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The Assembly of States Parties to the International Criminal Court: a good governance approach

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Part I

Introduction

1 PRELIMINARY REMARKS

This dissertation finds its basis in how the Assembly of States Parties to the Rome Statute (ASP or the Assembly) acts as a looking glass into the captivating world of international institutions and the realm of laws that govern their function.¹ The ASP, through its fora, also questions and exhibits some of international law's key characteristics in a magnificent myriad of ways. In particular, entering the World Forum in The Hague in November-December every two out of three years,² allows one to walk into a textbook exhibition of *the political*, only to find hiding in plain sight, *the legal* – through debates and issues of an intricately legal nature.³ The forum of the Working Group

1 The 'institutional law of international organizations' has been said to comprise 'those rules of law that govern their legal status, structure and functioning.' See further, See Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, (6th ed. Brill | Nijhoff : 2018), pp.4-5, para.7.

2 As decided by the ASP, it holds 'the Assembly sessions alternately two years at the seat of the Court and one year at the Headquarters of the United Nations, when elections are held, as a rule with a length of up to six days, preferably over one calendar week, unless judicial or prosecutorial elections are scheduled.' See Assembly of States Parties to the International Criminal Court (ASP), *Strengthening the International Criminal Court and the Assembly of States Parties*, 13 December 2023, ICC-ASP/22/Res.3, p.13, para.108.

3 Discussions within the ASP's plenary sessions often include several legal topics both directly and indirectly. See for example, Assembly of States Parties to the International Criminal Court, *Provisional agenda*, 18 January 2024, ICC-ASP/23/1; Assembly of States Parties to the International Criminal Court, *Annotated list of items included in the provisional agenda*, 17 November 2023, ICC-ASP/22/1/Add.1; Assembly of States Parties to the International Criminal Court, *Annotated list of items included in the provisional agenda*, 4 December 2022, ICC-ASP/21/1/Add.1; Assembly of States Parties to the International Criminal Court, *Annotated list of items included in the provisional agenda*, 8 December 2021, ICC-ASP/20/1/Add.1/Rev.1; Assembly of States Parties to the International Criminal Court, *Annotated list of items included in the provisional agenda*, 9 December 2020, ICC-ASP/19/1/Add.1/Rev.1; Assembly of States Parties to the International Criminal Court, *Annotated list of items included in the provisional agenda*, 19 November 2019, ICC-ASP/18/1/Add.1; Assembly of States Parties to the International Criminal Court, *Annotated list of items included in the provisional agenda*, 29 November 2018, ICC-ASP/17/1/Add.1; Assembly of States Parties to the International Criminal Court, *Annotated list of items included in the provisional agenda*, 29 November 2017, ICC-ASP/16/1/Add.1/Rev.1; Assembly of States Parties to the International Criminal Court, *Annotated list of items included in the provisional agenda*, 10 November 2016, ICC-ASP/15/1/Add.1; Assembly of States Parties to the International Criminal Court, *Annotated list of items included in the provisional agenda*, 13 November 2015, ICC-ASP/14/1/Add.1.

on Amendments (WGA) in 2016 for instance, which is a subsidiary body established by the ASP, provides one such instance of *the legal* in and around *the political*. The setting of the WGA, found the governance body of the International Criminal Court (ICC or the Court), the ASP, debating various complex aspects of the law applicable before the Court in considerable detail.⁴ This came in the wake of the Court having provisionally amended its own Rules of Procedure and Evidence (RPE or the Rules), something that can only be done under exigent circumstances.⁵ The ASP, pursuant to its legislative role under the Rome Statute,⁶ went on to discuss the provisional amendment, with one State referring to the Court's provisional amendment as being *ultra vires*.⁷ Other States expressed their uncertainty as to which body (the ICC or the ASP) could decide on the applicability of the rule until the ASP had taken a decision, something the Assembly seemed unable to do.⁸ Ranging from technical considerations relating to criminal procedure, to only stopping short of an actual review of the Court's decision,⁹ this is only *one* demonstration of how the ASP – sometimes referred to as a political body¹⁰ – through its ever multiplying and diversifying fora represents a much more composite site for engagement between *the legal* and *the political*. While this in itself, is not new to the (international) legal field, what makes it a particularly poignant subject for analysis is that within the relationship between the ICC and its governance body, *the legal* and *the political* often oscillate between being in conflict, on the one hand, and being in peaceful and mutually conducive co-existence, on the other hand.

This example spotlights an instance where the ASP's inability to decide on whether or not to accept the provisional amendment to Rule 165 (or reject,

4 See for example, Assembly of States Parties to the International Criminal Court, *Report of the Working Group on Amendments*, 8 November 2016, ICC-ASP/15/24; Assembly of States Parties to the International Criminal Court, *Report of the Working Group on Amendments, Addendum*, 21 November 2016, ICC-ASP/15/24/Add.1.

5 International Criminal Court, *Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence*, 29 February 2016.

6 This is discussed in Part III, under Chapter 7.

7 *Report of the Working Group on Amendments*, *supra* note 4, p.7; citing Assembly of States Parties to the International Criminal Court, *Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence*, ICC/ASP/15/7, 21 September 2016, Annex III, pp.12-13.

8 *Report of the Working Group on Amendments, Addendum*, *supra* note 4.

9 For a summary and analysis of the adoption of the provisional amendment to Rule 165 by the Court and the ASP's response to this amendment or its 'decision not to decide', see Kritika Sharma, 'The Curious Case of Rule 165 of the Rules of Procedure and Evidence: The Effect of Control Exercised by the Assembly of States Parties over the International Criminal Court', (2020) 20 *International Criminal Law Review*, pp.285-317.

