court to feel called upon to do it him- or her-self.

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We do not expect the US to ratify the Rome Statute in the near future. It is important, however, to continue to stress that the ICC poses no real threat of usurpation of national sovereignty, as has been claimed as the reason for these attacks. It remains important to recall that all of America's allies in the Western world—and their NATO allies (except Turkey)—are parties to the Rome Statute. They do not see the ICC as a threat to their sovereignty, because they fully understand that the ICC cannot prosecute or adjudicate a case, as long as jurisdiction is being exercised by the country with the sovereign tie to the territory or suspect of the crime.

In this connection, please allow me to note relevant developments out of Australia in recent times. The report of a national commission of inquiry contains allegations that some Australian soldiers had committed war crimes in Afghanistan. Upon publication of that report, the Australian authorities promptly apologised. As disciplinary measures, some of the soldiers implicated in the allegation lost their employment in the Armed Forces. Additionally, the country announced that there would be prosecution. So far, these developments promise much as a correct demonstration of the doctrine of complementarity at work. There is, indeed, seldom a war in which a soldier does not commit a war crime, much to the embarrassment of their commanding officers. This is so, however disciplined the armed force in question. It is a show of leadership in the ethos of the rule of law for the national authorities concerned to conduct the appropriate inquiry and take disciplinary and prosecutorial action against the culprits. Australia deserves all the credit for the promise of being an exemplar in this regard.

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In my first statement to the ASP in December 2018, I expressed concerns about adequate funding for the Court. The theme remains important to attract my remarks again in my last speech. In my nine years at the Court, I have observed a palpable reluctance to fund the Court at the appropriate levels that would allow optimal delivery on its mandate.

As I once had occasion to say: as matter of policy, justice is good investment. And that investment is not daunting in the general scheme of things. Adam Smith once described it as ‘[a very inconsiderable part of the whole expense of government](#)’ in any civilised country.¹⁰ And, globally speaking, the investment in the ICC is indeed negligible—in the broader scheme of things. We may begin by noting that the entire annual budget of this **international court of justice** used to be much less than the annual budget of the **Police department** of Minneapolis—which is the 46th largest city in the US—until this year when a fraction of the latter budget was redirected to other municipal programmes. See [here](#).

¹⁰ Adam Smith expressed the thought more fully as follows: ‘The salaries of all the different judges, high and low, together with the whole expense of the administration and execution of justice, even where it is not managed with very good economy, makes, in any civilised country, but a very inconsiderable part of the whole expense of government’: *The Wealth of Nations* (1776) Book Five, Chapter I, part 2.

Perhaps, more interesting is that the total annual programme costs of the ICC from its inception have now (after 18 years as of this year) finally equalled (roughly) the programme cost of **\$2.1 billion** for a *single* B-2 Spirit military aircraft—known popularly as the ‘Stealth Bomber’. In 2019, the world appropriated **\$1.917 trillion** on military spending—an increase of 3.6% from the previous year. See [here](#). That is roughly ten thousand times larger than the budget of the **€148 million** of ICC’s current budget—and one of the highest figures to-date. There is much room for improvement in the Court’s budgetary appropriations.

To that end, the obligation of support that States Parties owe the Court requires the abandonment of **zero nominal growth** (ZNG) as a policy framework that many States Parties demand at budget time. The logic of the policy is readily apparent as inconsistent with the reasonable fulfilment of the Court’s mandate. ZNG is an assured way of hamstringing the Court in its work. It needs to be rejected as a welcome idea. It is entirely proper for States Parties to insist that the Court must justify its budget proposals to the penny. It is that process that should drive the outcome in budgetary appropriations; not a predetermined insistence on ZNG, even before the States Parties have had an opportunity to review the budget proposal.

Failure of Restraint in Public Criticism

As discussed earlier, the last three years saw unprecedented levels of political attacks against the Court. Those attacks were not only in the manner of threats of unpleasant actions against the Court, by those who do not wish it well. The attacks have also taken the form of a relentless campaign of calumny and disinformation against the Court. The usual trope has been a constant stream of negative commentary about ‘inefficiency’ or ‘unsatisfactory performance’, most often with no specificity. The evident aims were always to discredit the Court and shake its confidence.

Unfortunately, some (but by no means all) of the most ardent supporters of the Court often joined its detractors in that stream of constant criticism. Even amidst discussions about how to protect the Court from the latest political attacks, some of these supporters would insist on maintaining such criticisms, as if a necessary step in the direction of protecting the Court from its evident detractors. The effects in the minds of third party public and the Court remained the same. There is little consolation knowing that a loved one fell to **‘friendly fire’**, when the victim still comes home in a body bag.

Constructive criticisms born out of deep love should not be discouraged. Nonetheless, much caution is necessary to avoid a situation in which the timing and manner of such constructive criticisms may play into the hands of those who harbour no deep love for the Court because of its work. The better approach lies, then, in the wisdom of a Nigerian parable which teaches that when one happens upon an emergency, posed by a menacing predator intent on attacking one’s free-range chicken, the priority must be to save the chicken immediately; without prejudice to its later admonition for straying too far afield into the predator’s territory.

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There were times when it was difficult to resist the supposition that these criticisms from supporters had much to do with frustrations that stem from considerations beyond the need to encourage greater efficiency and better performance. It is known that some States representatives were greatly frustrated by the Registry during the period of 2015-2018 (for questions of timely disclosure about cost overruns on the permanent premises, the cost of the *ReVision* exercise, and for what they perceived as excessive increase in the budget of the organ in the year immediately following the *ReVision*). There had also been frustration expressed about some preliminary inquiries, investigations and prosecutions that the Office of the Prosecutor had embarked upon. It is also well known that some delegates were especially frustrated that Judges had pressed their request for a review of judicial conditions of service, and commenced legal action when that request went unanswered (discussed more fully below). So, too, were frustrations about ‘performance’ expressed whenever a case ended with a judgment of acquittal.

It would be wrong to suggest that the foregoing factors afford the only explanations for the criticisms of suboptimal ‘efficiency’ and ‘performance’ at the Court. After all, as I mentioned earlier, many national judicial systems have faced the same criticisms in various respects.¹¹ But, it is also naïve to ignore the query whether there might have been other considerations that induced these criticisms, especially when they are made in the mass media or disseminated through social media, in circumstances in which the commentator or tweeter made a linkage to the considerations mentioned above.

Notwithstanding the good faith of these criticisms (by those who undoubtedly love the Court), they have still, in fact, combined with the deliberate campaign of political calumny launched against the Court (by those who were intent on discrediting the Court and its work).

Acquittals

It is wrong to put the Court under pressure to produce convictions in every case, lest the Court is seen as ‘not performing.’ As a judge of this Court, I have felt that pressure. It is disappointing. The attitude needs to stop. Supporters of the ICC should embrace the idea that acquittals are a normal part of the judicial process. In the movie *Nuremberg* (2000), the character of **Robert H Jackson**, the **US Chief Prosecutor** (played by Alec Baldwin) correctly expressed the proposition as follows: ‘A fair trial means an uncertain outcome. If we don’t prove the defendants’ guilt, we have to let them walk, even if we can smell the blood on their hands.’

But beyond that dramatization of that legal truism, Jackson actually left records of his views on the subject. For instance, in a classic pre-Nuremberg speech he gave to the American Society of International Law (on 13 April 1945), he said this:

The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case,

¹¹ See [here](#), [here](#) and [here](#), and [here](#).

there is no occasion for a trial; the world yields no respect to courts that are organized merely to convict.¹²

Jackson was correct to observe that courts are not organised merely to convict. They are organised to ensure accountability. To insist upon accountability is not the same thing as to insist upon conviction. In its fuller import, accountability means, first and foremost, an assurance that no one is above the law. That is to say, everyone, *regardless of their station in life*, must answer to the law. On that score, the ICC is not only one of the greatest achievements of the multilateral international order; it is truly one of the defining hallmarks of civilisation in our own age.

