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ICC State-Party Governance in Times of Disunity

By Morten Bergsmo, Emiliano J. Buis, Gregory S. Gordon, Brigid Inder, Wolfgang Kaleck, Gunnar M. Ekeløve-Slydal and Song Tianying

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1. Are States Parties Good Sparring Partners for the Court?

The election of a new President of the Assembly of States Parties of the International Criminal Court ('ICC') on 4 December 2023 represents a new start for the Court and the States Parties, its main stakeholders. Four years ago, they gave the Independent Expert Review ('IER') a mandate to critically assess the functioning of the Court itself (which has taken somewhat of a beating in its first 20 years). The experts, however, chose to also add critical remarks on matters pertaining to State-Party governance, our concern in this policy brief.

The experts pointed out that States Parties have chosen to create a dense governance ecosystem, with an Office of Internal Audit, Independent Oversight Mechanism, Committee on Budget and Finance, Audit Committee and External Auditor, in addition to the Study Group on Governance and The Hague and New York Working Groups. Combined, these structures make frequent and time-consuming requests to the Court for more information on its programmes and management decisions. Such bureaucratization can be seen as an expression of the commitment of States Parties and thus generate trust. But it could also be perceived as a lack of focus. It begs the question whether such crowded and busy oversight trigger the best insights available to States Parties and their ability to communicate them clearly to the Court.

We believe there is something to add to the structural changes proposed by the IER,[1] and to what we already know about ICC governance. *Blokker* – a preëminent expert on the law of international organizations – emphasizes the need for more research on international judicial governance institutions.[2] By bringing more minds to the table to consider governance enhancement, his contributions, like those of *Vasiliev*,[3] are important for the field of international criminal justice. This policy brief does not address the governance structures as such, but asks whether the dense governance ecosystem leaves enough room for States Parties to be constructive sparring partners for the Court on the questions that really matter (in the best interest of the Statute, respectful of the Court's independence)? That is, do ICC States Parties ask the right questions at the right time to the Court, even when the questions are not endearing? Let us consider four current areas of practice where it seems that they have not managed to do so.

2. State-Party Performance Since the 2020 IER Report

In 2022 and 2023, a number of States Parties rallied behind Court involvement in the investigation of alleged crimes in Ukraine in ways which have triggered questions that they should perhaps themselves have asked. The Coalition for International Criminal Justice first brought up the risk of perceptions of double standards.[4] A considerable number of the recommendations in Amnesty International's report to the 21st Session of the ICC Assembly of States Parties concerned double standards, voluntary contributions and seconded personnel.[5] Amnesty warned that secondments can threaten to "create a two-tier system of international justice and opening up the Court to accusations of geopolitical bias and political control".[6] Indeed, one of the 'never again' themes during the ICC negotiations was precisely secondments to the ICC's prosecution service. Several States were bent on avoiding the secondment practice of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), whose Office of the Prosecutor ('OTP') started off with 23 secondees from the United States, leading to politically-charged, persistent criticism from some States and to a subsequent recruitment practice tilted in favour of similar Anglosphere credentials. As opposed to the ICTY, the ICC works on multiple situations, so if it in effect accepts secondees for one, what will it do for the next? Does it not create a temptation for government ministers to proactively offer (*de facto* 'earmarked') secondments or other assistance to investigations they consider desirable, sometimes for domestic political reasons?

Second, there are suggestions that States Parties have not dispassionately observed complementarity in the context of Ukraine, which is both willing and able to investigate and prosecute. *Schabas* has remarked that "[s]upporters of the [ICC's Ukraine] investigation seem to have entirely overlooked the issue of complementarity, whereby the Court should only intervene if the national authorities are unable or

[1] On the Secretariat of the Assembly of States Parties, Assembly–Court relations, and oversight mechanisms, see "Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report", 30 September 2020, paras. 955–957 (recommendations R364–R368) and 958–960 (recommendations R369 and R370) ('IER Report') (https://www.legal-tools.org/doc/cv19d5/).

[2] See, for example, Niels Blokker, "The Governance of International Courts and Tribunals: Organizing and Guaranteeing Independence and Accountability – Appeal for Research", in Conference Paper No. 5/2015, European Society of International Law, 2015.