10 See for example, Jennifer Trahan, 'The Assembly of States Parties', in Margaret deGuzman and Valerie Oosterveld (eds) *The Elgar Companion to the International Criminal Court* (Edward Elgar Publishing: Cheltenham, UK: 2024), 231-260, p.245. It has also been referred to as being quasi-political. See Kenneth S. Gallant, 'The International Criminal Court in the System of States and International Organizations (2003) 16 *Leiden Journal of International Law*, 553-591.

or amend it), led to the law applicable before the Court being in a state of flux.¹¹ Thus, it demonstrated how in exercising certain choices in its governance over the Court, the ASP could arguably hinder instead of assist the work of the Court. Together with examples of situations where the ASP has amended the law of the Court *sub judice*,¹² this highlights within the relationship between the Court and its governance body, certain tensions between the objective of ensuring that the Court is accountable to the Assembly while simultaneously safeguarding its independence.

This dissertation studies the intricate relationship between the Court and its governance body through an analysis of how the ASP exercises specific governance functions. Drawing from instances similar to the treatment of provisional Rule 165 among other rule and Statute amendments,¹³ it examines the legal framework through which the ASP exercises key governance functions in relation to the Court. Acknowledging the Court's nature as both a judicial institution and an international organisation, this dissertation further examines the scope and parameters of the exercise of *good* governance by the ASP over the ICC. It then analyses the prevalent arrangements for the exercise of governance by the former over the latter. Based on such an analysis, it further examines whether and how these arrangements fall short of the standard of good governance, as well as how such shortcomings can be addressed.

It has been several years now that the conversation around the work of the ICC has relied on the language of crisis.¹⁴ The Court was established to deal with crimes that often find their commission intertwined in the most acute of crises.¹⁵ Given its mandate, that also includes a complex system of interaction with victims of both crimes and situations, the Court's dialogue with,

11 Sharma, *supra* note 9.

12 On this topic see for example, Hannah Woolaver and Emma Palmer, 'Challenges to the Independence of the International Criminal Court from the Assembly of States Parties' (2017) 15 *Journal of International Criminal Justice* 641-665, pp.647-652.

13 The Court found this provisional rule applicable in *The Prosecutor v Paul Gicheru and Philip Kipkoech Bett*, Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, Pre-Trial Chamber A (Article 70), 10 December 2020, ICC-01/09-01/15-61; upheld in *The Prosecutor v Paul Gicheru*, Judgement on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled 'Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence', 8 March 2021, ICC-01/09-01/20-107.

14 This has also been the case for international criminal justice more generally. See for example, Joseph Powderly, 'International criminal justice in an age of perpetual crisis' (2019) 32(1) *Leiden Journal of International Law*, 1-11; Sergey Vasiliev, 'The Crises and Critiques of International Criminal Justice' in Kevin Heller, Frédéric Mégret, Sarah Nouwen, Jens Ohlin, and Darryl Robinson (eds) *The Oxford Handbook of International Criminal Law* (Oxford University Press: 2020).

15 See for instance, Yuzuki Nagakoshi, 'The Scope and Implications of the International Criminal Court's Jurisdictional Decision over the Rohingya Crisis' (2021) 43(2) *Human Rights Quarterly*, 259-289; Kirsten Ainley, 'The Responsibility to Protect and the International Criminal Court: Counteracting the Crises' (2015) 91(1) *International Affairs*, 37-54.

through, and around crises has only expanded. Since around 2015, the discussion on the Court and crises took a different turn. This saw commentators, critics as well as some supporters term the Court itself as being in a state of crisis or in trouble.¹⁶ Since then, several debates (oral and written), in practice and in scholarship, have been devoted to arguing whether or not *the Court* is in crisis analysing what led it there, studying its route out of this crisis, and studying what lies in its future.¹⁷ Different approaches have been adopted, demonstrated, and suggested.¹⁸

However, one aspect of this conversation is that it has been largely if not *solely* focused on the Court itself. The discussions around the Court being in crisis could be described as resembling part of the visual depiction of Plato's allegory of the cave. To explain the effect of education, Plato describes human beings living in a cave, imprisoned, unable to leave.¹⁹ The prisoners unable to turn their heads, can only see the reflections of people and the objects they carry as a result of shadows cast by the fire behind them. With no way of knowing *what the source* of these shadows are, the prisoners believe these to be the actual objects that they see and to be the true source of the noises they hear. A depiction of this allegory often sees an individual staring at a shadow of a bird, with the bigger picture demonstrating how another individual like

16 See for example, Douglas Guilfoyle, 'Part I- This is not fine: The International Criminal Court in Trouble' (*EJIL:Talk!*, 21 March 2019) available at <https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/> (accessed 7 July 2024); Douglas Guilfoyle, 'Part II- This is not fine: The International Criminal Court in Trouble' (*EJIL:Talk!*, 22 March 2019) available at <https://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/> (accessed 7 July 2024); Douglas Guilfoyle, 'Part III- This is not fine: The International Criminal Court in Trouble' (*EJIL:Talk!*, 25 March 2019) available at <https://www.ejiltalk.org/part-iii-this-is-not-fine-the-international-criminal-court-in-trouble/> (accessed 7 July 2024).

