

The Topography of Power in International Justice and the Rise of India

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Policy Brief Series No. 135 (2022)

1. Why Unmask Power?

In January 2018, the four senior-most judges of the Supreme Court of India, the largest democracy in the world, unprecedentedly held a press conference. They publicly expressed their disapprobation at the distribution of administrative power within the Supreme Court, and its entrenchment with and dishonourable exercise by the then Chief Justice of India, typically envisaged as the ‘first among equals’ in the Indian judicial system.¹ The judges alleged, *inter alia*, that the manner in which the Chief Justice constituted the roster determining work-allocation for sitting judges of the Court lacked transparency and failed to inspire confidence in its fairness and impartiality. According to them, politically sensitive cases were being assigned to a select few sitting judges on an *ad hoc* and preferential basis, without due regard to the principle of seniority. This first-of-its-kind historic press conference triggered a lingering discourse on how power is cabined, cribbed and confined in the hands of select individual(s) of the Court, rather than with the institution as a whole, and is consequently prone to misuse.

Should or could such a scenario be envisioned in international criminal justice? As noted by Morten Bergsmo in his Chapter 1 of the anthology *Power in International Criminal Justice*,² power in domestic justice systems is typically tempered by external correctives such as scrutiny by bar associations, auditors, media, and parliamentary committees, as well as internal checks and balances such as the doctrines of constitutionalism and separation of powers. Notwithstanding, it appears that the crisis of conscience within the Indian Supreme Court was such that even these domestic correctives were inadequate to prevent the malaise, prompting the four senior-most judges to appeal to the people directly through a press conference. Absent comparable correctives, how can the wielding of power in international criminal justice be unmasked? How can one speak to the conscience of people from within international criminal justice? Through whom would the revelation be made?

Foucault in his theory of power advanced the idea that power is not possessed by a single actor, whether individual or group, but rather pervades the whole of the ‘*dispositif*’, that is, the institutional- and knowledge-structures *in toto*, and thus tends to remain elusive and undetectable. Those who embody and enact power within relevant structures – and the degree and scope of their power – can, however, be identified.³ How can that be done with regard to international criminal

justice institutions?

Bergsmo proposes that the wielding of power within international criminal justice can be analyzed as a ‘topography’, which is likely to reveal different ‘layers’ of power. Among the layers he proposes are the judges and prosecutors, the States Parties of the International Criminal Court (‘ICC’) and their representatives, and what I call informal trans-governmental networks. By peeling off such layers, we may form a better understanding of who wields power, how, and in pursuit of which interests. The exposure of such wielding of power may deter its abuse or self-serving use, by making the power-holders aware that their exercise of power is keenly observed. This may strengthen the ability of international criminal courts to fulfil their mandate.

Judges and prosecutors constitute the familiar faces of the institution, conspicuously visible to the public eye, and thus easy to critically review. There is abundant literature on how they embody and enact power. Bergsmo therefore keeps the role of diplomatic actors and informal networks at the fulcrum of discussion. This policy brief seeks to follow the same trajectory, before discussing how the emerging picture of power in international criminal justice contributes to distrust of States not Party to the ICC Statute like India, and how the so-called ‘invisible college’ of international lawyers could contribute in this area.

2. Organizational and Power Structures of International Criminal Justice

The Preamble to the ICC Statute captures the resolve of the States Parties to “guarantee lasting respect for and the enforcement of international justice”.⁴ This aim is realized not simply by States Parties’ fulfilment of statutory obligations in relation to the ICC – such as obligations of co-operation, compliance and judicial assistance⁵ – but also by the conduct of States Parties in international judicial governance institutions vested with the responsibility of overseeing international and special or hybrid criminal tribunals, which Niels Blokker terms as “injugovins”.⁶

Given how international law routinely touches the lives of individuals, scholars have argued for consciously invoking the principle of separation of powers in international institutional contexts.⁷ Within the organizational structure of the ICC, one could simplify and say that

for Analysis”, in Derek Hook (eds.), *Foucault, Psychology and the Analytics of Power*, Palgrave Macmillan, London, 2007, p. 66.

⁴ Rome Statute of the International Criminal Court, 17 July 1997, Preamble, para. 11 (‘ICC Statute’) (<https://www.legal-tools.org/doc/9c9fd2/>).

⁵ ICC Statute, Part 9, *ibid*.

