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Integrity in International Justice

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E-Offprint:

Cyril Laucci, “The Wider Policy Framework of Ethical Behaviour: Outspoken Observations from a True Friend of the International Criminal Court”, in Morten Bergsmo and Viviane E. Dittrich (editors), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (ISBNs: 978-82-8348-190-7 (print) and 978-82-8348-191-4 (e-book)). This publication was first published on 19 November 2020.

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Front cover: Sir Thomas More (1478-1535) painted by the German artist Hans Holbein the Younger (1497-1543) in the late 1520s. Sir Thomas More is discussed extensively in this book as a symbol of integrity in justice.

The Wider Policy Framework of Ethical Behaviour: Outspoken Observations from a True Friend of the International Criminal Court

Cyril Laucci*

21.1. Introduction

In this chapter, I will offer several observations on the relationship between the legal and policy frameworks of international institutions and integrity. Before that, however, I would like to compliment the International Nuremberg Principles Academy and the Centre for International Law Research and Policy ('CILRAP') for organizing the international conference 'Integrity in International Justice' in the Peace Palace in The Hague in December 2018, and for initiating the Integrity Project which has resulted in this comprehensive anthology. It actually takes courage to address such issues, which are usually taken for 'granted without saying'. It requires looking at integrity in international justice without fear or bias, comparing the way things are with the way they should be. This is indeed the actual support international justice needs: the frankness of true friends, instead of the flattery of courtesans. It requires going beyond the complacent fascination and deference for international justice institutions and their officials, remembering that these institutions are ultimately made up of women and men, with their own limits, needs and dilemmas, whatever the qualities of such individuals. It also requires looking deeper into the governance and policy framework of these organisations to find what, if anything, is going wrong, instead of entering superfluous judgments as to the alleged poor quality of their personnel and officials as the sole explanation for their failure to fulfil their mandate. The best civil servants and officials can do barely better than the worst ones if a proper policy framework governing their action is miss-

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ing. The main difference is that the first priority for good civil servants and officials in such a case is addressing policy gaps, and promulgating a proper legal framework for their sound action.

Rules alone cannot guarantee integrity. Norms are useful in setting a standard framework of reference on which individuals can rely to assess the integrity of a given behaviour. In most cases, rules and policies – when they exist – provide ready-made answers and guidance for international civil servants to learn about the integrity that is expected from them. By itself, compliance with policies will not always be sufficient to lead one towards integrity and ethical behaviour. Nevertheless, clear guidelines will, at least, provide a framework within which individual dilemmas can find ready-made solutions for ethical action. In case of policy gaps, individual civil servants are left with no such guidance. Hence, the identification of ethical behaviour essentially relies on individual value judgments. In such a scenario, those who care about integrity, and are sufficiently enlightened to identify the right behaviour succeed, while those who lack integrity, or the capacity to uphold it consistently, fail.

Furthermore, for those who fail, disciplinary action is made more difficult – if at all possible – in the absence of clearly defined disciplinary breaches. *Nullum crimen sine lege* does apply to disciplinary action.¹ Policy gaps and failures to prevent unethical behaviour are thus impediments to disciplinary liability and a cause of impunity. In turn, the consequential perception of impunity plays as a strong deterrent to integrity. Where integrity breaches are protected from disciplinary action, they may facilitate the career development and promotion of offenders; at the same time, those who restrain their actions and try to advise adherence to ethical behaviour in all circumstances are perceived as trouble-makers. Unethical behaviour generates its own dynamics of solidarity between offenders, and retaliation against those who refuse to depart from integrity. Naming and shaming those who err is made difficult by the absence of rule that define and repress the phenomenon. It also exposes non-like-minded staff members and whistle-blowers who care for integrity to retaliation, as easy scapegoats immolated on the ground of the alleged lack of efficiency resulting from their willingness to play by rules which, to all effects, do not exist.

¹ International Labour Organization Administrative Tribunal ('ILOAT'), *In re Berte and Beslier*, Judgment, 20 December 1983, No. 566, p. 5 (<http://www.legal-tools.org/doc/395956/>).

It is generally agreed that a strong policy and legal framework alone is not an absolute guarantee of integrity in the management of an international institution; yet, policy gaps are pitfalls on the road of civil servants towards integrity and ethical behaviour. Some can avoid these, and maintain the clarity of mind to find their way to integrity in all circumstances. Still, others may fall, and their institution would then have failed to provide them with the necessary guidance.

21.1.1. Five Examples

Having regard to the Integrity Project, useful reflections may come from considering an international organization working in the field of international justice which recruits and employs hundreds of staff members, often for years, without a legally promulgated recruitment and selection procedure, discussed in Section 21.3.1. below. Section 21.3.2. describes an organization which deploys hundreds of staff members and other contractors on field missions in sensitive, post-conflict environments without any binding policy on mandatory security requirements or diplomatic clearance. In Section 21.3.3., this chapter elaborates on an organization without properly promulgated rules and procedures governing staff appeals and disciplinary proceedings, and where, by way of consequence, staff appeals and disciplinary actions fare quashed, faced by properly grounded appeals by those who are aware of such normative gaps. I will then consider an organization which enters a statement of principles combatting fraud and protecting whistle-blowers, but which fails to promulgate the necessary procedures to implement these in Section 21.3.4. Finally, Section 21.3.5. looks at an organization which does not comply, on a daily basis, with its own Information Protection Policy and thus fails to protect classified information regarding its judicial proceedings, the protection of its witnesses, victims and staff members in accordance with its own legal standards.

Without entering any conclusion with regards to the adherence of such organizations to the applicable integrity standards, I believe that we can reasonably conclude that each one of the organizations mentioned above has not set up the basic policy and legal framework and, as a consequence, fails to provide its staff and officials with the minimal guidance they should receive in order to uphold integrity standards in each organization's areas of activity.