17 See for example, Mark Kersten, 'Yes, the ICC is in Crisis. It Has Always Been.' (*Justice In Conflict- JiC*, 24 February 2015) available at <https://justiceinconflict.org/2015/02/24/yes-the-icc-is-in-crisis-it-always-has-been/> (accessed 7 July 2024); Todd F. Buchwald, 'The Path Forward for the International Criminal Court: Questions Searching for Answers' (2020) 52 *Case Western Reserve Journal of International Law*, 417-432; Douglas Guilfoyle, 'Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis' (2019) 20(2) *Melbourne Journal of International Law*, 401-452; Sergey Vasiliev, 'Not just another "crisis": Could the blocking of the Afghanistan investigation spell the end of the ICC? (Part I)', (*EJIL:Talk!*, 19 April, 2019); Sergey Vasiliev, 'Not just another "crisis": Could the blocking of the Afghanistan investigation spell the end of the ICC? (Part II)', (*EJIL:Talk!*, 20 April 2019).

18 See for instance, Antonio Franceschet, *The International Criminal Court's Authority Crisis and Kant's Political Ethics* (2016) 16 *International Criminal Law Review* 201-215. See also, Ahmed Samir Hassanein, 'Self-referral of Situations to the International Criminal Court: Complementarity in Practice – Complementarity in Crisis' (2017) 17(1) *International Criminal Law Review*, 107-134; Leila Nadya Sadat, 'Reforming the International Criminal Court: "Lean In" or "Leave"', *Legal Studies Research Paper Series*, Paper No. 20-06-02; Jeremy Julian Sarkin, 'Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process' (2021) 21 *International and Comparative Law Review*, 7-42.

19 Plato, *The Republic* (ed G.R.F. Ferrari, translated by Tom Griffith), Book 7, 514-515.

a puppeteer holds an object that makes the shadow of the bird appear in front of the prisoner. Looking at how the Court might be in crisis and focusing on *the Court's* own internal functioning in order to bring it out of crisis thus, is much like focusing only on the shadow of the bird, without looking at the bigger picture. Looking at the whole picture instead, demonstrates how there are other actors involved, that might be responsible for such a crisis to a certain degree, and might be equally responsible to address this crisis, should it exist. This allegory therefore provides a map to the approach set out and applied throughout this research. Accordingly, moving away from looking at purely what can be fixed *within* the Court, if it does warrant fixing, this research aims at refocusing this attention to the entire picture itself. It does this by taking a step back, and looking at the entire institutional machinery adopted and established under the Rome Statute, to see whether viewing it as a whole can help in identifying areas for improvement that can make it stronger as a whole. This research therefore analyses the significant role that the ASP, as another institution established under the Rome Statute, plays with regard to the effective functioning of the ICC *via* the crucial governance that it exercises over it.

2 THREE FACTS OF ROME AND THE QUESTIONS RAISED IN NEW YORK AND THE HAGUE

Over two decades since its establishment, the Court has a current annual budget of € 187,084,300,²⁰ a total of 31 cases,²¹ with 10 convictions,²² and

20 See Assembly of States Parties to the International Criminal Court, *Resolution of the Assembly of States Parties on the proposed programme budget for 2024, the Working Capital Fund for 2024, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2024 and the Contingency Fund*, 14 December 2023, ICC-ASP/22/Res.4, p.1.

21 See for instance, International Criminal Court, *The Court Today*, 12 March 2024, ICC-PIOS-TCT-01-138/24.

22 See *The Prosecutor v Dominic Ongwen*, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", 15 December 2022, ICC-02/04-01/15-2022-Red; *The Prosecutor v Bosco Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06-2666-Red; *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red; *The Prosecutor v Ahmad Al Faqi Al Mahdi*, 27 September 2016, ICC-01/12-01/15-171; *Le procureur c Germain Katanga*, Jugement rendu en application de l'article 74 du Statut, 7 mars 2014, ICC-01/04-01/07-3436; *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red.

four acquittals.²³ Of these acquittals, two have been on the basis of a no case to answer motion.²⁴ The list of controversies surrounding the Court that have had both critics and supporters of the Court busy is quite long, particularly since 2016. To name a few incidents, three countries notified their withdrawal from the Court in 2016.²⁵ This fell in line with the overall dissatisfaction aired by the African Union with the Court.²⁶ The next year saw a press report with allegations of corruption against certain former and current staff of the Office of the Prosecutor (OTP).²⁷ The year after saw the judges of the Court sue the Court for an increase in salary.²⁸ That same year, the Appeals Chamber's decision to acquit Jean-Pierre Bemba drew a lot of attention towards the Court.²⁹ The decision of the Pre-Trial Chamber not to allow for an investigation into the situation in Afghanistan the year thereafter was followed by calls that the Court needed fixing.³⁰ Four former ASP Presidents who called for the Court to be assessed by a group of independent experts referred to the Court's rejection of an investigation into the situation of Afghanistan by the

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- 23 *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021, ICC-02/11-01/15-1400; *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636-Red; *The Prosecutor v Mathieu Ngudjolo Chui*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, ICC-01/04-02/12-271-Corr.
- 24 *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021, ICC-02/11-01/15-1400.
- 25 See United Nations, *Declaratory Statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court*, 19 October 2016, C.N.786.2016.TREATIES-XVIII.10 (Depository Notification); United Nations, *Gambia: Withdrawal*, 10 November 2016, C.N.862.2016.TREATIES-XVIII.10 (Depository Notification); United Nations, *Burundi: Withdrawal*, 27 October 2016, C.N.805.2016.
- 26 See for instance references to a 'withdrawal strategy', Assembly of the Union, *Decisions, Declarations, Resolutions and Motion*, Twenty-Eighth Ordinary Session, 30-31 January 2017, Addis Ababa, Ethiopia, Assembly/AU/Dec.622(XXVIII) available at https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf.
- 27 See for example the ICC statement concerning these allegations, International Criminal Court, *ICC Statement on recent media allegations*, 5 October 2017, available at <https://www.icc-cpi.int/news/icc-statement-recent-media-allegations>.
- 28 International Labour Organization Administrative Tribunal, *H. and others v ICC*, 7 December 2020, Judgment No.4354.
- 29 See for example, Buchwald, *supra* note 17, p.420; Sarah Hibbert, 'The Bemba Acquittal: A Blow to the ICC's Legitimacy in a Time of Crisis' (2019) 34(1) *Temple International & Comparative Law Journal* 95-127; Amnesty International, 'CAR: Acquittal of Bemba a blow to victims' (8 June 2018), available at <https://www.amnesty.org/en/latest/news/2018/06/car-acquittal-of-bemba-a-blow-to-victims/> (accessed 7 August 2024).
- 30 See Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser and Tiina Intelmann, 'The International Criminal Court needs fixing', Atlantic Council, 24 April 2019, available at <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/>.