⁶ Niels Blokker, “The Governance of International Courts and Tribunals: Organizing and Guaranteeing Independence and Accountability – An Appeal for Research”, in *European Society of International Law Conference Paper Series*, 2015, vol. 5, no. 5, p. 4.

⁷ Marjan Ajevski, “International Criminal Law and Constitutionalisation: On Hegemonic Narratives in Progress”, in *Erasmus Law Review*, 2013, vol. 6, no. 1, p. 53.

¹ “SC judges press conference: Legal fraternity says it’s unprecedented, shocking”, *The Hindu*, 12 January 2018.

² Morten Bergsmo, “Unmasking Power in International Criminal Justice: Invisible College v. Visible Colleagues”, in Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.), *Power in International Criminal Justice*, Torkel Opsahl Academic EPublisher (‘TOAEP’), Brussels, 2020, pp. 1–46 (<https://www.toaep.org/ps-pdf/28-power>). When I write ‘Bergsmo’ in subsequent paragraphs, I am referring to this chapter.

³ Derek Hook, “De-substantializing Power: Methodological Injunctions

the Assembly of States Parties ('ASP') assumes a legislative role, while the Office of the Prosecutor ('OTP') and the Registry are executive in nature, and the judges mostly perform a judicial role (while they also adopt and amend the Regulations of the Court pursuant to Article 52 of the Statute). The ASP is the ICC's 'injugovin', exercising primary authority and control over it by, *inter alia*, electing (and removing or failing to remove) the judges and Prosecutor, adopting the Rules of Procedure and Evidence and amendments thereto, holding the institution's purse strings, and exercising administrative and managerial oversight over the Presidency, the Prosecutor and the Registrar.⁸ In any modern polity resting on a strong foundation of constitutionalism, these organs keep a principled distance from each other in letter and spirit, practically criss-crossing each other, albeit not interfering with or usurping routine functions inherent to each other.

Does the relationship between ICC Chambers, the ASP and the OTP pass the test of an elementary version of separation of powers? This is not a straightforward polar question. There are ample instances of conflict. In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, the Prosecutor's "unequivocal refusal" to disclose the identity of a witness to the defence despite the Trial Chamber's order to the contrary was deemed as a "profound, unacceptable and unjustified intrusion" into the powers of the Court, and the Prosecutor's denial to be "checked" by the Chamber.⁹ The fault lines in the relationship between the ASP and the Court also became discernible in the case of *The Prosecutor v. Paul Gicheru*, with the ASP's refusal to take a formal decision – neither adopting, amending nor rejecting provisional Rule 165 of the ICC's Rules of Procedure and Evidence,¹⁰ a situation not foreseen by the ICC Statute.¹¹ By sitting on provisional Rule 165, the ASP demonstrated its power which is akin to a 'pocket veto'.

The cases of *The Prosecutor v. Uhuru Muigai Kenyatta* and *The Prosecutor v. William Samoei Ruto* ('Kenya Cases') are also relevant. Post the election of the accused as President and Deputy President of Kenya respectively, the African Union demanded that their trials be suspended and decided against their appearance before the Court until the completion of their tenures.¹² Meanwhile, the United Nations ('UN') Security Council considered a draft resolution requesting deferment of trial, albeit unsuccessfully.¹³ The ASP proceeded to amend the Rules of Procedure and Evidence including by way of insertion of Rule 134 *quater* to exceptionally excuse the presence of the accused.¹⁴ The incident is a textbook example of the power that diplomats in New York, The Hague and Addis Ababa wield over the ICC.

Such friction and the associated institutional cracks make it convenient for individuals to advance private interests directly or through their surrogates as key appointees in these institutions.

⁸ ICC Statute, Article 112, see above note 4.

⁹ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU, 8 July 2010, ICC-01/04-01/06-2519-Red, paras. 27, 31 (<https://www.legal-tools.org/doc/31e266/>).

¹⁰ Rules of Procedure and Evidence, 9 September 2002, Rule 165 (<https://www.legal-tools.org/doc/8bcf6f/>).

¹¹ 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", in *International Criminal Law Review*, 2020, vol. 20, no. 2, p. 303.

¹² Extraordinary Session of the Assembly of the African Union, "Decision on Africa's Relationship with the International Criminal Court", 12 October 2013, Ext/Assembly/AU/Dec.1(Oct.2013), para. 10(xi) (<https://www.legal-tools.org/doc/c36610/>).