[3] See Sergey Vasiliev, "Judicial Governance Entities as Power-Holders in International Criminal Justice: A Plea for a Socio-Legal Enquiry", 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. 483–567 (https://www.toaep.org/ps-pdf/28-power).

[4] See Coalition for International Criminal Justice, "Beyond Ukraine: International Justice Without Double Standards", 11 November 2022 (https://cicj.eu/steering-group-statement-2/).

[5] Amnesty International, "Key Recommendations: 21st Session of the Assembly of States Parties to the Rome Statute, 5-10 December 2022", p. 2 (https://www.legal-tools.org/doc/pgbxg4/). Amnesty International called for "full transparency regarding the receipt and assessment of voluntary contributions and how the money received is spent" (p. 3), and that "transparency regarding the Court's acceptance of gratis personnel is essential" (p. 4).

[6] *Ibid*.

unwilling to undertake prosecution".[7] If Ukraine is not genuinely investigating and prosecuting core international crimes, we would like to know which country (that suffers real potential for armed conflict) would be capable of domestic accountability according to the ICC States Parties? Yes, it falls on ICC judges to determine whether a State Party is able and willing to investigate and prosecute ICC crimes. But that does not mean that the practice of justice at the international courts in The Hague is a suitable yardstick. International criminal justice is far too costly and cumbersome to be replicated at the national level. We note that the Ukraine investigation has led States Parties to second more than 60 professionals to the ICC-OTP, when a prosecutor in Ukraine costs approximately 20 per cent of an associate prosecutor at the Court. Would it perhaps be more cost-effective to support Ukraine's own efforts and prosecutorial priorities directly?

Third, there are also concerns about State-Party performance as regards so-called 'positive complementarity'. *Nouwen* discusses some of the questions raised by the idea of 'positive complementarity' activities and the ICC-OTP, with emphasis on and links to the International Law Association's 2022 report on the topic.[8] The 21st ASP Session did not grant the Prosecutor's full requested budget-increase affecting, *inter alia*, aspects of the hub-function envisaged in support of domestic criminal jurisdictions.[9] It is reasonable to expect that domestic criminal justice agencies may wish, in their time, to learn from and perhaps copy select working methods of the ICC-OTP that have been tested in successfully-prosecuted cases before the Court over several years. Excellence speaks for itself and hardly requires outreach. Seeking to advise specific domestic criminal justice actors on how they should work on core international crimes, on the other hand, is a serious matter that comes with responsibility. As the ICC is statutorily obliged to determine whether such investigations or prosecutions are genuine, it is blocked from undertaking proper needs-assessment on which potential capacity-strengthening must be based. Why would national prosecutors or other justice actors wish to share information on capacity needs with the ICC if that same information could be used against their jurisdiction by the Court? This is a systemic barrier which protects the Court against any responsibility for failed domestic capacity-building and the costs involved.

Fourth, there are also reasons to be concerned about the performance of ICC States Parties in the area of information technology ('IT'). While the OTP publicly shared its draft Strategic Plan for comment, did States Parties avail themselves of this and other opportunities to engage the Office on fundamental IT questions? The Office has declared its intention to move its case- and situation-information to the cloud, as reportedly required by the proprietary software Relativity, which it is adopting. Faced with mounting open-source and visual information, this promises search and other advantages. Add Microsoft-powered artificial intelligence capacity, and the approach gains allure. But there is no shortage of IT questions that States Parties could have discussed with the Office, especially after the cyber-attack on the Court in recent months.[10]

As regards the cloud where the ICC-OTP is now in the process of storing its evidence, the line among colleagues in The Hague is that this solution offers superior, 'military-grade security'. Even if we assume that this is correct (until technological advances prove that it is no longer so), have States Parties explored alternatives with the OTP (including conservative local storage cut off from the Internet, with two computer terminals for each person who is authorized to access the evidence)? The 'cloud' is a euphemism for 'someone else's server'. If the situation- or case-related information of the ICC-OTP will now be stored on servers controlled by proprietary United States actors, will the public believe assurances that the United States Government – not a party to the ICC Statute – does not have a back-door to the information? How will perceptions be affected by presidential elections? The 2002 American Servicemembers' Protection Act is still in force.[11] Is it conceivable that its provisions barring co-operation with the ICC could be expanded in ways that would cause problems for Microsoft and Relativity? States Parties are surely confident by now that they can sustainably absorb the licence costs of these services when they kick in after initial grace periods.