Pre-Trial Chamber where the Chamber cited 'a lack of confidence that the Court could successfully carry out the job' as a 'a prime example of why' such an independent assessment of the Court was 'badly needed'.³¹ Later that year the ASP decided to commission a review of the Court and the Rome Statute system by a group of nine independent experts.³² Various critiques, criticisms, crisis narratives, and arguments of support ever since have analysed different aspects of the work of the Court. Some have focused on external factors and bodies and their relationship to the Court, while most have been focused inward, looking at how the Court can function better, more effectively, and with greater efficiency.³³ Given the earlier stated objective of this research, which is to take a step back and to look at the institutional structure established under the Rome Statute holistically, this calls for an acknowledgment, as a preliminary matter, of what was actually done at Rome.

Twenty-five years ago, on the 17th of July 1998, a hundred and twenty States voted in favour of the Rome Statute that established the International Criminal Court.³⁴ The adoption of the Rome Statute has been considered an accomplishment for a variety of reasons.³⁵ Amongst these, it has been lauded for the achievement of what was once considered impossible – the establishment of 'a permanent international institution empowered to prosecute and punish the most heinous of crimes'.³⁶ Representing lengthy and comprehensive negotiations amongst a hundred and sixty States, the Statute and its adoption symbolise a meeting of diverse ideals, values, and objectives. A result of focused discussion and debate, compromise, and concession,³⁷ the Statute is the source of the now well-established ICC, currently in its twenty-second year of existence and operation.

Amongst the several achievements that it is celebrated for, the Rome Statute did three things. It established an international criminal court, with wide jurisdiction over four core international crimes. Second, it did this by also establishing the Court as an international organisation in its own right.³⁸ Third, the Rome Statute established the ASP, as another institution under the

31 *Ibid.*

32 See *Review of the International Criminal Court and the Rome Statute system*, *supra* note 42.

33 There has been at least one reference to the possibility of external actors such as the ASP being amongst those able to 'fix' the Court, if it were to be understood as being broken. For this see Guilfoyle, *supra* note 17, p.440.

34 Rome Statute of the International Criminal Court (Rome Statute) (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

35 See for example, Philippe Kirsch and John T. Holmes, 'The Birth of the International Criminal Court: The 1998 Rome Conference' (1998) 36 *Canadian Yearbook of International Law*, 3-40.

36 Roy S. Lee, 'The Rome Conference and its Contributions to International Law', in Roy S. Lee (ed) *The International Criminal Court. The Making of the Rome Statute* (Kluwer Law International: 1999)1-40, p.37.

37 *Ibid.*, p.36.

38 Rome Statute, Article 4.

Rome Statute.³⁹ As mentioned above, most of the crisis narratives and analyses of what might have led the Court into crisis, and what could lead it out of this,⁴⁰ have been focused on only one of the institutions established under the Rome Statute. This focus has been on the Court itself, without adequately taking into consideration each of these three things done at Rome. The role of the ASP has thus far largely been excluded from this conversation. Refocusing attention to the role of the ASP in this regard is particularly poignant in view of the fact that, each of the aspects of the Court being in crisis, as noted earlier, can be linked to decisions of the ASP. Thus, in its objective to view the ASP as an integral piece of the intricately crafted puzzle that is the Rome Statute, this research also analyses the effects of the choice to establish the ICC both as a judicial institution and an international organisation.

3 RESEARCH QUESTIONS AND OBJECTIVES UNDERLINING THIS ENQUIRY

Other than it being essential to look at the institutional framework established under the Rome Statute as a whole to address any criticism as to how the Court is currently functioning or any crisis that it might face or be in, the need for the present research can be further demonstrated through an examination of the *nature* of functions that the ASP is tasked with in relation to the Court. For instance, a survey of the factors discussed earlier that led to the controversy that the Court found itself in, allows for these to be classified into three categories based on the source for controversy. Broadly, these pertain to the decision or actions of the judges, those of the Prosecutor, and the resources of the Court. The striking feature here is that the body behind each of these factors (or actors) is the ASP. The ASP elects the judges and the Prosecutor of the Court.⁴¹ It also adopts the Court's budget of the Court and is thus responsible for its resources.⁴² Further still, the decision challenged by the judges of the Court pertaining to their salaries highlighted above, was in fact not a decision by the Court, but by the ASP itself.⁴³ In addition to this, the ASP has also specifically been allotted the task of exercising management oversight over the Court.⁴⁴ The ASP is also tasked with dealing with any non-cooperation with the Court, should it occur.⁴⁵ Finally, the ASP is the sole body

39 *Ibid*, Article 112.