¹³ Azerbaijan, Burundi, Ethiopia, Gabon, Ghana, Kenya, Mauritania, Mauritius, Morocco, Namibia, Rwanda, Senegal, Togo and Uganda: draft resolution, UN Doc. S/2013/660, 15 November 2013 (<https://www.legal-tools.org/doc/1fedef/>).

¹⁴ ICC ASP, "Amendments to the Rules of Procedure and Evidence", 27 November 2013, ICC-ASP/12/Res.7 (<https://www.legal-tools.org/doc/c50839/>).

3. States, Their Representatives, Elections and Appointments

Diplomats working in the international criminal justice space can often be seen to humanize naked power, by advancing state concerns, on one hand, and routine interests, personal ambition and interests of the international legal order, on the other. This duality is not always easy to distil. Sociologically-inspired enquiry into the elections of high officials and recruitment of important staff within international criminal institutions can attempt such dissection. In *Power in International Criminal Justice*, Bergsmo analyzes the conduct of specific individuals, including the first President of the ASP and the first Prosecutor of the ICC with whom he had worked during the establishment of the Court.

Let us place these actors and their exercise of authority in a Weberian mould. Diplomats often possess charismatic persuasion and sometimes authority, derived from the respect for the culture of diplomacy and its emphasis on forging interpersonal relations, also in difficult circumstances. High offices in international courts and tribunals attract reverence, as they are perceived as harbingers of justice struggling to end impunity for grave international crimes. For example, the position of the Prosecutor of the ICC has been viewed as the "most high profile prosecutorial appointment in the world",¹⁵ in the contest for which concern for the integrity standard has not always taken first place.¹⁶ As has been written about Dr. Silvia A. Fernández de Gurmendi (the first *Chef de cabinet* of the ICC Office of the Prosecutor and right-hand person of the first Prosecutor, and an Argentine diplomat), she exerted power through "fear and intimidation", "pushed through hirings" of loyalists and those who were perceived to be owed favours, and issued menacing threats such as that of "destruction of the Legal Advisory Section"¹⁷ which had sought to raise legal concerns regarding her actions.

Similarly, Luis Moreno-Ocampo, the first Prosecutor of the ICC, has been criticized by legal journalists and scholars, including in the report of the External Independent Experts in their review and recommendations over the Kenya Cases ('Kenya Report'), for his "autocratic leadership style" and "top-heavy, cumbersome decision-making" and "staffing practices".¹⁸ It is somewhat ironic that Moreno-Ocampo recently wrote an op-ed on his expectations from and advices for the incoming Prosecutor, who he considered as the "Gatekeeper of the entire Rome Statute".¹⁹ He likened the role of the Prosecutor to that of an orchestra director symphonizing different players. The abject criticism of his exercise of power during his tenure tells a story different from the sanctimonious canvas painted by Moreno-Ocampo.

The process to elect the third ICC Prosecutor saw the resurfacing of these fears in June 2020 as the Committee on the Election of the Prosecutor ('Committee') released the original shortlist of four candidates.²⁰ Richard Roy from Canada was one of the two shortlisted Canadian candidates, along with Robert Petit. However, the Prosecutor and the Deputy Prosecutor have to be of different nationalities.²¹ The incumbent Deputy Prosecutor at the time, James Steward, was also Canadian and due to retire only in 2022, practically nipping the chances of Roy being elected. However, Sabine Nölke, a former Canadian Ambassador to The

¹⁵ Kate Vigneswaran and Melinda Taylor, "ICC Prosecutor Symposium: The Appointment of the Next ICC Prosecutor is Not a Forum for Career Transition", in *Opinio Juris*, 13 April 2020.

¹⁶ Morten Bergsmo and Viviane E. Dittrich, "Integrity as Safeguard Against the Vicissitudes of International Justice Institutions", in Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, TOAEP, Brussels, 2020, pp. 1–38 (<https://www.toaep.org/nas-pdf/4-bergsmo-dittrich>).

¹⁷ Bergsmo, 2020, pp. 15–16, see above note 2.

¹⁸ OTP, "Full Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn from the Kenya Situation – Annex I", 26 November 2019 ('Kenya Report, 2019') (<https://www.legal-tools.org/doc/32p2hy/>).

¹⁹ Luis Moreno-Ocampo, "The Challenges for the Next ICC Prosecutor", in *Justice in Conflict*, 8 April 2020.

²⁰ ICC ASP, "Report of the Committee on the Election of the Prosecutor", 30 June 2020, ICC-ASP/19/INF.2 ('Election Report, 2020') (<https://www.legal-tools.org/doc/hpc4ya/>).