States Parties have presumably concluded that the new IT approach is disclosure-proof as regards metadata registration and compatible with a Registry-managed electronic disclosure suite for open-source and public documents.[12] Does the ever-greater dependence on search and now artificial intelligence mean that we have lost the battle to maintain an adequate overview of information in case-preparation, a long-standing problem in international criminal justice?[13] Does the sheer volume of anticipated visual evidence affect our appreciation of the bread-and-butter in war crimes trials over the last 25 years, namely witnesses and documents?

3. Election and Removal: The Achilles Heel

States Parties also struggle with their governance role in the areas of election and removal. They elect the high officials of the Court as well as the President of the Assembly of States Parties. In doing so, they have made blunders consequential for the Court and its reputation. *Vasiliev* observes that by making "ill-conceived organisational and staffing choices", States Parties can "debilitate the courts and bring them to their knees".[14] For example, the first ICC Prosecutor was elected by acclamation, against the advice of the Court's largest donor at the time.[15] The legacy of such missteps lingers on in the Court's

7 See William A. Schabas, "La Cour pénale internationale à vingt ans: Un bilan géopolitique", in *Annuaire français de rélations internationals*, vol. XXIV, Éditions Panthéon-Assas, Centre Thucydide, 2023, pp. 911–925: "The enthusiasm for the investigation in Ukraine constitutes an exercise of discretion by the Prosecutor that reveals a bias towards the political priorities of Western States that may harm the Court's reputation elsewhere in the world".

8 See Sarah M.H. Nouwen, "A CILRAP Conversation on World Order" focusing on 'positive complementarity', CILRAP Film, 3 October 2022 (https://www.cilrap.org/cilrap-film/221003-nouwen/). See also International Law Association, "Lisbon Conference: Complementarity in International Criminal Law", 2022 (https://www.legal-tools.org/doc/vqvrwy/).

9 Strategic goals 2 and 3 of the new strategic plan are "Enhance efforts by national authorities to fight impunity" and "Make the Office a global technology leader", respectively, see International Criminal Court, Office of the Prosecutor Strategic Plan 2023-2025, 14 June 2023, pp. 12–14 (https://www.legal-tools.org/doc/mu9jlt/).

10 International Criminal Court, "Measures Taken Following the Unprecedented Cyber-Attack on the ICC", Press Release, 20 October 2023.

11 The American Servicemembers' Protection Act, 2002 (as amended on 29 December 2022) (ASPA, Title 2 of Pub. Law, 107–206, H.R. 4775, 116 Stat. 820, enacted 2 August 2002), known informally as 'The Hague Invasion Act' (https://www.legal-tools.org/doc/cezjd1/).

12 See former Judge David Re, "Rethinking Disclosure: Embrace the Electronic Disclosure Suite", in Xabier Agirre, Morten Bergsmo, Simon De Smet and Carsten Stahn (eds.), *Quality Control in Criminal Investigation*, TOAEP, Brussels, 2020, pp. 735–797 (https://www.toaep.org/ps-pdf/38-qcci); and the cautionary note in John William Hak, "Non-textual Evidence in International Criminal Prosecutions: Discovering the Best Practices for Audiovisual Materials in a Digital Age", Doctoral thesis defended at Leiden University on 9 November 2023, p. 357 (on file with the authors).

13 Morten Bergsmo, "Towards a Culture of Quality Control in Criminal Investigations", Policy Brief Series No. 94 (2019), TOAEP, Brussels, 2019 (http://www.toaep.org/pbs-pdf/94-bergsmo/).

14 Sergey Vasiliev, see *supra* note 3, p. 564. *Barnett* and *Finnemore* writes about "the propensity of [international organizations] for undesirable and self-defeating behaviour", see Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics*, Cornell University Press, Ithaca, 2004, p. 7.