We only need to consider that only 18 short years ago, there was no permanent global mechanism through which individuals could have been compelled to answer to the whole world for their actions when no one dared to ask them such questions of accountability at home—because they were above the law. That, sadly, remains the case in countries that are not yet Parties to the Rome Statute, and whose situations the Security Council has proved dishearteningly unable to refer to the ICC, if atrocity crimes have apparently been committed there.

But, in those circumstances where a case is brought to the ICC, the Rome Statute does not require any particular outcome as a consequence of the judicial process at the ICC. Rather, the outcome must follow the process of the law. The critical question in that process of the law is whether the evidence proves that the accused person is guilty beyond a reasonable doubt. Proof beyond reasonable doubt does not ask whether the popular view—projected in the mass or social media or held in the community lore—has concluded that the accused person is guilty; and awaiting only the formalism of compliant judicial pronouncement. The standard of appreciation of what legal proof beyond reasonable doubt truly means is far more exacting. It is whether a reasonable person who has **actually, fully** and **fairly** reviewed the evidence on a **first-hand** basis would experience a settled feeling in the heart that the accused, a fellow human being, had committed the crimes as charged—and must be punished for it. At the ICC, the persons best placed to make that determination are the Judges who have **actually** reviewed the evidence. It is not someone who only has a part-time—or second-hand—familiarity with the evidence or the record of it, let alone someone who has none at all.

The Rome Statute does not express the functions of the Prosecutor, the Defence Counsel or the Judges in the manner of a promise—let alone an undertaking—of a conviction or an acquittal at the conclusion of the trial. The Prosecutor is required only to prosecute with vigour, tempered by a due sense of fairness and responsibility. The Defence Counsel's obligation is to be resolute in defence of their client. Counsel for victims are obligated to present the views and concerns of the victims. And, the Judges must judge impartially and according to the judicial conscience of each judge directed by their individual appreciation of the evidence and the law.

¹² Robert H Jackson, 'The Rule of Law among Nations' (1945) 19 *American Bar Association Journal* 140-141.

It is incorrect to consider that the Prosecutor or the Court has ‘failed’ or ‘succeeded’, depending on the outcome. Nor is it correct to intone that the Court is not ‘performing’ well unless the record of ‘performance’ shows that there have been more convictions than acquittals; let alone convictions in every case. The only acceptable measure of success is that an accused person was compelled to account for his or her conduct—in front of the whole world—through a transparent, fair and impartial legal process: notwithstanding that the Court may or may not accept that account as exonerating him from criminal responsibility. That is justice fully done.

The IER Review: Some Notes of Caution

Human endeavours are seldom flawless. As Professor **Stephen Hawking** famously put it, “[The universe doesn’t allow perfection.](#)” That is why we volunteered to do the review. But, the review exercise itself shares the same human fallibility. The resulting report comes with its own flaws: some minor, others major. In due course, the Court will share its detailed reaction to the observations and recommendations made in the IER report. This does not mean that the report’s recommendations may not be considered in any respect. Yet, it must be understood that some of the observations and recommendations are problematic.

For instance, one major flaw that underpins much of the report is the ‘Three-Layered Governance Model’ proposed by the consultants. The model is both awkward and inconsistent with the Rome Statute; and its implementation would require statutory amendments.

Notably, a critical aspect of the Model is the proposal of full devolution of the administrative functions to whomever occupies the position of Registrar, who should now be re-imagined as the Court’s ‘Chief Executive Officer’,¹³ reporting thenceforth to the ASP, instead of the Presidency of the Court. In line with this arrangement is the further proposal to eliminate the Secretariat of the ASP.

This set of proposals must be approached with much care. For, one thing, they would, as a practical matter, invite the reality of **split personality disorder** in the Court. But, more than that, the proposal will quickly entrench the difficulty of conflict of interest in the Registrar, in circumstances where the preferences of the ASP do not align smoothly with those of the Court. Indeed, such difficulties have occurred in the life of the Court—far more than would be wished. And, most importantly, these proposals *will*, if accepted, quickly erode judicial and prosecutorial independence—however much we may wish otherwise.

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There is a further danger. The logic of seeing the ICC as just another international organisation, whose member States ‘reasonably expect to guide and shape’ will also bring with it the logic of seeing this Court as just another international ‘political’ entity whose operations would be

¹³ Currently, the Registrar is the Principal Administrative Officer, who reports to the President of the Court. If one must speak in such corporate terms, the President of the Court would be the ‘Chief Executive Officer’, while the Registrar would be the ‘Chief Operating Officer.’

susceptible to the preferences or forbearances of powerful States or a sufficiently determined bloc.

The danger of such vision of the ICC (as just another international organisation, whose member States ‘reasonably expect to guide and shape’) should be apparent to anyone who has followed the ICC’s history since its inception, and particularly in the context of the recent political attacks against the Court. The label of a ‘political’ or ‘politicised’ court has been one of the most common epithets thrown at the ICC by those—on different continents—who have felt threatened by the Court’s processes, thus affording them a supposed justification to attack the Court in kind. Until now, the accusation has remained patently false, of course, with no objective factual or normative basis. It is best to keep it that way, if we cannot make it go away. It is unwise to lend normative credence to the accusation, by endorsing the view that the Court should be ‘guided and shaped’ by a political body.

Judges’ Conditions of Service: work in process

As I reflect upon areas in need of continuing improvement, I must use this farewell opportunity to share some reflections on a certain course of action that I felt constrained to embark upon, soon after my assumption of office as President of the Court. Many have found that course of conduct unusual in the President of the Court. Here, I must recall that the two primary reasons that I offered to serve as President remain: (i) to try to resolve the difficulty with the AU; and, (ii) operational reforms at the Court. Those remain the primary motivations.

But, there was a secondary, long-standing issue that needed urgent attention, in my view. This was the matter of judicial conditions of service. Notwithstanding its secondary nature, it is still a very important matter.

Many State representatives have been appreciably sympathetic and understanding of the Judges’ concerns on the matter. But, it has remained a source of sustained tension in other quarters. One Ambassador once likened my efforts to those of a ‘union leader’ fighting for members of his union. There is, of course, no shame in a trained lawyer—or even a ‘union leader’—insisting upon fidelity to fundamental *principles*: even if recourse to legal action became necessary *as a last resort* to encourage adherence to such principles. And, regrettably, I felt constrained to join a group of Judges in legal action—indeed at its vanguard—a little less than three years ago—in a last ditch effort to encourage adherence to certain fundamental principles that were apparently being ignored on a permanent basis, in relation to judges’ conditions of service. The endeavour understandably, but foreseeably, resulted in much tension in some quarters, as indicated earlier.

In his 2006 report on the state of the US Federal Judiciary, **US Chief Justice Roberts** adequately captured the tension that attends such efforts. As he put it: ‘*No doubt a judicial salary increase would be unpopular in some quarters, but Congress—like the courts—must sometimes make decisions that are unpopular in the short term to promote a greater long-term good.*’ [Emphasis added.] See [here](#). It is a notorious fact that **Chief Justice Roberts** and his predecessor, **Chief Justice Rehnquist**, tried hard—in vain—with political persuasion—to rescue the salaries of US federal judges from similar lengthy degradation that resulted from a policy of conscious political

neglect. See [here](#). Eventual legal action in the case of *Beer v United States*¹⁴ was required finally to produce movement beginning in 2014. See [here](#). The same story goes for judges of the State of New York. See [here](#). A recent study by **Professor Paul Thomas** discussing ‘[why politics shouldn’t influence how much \[judges are paid\]](#),’ recalled the regrettable acrimony that attends such politicisation. See [here](#) and [here](#).

Indeed, my efforts to correct ICC judicial conditions of service were bound to be deeply unpopular in some quarters. I was keenly aware that it was bound to be so. Nevertheless, it was a necessary decision made ‘[to promote a greater long-term good](#)’ of judicial independence as Professor Thomas rightly observes.