²¹ ICC Statute, Article 42(2), see above note 4.

Hague and Chair of the Committee, whose appointment has also been criticized, reportedly expressed how States could conveniently circumvent the statutory requirements.²² A diplomat also allegedly demanded that Steward demit office to pave way for Roy.²³

Coming back to Weber's classification, charismatic and symbolic authority in this system leverages the traditional authority which stems from a First World bias, giving the institutions an almost patrimonial appearance. The hiring of British and Canadian diplomats to high-ranking positions in the OTP as a form of "political payback"²⁴ for the perceived investment by British and Canadian foreign affairs officials in securing the election of desired candidates, attests the same. The first *Chef de cabinet* of the OTP was heard heralding the United States as "the best" on more than one work occasion, expressing the need to "align with the British", and simultaneously disapproving of the Chinese. The coupling of charismatic and traditional authority does not guarantee that the OTP will also function on the basis of rational-legal authority hallmarked by administrative fairness and separation of powers. That is why these episodes are not ignored, as both admonitions for the past and forewarnings for the future.

At the same time, these episodes provide a rare and precious window to the psychology of some individual wielders of power in international criminal justice, their personal perceptions of indebtedness, the demography of the institutions, and the vocabulary of the analytical frameworks employed. Since its genesis, international criminal justice has had to stand in the dock time and again and answer indictments of First World bias and, the last two decades, gender imbalance. Its material, procedural, geographical, temporal and personal selectivity are discussed emphatically in several chapters of *Power in International Criminal Justice*, and it is not necessary for the present policy brief to take that discursive detour. We owe Chapter 1 of the anthology a particular debt of gratitude because it displays the unusual courage of pinpointing individual actors who embody power in international criminal justice institutions, that is, 'subjects of power'. However, it is important to look at these individual actors, even if briefly, as 'objects of power': civilizational and gendered power which begets representational power.

Elections and appointments are principal evidence of display of representational power. If we look at the geographical distribution of staff at the ICC, there is a bias in favour of candidates from the Western Europe and Others Group ('WEOG'), which includes Canada, the United Kingdom and Australia. Around 73 percent of the staff comes from these countries.²⁵ In the above-mentioned 2021 Prosecutor elections, the Committee was also criticized for lack of civil law candidates in the shortlist²⁶ and for its working methods such as shortlisting candidates on the basis of subjective criteria like 'demeanour' which could be an avenue for projection of these biases.²⁷ Aspersion were also cast regarding the alleged preference for candidates who sought to 'go easy' on investigations in Afghanistan and Myanmar to assuage the United

States' concerns.²⁸

Similarly, the Court is called an exclusive 'boy's club' as it faces a gender imbalance in representation, especially at higher positions (P-5 and above) with only 23.5 percent female staff.²⁹ In the 2021 Prosecutor elections, out of the 89 original applicants, only 26 were women and in the final shortlist of nine candidates, only two were women.³⁰

4. Trans-Governmental Networks

Upon further scrutiny, a further layer in the topography of power is revealed: individuals and civil-society actors forming what ends up functioning as trans-governmental or informal social networks. Leaders of non-governmental organizations ('NGOs') such as the Coalition for the International Criminal Court, Human Rights Watch and Amnesty International are key actors in such networks. They wield heightened bargaining and brokering power in international criminal justice. In part because of the variety of roles they play (such as representing victims, independently collecting and presenting potential evidence, submitting *amicus curiae* briefs, and lobbying with domestic governments), they enjoy political, delegated and moral authority so much so that they have been deemed to be "running the Court's errands".³¹ Within these networks, there are individuals who enjoy both individualized and institutional authority.

It goes without saying that the relationship between the second and the third layers of power is subtle and not obvious. Trans-governmental networks and States can work hand in glove on specific issues. For example, during the negotiations on Article 7 (crimes against humanity) of the ICC Statute, the NGO REAL Women of Canada along with some conservative States lobbied to highlight their concerns with a wider interpretation of the provisions on forced pregnancy as well as the term 'gender', which it deemed could negatively impact national laws relating to abortion and sexual orientation.³² The lobby ultimately settled for a compromise through interpretative caveats in the form of Article 7(2)(f)³³ and Article 7(3) of the ICC Statute.³⁴