This reasonable conclusion becomes a matter of serious concern when the five examples mentioned above are all related to the same organi-

zation, perhaps even more so when such organization is the central body in international criminal justice: the International Criminal Court ('ICC') (see Section 21.2. below). I am expressing this concern as a true friend of the ICC, with the genuine wish that the management of the Court may eventually heed my advice and take the necessary measures to correct the course. I am sharing this advice with the intent of making sure that, should the management persist in refusing to react, the concerned individuals risk facing the criticism arising from not addressing the policy gaps that undermine the daily action of this important institution, preventing the satisfactory fulfilment of its mandate of prosecuting the most serious crimes of international concern. Two years after making this advice public at the Peace Palace Conference of December 2018, I can see, with sadness, that it has remained unsuccessful so far: the final report of the Independent Expert Review ('IER') delivered on 30 September 2020 still flags "potentially outdated administrative issuances or those that are contradictory to principles set out in decisions of the International Labour Organisation – Administrative Tribunal (ILOAT) against the Court", and suggests, in its Recommendation R12, that "a systemic process should further be put in place to enable the Court's internal legal framework's compliance with ILOAT decisions, as soon as practicable after such a decision involving the Court is delivered, to identify and implement any necessary amendments".² This chapter is written with the genuine hope of saving the ICC from a future where it may decline by itself, by failing to uphold the highest standards of integrity, without need for a decisive action of its usual, numerous and powerful foes.

21.2. Overview of the Structure of the Internal Legal and Policy Framework of the International Criminal Court

The legal framework of relevance for the topic at hand is not composed by the usual sources of ICC law: although some articles of the Rome Statute referred to below are relevant, the other provisions governing the mandate and judicial proceedings of the Court in the Statute, the Rules of Procedure and Evidence, and other regulations have no direct relevance.

The combined provisions of Articles 38(3)(a), 42(2) and 43(2) of the Rome Statute entrust the Registrar, as "principal administrative officer of

² *Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report*, 30 September 2020, para. 59 and Recommendation R12, pp. 22–23 ('IER Report') (<https://www.legal-tools.org/doc/cv19d5>).

the Court” exercising his or her functions under the authority of the President of the Court and the Presidency, in charge of its “proper administration, with the exception of the Office of the Prosecutor”, with the main responsibility of establishing the machinery governing the daily administration of the Court.

On the basis of these combined provisions, the ICC Presidency issued, on 9 December 2003, the first ever Presidential Directive of the Court setting up the “Procedures for the Promulgation of Administrative Issuances”.³ Section 1.1 of this Presidential Directive defines the various types of administrative issuances that can be issued by the Court: (a) Presidential Directives; (b) Administrative Instructions; and (c) Information Circulars. The list is limitative. Sections 2–4 define the scope of each type of issuances, their hierarchy, and the authority entrusted with their promulgation. Sections 5 and 6 set up the procedure for the consultation, promulgation, publication and review of administrative issuances. Section 7 provides general guidelines for their interpretation. The Presidential Directive of 9 December 2003 thus plays a preeminent, quasi-constitutional role of organic law (in French, *loi organique*), immediately under the Rome Statute, next to the Staff Regulations adopted under Article 44(3) of the Statute, and at the very top of the administrative and policy framework of the Court. All subsequent administrative issuances, more than one hundred,⁴ were promulgated in accordance with this Presidential Directive.

21.2.1. Instances of Non-Observance of the Terms of the Presidential Directive of 2003

A quick review of the corpus of ICC administrative issuances reveals that, though promulgated pursuant to Presidential Directive of 9 December 2003, they were not necessarily compliant with its provisions. Since the delivery of the author’s speech at the Peace Palace Conference of December 2018, the Court has fortunately taken action and redressed some of these issues, as mentioned in the relevant footnotes below.

³ International Criminal Court (‘ICC’), Procedures for the Promulgation of Administrative Issuances, 9 December 2003, ICC/PRESG/2003/001 (<http://www.legal-tools.org/doc/6a92e0/>).

⁴ ICC, “Administrative Issuances” (available on its web site). The full list – unfortunately not up to date – of ICC administrative issuances.

21.2.1.1. Administrative Issuances Outside the Exhaustive List

First, many administrative issuances have been promulgated by instruments which do not form part of the exhaustive list of administrative issuances under Section 1.1 of the Presidential Directive of 9 December 2003. For example, the “ICC Recruitment Guidelines for Established Posts” of 2 November 2009, which govern the selection and recruitment of staff members⁵ (see Section 21.3.1. below); the “Guidelines on Special Post Allowances” of 1 August 2007;⁶ and the document published under the reference ICC/HRS/2007/7229 governing Official Working Hours of the Court and Official Holidays of 1 June 2007.⁷ Although the latter document bears the label ‘Information Circular’ on its first page, it was not promulgated and is not published as such.

21.2.1.2. Administrative Issuances Adopted Outside of Their Given Scope

There have been several instances of administrative issuances adopted exceeding the scope of the specific instruments used for their promulgation, as defined under Sections 2 to 4 of the Presidential Directive of 9 December 2003. Such issuances include general procedures promulgated by way of Information Circulars, whereas a Presidential Directive or an Administrative Instruction would have been required under Sections 2 or 3 of the Presidential Directive of 9 December 2003. For instance, the “Rules of Procedure of the Appeals Board” promulgated by Information Circular ICC/INF/2006/003 of 21 March 2006⁸ (see Section 21.3.3. below); the “Guidelines on Staff Training and Development” promulgated by Information Circular ICC/INF/2006/009 of 27 March 2006;⁹ the “Rules of Pro-

⁵ ICC, Recruitment guidelines for Established Posts, Professional and higher General Service categories, 2 November 2009 (<http://www.legal-tools.org/doc/50ed6b/>) (not fixed).

⁶ ICC, Guidelines on Special Post Allowances (SPA), 1 August 2007, ICC/HRS/2007/7385 (<http://www.legal-tools.org/doc/018904/>) (not fixed).

⁷ ICC, Official Working Hours of the Court and Official Holidays, 1 June 2007, ICC/HRS/2007/7229 (<http://www.legal-tools.org/doc/471713/>) (partially fixed by ICC/AI/2019/004, 28 October 2019 (<https://www.legal-tools.org/doc/asnyvr/>)).

⁸ ICC, Rules of Procedure of the Appeals Board, 21 March 2006, ICC/INF/2006/003 (<http://www.legal-tools.org/doc/fb03b5/>) (fixed by ICC/AI/2019/005, 28 October 2019 (<https://www.legal-tools.org/doc/2ekgxu/>)).