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On 7 December 2020, we finally received the judgment of the ILO Administrative Tribunal (ILOAT). You can find it [here](#). The Tribunal declined to proceed with the case on the merits. They held, instead, that the case was ‘not receivable,’ because it was ‘filed out of time.’ It is a pity that the Tribunal did not decide the matter on the merits. Still, the Tribunal’s decision deserves all due respect as a judgment of a court of law. The Tribunal must be commended for its important and difficult work in affording an independent arbitrage for the teeming personnel of international institutions including this Court.

ILOAT judgments are not appealable. It is possible, however, to seek review of a judgment. Although I did resolutely lead the original litigation effort (and would not hesitate to do so again under the same pre-litigation circumstances), I do not encourage reverting to the ILOAT for a review of their decision, notwithstanding the reasonableness of such a review.¹⁵ There is now a

¹⁴ *Beer v United States*, 696 F3d 1174 (Fed Cir 2012), *cert denied*, 133 SCt 1997.

¹⁵ The basis of an application for review hinges on at least three factors. The **first factor** concerns a key premise for the ILOAT decision of 7 December 2020. That premise was that the Plaintiffs, in their request of February 2017 to the ASP, ‘chose to designate’ 31 January 2018 as the deadline within which the ASP needed to do the review. Consequently, the Tribunal held that the ASP’s resulting resolution (of December 2017) was an ‘unambiguous rejection’ of the request, which then triggered the shorter time limit that the Tribunal found to have been missed by over one month. It is *not* now necessary to revert to the ILOAT in order to explain the reason that the Plaintiffs designated the deadline of 31 January 2018 (in their request to the ASP dated February 2017). The reason was to avoid a repeat of what happened during the litigation of the case of two former ICC Judges on whose behalf a request was made to the ASP in 2010 regarding the scheme that governed their pension. The matter went unresolved, with the ASP not even placing the matter on their agenda in the following years. In the meantime, the ILOAT, in Judgment 3359, felt compelled—four years later (in July 2014)—to order the ICC to resubmit to the ASP the request of 2010, so that the ASP must respond one way or another to the request of the two former judges. Following that resubmission, the ASP finally communicated a final decision in December 2014 clearly giving a negative answer to the two former judges, saying that their pension must be governed by the less favourable pension regime. The decision of the ASP in December 2014 brought a definitive conclusion to the request of the two former judges. By that decision, the ASP reserved no further question on their agenda on that issue; and they said so in terms that they would no longer reopen the question of pensions. With that finality, the ILOAT was able to proceed with the proceedings, which ended in Judgment No 3859. See [here](#). But, it took the ASP four years to come to the definitive 2014 decision, after the initial request was made on behalf of the two judges in 2010. It was precisely that history that compelled the Plaintiffs in this case to indicate the deadline of 31 January 2018, so that an open-ended request would not go unanswered for four years, with the matter left un-tabled in ASP agenda items in intervening years. And the Plaintiffs’ indication of the 31 January 2018 deadline produced a response from the ASP. That response came in the

material change in the circumstances of the ICC judicial conditions of service, because of certain efforts that the ASP has made within the last year, notwithstanding other problems that still need resolving (as discussed below). The reason to accept the judgment and move on is because of those recent changes made by the ASP this year, with the aim of finally bringing to an end a regime of judicial compensation particularly marked by demoralising features of unfairness such as the following: (a) the permanent denial of update to judicial salaries; (b) an impecunious pension scheme; (c) the absence of payment of medical insurance contribution; and, (d) the absence of dependency allowance. Those were the normative, primary purposes¹⁶ that made the litigation necessary in the first place—as a last resort.

ASP resolution of December 2017. The ASP did not give a negative response to the Plaintiffs' request. Nor did they say, as they finally did in 2014, that the issue would not be reopened for further discussion. What the ASP did, instead, was request the Bureau of the ASP to set up a working group to discuss the Plaintiffs' request and report back to the ASP at the next session of the Assembly, precisely because of the Plaintiffs' request of February 2017. It is instructive that the ASP's Committee on Budget and Finance, before whom the matter initially came up in the manner of budgetary proposal, had advised that the matter required a policy decision from the ASP, and it required careful study. The **second factor** would seek to explore the real difference between the time-limit fact pattern in the case of two former judges that the Tribunal decided on the merits in 2014 (Judgment No [3859](#)) and the Plaintiffs' case (Judgment No [4354](#)). The latter case reveals a transaction period of 13 months—between February 2017 (when the initial request for administrative action was made to the ASP) and March 2018 (when the Plaintiffs filed their claim). The case of the two former Judges (Judgment No [3859](#)) involved a total transaction period of 50 months—from October 2010 when the initial request for administrative action was made to the ASP and March 2012 (when the Judges in that case filed their claim), through December 2014 (when the ASP finally decided not to grant the former Judges' request). Notably, the Tribunal did not rule that case as time-barred. Instead, in July 2014 (i.e. 44 months after the initial request for administrative action was presented to the ASP), the Tribunal ordered (in Judgment No [3359](#)) that the initial request of October 2010 must be resubmitted to the ASP for prompt decision. It was not clear whether the consideration that impelled the Tribunal to order the resubmission of the request to the ASP in the previous case was inapplicable in the Plaintiffs' case. And, the **third factor** is the Tribunal's finding that the ASP had 'unambiguous[ly] reject[ed]' the Plaintiffs' February 2017 request, did not take into account the following significant developments this year, which directly resulted from the Plaintiffs' February 2017 request. Following their review exercise, the Judges' Remuneration Panel of the ASP, set up by the ASP Bureau, pursuant to the ASP Resolution of December 2017, recommended a new scheme of judicial conditions of service. The new scheme will now ensure the following elemental norms in ICC judicial conditions of service: (a) an assurance of regular updates or adjustments of judicial salary to protect against inflation and rises in cost of living; (b) a gross monthly pension that is significantly higher than the €1 875 introduced in 2007; (c) health insurance contribution; and, (d) dependency allowance. Just ahead of the ASP session of this year (i.e. 2020), the ASP Bureau adopted a decision recommending the new scheme to the ASP for adoption. It is the practice of the ASP to adopt resolutions recommended by its Bureau. Considering that the absence of the aforementioned elements of the new scheme was precisely the normative gravamen of the Plaintiffs' request of February 2017, there is an eminent case for the Tribunal to reconsider its conclusion that the ASP resolution of December 2017 was an 'unambiguous rejection' of the Plaintiffs' request: when it was precisely that resolution—specifically motivated by that request—that set in motion the train of events that culminated in the new scheme of conditions of service outlined above. Nevertheless, being judges themselves, the Plaintiffs will fully respect the decision of the ILOAT, construing the ASP's resolution of December 2017 as amounting to 'an unambiguous rejection' of the Plaintiffs' request of February 2017, thus triggering the shorter deadline that the Tribunal found to have been missed, rather than the longer deadline that the Plaintiffs had relied on, which applies when neither a positive nor a negative decision has been taken to address a request for administrative action.

¹⁶ Notably, those purposes were stated as follows in the Plaintiffs' statement of claims: 'apply the post adjustment regime to ICC Judges ...'; 'make the judicial pension compliant with the Noblemaire principle and the principle of judicial independence; at the very least, the 2007 amendment to the pension regime

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There is nothing unusual about judges—even **Chief Judges**¹⁷—taking legal action as a last resort to question the correctness of political actions or omissions that have a negative impact on their conditions of service and, in turn, *judicial independence*. There is ample judicial precedents of such legal actions, including from Australia,¹⁸ Canada,¹⁹ Czech Republic,²⁰ Poland,²¹ Portugal,²² the United Kingdom,²³ and, the United States.²⁴

As noted earlier, the long-term good in the effort was the security of judicial independence at the ICC. It is so because appropriate conditions of service are a serious matter for judicial independence. That rationale is adequately captured in the **European Charter on the Statute for Judges** and the accompanying **Explanatory Memorandum**. Article 6.1 provides as follows:

Judges exercising judicial functions in a professional capacity are entitled to remuneration, *the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality*. [Emphasis is added.]