On the other hand, actors in trans-governmental networks have been observed to exercise great influence over the actions of diplomats or high officials, leading to conflicts or misunderstandings. Moreno-Ocampo was criticized in the Kenya Report for allowing NGOs to get the better of the OTP.³⁵ NGO campaigns during ICC elections are commonplace. Shortlisted candidates 'audition' before NGOs to garner support for their candidature – the approval of NGOs evidences popular and moral sanction for a candidate. During the 2021 election, a few African NGOs raised concerns over Mr. Karim A.A. Khan QC's appearance as a defence counsel in the Kenya cases. While he went on to win the election with a very comfortable margin, the NGO allegations triggered a back-and-forth between his supporters and adversaries, highlighting the sway of NGOs and how they can be instrumentalised.³⁶ During the drafting of the ICC Statute, several civil society actors were alleged to have ostensibly 'bullied' delegates to agree to their agenda-setting.³⁷

²² Stéphanie Maupas, "ICC Prosecutor Election: The Wheeling and Dealing is Not Yet Done", in *Justice Info*, 25 September 2020.

²³ *Ibid.*

²⁴ Gregory S. Gordon, "Selecting the ICC's Next ASP President: High Scrutiny for High Stakes", in *Opinio Juris*, 16 November 2020.

²⁵ ICC ASP, "Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court", 29 November 2021, ICC-ASP/20/29, pp. 4–5 (<https://www.legal-tools.org/doc/09v1ci/>).

²⁶ It caused much amusement when Professor Alex Whiting, a well-reputed United States prosecutor, was placed on the list of candidates which seemed intended to ensure civil law representation in the top management of the OTP (OTP, "Panel assessment of Candidates presented on List B", 10 October 2021, OTP2021/018358, pp. 5–6). While he has some family background from France and is said to speak French, his reputation in The Hague is that of being a very effective representative of the common law approach to international prosecutions.

²⁷ Open Society Justice Initiative, "2020-2021 International Criminal Court Prosecutor Election Process: Insights and Recommendations for Future Elections", November 2021, p. 19.

²⁸ Janet H. Anderson, "Last Men Standing for the ICC Prosecutor Election", in *Justice Info*, 8 February 2021.

²⁹ Angela Mudukuti, "Symposium on Gender Representation: The International Criminal Court's 'Boy's Club' Problem", in *Opinio Juris*, 7 October 2021.

³⁰ Election Report, 2020, p. 6, see above note 20.

³¹ Kjersti Lohne, "Global Civil Society, the ICC, and Legitimacy in International Criminal Justice", in Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, 2017, p. 458.

³² Helen Durham, "The Role of Civil Society in Creating the International Criminal Court Statute: Ten Years on and Looking Back", in *Journal of International Humanitarian Legal Studies*, 2012, vol. 3, no. 1, p. 38.

³³ ICC Statute, Article 7(2)(f), see above note 4.

³⁴ *Ibid.*, Article 7(3).

³⁵ Kenya Report, 2019, see above note 18.

³⁶ Twitter, tweet @arjunsethi81, 31 January 2021 (last accessed on 19 September 2022); Kevin Jon Heller, "NGO Letter Supporting Karim Khan QC", in *Opinio Juris*, 8 January 2021.

³⁷ Durham, 2012, p. 39, see above note 32.

Members of informal social networks may sometimes perceive that their interests are threatened by civil society actors. The anthology *Power in International Criminal Justice* provides an example linked to the late Christopher H. Hall of Amnesty International, one of the most prominent NGO leaders during the making of the ICC, known for his principled independence.³⁸ Dr. de Gurmendi took a dim view of his candidature for a legal adviser position in the OTP's Legal Advisory Section. Deeply disappointed, he withdrew his candidature.

As Lohne eloquently develops,³⁹ power has unique connotations in the context of NGOs, such as the exclusivity of mandates and roles, representational capacity, ability to set agendas, accreditation and informality. For example, the Coalition for the International Criminal Court – convened for more than two decades by the NGO leader William Pace – not only attends, participates in and monitors the ASP's sessions, but for years it also handled the accreditation of civil society actors to Assembly meetings.⁴⁰ However, it is the peculiarity of the moral authority which they wield – not representational in nature, splendidly detached from the constraints of popular sovereignty and accountability – that allows their concentration of power and funding patterns to largely escape scrutiny. Conveniently, some of these NGO representatives situationally impersonate both the activist and the diplomat, and tactically leverage politics.⁴¹ This reinforces the need for a search for solutions elsewhere, such as in the strengthening of a culture of constructive critique drawing, *inter alia*, on sociology of law, answering the Roman poet Juvenal's question as to who watches the watchdogs.⁴²

5. Rise of India and Its Distrust of International Criminal Justice

How do States such as China and India – large ICC non-party States that are beginning to assume more diplomatic significance – respond to the above-discussed exposure of the wielding of power in and around international criminal jurisdictions?