15 Germany expressed reservations, see Morten Bergsmo, "Institutional History, Behaviour and Development", in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, TOAEP, Brussels, 2017, pp. 5–6 (fn. 10) (https://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song). See also Morten

culture insofar as such officials brought many persons into the Court, including some whose contribution to the field of international criminal justice is yet to be validated. Sadly, some of their protégés are still bringing the Court into disrepute. The recent, manifestly unfounded public accusations made by two former OTP members, Florence Olara and Joanna Frivet, against Brigid Inder OBE, one of the present authors, are an unfortunate case in point.[16]

In the past, States Parties have also decided not to use their power to remove ill-suited electees (although this had once been considered by States Parties). Are they aware that flawed election outcomes and subsequent failures to take remedial steps are regularly invoked by other high officials and prominent professionals in the field as indicative of acceptable standards? Some of us have heard more than once the argument that because a certain high official was not removed by the States Parties several years ago, then there is simply no problem. If upheld at the ICC, such an argument would in effect nullify the legally-binding integrity standard for high officials and staff alike.[17] Have States Parties contemplated the demoralizing effects on Court staff and performance that they may have inadvertently caused? And have they considered the impact among both current and future supporters outside the Court whose aspirations of international justice constitute its ultimate bulwark?[18] States Parties should avoid steps that lead to a drift towards the bottom.

Should States Parties persist in prioritizing regional and national interests above the global interests of the Statute and the Court, as suggested by the IER,[19] it is not difficult to imagine growing support for alternatives to the current protocols of the ICC Statute. For example, the power to elect judges could be transferred to an election council made up of two chief justices from each regional group of States Parties (who would be nominated by all chief justices in the group).[20] There could be a similar council for the election of the ICC Prosecutor, composed of two national chief prosecutors from each regional group of States Parties. Such a solution would instil trust in several constituencies.

Furthermore, States Parties have also chosen not to take steps that would allow for more effective removal of inadequately-performing staff members who share the responsibility for the meagre results produced by the Court in its cases to date. Is this a burden that the third Prosecutor is expected to shoulder alone, despite the considerable administrative challenges frequently involved? Informed conservative estimates suggest that some 10 per cent of OTP staff should depart in order to meet standards appropriate for a permanent international prosecution service, worthy of the third Prosecutor's transformative agenda. Adding new posts without removing those concerned may not resolve persistent issues of quality control. Work culture is not easily changed in large organizations, and the ICC is marching towards a EUR 200 million budget.

4. Rotation of Diplomats v. Continuity and Expertise

There is a risk that the ICC will not become stronger than the common will of the political actors who created it. Without effective governance, States Parties could end up glorifying the existence of the Court while simultaneously neutering the power of its mandate. Are there perhaps systemic limitations that undermine the ability of States Parties to engage in more effective governance of large international judicial institutions with the size, budgetary complexity and IT challenges of the ICC?

One feature of the current architecture stands out: the frequent rotation of dedicated diplomatic personnel, who commonly cover the ICC and other international organizations for a brief period of a mere three years. By the time they have grown into their role, they need to move on to other postings, often to their expressed regret. This frequent turnover seems to make it difficult for States Parties to fully appreciate all issues, their background, technicalities, and interests driving questions played out before them. Their discussion partners at the Court, on the other hand, are often seasoned lawyers who may have dealt with the applicable budget rules and contextual facts over many years. Not only may there be, strangely, an inequality of arms in this working relationship, but Court officials frequently invoke the Court's "independence from state control and its need for confidentiality".[21]

Unsurprisingly, very few of the diplomats have a background in judicial administration, much less in the oversight of a multi-faceted international criminal jurisdiction with, *inter alia*, detention, investigation, prosecution, adjudication, reparations and outreach functions (which are commonly executed by a variety of government agencies at the domestic level, often with separate administrations and oversight systems). They find themselves dealing with a "highly complex and unusual organism where confidentiality and independence of decision-making are central to the proper functioning of the institution", while there are simultaneously expectations of an international organization operating "under the close supervision and oversight of their member states"[22] which may create a sense of micromanagement.[23]

It is our submission that domestic judicial and prosecutorial administrators should play a greater role in the Assembly of States Parties. Their participation in Court governance will bring more continuity and relevant expertise that enable States Parties not only to critically assess needs presented by Court officials and how they should be realistically priced, but also to be insightful and constructive sparring partners for the Court on technical issues. States Parties with professional and independent justice administrations should start to include such experts in their delegations to the Assembly. They should not be subjected to the rotation principle, but be able to have continued involvement through that State Party's delegation in, for example, the budget process or oversight of technical questions.