40 Reference has however, been made to the role of the ASP in addressing some of these issues. See Guilfoyle, *supra* note 17, p.440, who acknowledges the role of the ASP in 'fixing' the Court.

41 Rome Statute, Article 36(6) and Article 42(4).

42 *Ibid*, Article 112(2)(d) and Articles 113-117.

43 *H. and others v ICC*, *supra* note 28.

44 Rome Statute, Article 112(2)(b).

45 *Ibid*, Article 112(2)(f).

tasked with adopting amendments to the Statute and with adopting any final amendments to the Rules of Procedure and Evidence of the Court (RPE or the Rules).⁴⁶ Each of these functions harnesses the potential to have a considerable impact on the work of the Court. Whether that impact be direct or indirect, few would disagree with the *possibility* of the ASP being able to influence the work of the Court. While dealt with the cards to assist the Court in its mandate (through coordinated regimes *viz* cooperation, for instance, or providing resources), the ASP also retains the ability to starve the Court of funds, or to legislate on issues *sub judice*. This makes it vital to ensure that this influence remains constructive and not detrimental to the work of the Court.⁴⁷ This research proceeds from the hypothesis that the ASP's governance ought therefore to be limited to a certain extent, with this limitation manifesting itself through the exercise of *good* governance by the ASP over the Court.

Given that the ASP, tasked with the governance of the ICC, has the power to call for its review, ask the Court to demonstrate its effectiveness, and call for higher efficiency in its operations, who might ask the ASP for the same? Who *or what* therefore governs the governors themselves?⁴⁸ While the Court reports to the ASP, allowing the latter to hold it accountable, it remains less clear how the ASP is held accountable for the exercise of its role as governor, despite accountability being an integral facet of good governance.⁴⁹ The governance exercised by the ASP over the Court therefore may raise fundamental concerns. As mentioned earlier, these concerns pertain to the objectives of ensuring that the Court is accountable in the exercise of its mandate, and as an international organisation, whilst simultaneously ensuring its independence as a judicial institution. The two objectives can sometimes raise demands that might be in opposition to each other.⁵⁰ This highlights the need to analyse the governance exercised by the ASP to see how it can balance the dual objectives of ensuring the independence as well as the accountability of the Court in its exercise of good governance over the Court. This need is enhanced by the prospect of an abuse of power latent in the nature of the

46 *Ibid*, Articles 121-122, and Article 51(2)-(3).

47 See generally, Niels Blokker, 'The Governance of International Courts and Tribunals: Organizing and Guaranteeing Independence and Accountability', in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford: 2018), 26-42.

48 'Who governs the governor' refers to the phrase 'quis custodiet ipsos custodes', or 'who chaperones the chaperones', see Juvenal and Persius, Satire 6 (ed Sussana Morton Braund), Loeb Classical Library, pp.266-267, 030. However, the phrase is modelled after 'who guards the guardians' and is inspired by the thought in Plato's Republic, on the need to ensure that guardians do not themselves transgress, and how education can prevent this. See for example Plato, *The Republic* (ed G.R.F. Ferrari, translated by Tom Griffith), Book 3, 416.

49 See for example, Huw Llewellyn, *An Institutional Perspective on the United Nations Criminal Tribunals: Governance, Independence and Impartiality* (Brill: 2021) p.45.

50 See Blokker, *supra* note 47, p.40.

ASP's functions, and the need to additionally identify how this risk can be averted and/or addressed.⁵¹

With this objective in view, this dissertation addresses the following main research question:

How should the ASP exercise good governance over the ICC in order to ensure a balance between the objectives of holding the Court accountable and ensuring its independence?

To answer this question, this dissertation therefore sets out what a good governance standard in the context of the ICC and ASP entails. It then addresses whether and how the current governance arrangements put in place by the ASP fall short of this standard, and, where it does, how this can be addressed.

This dissertation proceeds in three parts, by answering three sub-questions. The first asks what the objectives underlying the establishment of the ASP were, and how these have been given effect through its structure and operations. This is done in two Chapters, one aimed at analysing how the manner in which the ASP was established has influenced its nature as a governance body and the objectives of the governance that it exercises over the Court. In light of this manner of establishment and these objectives, the second, Chapter 2 analyses how the structure of the ASP has been developed to further the exercise of its governance functions. The second sub-question is dealt with under Part II, and asks what good governance entails and requires from the ASP in its exercise of governance over the Court. This involves addressing what the components of such a good governance standard are in the context of the ASP and its governance over the ICC. Finally, the third sub-question is dealt with under Part III and asks whether such a standard of good governance is applied by the ASP in the exercise of its governance functions, and should this not be the case, how this can be addressed. This is dealt with in five chapters. Each chapter is focused on the application of this good governance standard to a particular governance function of the ASP, which are specified below. The answers to each of these three sub-questions thus aim at addressing the main question, of how the ASP ought to exercise good governance over the Court.