⁹ ICC, Staff Training and Development – Guidelines, 27 March 2006, ICC/INF/2006/009 (‘Staff Training and Development – Guidelines’) (<http://www.legal-tools.org/doc/317ad3/>) (not fixed).

cedure of the Disciplinary Advisory Board” promulgated by Information Circular ICC/INF/2007/003 of 7 May 2007¹⁰ (see Section 21.3.3. below); the setting up of the ICC Security and Safety Section, and various inter-organ fora created for the purpose of ensuring security at the Court and responding to crisis, promulgated by Information Circular ICC/INF/2008/003 of 22 January 2008¹¹ (see Section 21.3.2. below); “Mandatory Security Arrangements” for ICC field missions promulgated by Information Circular ICC/INF/2011/006 of 23 August 2011¹² (see Section 21.3.2. below); the procedure governing the delivery of “UN Laissez-Passer” for ICC missions promulgated by Information Circular ICC/INF/2015/008 of 19 March 2015¹³ (see Section 21.3.2. below); and the “Guidelines on Language Proficiency and Language Incentives” promulgated by Information Circular ICC/INF/2016/011 of 30 December 2016.¹⁴

21.2.1.3. Other Instances of Flawed Administrative Issuances

The practice of the Court has brought other kinds of problematic administrative instances, such as those that are manifestly obsolete which were not reviewed, as required under Section 5.2 of the Presidential Directive of 9 December 2003: for example, the “ICC Information Protection Policy” promulgated by Administrative Instruction ICC/AI/2007/001 of 19 June 2007¹⁵ (see Section 21.3.5. below).

Other administrative issuances refer to subsequent, subordinate instruments for the implementation of the general principles they provide,

¹⁰ ICC, Rules of Procedure of the Disciplinary Advisory Board, 7 May 2007, ICC/INF/2007/003 (‘Rules of Procedure of the Disciplinary Advisory Board’) (<http://www.legal-tools.org/doc/c7e8f0/>) (fixed by ICC/AI/2019/006, 28 October 2019 (<https://www.legal-tools.org/doc/43ztuk/>)).

¹¹ ICC, An executive statement by the Registrar on the ICC Security and Safety Section (SSS), Joint Threat and Assessment Group (JTAG), Joint Crisis Management Team (JCMT) and Information Security Management Forum (ISMF), 22 January 2008, ICC/INF/2008/003 (‘Executive Statement’) (<http://www.legal-tools.org/doc/278a95/>) (not fixed).

¹² ICC, Mandatory Security Arrangements, 23 August 2011, ICC/INF/2011/006 (‘Mandatory Security Arrangements’) (<http://www.legal-tools.org/doc/676299/>) (not fixed).

¹³ ICC, United Nations Laissez-Passer, 19 March 2015, ICC/INF/2015/008 (‘United Nations Laissez-Passer’) (<http://www.legal-tools.org/doc/9a62af/>) (not fixed).

¹⁴ ICC, Guidelines on Language Proficiency and Language Incentives, 30 December 2016, ICC/INF/2016/011 (<http://www.legal-tools.org/doc/ee42ad/>) (fixed by ICC/AI/2019/007, 28 October 2019 (<https://www.legal-tools.org/doc/sxt7ql/>)).

¹⁵ ICC, ICC Informational Protection Policy, 19 June 2007, ICC/AI/2007/001 (<http://www.legal-tools.org/doc/04b126/>) (not fixed).

which were not followed by the announced implementing issuances: for instance, the “ICC Anti-Fraud Policy” promulgated by Presidential Directive ICC/PRESG/G/2014/002 of 13 May 2014 (see Section 21.3.4. below);¹⁶ and the “ICC Whistleblowing and Whistle-blower Protection Policy” promulgated by Presidential Directive ICC/PRESG/G/2014/003 of 8 October 2014 (see Section 21.3.4. below).¹⁷

21.2.2. The Rank of the Presidential Directive of 2003

Until recently, the frequent non-observance of the Presidential Directive of 9 December 2003 had led to a perception, widely shared within the Court, that the Directive may not necessarily be binding. Indeed, in this light, the Presidential Directive may be seen to represent an early and long-time gone era of the ICC development when all important decisions could be achieved in agreement between the various organs of the Court, and should be considered as guidelines rather than as a compulsory instrument. Though legally questionable, this perception was rarely challenged and had not led to a judicial determination until 24 January 2018.

On 24 January 2018, the Administrative Tribunal of the International Labour Organization (‘ILOAT’), which is the ultimate body of appeal in ICC staff appeal and disciplinary cases pursuant to Regulation 11.2 of the ICC Staff Regulations¹⁸ and Section 6.4 of Administrative Instruction ICC/AI/2008/001 of 5 February 2008,¹⁹ issued its Judgment No. 3907.²⁰ In this Judgment, the ILOAT quashes an administrative decision and heavily sanctions the ICC as a result of its non-observance of the Presidential Directive of 9 December 2003 in the promulgation of another administrative issuance. Importantly, the ILOAT rules:

In conclusion, pursuant to the Presidential Directive [of 9 December 2003], the Principles and Procedures should have been

¹⁶ ICC, ICC Anti-Fraud Policy, 13 May 2014, ICC/PRESG/G/2014/002 (‘ICC Anti-Fraud Policy’) (<http://www.legal-tools.org/doc/a5168a/>) (not fixed).

¹⁷ ICC, ICC Whistleblowing and Whistleblower Protection Policy, 8 October 2014, ICC/PRESG/G/2014/003 (‘ICC Whistleblowing and Whistleblower Protection Policy’) (<http://www.legal-tools.org/doc/0c36ff/>) (not fixed).

¹⁸ ICC, Staff Regulations, 30 September 2016, ICC/PRESG/G/2016/002 (‘ICC Staff Regulations’) (<http://www.legal-tools.org/doc/bc0ddb/>).

¹⁹ ICC, Disciplinary Procedure, 5 February 2008, ICC/AI/2008/001 (‘Disciplinary Procedure’) (<http://www.legal-tools.org/doc/094a22/>).

²⁰ ILOAT, *F v. ICC*, Judgment, 24 January 2018, No. 3907 (<http://www.legal-tools.org/doc/c1fdb/>).

promulgated by an Administrative Instruction or, arguably, by a Presidential Directive. As the promulgation of the Principles and Procedures by Information Circular was in violation of the Presidential Directive, they were without legal foundation and are, therefore, unlawful as are the decisions taken pursuant to the Principles and Procedures.²¹

The ILOAT ruling should have dissipated any doubt as to the compulsory nature of the Presidential Directive of 9 December 2003. The ILOAT confirms that not only this Presidential Directive is preeminent in the policy framework of the ICC and compulsory, but its non-observance in the promulgation of other administrative issuances is a cause of unlawfulness of the ill-promulgated provisions, and of all administrative decisions taken on their basis. The organ promulgating an administrative issuance in violation of the Presidential Directive of 9 December 2003 – be it the President, the Prosecutor or the Registrar – is found to have no authority to overcome this primary illegality by way of exercising its own policy attributions.