This proposal should not be misconstrued as an attempt to undermine the traditional role of career diplomats in the governance of

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*, TOAEP, Brussels, 2020, pp. 14–19 (https://www.toaep.org/ps-pdf/28-power), who cites publications by Gunnar M. Ekeløve-Slydal and Gregory S. Gordon.

16 See "Statement by Brigid Inder OBE", 21 September 2023 (https://www.legal-tools.org/doc/0756ci/).

17 The comprehensive volume *Integrity in International Justice* and the Peace Palace conference it draws upon have brought attention to the legally-binding integrity standard in international justice institutions, see Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, TOAEP, Brussels, 2020 (https://www.toaep.org/nas-pdf/4-bergsmo-dittrich). When international criminal jurisdictions pursue alleged crimes of powerful State actors, they will face enhanced intelligence pressure (including against individual high officials and their past and present personal conduct).

18 "The formalized Independent Oversight Mechanism is not the ultimate overseer of the Court, nor is the Assembly of States Parties. The aspirations of individuals and communities made the Court and continue to provide its foundation. If the leaders of the Court cannot retain their trust, their aspirations will move on to other instruments for the betterment of humankind", see Morten Bergsmo, Wolfgang Kaleck, Alexander S. Muller and William H. Wiley, "A Prosecutor Falls, Time for the Court to Rise", Policy Brief Series No. 86 (2017), TOAEP, Brussels, 2017, p. 4 (http://www.toaep.org/pbs-pdf/86-four-directors/).

19 The IER remarked: "Nevertheless, it is disturbing to discover that the practice of trading votes out of political self-interest, unrelated to the calibre of the candidate for election to a leading, international judicial post, is so well-entrenched that some States Parties still to this day find it politically expedient and acceptable to adhere to it. The remainder appear to tolerate it at a time of widespread, grave concern that the Court is proving to be less effective and efficient in the global fight against impunity than was hoped by its many supporters", see IER Report, para. 963, see *supra* note 1.

20 This idea was shared with the authors by Judge Gilbert Bitti (Kosovo Specialist Chambers).

21 IER Report, para. 949, see *supra* note 1.

22 *Ibid.*, para. 950.

23 *Ibid.*, para. 948.

international courts and tribunals. This is not a zero-sum game. The vital contributions of some lawyer-diplomats with long Assembly experience prove the importance of continuity and expertise. The nature of international courts has evolved significantly since the mid-1990s. The way States govern such courts should also evolve as international jurisdictions become more complex. States are right that results are what matters.[24] But this also holds true for State-Party governance of international courts.

5. From Small-Group Governance to Guardianship

The quest for results does not, however, justify what *Benvenisti* described already nine years ago as "isolating policy-making within narrow, functional venues [international organizations] that are effectively monitored and controlled by the executive branches of a small group of powerful democratic States".[25] He warned that "the large and heterogeneous global public that resides outside the small group of powerful States can never be confident that their interests, in the absence of due process, are being adequately protected from the exercise of arbitrary power".[26] This explains why the discussions on staffing and secondments, on power in international criminal justice,[27] on Common v. Civil Law tension and 'surplus of Anglosphere influence'[28] are fundamentally important.[29] Professionalization of State-Party governance recognizes that centres of ICC power have not always fostered a harmonious, transparent and confident governance environment in which all States feel valued. This problem has been amplified by the operation of informal social networks.[30] The sense of entitlement among representatives of some wealthy states should be reined in – the ICC does not have majority shareholders from a small number of dominant countries. Whereas the current governance model may drain motivation to collaborate, the principle of equality can renew the moral practice of multilateralism. Diversity is a fact, but inclusion is a choice.