4 SCOPE OF ENQUIRY

To answer the main research question set out above, this dissertation develops and establishes a standard of good governance, applicable to the governance

⁵¹ See for instance, on the influence of the ASP's role on the judicial and prosecutorial functions of the ICC, Woolaver and Palmer, *supra* note 12.

exercised by the ASP. It also applies this standard to five particular functions of the ASP to identify how the ASP can exercise good governance. Keeping in view the objective of this enquiry, its scope is therefore necessarily limited in three ways. First, it is limited to one particular court and its governance. While a comparative analysis of the governance exercised over different courts and tribunals is a legitimate research objective and approach towards studying such governance, this would entail, a collection and analysis of empirical data pertaining to each of the five governance functions at these courts and tribunals. Instead, this dissertation provides such a comprehensive analysis for these five governance functions at the ICC, as exercised by the ASP, which is an enquiry that has not so far been conducted. Second, it focuses on the governance exercised by the ASP over the ICC, and the relationship between the two institutions. The study is therefore restricted to *external* governance exercised over the Court by the ASP, and does not include the ICC's self-governance, i.e. governance exercised by the Court internally. Third, this study focuses on five governance functions in particular. Acknowledging that any selection by its nature is imperfect, it has been made in keeping with both the scope of this thesis, and in light of the recent developments in relation to these five functions,⁵² which highlight, significantly, the varied nature of these functions and the underlying tensions between the objectives of ensuring the independence of the Court and its accountability. These are: the election of judges; the election of the Prosecutor; the exercise of management oversight over the Court; the adoption of legislative amendments; and the adoption of the Court's budget. These functions have also been selected on the basis that they are exemplary. The argument advanced in this dissertation rests on the understanding that the findings and conclusions can be applied to each of the governance functions exercised by the ASP, and relies on these five as examples. Thus, while other functions like addressing non-cooperation are equally vital for the Court, the issues that this function raises are similar to those dealt with under the legislative function exercised by the Court,⁵³ as well as those discussed in relation to the function of financing of the Court.⁵⁴

A further limitation is that this enquiry is situated within the independence *versus* accountability debate, which highlights certain salient features of international judicial governance institutions ('injugovins' or governance bodies) and the nature of their functions.⁵⁵ That being said, this dissertation is rooted in an understanding that while the principles of independence and accountability need not necessarily exist in a constant state of conflict, they often lead to requirements and practices in their pursuit that draw out tensions between the two principles. The independence *versus* accountability debate therefore

52 See Part III, Chapters 4, 5, 6, 7, and 8 respectively.

53 See Chapter 7.

54 See Chapter 8.

55 Blokker, *supra* note 47. See also Woolaver and Palmer, *supra* note 12.

finds itself at the centre of the standard of good governance developed within this dissertation. This is particularly in view of the aim of establishing, through good governance, an *aurea mediocritas* that balances both the objective of ensuring the accountability of the Court with that of ensuring its independence.

Finally, the scope of this dissertation is also delimited by its focus on the *legal* framework adopted, developed, and adapted by the ASP for its governance over the Court, without excluding its interaction with *the political*. This delimitation is visible particularly in the choice of methodology adopted to address the questions raised in this enquiry. While this research involves an analysis of documentation within the public domain, it acknowledges that this depicts only part of a picture, one that the institutions involved might choose to present. This self-representation however continues to be key in understanding the ASP's governance over the Court. Therefore, this research remains grounded in an understanding that the ASP and the ICC as institutions established under international law, exist in an environment that is both legal and political.⁵⁶ The existence of the latter ought not to discount the legal mechanisms and rules that a political body has 'inflicted' on itself. An analysis of these mechanisms and rules is necessary in order to understand whether or not the ASP adheres to this legal framework in practice. Such an analysis is equally necessary to understand the objectives driving this framework in the ASP's exercise of governance over the Court.

5 METHODOLOGY

In answering the main research question, 'how should the ASP exercise good governance over the ICC in order to ensure a balance between the objectives of holding the Court accountable and ensuring its independence?', this research proceeds in three steps, reflected in the three parts of this dissertation. Each of these is informed by a teleological analysis of the objectives underlying the ASP's governance over the ICC. These three parts include, first, identifying the objectives for such governance, as envisaged under the Rome Statute which established both the Court and the ASP. Second, this dissertation establishes a good governance framework applicable to the ASP's governance of the ICC, setting out the components of this framework. Third, it describes and analyses the current provisions for the governance by the ASP of the Court and examines these through the lens of the good governance framework, to determine

56 On the 'elements of the 'trinity of politics, order, and law' being a part of 'all international criminal fora – as a behaviour-influencing factor' see, Tamás Lattmann, 'The System of Operation of International Criminal Justice Fora, in Particular of the International Criminal Court – Will the Future Be Governed by Politics, Orders or Law?', in Pavel Šturma, *The Rome Statute of the ICC at Its Twentieth Anniversary. Achievements and Perspectives* (Brill Nijhoff: Leiden | Boston: 2019) 13-26, p.18.

and demonstrate whether and how these arrangements fall short of the good governance standard. The application of this standard is then further used to demonstrate how the ASP ought to address these shortcomings by complying with this good governance standard. In view of the normative nature of the main research question and the normative as well as descriptive nature of the sub questions this dissertation raises,⁵⁷ the methodology relied on to answer these questions accordingly comprises both normative and legal positivist and doctrinal research methods. In addition to being necessary for answering the research questions set out under this enquiry, the descriptive sections of this dissertation are aimed at providing a comprehensive overview of the ASP's exercise of its five governance functions. While the ICC's own legal framework has been subject to detailed description in literature, the same cannot be said of the ASP. The choice to include a thorough description of the ASP's legal framework before proceeding to establishing a normative framework and then conducting an in-depth analysis of the ASP's legal framework and practice through the lens of good governance, was also made with the objective to address this gap in literature.

In line with this, the dissertation starts with ascertaining and analysing what the objectives underlying the establishment of the ASP and its governance functions in relation to the Court were. For this, it comprises an analysis of the provisions of the Rome Statute that establish the ASP by following the rules of interpretation set out under the Vienna Convention on the Law of Treaties.⁵⁸ In keeping with this, a significant portion of this analysis comprises a study of the legislative drafting history of these legal provisions, consisting of both primary sources in the form of draft Statute provisions, committee reports and documents, statements and comments made by State delegations, and other documents comprising the *travaux préparatoires* of the Rome Statute. It also includes secondary sources such as commentaries on the Statute and other forms of literature and scholarship.