It would be wrong to think that ICC Judges would not be targets of such pressures. The political attacks and threats that come with our work must be instructive. Such pressures can come in many forms. They even take the form of overt threats and attacks from States and entities bold enough to make them. In 2018, officials of a powerful State threatened Judges and officials of the Court with unpleasant consequences, including economic ‘sanctions’, if the ICC did not ‘change course’ from what many would rightly consider to be the ‘course of justice.’ It is common knowledge that the shape of such ‘sanctions’ typically involves designating someone on a list, and threatening derivative unpleasant actions against any individual or entity who renders beneficial ‘service’ or ‘assistance’ to the designated person. Such a designation has proved sufficient to prevent even the most ardent supporters of the Court from wanting to be seen to render beneficial ‘service’ or ‘assistance’ to designated persons. One can thus see how designating an ICC judge on a list of ‘sanctions’ would drastically diminish future employment,

must be set aside ...’; ‘contribute to Judges’ medical insurance coverage ...’; and, ‘make available to ICC Judges dependency allowance ...’ See [here](#).

¹⁷ In 2008, Chief Judge Judith Kaye of New York State commenced litigation to try and correct the degraded conditions of service of the Judges of the State of New York. See [here](#).

¹⁸ See judgment of the High Court of Australia in *Austin v Commonwealth* [2003] HCA 3.

¹⁹ See, for instance, judgment of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (1997) 3 SCR 3. Also see [here](#).

²⁰ See decisions of the Constitutional Court of the Czech Republic in File Nos Pl. ÚS 11/02 of 11 June 2003, Pl. ÚS 34/04 of 14 July 2005, Pl. ÚS 12/10 of 7 September 2010, Pl. ÚS 33/11 of 3 May 2012; Pl. ÚS 28/13 of 10 July 2014.

²¹ See decisions of the Constitutional Court of the Polish Republicin: File No. P 8/00 of 4 October 2000. See also File Nos P 1/94 of 8 November 1994, K 13/94 of 14 March 1995, P1/95 of 11 September 1995, K 12/03 of 18 February 2004.

²² See *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (Request for a preliminary ruling from the Supremo Tribunal Administrativo) Judgment of the Court (Grand Chamber) dated 27 February 2018, para 44.

²³ See *Lord Chancellor v McCloud & Ors* [2018] EWCA Civ 2844 [Court of Appeal of England and Wales].

²⁴ See judgment of the US Supreme Court in *US v Hatter*, 532 US 557 (2001). See also the judgment of the US Federal Court of Appeal for the Federal Circuit in *Beer v United States*, 696 F3d 1174 (2012).

leaving the judge only with an ICC pension as the only means of livelihood after service. For ICC Judges who served from 2009 until date, the pension is only an impecunious gross sum of €1 875 per month. In the circumstances, such a pension becomes abjectly inadequate to secure judicial independence.

It is thus easy to see how it was that considerations of judicial independence at the Court made it necessary to commence legal proceedings, in order to correct the degraded ICC judicial conditions of service.

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But, the ICC Judges in the case never prioritised litigation over solution-oriented discussion. There is, indeed, much irony in the very outcome of the ILOAT decision of 7 December 2020. For, it mostly casts in relief the efforts of ICC Judges in seeking to avoid the litigation in the first place. Notably, at page 2, the Tribunal recites the Plaintiffs' averment indicating one of the several occasions when they had stayed the hand of prompt litigation, preferring to 'allow time for a diplomatic solution to be reached.'

It is true, of course, that the Plaintiffs delayed action for four months during a period that the Tribunal found critical to the question of time limits to commence the lawsuit. The Plaintiffs expended time and efforts seeking to exhaust diplomatic solutions before commencing the proceedings. In the end, the Plaintiff Judges were compelled to commence legal action—only when it became clear to them that the failure to update ICC judicial conditions of service was no mere oversight, but a policy of conscious inaction. Without the litigation, the stagnation and deterioration in judicial conditions of service would remain a permanent feature of the ICC judicial conditions of service. But, while engaged in the diplomatic demarches, in hopes of avoiding the litigation, the time limit expired, according to the Tribunal, after the first three of those four months.

It was certainly correct for the Plaintiffs to go to great lengths in seeking a diplomatic solution, rather than rush to sue. The ILOAT decision ensures, however, that future plaintiffs will now know that the Tribunal is truly strict with its regime of time limits; and will allow no reprieve, even for judges of international courts, who do not commence litigation on time, because they were seeking a diplomatic solution.

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Granted, this technical judgment on time-bar concludes the legal process for some of the Judges of the Court. And, granted that the ASP has finally taken steps this year to address, to an extent that must be acknowledged, some of the normative complaints in that litigation. Nevertheless, the plenary merits of that issue remain very much alive for the Court's judiciary in many ways. This is particularly so at the instance of other Judges (present and future) who were not directly connected to the just concluded litigation. For that reason, it remains necessary that careful efforts are made in good faith to resolve the still lingering aspects of judges' conditions of service. According to Cicero, ['The foundation of justice is good faith.'](#) Principles and the rule of law must guide us here. The ICC was established on the very premise that our civilisation is

much the poorer when political power rides roughshod over principles. All through history, the lesson of that policy has been tragic for the weaker and the smaller nations of the world: just as the experience of the same policy has been unpleasant for the judiciaries of the world at every level. The affairs of the ICC must eschew the cynical policy that political might is always right. **Ovid's** maxim, which teaches that *'The end doesn't justify the means'* is always better than the disheartening approach to justice revealed in **Winston Churchill's** following observation: *'The whole history of the world is summed up in the fact that, when nations are strong, they are not always just, and when they wish to be just, they are no longer strong.'*

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The lessons of the ILOAT proceedings should give enduring comfort to no one. The primary lesson is that when judges are sufficiently aggrieved, their number may include those who feel impelled to seek appropriate redress before independent judges in a court of law that may exercise jurisdiction, if there is no other avenue left to resolve the grievance at issue. In doing so, the complainants are impelled by the very same instinct of justice that is captured in Dietrich Bonhoeffer's famous epigram, which moves the work of this Court in its core mandate: *'We are not to simply bandage the wounds of victims beneath the wheels of injustice, we are to drive a spoke into the wheel itself.'*

It may be recalled that this was the second time that ICC Judges have felt constrained to resort to litigation to try and resolve the merits of a complaint about their conditions of service. The two cases involve a total number of nine of the Court's present and former Judges who have felt constrained to explore the legal process as a final recourse to a lingering grievance. That reveals a high ratio of discontent. On the previous occasion, the case of two now former Judges was considered on the merits in their favour, and not time-barred.

It is necessary to remove the incentive for these sorts of legal proceedings, by considering the merits of complaints and resolving them fairly and with dignity. In this connection, it is important to heed the counsel of the **Editorial Board** of the *New York Times* (discussed more fully below). As they observed in a comparable context, *'[t]he Legislature should remove the motivation for the lawsuit [of judges] by raising judicial salaries'* to a level that is appropriate, and by creating an independent, objective commission for the reasonable updating of judicial salaries—in order to protect judicial salaries against inflation and rises in cost of living.