In light of the abovementioned long, yet non-exhaustive, list of instances of non-observance of the Presidential Directive of 9 December 2003 in the promulgation of administrative issuances, ILOAT Judgment No. 3907 had very significant consequences on the internal legal framework of the ICC. Potentially, each and every administrative issuance not in compliance with the terms of the Presidential Directive – such as, for instance, the ICC Recruitment Guidelines for Established Posts – may be challenged; furthermore, each and every decision taken on the basis of such issuances, like the appointment of staff members, may be quashed. This is a cause of high insecurity for the Court, which cannot safely rely on substantial aspects of its own internal legal framework in support of its day-to-day administrative decisions. As a consequence of the ILOAT ruling, there is now a potential for litigation every time an administrative decision perceived as adverse is taken on the basis of one of the administrative issuances listed above. To some extent, this is also a cause of legal insecurity for ICC staff

²¹ *Ibid.*, p. 26; ILOAT, *A v. ICC*, Judgment, 24 January 2018, No. 3903, p. 20 (<http://www.legal-tools.org/doc/b3ed30/>); ILOAT, *G v. ICC*, Judgment, 24 January 2018, No. 3904, p. 20 (<http://www.legal-tools.org/doc/06301a/>); ILOAT, *L. (No. 3) v. ICC*, Judgment, 24 January 2018, No. 3908, p. 9 (<http://www.legal-tools.org/doc/619e5a/>); ILOAT, *B. v. ICC*, Judgment, 26 June 2018, No. 4004, p. 6 (<http://www.legal-tools.org/doc/dca542/>); ILOAT, *T.P. and M. v. ICC*, Judgment, 26 June 2018, No. 4007, p. 5 (<http://www.legal-tools.org/doc/bcf9cb/>).

members, even though they can nonetheless rely on unlawfully promulgated administrative issuances in support of their claimed acquired rights on the basis of the *tu patere legem quam ipse fecisti* principle: the organization is bound to comply with the rules it has itself defined in favour of its staff, even if these are found unlawful. Strikingly, ICC staff members are in a much more favourable position than the Court itself, since they can, in support of their rights, rely on provisions which the Court cannot rely upon any longer in support of its decisions.

ILOAT Judgment No. 3907 clarifies that the Court cannot anymore consider its Presidential Directive of 9 December 2003 as mere guidance and disregard its provisions in the preparation, promulgation and implementation of administrative issuances. It should have led the Court to conduct, on an urgent basis, a comprehensive review of its policy framework in order to abide by the provisions of its Presidential Directive of 9 December 2003, and particularly its Section 5.2 which requires that

officials responsible for promulgating administrative issuances shall see to it that issuances in effect within their respective spheres of competence are reviewed periodically so as to ensure that the rules, instructions and procedures that they prescribe are up to date, that obsolete administrative issuances are abolished with the minimum delay and that new issuances or amendments to existing issuances are promulgated as required.

Almost three years after the issuance of ILOAT Judgment No. 3907, no such review has taken place, despite all efforts made to raise the attention of the high management of the Court on the urgency of the review. Let us hope that the above-mentioned IER Recommendation R12 will have the power to trigger it.

21.3. Main Areas of Policy Gaps and Their Potential Impact on the Perception of Integrity at the ICC

As stated in the introduction to the present chapter, policy gaps, when they are not addressed, leave the organization's staff members and officials with no guidance as to the way of upholding the highest standards of integrity, and have the potential impact of feeding a perception of impunity for unethical behaviour, which in turn deters strict adherence to integrity standards.

21.3.1. Selection of Staff Members

There is no legally promulgated administrative issuance governing the selection and recruitment of staff members at the ICC. On 2 November 2009, the Registrar of the ICC informally promulgated “Recruitment Guidelines for Established Posts – Professional and higher and General Service categories”.²² Under Section 1, these Guidelines govern the procedures for the recruitment of staff members on established posts and positions funded by general temporary assistance. They provide rules and procedures regarding the advertisement of vacancy announcements, the classification of posts, the submission of applications, the composition of interview panels, the short-listing, assessment and final selection of candidates and the use of rosters. Unfortunately, the Court failed to resort to one or the other kind of administrative issuances listed in Section 1.1 of the Presidential Directive of 9 December 2003. As a consequence, and in light of ILOAT Judgment No. 3907, these Recruitment Guidelines were promulgated in violation of the Presidential Directive of 9 December 2003, they are without legal foundation and are, therefore, unlawful, as are all the administrative decisions taken on the basis of these guidelines, that is, each and every recruitment procedure which applied the Recruitment Guidelines.

This does not mean that each and every staff member working at the Court was unlawfully hired and shall see his or her appointment cancelled. Though unlawful, the individual administrative decisions appointing staff members created acquired rights for the incumbents, and most of them were not appealed. These acquired rights cannot be challenged on the basis of the unlawfulness of the individual administrative decisions originating them. Except in the few cases where recruitment decisions are appealed, such decisions cannot be quashed or cancelled. In the rare appeals, for example, by other unsuccessful applicants, reliance on the unlawfulness of the Recruitment Guidelines on the basis of ILOAT Judgment No. 3907 provides a solid ground for the quashing of the impugned decisions and the cancellation of the challenged recruitment processes. This situation is obviously a factor of high vulnerability for the Court, whose recruitment processes – virtually all of them – can be successfully challenged.

²² ICC, ICC Recruitment guidelines for Established Posts, Professional and higher General Service categories, 2 November 2009, ICC/INF/2012/020 (<https://legal-tools.org/doc/50ed6b>).

However, this risk is limited by the fact that the right to challenge recruitment decisions, like any other administrative decisions, is limited to staff members who are already working for the Court under Article II.1 of the ILOAT Statute and is not open to external applicants. Only internal applicants can challenge a recruitment process and, except in rare situations, internal applicants will refrain from challenging such a decision by fear of retaliation or other adverse consequences for their career within the Court. The non-implementation of the principles governing the protection of whistle-blowers (see Section 21.3.4. below) thus plays as a powerful deterrent against the lodging of appeals against appointment decisions. Finally, the absence of reaction from the management of the Court and of review of the Recruitment Guidelines after the issuance of Judgment No. 3907 feeds the perception that, notwithstanding the clear and unambiguous ruling of the ILOAT, the Recruitment Guidelines may nonetheless be valid, for whatever reason, in the mind of the majority of staff members, who are not sufficiently acquainted with administrative subtleties. All these mitigating factors concur in limiting the risk of challenges against recruitment decisions and containing it, below the advantages of keeping things as they are. As long as a binding and properly promulgated selection and recruitment procedure is not in force, the hiring manager has the possibility of disregarding the existing Recruitment Guidelines every time they do not serve his or her purposes or those of the Human Resources Section.