After analysing the objectives underlying the establishment of the ASP and its governance role, this dissertation incorporates into its legal positivist approach those methods that more adequately answer the second, normative research sub-question, which is what a standard of good governance ought to comprise in the context of the ASP's governance over the ICC. While analysing the law governing the ASP as *it is*, it explores what good governance *ought to* include in this context, keeping in view the objectives identified earlier. For

57 On how normative research questions generally 'tend to have descriptive doctrinal sub-questions', see Eliav Lieblich, 'How to do research in international law? A basic guide for beginners', 62 (2021) *Harvard International Law Journal Online*, p.8.

58 Vienna Convention on the Law of Treaties (Vienna Convention on the Law of Treaties) (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Article 31.

this, in addition to doctrinal legal research, the dissertation draws on theories of good governance, both from governance theory⁵⁹ and organisation studies.

Having identified and established the components of a good governance framework applicable to the ASP's governance over the ICC, this dissertation then relies on a combination of legal positivist and normative research methods to apply this standard to the ASP's exercise of five key governance functions. It uses a combination of doctrinal legal research of the legal framework adopted and developed by the ASP⁶⁰ as well as an empirical element in the form of data collected in relation to specific governance functions. This includes statistics and data pertaining to the annual budget of the Court and voting patterns in the election of judges and the Prosecutor of the Court. It also includes statistics pertaining to the management oversight related activities of the ASP in relation to the Court, as well as other data concerning timelines *vis-à-vis* the exercise of these functions. Each of these is based on primary sources such as the Statute and other legal texts of the Court, Court reports, ASP reports, ASP resolutions, and other ASP documentation such as *notes verbales*, and comments by delegations of States within the ASP, amongst others. After setting out how the ASP exercises its governance functions in practice, this dissertation then analyses the exercise of these functions through the lens of the good governance framework it sets out in Chapter 3 and determines whether and how the ASP's governance might fall short of this standard and how it should address this problem.

In addition, this research is also informed by gender perspectives, both on international law generally,⁶¹ and those pertaining to the work of the ICC⁶² and the ASP more specifically. The impact of this reliance is twofold. The first is that this research keeps in view feminist legal thought and the

59 This includes, for instance, pragmatic approaches towards governance and creative syncretism. Pragmatism's focus on '*problem-solving, deliberation, and experimentation*' makes it particularly useful to the enquiry in this dissertation. See Christopher Ansell, 'Pragmatism', in Christopher Ansell and Jacob Torfing (eds) *Handbook on Theories of Governance* (Edward Elgar Publishing: Cheltenham, UK: 2016) p.394. On creative syncretism see for example, Gerald Berk and Dennis Galvan, 'How people experience and change institutions: a field guide to creative syncretism' (2009) 38(6) *Theory and Society* 543-580.

60 On how '[n]on-binding resolutions of international organizations, for example, and instruments of "soft law" can also be viewed as part of the doctrine,' see for example, Lieblich, *supra* note 57, p.18.

61 In 1991, in their seminal work on the subject, highlighting how international law was 'a thoroughly gendered system', Charlesworth, Chinkin, and Wright questioned what they called international law's immunity to feminist analysis, and argued that 'both the structures of international lawmaking and the content of the rules of international law privilege men' and that 'if women's interests are acknowledged at all, they are marginalized'. See Hilary Charlesworth, Christine Chinkin and Shelly Wright, 'Feminist Approaches to International Law' (1991) 85(4), *The American Journal of International Law*, 613-645, pp.614-615.

62 See for example Rosemary Grey, Kcasey McLoughlin and Louise Chappell, 'Gender and judging at the International Criminal Court: Lessons from 'feminist judgment projects'', (2021) 34 *Leiden Journal of International Law*, 247-264.

arguments that this school of thought raises, including in relation to the work of the ICC and its impact, and in its consideration of gender related issues.⁶³ Second, this research includes a study of how the ASP addresses the possibility of the gendered impact of its decisions, and the need for greater gender balance in its work. This is in conformity with the legislative history of the Rome Statute.⁶⁴ It is also in conformity with the resolution of the ASP itself to ensure a gender balance within the organs of the Court as well as in the Assembly's own work and its subsidiary bodies.⁶⁵ However, the experts as part of the Independent Expert Review of the International Criminal Court and the Rome Statute system (IER) found that the ASP's own commitment towards ensuring gender equality 'requires decisive action'.⁶⁶ This, along with the sheer significance that the ASP's governance could have on the work of the Court, makes it vital for the ASP to aim at prefiguring gender perspectives into its own work so as to keep in line with this objective.⁶⁷

6 STRUCTURE OF DISSERTATION AND OVERVIEW OF CHAPTERS

Part I of the dissertation sets out the general framework for this enquiry, addressing the nature of the ASP as the Court's governance body. It focuses on what the ASP is, what its role is, and how it was established. It does this with a view to understanding and analysing the objectives underlying the establishment of the ASP and its governance role. It also addresses the

63 See generally, as an example, Indira Rosenthal, Valerie Oosterveld, and Susana Sácouto (eds) *Gender and International Criminal Law* (Oxford University Press: Oxford, UK: 2022).

64 See for instance Varrall and Easy, who observe how, owing 'to the legacy of the Women's Caucus for Gender Justice and the broader feminist movement, gender has been central to the mandate and legal framework of the ICC since the negotiation of its foundational legal document – the Rome Statute'. Suzanne Varrall and Sarah Easy, 'Gender on the agenda? The 21st Session of the Assembly of States Parties to the International Criminal Court', Australian Human Rights Institute, available at <https://www.humanrights.unsw.edu.au/research/commentary/gender-assembly-state-parties-international-criminal-court>.