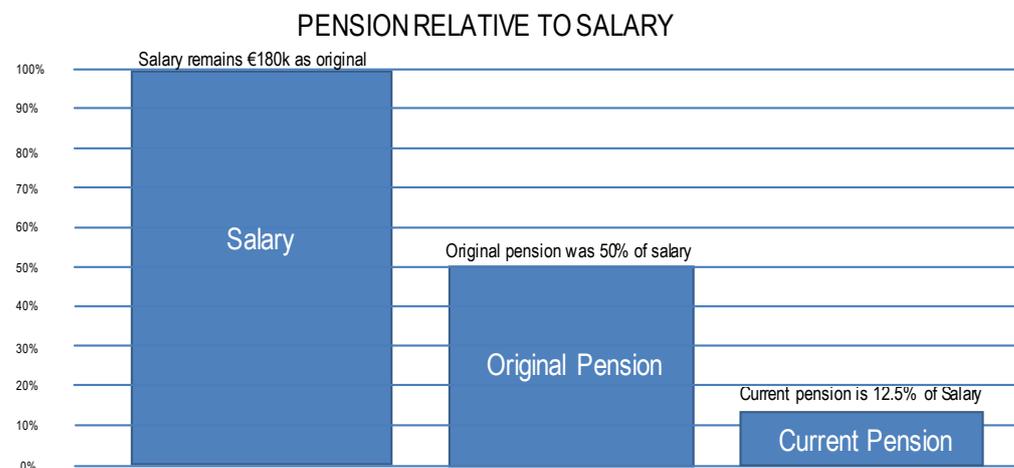
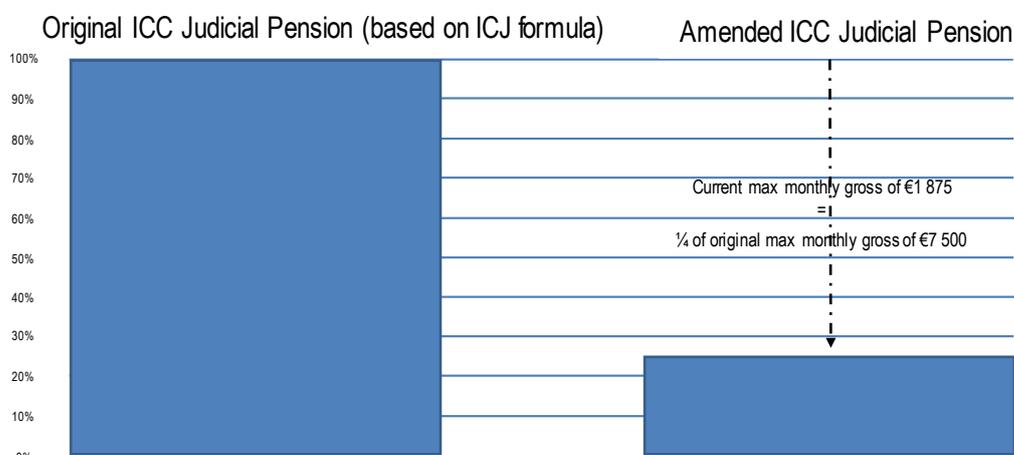
Hence, the merits of the issues in this case remain very troubling and unresolved, despite the technical decision of the ILOAT that avoided considering the merits of the issues because of their finding that the action was time-barred. The merits need to be contended with fairly for the benefit of the Court's judiciary (present and future) as a whole. I recall them below in summary, for the benefit of those who have heard about the lawsuit but are not quite familiar with the reasons for it as a matter of last resort.

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To understand the concerns that compelled the litigation, it may be necessary to frame the picture in these stark terms. In 2002, the original architects of the Rome Statute system

conceived of ICC Judges as equal in stature to the Judges of the International Court of Justice (ICJ). To their credit, the first generation of ASP delegates conveyed that message explicitly in the initial batch of ICC’s governing instruments: specifically in the **Annex to Resolution ICC-ASP/3/Res 3 (2004)**. A key element of that parity of stature was the formal linkage of ICC judicial conditions of service to those of the ICJ Judges. Indeed, at that time, those conditions of service compared well with those of not only ICJ Judges, but also those of the Judges of other international courts in The Hague, in Strasbourg and in Luxembourg.

Regrettably, the salary of ICC Judges has been allowed, over the years, to degrade to a degree of 20% or more, as compared to the salary of their peers in these other international courts. Worse still, the ASP put the ICC judicial pension through a draconian cut, in 2007. The cut brought down the pension from the gross monthly sum of €7 500 to a gross monthly sum of €1 875 (not tax exempt) for a judge that was in *full-time* service for the *entire nine-year tenure*—prorated lower for those who did not serve full-time for nine years. Notably, retired ICC Judges do not have Court-assisted after-service health insurance to soften the harshness of the 2007 pension cut. A visual representation of that 2007 pension cut is set out below:



The current gross monthly pension of €1 875 (gross) would be inadequate to pay rent in many of the countries where a former ICC judge may retire. But that was all the pension that was available for a retired judge—even when the judge was compelled to retire due to permanent disability sustained while serving the Court and as a result of such service to the Court. The reduced pension falls far short of the proper standard for judicial pension. In the Council of Europe’s *European Charter on the Statute for Judges*, it is stated that the legislation concerning judicial conditions of service ‘shall’ particularly ‘ensure that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.’ [Paragraph 6.4, emphasis added.]

The provision of the *European Charter on the Statute for Judges* is fully consistent with the conclusions of an expert study commission by the UN Secretary General for purposes of establishing appropriate levels of pension for ICJ Judges. The experts who advised the Secretary General had concluded that an adequate pension is one which affords a replacement income: ‘generally held to be an income sufficient to maintain a standard of living after retirement equivalent to that enjoyed in the immediate years prior to retirement.’²⁵

On no view, then, could a gross monthly pension of €1 875 be considered to be ‘adequate’ pension for a retired ICC judge. It dignifies neither the ICC nor the ASP for a retired ICC judge to fall into abject penury in the years following a nine-year service at the ICC—regardless of the former Judge’s country of origin.

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Indeed, there was a distinct feeling amongst many Judges that the conditions of service of ICC Judges had become decidedly unkind, in comparison to those of their peers, due to a combination of both a passive determination to allow it to degrade and even active measures (such as the pension cut of 2007) that occasioned such degradation.

The degraded state of those conditions of service engaged serious concerns that certain fundamental principles of fairness were not being respected. One of those fundamental principles of fairness is expressed in all the leading policy and legal instruments to the following effect: ‘Judicial salaries and pensions shall be adequate and should be *regularly adjusted to account for price increases independent of executive control.*’ Those are the words of **paragraph 14** of the *Minimum Standards of Judicial Independence* of the **International Bar Association**. Similarly, article 4(1) of the **resolution** of the **Institut de Droit International** on

²⁵ United Nations, Report of the Secretary-General (Conditions of service and compensation for officials other than Secretariat officials: Members of the International Court of Justice) Doc No A/C.5/50/18 dated 2 November 1995, p 17. Notably, on or about June 2019, the ASP Bureau obtained two reports from two external consultants who examined the state of conditions of service of ICC judges. *It is a matter of much regret that in spite of repeated requests from the Court’s Presidency, the Bureau did not disclose those reports to the Court’s Presidency, the Judges nor to the public (in the same way that the Secretary General made public the report of the consultants that reported on the pension of ICJ judges in 1995), despite repeated references (in ASP resolutions and reports) to the 2019 consultants’ reports.*

the **Position of the International Judge** (2011) provides: '*International judges should receive remuneration allowing them to perform their functions in the best possible conditions. Such remuneration shall not be reduced during their term of office. **Therefore, it should be regularly adapted to the cost of living in the country where the seat of the court or tribunal is located. ...***' [Emphasis added.] The point of that consideration is that there is an effective reduction in salary when there has been a failure to adjust compensation in a manner that keeps pace with inflation and rises in cost of living.