Paradoxically, the procedure governing the selection and recruitment of the most precarious category of staff members, employed under short-term appointments, was properly promulgated by way of Administrative Instruction ICC/AI/2016/001 of 28 January 2016.²³ Section 4 of that Administrative Instruction governs the advertisement of vacancy announcements and provides relaxed selection and appointment processes, ensuring full discretion to the hiring manager in the selection of staff on short-term appointments. This Administrative Instruction shows *a contrario* that the ICC management is aware of the proper way of promulgating recruitment procedures, and that nonetheless, when it does so, it only promulgates loose provisions, ultimately preserving the capacity of hiring managers to select and appoint the persons of their choosing.

²³ ICC, Short-Term Appointments, 28 January 2016, ICC/AI/2016/001 (<http://www.legal-tools.org/doc/286b48/>).

The legal possibility of disregarding the Recruitment Guidelines opens the door to all possible allegations of discrimination, favouritism, nepotism, blacklisting, or other unethical behaviour in relation to recruitments for established posts in the ICC. It provides an explanation as to why subsequent internal staff surveys show that ICC staff members have a low level of confidence in the fairness of recruitment processes, and questions the very capacity of the Court to select, appoint and keep at its service the most qualified staff members, as required under Article 44 of the Rome Statute. In its final report, the IER notes the symptoms, but fails to identify the cause: none of its essentially cosmetic Recommendations R91 to R96 on recruitment addresses the lack of properly promulgated and enforceable selection and recruitment procedure.²⁴ The failure to address this key issue by the IER is a missed opportunity to create a sound policy basis for the hiring of ICC staff fulfilling basic standards of integrity.

21.3.2. Field Operations

Among the more than one hundred administrative issuances of the ICC, a very few are related to field operations and missions.

Appendix 1 to Information Circular ICC/INF/2008/003 of 22 January 2008²⁵ provides in Section 3 – ‘Field Security’ that the Registry Security and Safety Section (‘SSS’) is in charge of completing Security Risk Assessments and planning co-ordination for the deployment of all security staff – only! – in the field, assessing risks and planning security missions, acting as a focal point to obtain security clearance for ICC staff travelling on mission to ensure compliance with the Court’s obligations arising from membership of the UN security management system, liaising with other organizations – like the UN Department of Safety and Security (‘UNDSS’) and Department of Peace Keeping Operations – monitoring all mission-related security reports and incidents, identifying security shortfalls and highlighting required remedial actions, and leading and managing the SSS personnel in the field. The Information Circular of 22 January 2008 further establishes various internal bodies in charge of coordinating on security issues: the ‘ICC Joint Threat Assessment Group’, the ‘ICC Joint Crisis Management Team’ and the ‘ICC Information Security Management Forum’. The composition, functioning and responsibilities for each body are

²⁴ IER Report, paras. 218–227 and Recommendations R91 to R96, pp. 70–74, see above note 2.

²⁵ Executive Statement, see above note 11.

detailed in Appendices II, III and IV of the Information Circular of 22 January 2008, respectively.

Information Circular ICC/INF/2011/006 of 23 August 2011,²⁶ on the other hand, provides some ‘Mandatory Security Arrangements’. These include attendance of security briefings delivered by SSS or UNDSS personnel, the completion of basic and advanced security training prior to deployment on field missions, the delivery of security clearance from UNDSS, the timely submission of a mission plan “at least 30 days prior to travel” and of a “detailed mission plan” (not defined) “at least 14 days prior to travel”. The Information Circular of 23 August 2011 specifies that “the compliance with the mandatory security arrangements is also taken into consideration in case of investigation of an incident and may impact insurance coverage and other related compensation”.

Information Circular ICC/INF/2015/008 of 19 March 2015²⁷ provides the procedure for the delivery of a UN Laissez-Passer (UNLP). An earlier version of the same issuance was promulgated by Information Circular ICC/INF/2005/005 of 22 August 2005²⁸ and superseded by the Information Circular of 19 March 2015.

However, these three key issuances governing field operations are unenforceable because they were, once again, illegally promulgated and are largely obsolete: most of the time, they are not complied with.

The three Information Circulars of 22 January 2008, 23 August 2011 and 19 March 2015 promulgate general procedures of a permanent nature. As such, these shall have been promulgated by way of a Presidential Directive or an Administrative Instruction pursuant to Sections 2 and 3 of the Presidential Directive of 9 December 2003. Since the issuance of ILOAT Judgment No. 3907 of 24 January 2018, the unlawfulness of these administrative issuances and all administrative decisions taken pursuant to these is *res judicata*. Yet, the management of the Court is not taking steps to address this issue.

From 6 June to 2 July 2012, four ICC staff members were illegally arrested and detained in Zintan, Libya, while on a mission for the Court. In response to the arrest of its four staff members, the ICC Joint Crisis Man-

²⁶ Mandatory Security Arrangements, see above note 12.

²⁷ United Nations Laissez-Passer, see above note 13.

²⁸ ICC, Guidelines for the use of the United Nations Laissez Passer, 22 August 2005, ICC/INF/2005/005 (<http://www.legal-tools.org/doc/5ac2df/>).

agement Committee, established by the Information Circular of 22 January 2008 to respond to this specific type of crisis, was not even activated. The release of the four ICC staff members was followed by two post-incident reports, and a Judgment issued by the ILOAT on 26 June 2018 upon a claim from one of the four arrested ICC staff members. The first post-incident report, issued by the ICC Independent Oversight Mechanism ('IOM') in October 2012, finds that there were significant gaps in the ICC's mission planning framework: no agreement had been entered with the Libyan authorities concerning the privileges and immunities of the ICC staff members; the activities that the ICC staff members intended to pursue during their mission had not been defined in advance by means of an exchange of *Notes Verbales*; the security recommendations made by the ICC Field Security Unit during the preparation of the mission had not been implemented.²⁹ A revised version of this first post-incident report dated 21 February 2013 further concludes that

both in preparing the mission and attempting to resolve the crisis, the Court was greatly hindered by a poor guidance framework and absence of advanced planning. By taking action, in both areas, to strengthen the Court's system, the Court can hopefully avoid future similar crises and, when crisis is unavoidable, be able to react more robustly.³⁰