65 The ASP has emphasised, for instance, 'the importance of equitable geographical representation and gender balance in the organs of the Court and, as appropriate, in the work of the Assembly and its subsidiary bodies'. See *Strengthening the International Criminal Court and the Assembly of States Parties*, *supra* note 2, p.2. The ICC itself has also expressed the need for gender perspectives in all aspects of its work, through press releases for instance. See International Criminal Court, Press Release, *International Criminal Court marks International Women's Day*, 8 March 2023.

66 Assembly of States Parties to the International Criminal Court, *Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report – 30 September 2020*, ICC-ASP/19/16, 9 November 2020, p.19.

67 See for example, Hilary Charlesworth, 'Prefiguring Feminist Judgment in International Law', in Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law* (Hart Publishing: Oxford, UK: 2019) 479-293, p.480, citing Margaret Davies, 'Material Subjects and Vital Objects – Prefiguring Property and Rights for an Entangled World' (2016) 22(2) *Australian Journal of Human Rights* 37, 39.

structure of the Assembly and its working methods, in order to analyse how the objectives underlying the establishment of the ASP are given effect institutionally. Part II sets out a good governance framework, that is developed on the basis of eight principles, reliance on which, as this dissertation will argue, could allow the ASP to exercise its governance in a manner that properly balances the objectives of ensuring both the Court's independence and its accountability. Part III then comprises an analysis of five key governance functions exercised by the ASP. This Part thus applies the good governance framework developed under Part II, to analyse whether and how the ASP falls short of the good governance standard in its exercise of these functions and how the Assembly ought to address this in order to exercise good governance over the Court. Finally, conclusions are drawn from this analysis with respect to the ASP's governance over the ICC and the need for balancing the Court's independence as well as holding the Court accountable.

In line with the scope and structure adopted for this enquiry, the three Parts within this dissertation are concerned with: analysing the objectives underlying the ASP's establishment and its governance over the Court (Part I: General Framework); the components of good governance and setting out a good governance framework (Part II: Good Governance of the ICC by its ASP); and the application of this framework to the governance functions exercised by the ASP (Part III: Key Governance Functions), respectively.

After setting out the objective, scope, and structure of this research, Part I starts with Chapter 1 which consists of an analysis of the ASP and the 125 States that comprise it. This analysis starts with a study of the establishment of, as well as the choice to establish the ASP. It focuses on the nature of the ASP as an entity separate from the Court. Analysing the manner in which the ASP was established, this Chapter studies the underlying objectives and draws these objectives into connection with the current functions and role that the ASP is allotted with. It then analyses the effect of the ASP having been established as a treaty organ under the Rome Statute. Chapter 2 then conducts an analysis of the institutional framework of the ASP. It commences with an analysis of the structure of the ASP and concludes by setting out how this structure is given further shape through the manner in which the Assembly exercises its functions and the working methods it has adopted. Chapter 2 also examines how the development of the structure of the ASP and its working methods might correspond to its establishment and the objectives underlying it.

Part II, in Chapter 3, sets out a good governance framework, applicable to the ASP's exercise of governance over the Court. It relies on theories of good governance and takes into consideration the need to ensure that the Court is accountable to the ASP in the exercise of its mandate, while also ensuring the Court's independence. This framework relies on eight principles of good governance, each of which form the pillars of a standard of good governance

established and advanced through this dissertation as being applicable to the ASP's governance over the ICC.

Part III applies the good governance framework developed under Part II, to five governance functions exercised by the ASP. It commences with Chapter 4, which analyses the ASP's election of the judges of the Court in practice. The Chapter studies each of the elections conducted thus far, and analyses the procedure adopted and executed by the ASP for the exercise of this governance function. Highlighting how this function treats both the independence and accountability of the Court, the Chapter concludes with a good governance analysis of this function, highlighting how reliance on the framework might lead to alternative outcomes. Chapter 5 conducts a similar analysis of the ASP's election of the Prosecutor of the Court. It similarly highlights the treatment of independence and accountability of the Court in the ASP's exercise of this governance function and concludes with a good governance analysis highlighting the need for further consideration of various principles of good governance. Chapter 6 analyses the ASP's exercise of management oversight. It focuses specifically on the exercise of this function through the establishment and operation of the Independent Oversight Mechanism (IOM). Highlighting how the objective of ensuring both the independence and accountability of the Court have been treated in the exercise of this function, the Chapter concludes with a good governance analysis of whether the ASP adequately considers and takes the principles of good governance into consideration. Chapters 7 and 8 conduct a similar analysis of the ASP's exercise of governance through its adoption of legislative amendments, and the adoption of the Court's budget respectively. Both Chapters focus on how the exercise of these two functions takes into consideration the independence and accountability of the Court, concluding with a good governance analysis of both functions.

Finally, the dissertation concludes by setting out its main findings and results and advancing recommendations. The main research question is answered first by highlighting four overarching findings pertaining to the ASP's exercise of governance over the Court. This is accompanied with corresponding (general) recommendations. Second, the dissertation in its conclusion includes an analysis of the findings and results of the application of the good governance framework to each of the five governance functions of the ASP discussed under Part III. This analyses how the ASP might currently fall short of this standard of governance. It also advances specific recommendations on how the ASP should address specific aspects of good governance, and how it could apply such recommendations, before offering final concluding remarks summarising the answer to the main research question.