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Also engaged as a fundamental principle of fairness was the abjuration of discriminatory treatment. **Lewis Powell Jr** once correctly observed that '*it is fundamental that justice should be the same, in substance and availability, without regard to economic status.*'

The two fundamental principles indicated above unite in the following series of observations. First, the essence of the principle of periodic upward adjustment to salaries—in order to avoid reduction in the value of salaries due to inflation or rises in cost of living at the duty station—has been the consistent practice for *all other* posts at the ICC. Of all the thousand posts at the ICC, only 18 posts—the Judges—have been consistently denied such adjustment for the entire 17 years during which the Court has been in operation. This denial violates the principle of prohibition of discrimination. Second, of *all* the personnel posts in *all* the international organisations based in The Hague, it is only 18 posts—the ICC Judges—that have been denied the benefit of periodic revision to keep pace with inflation and rises in cost of living in The Hague. Third, of all the judicial posts in all the international courts based in Europe—specifically, the ICJ, the International Criminal Tribunal for the former Yugoslavia, the Residual Mechanism for the International Tribunals, the International Tribunal for the Law of the Sea, the European Court of Justice, and the European Court of Human Rights—it is only the 18 judicial posts at the ICC that have not received one cent in inflation related adjustment in the whole 17-year period that the ICC has been in existence. Fourth, in the entirety of international public service all over the world, it is only these 18 posts that are known to have not received any upward adjustment whatsoever to account for inflation and rises in cost of living. Fifth, of all the judicial posts in the exemplary national legal systems of the world that are Parties to the Rome Statute—notably Australia, Canada, Japan, New Zealand, Switzerland and the United Kingdom—it is only the 18 judicial posts at the ICC that have not received one penny in such adjustment since 2002 when the ICC judicial salaries were first established. Finally, one must struggle to find any post anywhere in the world where the salary attached to the post has received not a half penny in salary adjustment in 17 years to compensate for erosions due to inflation and rises in cost of living. The only example that I know is at the ICC judiciary.

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One particular reason that the obvious policy of conscious inaction to update ICC judicial conditions of service proved difficult to accept—thus compelling litigation as a last resort—was that it went against the reasonable expectation—if not positive updating obligation—created in the original governing documents adopted by the ASP itself in the **Annex to Resolution ICC-ASP/3/Res 3 (2004)**. That resolution did two things in particular. First, it set ICC judicial

conditions of service at the same levels as those of the ICJ. And, then, it said in §XIII that ‘the conditions of service and compensation of [ICC Judges] shall be reviewed by the Assembly as soon as practicable following review of the conditions of service of the judges of the International Court of Justice by the General Assembly of the United Nations.’ While ICJ judicial conditions of service have been periodically reviewed to protect against reduction due to rises in cost of living, the same was never done for ICC Judges. Indeed, ICC judicial conditions of service were progressively given the opposite treatment, beginning in 2007 when the ICJ judicial salaries were put on a regular scheme of annual post-adjustment, with no degradation in their pension scheme that was at half-salary. In the same year, rather than put the ICC judicial salary on the same post-adjustment scheme as the ICJ, the pension of ICC Judges was drastically cut down from €7 500 to €1 875 per month.

The failure to respect the requirements of §XIII of the Annex to Resolution ICC-ASP/3/Res 3 was not in keeping with the principle of international administrative law expressed in the Latin maxim *tu patere legem quam ipse fecisti*—‘an organization must conduct itself in accordance with the provisions of its own regulatory documents.’²⁶

To the extent that the periodic review of ICJ conditions of service is motivated—and it is—by the principle expressed in paragraph 14 of the IBA Minimum Standards and similar instruments, it remains inescapable that the obligation that the ASP created for itself in §XIII of the Annex to Resolution ICC-ASP/3/Res 3 was never complied with. That obligation was to review ICC judicial conditions of service to keep it in step with the ICJ conditions of service.

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Such treatment is truly difficult to understand given that ICC Judges subjected to these surprising conditions worked just as hard as their colleagues in the other international courts. What is more, recent events have underscored the unique occupational hazards that the ICC and its personnel, including the Judges, face in their work: the trenchant political threats. The Judges of the other international courts are not known to face such political attacks to the same extent.

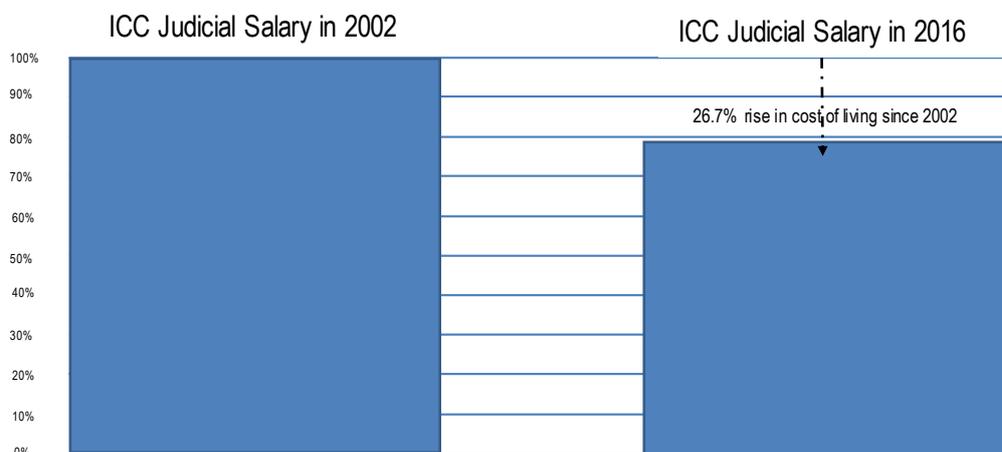
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Before the initiation of the legal action at the ILOAT, Judges expended much effort in polite diplomatic demarches to try and engage meaningful discussion of the problem. However, their efforts encountered more or less controlled resentment (from the more forceful interlocutors) or kind words of sympathy that remained non-committal (from the gentler interlocutors). All of that unmistakably conveyed either or both of the following messages: (a) the Judges’ complaints would not be entertained with an open mind; or (b) no changes ‘whatsoever’ would be made to the scheme of judicial salary and pension. More often than not, the only arguments offered for these attitudes were stated in terms as explicit as these: (a) ICC Judges are asking for ‘more money’; (b) the ICC judicial salary is ‘already higher’ than that of the salary of the interlocutor being made to listen to the request for ‘more money’; and, (c) the ICC judicial salary is ‘tax free.’

²⁶ See ILOAT Judgment No 3661, consideration 3. See also ILOAT Judgment No 3613, consideration 40.

But, the difficulty with those arguments is as follows: (i) that the ICC Judges were never asking to be paid ‘more money’ than their peers at the other international courts in The Hague and elsewhere in Europe. They were asking for an update of judicial salary to the same levels as those of their peers in the other international courts—as was *precisely* the original intention expressed in the Annex to Resolution ICC-ASP/3/Res 3; (ii) that ICC Judges were not asking to be paid more money than they were originally entitled. They were asking to have their salaries and pensions updated to the original levels, in order to offset the reduction—by more than 20%—due to inflation and rises in the cost of living in The Hague; and, (iii) that ‘tax free’ salary is not unique to ICC judicial salary. It is a *standard* and *traditional* feature of the salaries of the personnel of virtually *every* international institution or organisation. The rationales for such ‘tax free’ salaries include the consideration that personnel of international institutions and organisations are nomads in foreign lands. As such, they are generally not entitled to certain social benefits at their duty stations. By living abroad, they also generally lose the social benefits that their fellow citizens enjoy back home. Amongst such benefits, but not all, are free education that is not in the local language and national health insurance coverage.²⁷

All this is to say that ICC Judges were not ‘asking for more money’. They were merely asking for restoration of the real value that their salary was intended to have when it was established in 2002, that real value having eroded due to the effects of inflation and rises in the cost of living in The Hague since 2002. The effect of that reduction may be graphically represented as follows:



After lengthy diplomatic efforts in vain to invite a meaningful discussion of the complaint, and in light of the determination to rebuff the complaints of Judges, my colleagues and I saw no other meaningful avenue for resolving the matter than to take our complaints to a court of law, hence the proceedings at the ILOAT, in accordance with the orderly processes and principles of the rule of law.