The second post-incident report, issued on 3 June 2013 by an external expert tasked by the ICC, also found that there had been a lack of adequate preparation for the mission to Libya.³¹ In its Judgment No. 4003 of 24 June 2018, the ILOAT finds that

the Complainant's ordeal in Libya was a direct result of the ICC's failure to properly prepare for the mission, specifically its failure to: (a) establish a diplomatic basis by ensuring that a Memorandum of Understanding was established and/or *Notes Verbales* were exchanged with the Libyan authorities prior to the mission's initiation; (b) establish a mission plan which identified the objectives of the mission, the locations to visit and persons to be met, as well as naming the Head of Mission and clarifying the specific responsibilities of the team members; and (c) ensure that all security protocols were followed

²⁹ ILOAT, *A v. ICC*, Judgment, 26 June 2018, No. 4003, pp. 2–3 ('Judgment 4003') (<http://www.legal-tools.org/doc/81bbe3/>).

³⁰ *Ibid.*, para. 4.

³¹ *Ibid.*, para. 5.

and advice was implemented to guarantee the safety and security of the staff members on mission.³²

After the occurrence of such a serious event as the Zintan crisis of 2012, no step was taken to strengthen the policy regarding field missions and activities, privileges and immunities and compliance with field security rules. The findings and recommendations made in the two post-incident reports were not implemented. The rulings of the ILOAT in Judgment No. 4003 did not lead to significant change in the mission preparation, mission planning, privileges and immunities and field security policies of the Court.

The most significant actions taken by the ICC management in relation to field operations and security since the Zintan crisis of 2012 and the issuance of the post-incident reports consist in a restructuring of the ICC Security and Safety Section, done as part of a wider restructuring of the ICC Registry services in 2014-2015, and the promulgation of the Information Circular of 19 March 2015 on UN Laissez-Passer, replacing the earlier Information Circular of 22 August 2005.

The restructuring of the ICC Security and Safety Section essentially consisted in separating the field security, security analysis, crisis management and mission planning functions from the SSS, and entrusting them to a new Division of External Operations,³³ distributed between a new External Operations Support Section³⁴ and each individual Field Office. This change was implemented without amending or updating the Information Circular of 22 January 2008 entrusting the Security and Safety Section with these important functions to adapt it to the new structure and redistribution of functions. The Information Circular of 22 January 2008, already not complied with at the time of the Zintan crisis, has now become totally obsolete as a result of the restructuration of the Registry security and field management services. The failure to review or abolish the Information Circular of 22 January 2008 is in further breach of Section 5.2 of the Presidential Directive of 9 December 2003. One may also legitimately question how a restructuring that dilutes security and mission planning functions and responsibilities between, at least, three different working units instead of one without amending the applicable legal and policy framework may

³² *Ibid.*, para. 16.

³³ ICC, Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court, August 2016, para. 325 (<http://www.legal-tools.org/doc/cbc6cc/>).

³⁴ *Ibid.*, paras. 428, 447-448, 552.

have contributed to address and fix the policy concerns raised in the two subsequent post-incidents reports on the Zintan crisis.

As already mentioned, the Information Circular of 19 March 2015 on UN Laissez-Passer is unlawful and unenforceable as a result of its promulgation, in breach of the Presidential Directive of 9 December 2003. In addition, it provides that UN Laissez-Passer delivered to ICC staff and officials shall contain an insert affirming that its bearer “is entitled to be accorded the privileges and immunities provided for in the Agreement on the Privileges and Immunities of the International Criminal Court of 9 September 2002 or in other agreements or arrangements defining the privileges and immunities of the Court”. The Information Circular of 19 March 2015 fails to inform potential bearers of the Laissez-Passer on the implications and limits of these privileges and immunities, in particular the need for an exchange of *Notes Verbales* with the local authorities and the fact that the ICC privileges and immunities only apply in States Parties to the Agreement on the Privileges and Immunities of the Court. Many current Situation countries are not Parties to the Agreement, like Côte d’Ivoire, Kenya, Sudan, Libya and Burundi, and ICC bearers of Laissez-Passer may also travel to other non-situation countries which also are not Parties to the Agreement on the Privileges and Immunities of the Court, such as the following countries under preliminary examination: Afghanistan, Bangladesh, Myanmar, Guinea (which signed the Agreement on 1 April 2004 but did not ratify it), Iraq, Nigeria, Palestine, Philippines or Venezuela (which signed on 16 July 2003 but did not ratify). By providing an insert that affirms that ICC bearers of Laissez-Passer enjoy privileges and immunities without the necessary information and caveats, the Information Circular of 19 March 2015 fails to discharge the Court’s duty of care³⁵ *vis-à-vis* its staff and officials who may believe, on the face of the insert in their UN Laissez-Passer, that they enjoy privileges and immunities when they do not. The failure to secure the privileges and immunities of the four ICC staff members played a central role in the materialization of the Zintan crisis of 2012, and resulted in the adverse Judgment No. 4003 issued by the ILOAT; nevertheless, it has not led the Court to learn from its past mistakes and address this issue properly. The fact that the Information Circular of 19 March 2015 was issued after the Zintan crisis and the issuance of the two post-incident reports highlighting this policy gap certainly plays as a factor

³⁵ Judgment 4003, p. 12, see above note 29.

aggravating the liability of the ICC management for its failure to discharge the duty of care.

The ICC policy on mission preparation, diplomatic clearance, privileges and immunities and mandatory security arrangements remains loose, largely obsolete and noncompliant with the structure of the internal legal framework of the Court. At any moment in time, an event similar to the Zintan crisis of 2012 can re-occur, perhaps leading to a much worse result. The management of the Court is taking a huge responsibility *vis-à-vis* the life and security of its own staff and all other persons sent on ICC field missions, such as counsel, by persisting in not addressing this problem in spite of the *res judicata* rulings of the ILOAT in its Judgments Nos. 3907 and 4003. The IER report does not suggest otherwise in its above-mentioned Recommendation R12, but it strangely addresses the specific issue of field activities with respect to the Office of the Prosecutor only and succinctly,³⁶ without considering the wider picture of the ICC-wide policy framework governing field presence and the preparation of field missions. Like for recruitment, the IER report thus missed the main problem here.