India's reasons for its opposition to the ICC from its inception have been worded in terms of complaints of distribution of power and its susceptibility to politics.⁴³ The concerns have included the vesting of power in an individual Prosecutor to initiate investigations *proprio motu*, triggering of the ICC's jurisdiction through referrals from a political UN Security Council, lack of respect for the principle of voluntary acceptance, and the risks of intervention. Owing to these lingering structural issues, India does not really need new reasons to distrust the ICC. However, several factors embolden the cynicism of Indian actors over the Court and its organizational efficiency, such as the problematic legacies of the ICC in its first two decades, suggestions of interventionist agenda-setting by informal trans-governmental networks, alleged favouritism in high-level appointments and elections, and any sign of preservation of Anglo-American interests as a yardstick for gauging the

³⁸ Bergsmo, 2020, p. 34, see above note 2.

³⁹ Kjersti Lohne, "Towards a Sociology of International Criminal Justice", in Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.), *Power in International Criminal Justice*, TOAEP, Brussels, 2020, pp. 47–78 (<https://www.toaep.org/ps-pdf/28-power>).

⁴⁰ Lohne, 2017, pp. 465–466, see above note 31.

⁴¹ *Ibid.*, p. 458, see above note 31.

⁴² Lindsay Watson and Patricia Watson (eds.), *Juvenal: Satire 6*, Cambridge University Press, 2014, p. 67.

⁴³ Devasheesh Bais, "India and the International Criminal Court", FICHL Policy Brief Series No. 54 (2016), TOAEP, Brussels, 2016 (<https://www.toaep.org/pbs-pdf/54-bais/>).

suitability of prosecutorial candidates.

In the 2017 elections to the International Court of Justice, India and the United Kingdom participated in a contest between their respective candidates – the first layer of the topography of power in international justice mechanisms. While India enjoyed an overwhelming majority in the UN General Assembly, the United Kingdom leveraged its power in the Security Council, leading to a stalemate which the latter sought to resolve by suspending the voting process, moving instead to an unprecedented conference mechanism.⁴⁴ However, the procedure would require open voting in the Council. The fear of that – and perhaps any visible display of power in broad daylight – made the United Kingdom withdraw its challenge.

Even though international criminal justice has its own peculiarities, the experience of competing with the United Kingdom – widely perceived in India to possess a nearly feudal sense of entitlement to a seat at the World Court – has bolstered a perception among Indian actors of the susceptibility of international justice and governance systems to the whims of 'the permanent' and the powerful. This is bound to influence how they perceive the administrative shuffling and political paybacks in the de Gurmendi episode. The undermining of institutional integrity through such conduct harms trust in international criminal justice by advocates in jurisdictions like India. Such displacement of trust cannot be corrected by a magisterial mindset, but through a conviction for reform.

Analyses drawing on sociology of law, combined with the external corrective of the distrust of non-party States, may motivate change. Unmasking power and making a case for its diffusion are not for the faint-hearted. It takes courage to speak up and face the whisperings of those who do not like your critical questions. Well-established, tenured professors should be among those who can contribute, if they have access to relevant information on the functioning of institutions. This includes what scholars have called the 'invisible college' of international criminal justice.⁴⁵ Those who may qualify as members of such an influential group have a responsibility to enhance the integrity and independence of the international criminal justice system in the face of vicissitudes of power, patronage and politics, drawing also on rich domestic traditions of sociology of law, without shying away from naming individuals and questioning the settled hierarchies of power. I hope the 'invisible college', despite benevolent intentions, will not itself fall prey to the interests of informal social networks.

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ISBN: 978-82-8348-210-2.

PURL: <https://www.toaep.org/pbs-pdf/135-goel/>.

LTD-PURL: <https://www.legal-tools.org/doc/3uk234/>.

⁴⁴ Varghese K. George, "India pulls off a diplomatic coup, wins prized ICJ seat", *The Hindu*, 21 November 2017.

⁴⁵ Claus Kress, "Towards a Truly Universal Invisible College of International Criminal Lawyers", Occasional Paper Series No. 4 (2014), TOAEP, Brussels, 2014 (<https://www.toaep.org/ops-pdf/4-kress>).



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