Notwithstanding the efforts that the Judges made to avoid the litigation, there was still much displeasure expressed against the Plaintiffs, by way of even explicit and publicly expressed acrimony. But, the proceeding were unavoidable in the circumstances. In resorting to them as a

²⁷ In Canada, for instance, citizens and permanent residents are entitled to free national medical insurance. But that insurance is not available to Canadians living overseas.

final recourse, the Plaintiffs did not consider that the outcome was guaranteed in their favour. Trained lawyers do not commence legal proceedings because of an assurance of outcomes. It is deep-seated grievances about violation of rights that impel complainants to seek the intervention of a third party who would arbitrate the complaint in circumstances that are beyond the authority of either party. As such, judicial proceedings are the most civilised methods that the rule of law has devised to resolve grievances, where dialogue between the parties proves unavailing.

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Notably, part of negative media publicity that followed the commencement of the proceedings was the article of *one* journalist from the *New York Times*, published in January 2019. Her piece was unambiguously reproachful of the Plaintiffs, while mentioning nothing at all of the Plaintiffs' grievances and the steps they had taken to avoid the litigation. Her focus was the usual rebuke heard from some delegates that the current level of ICC judicial salary is already substantial and 'tax free.'

But, one must compare the article of that *one* journalist with an earlier **editorial** piece from the **Board of Editors** of the *New York Times*, published on a similar subject on 2 June 2008, titled 'Repairing New York's Judicial System'. See [here](#). In it, the *New York Times* Editorial Board reproached the legislative and executive branches of the State of New York in words including the following:

By now the need for a significant pay increase for state judges is beyond debate. Their last raise was in 1999, an unconscionable lag that puts New York at 49th of the 50 states in judicial pay when the cost of living is taken into account. After years of trying to reason with, beg and shame Albany's key players, the state's chief judge, Judith Kaye, reluctantly filed a lawsuit, charging that the refusal to pay judges adequately violates the constitutional separation of powers. ... For the judicial branch to be at loggerheads with the legislative and executive branches over pay is not a healthy situation. The Legislature should remove the motivation for the lawsuit by raising judicial salaries to the level of Federal District Court judges, and creating a state commission, along the lines Judge Kaye has proposed, to help set salary levels for judges and legislators. [Emphases added.]

Remarkable in the foregoing was that the Editorial Board of the *New York Times* felt compelled to describe as '**unconscionable**' the 10-year pay freeze that judges of New York State had been made to endure. The Editorial Board conveyed evident sympathy for the Chief Judge of New York State, who felt constrained to commence legal proceedings in order to resolve the complaint of the judiciary. And, the Editorial Board recognised the need to 'remove the motivation for the lawsuit by raising judicial salaries' to the levels of comparable judicial peers and to keep pace with rises in cost of living.

But, it may be noted that it was a **10-year** pay freeze for New York State judges that attracted these rebukes from the Editorial Board of the *New York Times*. In contrast, ICC Judges have endured a pay freeze that has now lasted for **17 years**, and if the current trend continues, the pay freeze may never be corrected at all. It was those circumstances that compelled me, as they did my counterpart the Chief Judge of New York State, to resort to judicial proceedings to resolve the complaint—after exhausting all other efforts to avoid that step. It should be a matter of regret that I was compelled to follow that course. It was unavoidable. I am grateful to for all

the diplomats who expressed sympathy for our plight in having the matter resolved fairly. I continue to encourage them to keep supporting the efforts to resolve this matter fairly, despite the judgment of the ILOAT that deemed the lawsuit as non-receivable due to being time-barred.

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I am happy to note now that the ASP has finally abandoned the position of refusing to entertain the complaint. It is a welcome development that apparent efforts are now being made to remove for future Judges—and not for the Judges who served between 2009 and 2021—the following complaints that lay at the root of the ILOAT litigation: (a) a condition of permanent freeze to judicial salaries; (b) a gross pension of only €1 875 per month; (c) the absence of payment of medical insurance contribution; and, (d) the absence of dependency allowance.

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Suffice it to say this. Notwithstanding the imperfections (discussed below) that attended the revised package tabled before this session of the ASP, credit must still go to current **ASP Presidency**, under whose leadership efforts have now been made to foster a review of the judges' conditions of service, in order to remove need on the part of ICC Judges to resort to litigation as a final effort. Though concerns still linger about the process and substance of the eventual review, I am able to say that the ILOAT litigation would most likely not have occurred had these efforts at a review been made in **2007** (when the pension was slashed without proper discussion with the Judges); in **2010** (when Lord Justice Fulford, then a judge of the Court, made a representation to the ASP on behalf of the Judges urging a review); and in **2016** (when on behalf of the Judges I finally commenced the last series of communications to the ASP, as a final effort to bring about the review before the litigation was commenced).

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Nevertheless, there remains room for improvement to address the matter in the most rational way—mindful that whatever is worth doing at all is worth doing well. To begin with, the process chosen finally to address the concern raises questions of **independence** and **objectivity**. The international standards on this kind of process require such independence and objectivity. For instance, as noted earlier, paragraph 14 of the **International Bar Association's Minimum Standards of Judicial Independence** stipulates that: '**Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.**' [Emphasis added.] According to the **Supreme Court of Canada**, the process for review of judicial conditions of service must be '**independent, effective, and objective**'.²⁸ Models of independent, objective and effective review bodies for judicial emoluments abound around the world—including in the following Rome Statute State Parties: Australia,²⁹ Canada,³⁰ New Zealand,³¹ and, the United Kingdom.³²

²⁸ See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (1997) 3 SCR 3 [Supreme Court of Canada], paras 219, 224, 226 and page 287(2).

²⁹ See Remuneration Tribunal of Australia, see <https://www.remtribunal.gov.au/>

I must, regrettably, observe with the greatest respect that the ASP's Judicial Review Panel was not independent, though I do not question its desire and effort to be as objective as it could be. But, since it is part and parcel of the ASP, it cannot be independent of the ASP. I immediately alerted this shortcoming to the ASP Presidency when the composition of the panel was announced.

Questions also arise as to the substance of the contemplated changes. The questions include the following: Was it **rationally necessary** to disconnect the ICC judicial conditions of service from the original reference to the ICJ conditions of service—even as they portend eventual improvement already noted above for future ICC Judges? Here, it may be considered that there is a feeling that a driving feature of this review of judges' conditions of service is that it must be done in a way that does not involve the ASP spending any amount more than they do now on ICC judicial conditions of service. That is to say the ASP is reviewing the salary of judges in a way that will not require the ASP to pay ICC Judges any more than they paid ICC Judges in 2003—i.e. 17 years ago. Indeed, ICC Judges have not been paid a cent more by 2020 than the original judicial pay in 2003. But, there is another source of **legal** worry. In the new pay package, future ICC Judges are now being put on a lower pay grade than ICJ Judges, in order to avoid paying 'a cent more' in salary. The effect remains this. Rather than update the conditions of service to keep pace with the conditions of service of their peers, as fairness and good sense requires, after 17 years of solid pay freeze, the chosen solution is to put ICC Judges on a lower pay grade, without ever making the adjustment required by the applicable legal norms. Such legal norms have been representatively expressed by the IBA as a 'minimum standard of judicial independence.'³³ But, what is the **legal rationale** that explains having never updated ICC judicial salaries at the original scale, while the judicial salaries have continued to be updated for ICJ Judges, as the original comparators to the ICC Judges? And what is the **legal rationale** that justifies the new distinction to the effect that future ICJ Judges will continue to enjoy conditions of service that continue to be updated at the original pay grade shared with ICC Judges, while the only way to ensure that the conditions of service of future ICC Judges will be treated to periodic updates is by putting them on a lower pay grade? The law eschews arbitrariness and demands rationality to actions and policies.