The ICC Assembly of States Parties is not immune to the growing polarization witnessed in the international community. It is uncertain how this will evolve in coming years. States Parties should pay heed to the recent call for stronger affirmation of the preambular value of unity of humankind in the ICC Statute.[31] Invoking this value in *obiter dicta*, submissions or statements cements its recognition and defies the polarizing paralysis that we see in some international organizations. This is a simple message that draws States Parties together.[32]

For strategic governance, States Parties do need excellent lawyer-diplomats with broad skill-sets. An element of longer-term or 'cathedral' thinking will help the ICC States Parties as they consider the lasting repercussions of their decisions for the Court and pay attention to the future of the international justice system, as also recognized by the IER.[33] In our view, States Parties have a non-waivable duty of care for the ICC and its purpose. A lasting *guardianship* of the Rome Statute and the Court is incumbent upon them. They should now put their best foot forward, encouraged by the new leadership of the Assembly of States Parties. By including professionals who serve in their domestic judicial or prosecutorial administrations in the work of the Assembly, States Parties will increase their ability to be incisive sparring partners for the Court.

Morten Bergsmo *is the Director of the Centre for International Law Research and Policy (CILRAP). Dr.* ***Emiliano J. Buis*** *is Professor at the University of Buenos Aires and the Central National University in Azul.* ***Gregory S. Gordon*** *is Professor at the Chinese University of Hong Kong. Dr.h.c.* ***Brigid Inder*** *OBE is a founding Member of the Steering Group of the Coalition for International Criminal Justice ('CICJ'), and was formerly co-founder and Executive Director of the Women's Initiatives for Gender Justice (2004–2017) and Special Advisor on Gender to the ICC Prosecutor.* ***Wolfgang Kaleck*** *is General Secretary of the European Center for Constitutional and Human Rights.* ***Gunnar M. Ekeløve-Slydal*** *is Director of the CICJ and Deputy Secretary General of the Norwegian Helsinki Committee. Dr.* ***Song Tianying*** *is a CILRAP Research Fellow and Member of the CICJ Steering Group.*

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24 *Ibid*., para. 949: "many States Parties are frustrated with the Court, which they consider does not deliver full value for the funding their taxpayers provide, in terms of reducing the incidence of the crimes set out in the Rome Statute, through convictions and deterrence". There is also some frustration with the States Parties.

25 Eyal Benvenisti, *The Law of Global Governance*, Hague Academy of International Law, AIL-POCKET, 2014, p. 19.

26 *Ibid*., p. 20.

27 See the discussion in Morten Bergsmo, "Unmasking Power in International Criminal Justice: Invisible College v. Visible Colleagues", *supra* note 15, pp. 1–46; Bharatt Goel, "The Topography of Power in International Justice and the Rise of India", Policy Brief Series No. 135 (2022), TOAEP, Brussels, 2022 (https://www.toaep.org/pbs-pdf/135-goel/).

28 See Morten Bergsmo, "Institutional History, Behaviour and Development", *supra* note 15, pp. 9–10.

29 *Klabbers*' willingness to critique the prevailing school of 'functionalism' (which he defines as international organizations existing "so as to exercise functions delegated by their member states"), instils helpful realism, see Jan Klabbers, *An Introduction to International Organizations Law*, Fourth Edition, Cambridge University Press, 2022, p. 3: "the organization can always blame its members [States Parties] (who, after all, are *Herren der Verträge*, or more often *Herren des Vertrags*), while the members can always point to the organization's independence. In the process, the injured third party (be it a third state, a citizen, or a company) gets crushed and might look in vain for justice. It is precisely this latter concern for the position of third parties that means that issues of control and responsibility tend to escape from any kind of functionalist framework" (pp. 338–339).

30 See *supra* note 27.

31 See Morten Bergsmo, Emiliano J. Buis and Song Tianying (eds.), *Philosophical Foundations of International Criminal Law: Legally-Protected Interests*, TOAEP, Brussels, 2022 (http://www.toaep.org/ps-pdf/36-bergsmo-buis-song), in particular Chapter 1 by the co-editors.

32 This is important at a time when several States Parties even have difficulties meeting their ICC membership fee. As of 31 October 2023, a "total of 25 States Parties had outstanding contributions of more than one year, and 13 of those were ineligible to vote under article 112, paragraph 8, of the Rome Statute", see Bureau of the Assembly of States Parties, Tenth meeting, 1 November 2023, p. 6 (https://www.legal-tools.org/doc/wk1uxo/).

33 Recommendation R363 calls for a "discussion among stakeholders (Court, States Parties and civil society) […] on the strategic vision for the Court for the next ten years", IER Report, see *supra* note 1.

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