In light of the huge risk that follows the failure to review the ICC field operations policies, one can legitimately wonder the reasons of the ICC management for not addressing this serious issue, whereas its attention was repeatedly drawn thereon. Their inaction feeds a perception that the field operations policy framework is deliberately left as it is in order to keep the greater flexibility in the conduct of field operations that a loose legal environment provides. As long as a more stringent policy framework is not in place, ICC staff members can be sent on missions without the need for ensuring in advance that they are covered by privileges and immunities, or to disclose in advance a detailed mission plan defining the exact purpose of the mission, the foreseen activities and the locations to be visited. This gives room to maximum flexibility in the conduct of missions, with last-minute changes always possible. It echoes the concerns voiced in a recent CILRAP conference on 22-23 February 2019 by a Senior Legal Officer of the ICC Chambers about the serious challenges encountered by the Office of the Prosecutor in planning investigations in advance.³⁷ It also opens the

³⁶ IER Report, paras. 779–784 and Recommendations R293 to R298, pp. 251–253, see above note 2.

³⁷ Gilbert Bitti, “Quality control in Case Preparation and the Role of the Judiciary of the International Criminal Court”, CILRAP Film, New Delhi, 23 February 2019 (<https://www.cilrap.org/cilrap-film/190223-bitti/>).

door to all possible allegations of unethical behaviour, such as the undertaking of unofficial, parallel, non-transparent business while on a mission.

Flexibility on field missions may arguably be in the interests of the Court, but it can no longer be considered as such once, as with the Zintan crisis of 2012, it has proved to be at the cost of the security of ICC staff members and other persons at risk on account of the activities of the Court.

21.3.3. Staff Appeal and Disciplinary Procedures, Including the Independent Oversight Mechanism

The provisions governing staff appeal and disciplinary procedures before the ICC include general principles enshrined in Articles X and XI of the ICC Staff Regulations,³⁸ and Chapters X and XI of the ICC Staff Rules,³⁹ a description of the internal disciplinary procedure in Administrative Instruction ICC/AI/2008/001 of 5 February 2008,⁴⁰ rules of procedures applicable before the internal Appeals Board and Disciplinary Advisory Board promulgated by Information Circulars ICC/INF/2006/003 of 27 March 2006⁴¹ and ICC/INF/2007/003 of 7 May 2007,⁴² and specific grievance complaint procedures for cases of harassment and unequal treatment, including discrimination provided under Sections 6-7 of Administrative Instruction ICC/AI/2005/005 of 14 July 2005⁴³ and Sections 5-6 of Administrative Instruction ICC/AI/2005/006 of 14 July 2005.⁴⁴ On 27 November 2013, the Assembly of States Parties ('ASP') also adopted its resolution ICC-ASP/12/Res. 6 with the Operational Mandate of the IOM established under Article 112(4) of the Rome Statute in an annex.⁴⁵ The Operational Mandate of the

³⁸ ICC Staff Regulations, see above note 18.

³⁹ ICC, Staff Rules of the International Criminal Court, 27 July 2015, ICC/AI/2015/004/Corr.1 Anx (<http://www.legal-tools.org/doc/2a5274/>).

⁴⁰ Disciplinary Procedure, see above note 19.

⁴¹ Rules of Procedure of the Appeals Board, see above note 9; replaced by ICC/AI/2019/005, 28 October 2019.

⁴² Rules of Procedure of the Disciplinary Advisory Board, see above note 10; replaced by ICC/AI/2019/006, 28 October 2019.

⁴³ ICC, Sexual and Other Forms of Harassment, 14 July 2005, ICC/AI/2005/005 (<http://www.legal-tools.org/doc/619941/>).

⁴⁴ ICC, Equal Employment Opportunity and Treatment, 14 July 2005, ICC/AI/2005/006 (<http://www.legal-tools.org/doc/9c4023/>).

⁴⁵ ICC Assembly of State Parties ('ICC ASP'), "Independent Oversight Mechanism", 27 November 2013, ICC-ASP/12/Res.6 (<http://www.legal-tools.org/doc/64ebeb/>).

IOM provides, *inter alia*, that it plays a role in the investigation of disciplinary cases against staff members and elected officials.

Though apparently complete, the procedural framework applicable to staff appeals and disciplinary cases actually maintains significant gaps, which are likely to impact on the integrity of internal proceedings, should litigants elect to rely on them in support of their claims, thus making the Court highly vulnerable in case of appeal before the ILOAT.

Chapter XI of the ICC Staff Rules makes the submission of appeal cases to the internal Appeals Board a mandatory step in the internal phase of the proceedings on any staff appeal against an administrative decision. Rule 111.3 provides general principles governing the procedure before the Appeals Board. However, the Rules of Procedure of the Appeals Board govern the more detailed aspects of the procedure before the Appeals Board, such as the composition of Appeals Board panels, the recusal of its members, the filing, format and content of submissions, the disclosure of relevant documents, the drafting and content of the Panel's recommendation and other aspects. Yet, the Rules of Procedure were initially promulgated as an annex to Information Circular ICC/INF/2006/003 of 27 March 2006, whereas Sections 2 and 3 of the Presidential Directive of 9 December 2003 required the promulgation of general procedures by way of Presidential Directive or Administrative Instruction. This was fixed by the promulgation of Administrative Issuance ICC/AI/2019/005 on 28 October 2019. Until that date, pursuant to the ruling of the ILOAT at paragraph 25 of its Judgment No. 3907, the Rules of Procedure of the Appeals Board were unlawful, as were all decisions taken pursuant to them, that is, all final decisions on staff appeal cases. The invalid promulgation of the Rules of Procedure of the Appeals Board thus formed a solid basis for the quashing of any final decision on a staff appeal case before the ILOAT. This made the ICC highly vulnerable to any challenge made by its staff members against its administrative decisions, whatever their merits. In the case of the majority of staff members who were not aware of this gap, or who did not feel confident enough to challenge the validity of the Rules of Procedure of the Appeals Board, this risk remained limited. On the contrary, those staff members who had this knowledge, and had enough confidence in their legal skills to measure the consequences of the unlawfulness of the Rules of the Appeals Board, could be confident that they would succeed in their appeal against any decision they may have elected to challenge.