The ILO Administrative Tribunal has held that international organisations are '[bound to ensure that international law is observed in the relations between the said organisations and their staff](#)',³⁴

That being so, it is imperative that the choice of solutions brought to bear in the matter of ICC judicial conditions of service must comply with international law, lest such solutions remain vulnerable to legal challenges in future. There is no legal safety in the strategy of compelling the

³⁰ See Judicial Compensation and Benefits Commission of Canada, see <http://www.quadcom.gc.ca/pg_Jcjc_QC_01-eng.php>

³¹ See Remuneration Authority of New Zealand, see <<https://www.remauthority.govt.nz/>>

³² See Review Body on Senior Salaries, see <<https://www.gov.uk/government/organisations/review-body-on-senior-salaries>>

³³ See paragraph 14 of the IBA *Minimum Standards of Judicial Independence*.

³⁴ See ILOAT Judgment No 2420, consideration 11.

future Judges of the Court to accept the downgrading, lest the ASP would not elect them as judges. The new Judges will not be in equal bargaining power relative to the ASP, and international administrative law will intervene to make corrections when such disparities in bargaining powers engage questions of the correct calibration of conditions of service.³⁵

There are at least two further legal considerations to keep in mind here. The first is that international administrative law does not prevent an organisation from making changes to the conditions of service of its personnel. But, the organisation that chooses to abandon an established favourable regime is not free to do so either arbitrarily or in a high-handed way, merely because it can. The bare need to save money is not enough.³⁶ There is an obligation to provide ‘real rationale’ for the change, by explaining ‘in statistical, mathematical, methodological or otherwise scientific terms why the reduction ... was necessary or desirable or justified’. Indeed, the obligation of ‘real rationale’ must show why a threshold that ‘was appropriate up to and including’ a certain year was ‘no longer appropriate in’ subsequent years. A reduction is not sustainable in law, if the reduction is ‘not substantiated nor transparent’.³⁷

Such a rationale becomes difficult to proffer or sustain in respect of lowering the paygrade of future ICC Judges. The nature of their work is evidently more stressful, and their need for judicial independence in doing it has become demonstrably more acute. This is so given the political attacks against the Court in recent times, including threats of political sanctions and malicious prosecutions, and other pressures on their judicial independence.

The second consideration to keep in mind concerns discrimination. Having to put future ICC Judges on a different, lower scale as compared to their peers at the ICJ is as discriminatory against the ICC Judges as was the original failure to update ICC judicial conditions of service, when such a cost-of-living updating was afforded to every other personnel of the ICC (except the Judges) all through the years. This is to the extent that no other official or staff of the Court has suffered a similar fate of being put on a lower pay scale than their comparators in the UN common system, including at the ICJ, in order to comply with the requirement to update their conditions of service periodically. To the contrary, every other official and staff of the Court—at every level—has had salary updates at one point or another.

And the third question of fairness remains this. Is it truly right that in the annals of this Court there were several generations of Judges who served without ever having received any update to their conditions of service? And, there are three generations of ICC Judges some of whom may have no other meaningful pension. Is it right that their maximum pension after nine years of service to the ICC is only the gross sum of €1 875 per month, which was never corrected for them, when their peers at the ICJ and their peers at the ICC are entitled to a larger pension?

³⁵ ILOAT Judgment No 2097, consideration 19. According to the Tribunal: ‘Most contracts are entered into because both parties think it is to their economic advantage to do so. Where there is great disparity in bargaining power, as is the case here, the law will impose constraints upon the more powerful. In the international civil service that is one of the functions of the staff rules, and where these are inadequate, the Tribunal will intervene to redress the balance through the application of general principles of international civil service law.’

³⁶ See ILOAT Judgment No 2081, consideration 13(d).

³⁷ See ILOAT Judgment No 4134, especially considerations 47 and 49.

I am certainly alive to the sensitivity surrounding this part of my observations. But, I make them in good faith and with every sense of responsibility: as part of my continuing efforts and my enduring predisposition to strengthen this most important judicial mechanism. The Court's judiciary must be treated with ungrudging dignity in actionable ways by those in the position to do so, in order that the *very best* jurists from all over the world will continue to be attracted to serve the Court as judges.

IV. Conclusion

Excellencies, ladies and gentlemen:

When I took up the mantle of President, I called for re-energising the Court's mission in battling the forces of impunity for those who commit the world's worst crimes as proscribed in the Rome Statute.

I repeat that call today. We must employ our minds, our skills, our energy and our influence to do more justice and better justice, in more places and for more victims. We must do so in strict impartiality, fairness and independence.

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Before I conclude, I should like to return once more to the basic vision of what the world sought to achieve in building the ICC as a normative and physical edifice of accountability.

It was a vision of a world in which atrocities that shock the conscience of humanity would no longer be committed with an assurance of impunity. It was a vision of a world in which victims could hope to have their day in court and receive reparations for the wrongs they had suffered, even when their national justice systems could not for any reason fulfil that task. It was a vision of a world in which a permanent world court would be capable of looming large in the consciousness of those inclined to commit the most atrocious crimes, making them think twice, in the knowledge that they may one day be compelled to answer questions about their conduct, regardless of their station.

That vision is as powerful and necessary as it was 22 years ago.

With a permanent international criminal court now in place, even the most powerful individuals can no longer be sure that they would enjoy impunity, if they commit against their fellow humans the heinous crimes forbidden in the Rome Statute.

Even if prevailing circumstances seem to make impunity possible for the meantime, perpetrators and their accomplices will—now—have to recognise that their impunity will always be actionably reproached by the world and may not endure. A global agitation will always generate disquiet of the mind, as long as we have a permanent international criminal court that will ultimately ask questions of accountability—on the international stage—when those questions were not asked at home.

And with that comes the ICC's correlative value of deterrence. This is a value that cannot be emphasised strongly enough. There are, indeed, many reasons to insist that the mere existence of this permanent judicial mechanism for accountability does truly serve—at the very least—as an inconvenient obstacle to freewill on the part of those inclined to commit inhumane crimes on a scale that is massive or widespread.

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But, it would be a grave mistake to be content with celebrating the immense achievement that is the ICC. I said so much in my speech at the ceremony marking the 20th anniversary of the adoption of the Rome Statute. Complacency, passiveness—even undiscerning timing of well-intentioned criticisms of the Court—may easily become unwitting allies of impunity.

Indeed, the experience of the last two years tells us that we cannot not take the Court for granted. We all—including the States Parties and the Assembly—must learn lessons from what has unfolded in terms of the strident political attacks against the Court. It should be a wake-up call to everyone. The fact that the Assembly of 123 sovereign States was unable to protect the Court from attacks of one powerful country aimed at undoing the very essence of the institution should be of grave concern to all of us. It should prompt the States Parties to think hard about what could have been done differently—and what could be done better in the future.

One of the lessons to be learnt may be the need to exercise a certain measure of restraint and tact in communicating about the Court among its stakeholders. Well-intentioned criticisms and understandable frustrations on the part of those who do care about the Court's mission can easily become tools in the hands of those bent on destroying the institution, if such criticism and frustration is conveyed without due care. All well-meaning stakeholders of the Rome Statute system should be conscious that the Court remains a fragile institution in many ways.

It would be a mistake merely to breathe a sigh of relief at the imminent change of government in Washington, without learning the right lessons from what occurred and how worse it could have got. The fact that the incoming administration of the United States has promised to rebuild the multilateral order should not lull anyone into a false sense of security about the future of the ICC. The mandate that States defined in the Rome Statute is such that the Court's work will always draw criticism from many quarters, irritate powerful people, and tempt political attacks on the institution. A better system of protection against those dangers is required so that the Court as a judicial institution can do its work impartially and independently without interference. I do not have the answers. But we must find them without delay.

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Once more, it has been an honour to serve and to contribute to the mission of the ICC as best as I could. I have done it with conviction and confidence—because I am a true believer in the Court's enduring value for humanity, and will continue to be so when I leave the Court.

Thank you.