Chapter X of the ICC Staff Rules and Section 3 of the Administrative Instruction of 5 February 2008 provide that the referral of disciplinary cases to the Disciplinary Advisory Board is a mandatory step in the internal phase of disciplinary proceedings against ICC staff members. The same requirement applies to grievance procedures for harassment and unequal treatment, including discrimination, pursuant to Section 7.3 of Administrative Instruction ICC/AI/2005/005 of 14 July 2005 and Section 6.3 of Administrative Instruction ICC/AI/2005/006 of 14 July 2005. Yet, the Rules of Procedure of the Disciplinary Advisory Board were initially promulgated as an annex to Information Circular ICC/INF/2007/003 of 7 May 2007, whereas Sections 2 and 3 of the Presidential Directive of 9 December 2003 required the promulgation of general procedures by way of Presidential Directive or Administrative Instruction. This was fixed by the promulgation of Administrative Issuance ICC/AI/2019/006 on 28 October 2019. Until that date, like the Rules of Procedure of the Appeals Board, pursuant to the ruling of the ILOAT at paragraph 25 of its Judgment No. 3907, the Rules of Procedure of the Disciplinary Advisory Board were unlawful, as were all decisions that rely on them, that is, all final decisions on disciplinary and grievance cases. The invalid promulgation of the Rules of Procedure of the Disciplinary Advisory Board formed a solid basis for challenging the lawfulness of every final decision on disciplinary action before the ILOAT. This implied that no disciplinary action could succeed before the Court against a staff member who was aware of this gap, and felt sufficiently confident to challenge the validity of the Rules of Procedure of the Disciplinary Advisory Board. For this minority of staff members – the few who are most aware of procedural subtleties, or who are well-advised – this created a situation of total impunity for unsatisfactory conduct, as no disciplinary action could succeed against them. For those who adhered to the highest standards of integrity, and wished to report unsatisfactory conduct by way of grievance complaint – where applicable – or other reporting under the ICC Whistleblowing Policy (see Section 21.3.4. below), this created a situation of deep sorrow, as they were aware that offenders could carry on their misconducts in full impunity, as long as they knew about this gap.

The operational mandate of the IOM was adopted by Resolution ICC-ASP/12/Res. 6 of the ASP in 2013 (the ‘Operational Mandate’). Section 2.1 of the Presidential Directive of 9 December 2003 provides:

A Presidential Directive shall be required for the promulgation of procedures for the implementation of regulations, resolu-

tions and decisions adopted by the ASP, including: [...] (c) Promulgation of regulations and rules governing [...] the monitoring of implementation and methods of evaluation.

As briefly alluded to by Karim A.A. Khan in his chapter and previous presentation,⁴⁶ and flagged by the International Criminal Court Bar Association in a legal analysis of February 2018,⁴⁷ since the promulgation of Resolution ICC-ASP/12/Res. 6, no Presidential Directive was issued to implement its provisions within the internal legal framework of the Court. Furthermore, the specific administrative issuances governing activities of relevance to the IOM Operational Mandate, such as disciplinary proceedings, have not been amended, nor abolished, nor replaced, whereas paragraph 3 of Resolution ICC-ASP/12/Res. 6 of the ASP had invited the Court in 2013 to complete the review of its policies “necessary for the full operationalization of all functions of the IOM” within one year. This has not been done. In his 2017 Annual Report to the ASP, the former Head of the IOM rightfully flagged that the procedural provisions of the IOM Operational Mandate “contradict or appear at odds” with “pre-existing investigation-related authorities and procedures”.⁴⁸ Worse, Administrative Instruction ICC/AI/2019/006, which repromulgated the old Rules of Procedure of the Disciplinary Advisory Board on 28 October 2019, did not amend these to insert a provision on the role of the IOM in disciplinary proceedings, this leaving it outside of the ICC disciplinary scheme. The non-adaptation of the relevant administrative issuances governing disciplinary procedures within the Court in breach of paragraph 3 of Resolution ICC-ASP/12/Res. 6 of the ASP has several consequences on the integrity of disciplinary proceedings. It would not be an overstatement to submit that, since the adoption of the IOM Operational Mandate, not a single disciplinary procedure within the Court is protected from being successfully challenged on the ground of procedural flaws, irrespective of whether the IOM was involved in it. The non-compliance of the Court with paragraph 3 of Resolution ICC-ASP/12/Res. 6 of the ASP and its consequences were overlooked by the IER. Its report limits itself to noting that “the IOM does not yet enjoy

⁴⁶ Karim A.A. Khan, “Integrity and the Limits of Internal Oversight Mechanisms”, CILRAP Film, The Hague, 2 December 2018 (<https://www.cilrap.org/cilrap-film/181202-khan/>).

⁴⁷ ICCBA Legal Advisory Committee, “Legal Analysis: ICC Internal Accountability Mechanisms and Policies”, February 2018 (‘Legal Analysis of ICC Internal Accountability Mechanisms and Policies’) (<http://www.legal-tools.org/doc/929bc0/>).

⁴⁸ ICC ASP, Annual Report of the Head of the Independent Oversight Mechanism, 17 October 2017, ICC/ASP/16/8, para. 15 (<http://www.legal-tools.org/doc/aab4bb/>).

the full confidence and trust of all staff”,⁴⁹ which is, by far, an understatement of the symptom, without identifying the cause.

In disciplinary cases where the IOM fulfils its investigative function under Sections 27 to 41 of its Operational Mandate, the parties – the person whose conduct is alleged to be unsatisfactory and, where applicable, the complainant – can challenge its intervention on the basis of the absence of a Presidential Directive implementing the Operational Mandate within the internal policy framework of the Court in accordance with Section 2.1 of the Presidential Directive of 9 December 2003. The ILOAT Judgment No. 3907 would support such a claim. This can be used to demonstrate a breach of procedure, and claim the quashing of the disciplinary decision: disciplinary measures may be cancelled, with financial compensation for prejudice or, in case of acquittals, complainants may get financial compensation for the Court’s failure to protect their rights. Either party may also claim that the transmission of confidential information about the disciplinary charges and, where applicable, grievance complaints to the IOM amounts, in the absence of a proper legal basis for its intervention, to unauthorized disclosure, a compromise of classified information and unsatisfactory conduct pursuant to Sections 1.7, 16.1(b) and 40.3 of the ICC Information Protection Policy (see Section 21.3.5. below). This could be the basis for further disciplinary action against the officials who transmitted the classified information to the IOM and against the IOM staff members themselves, if they disclosed it to further recipient(s) in the course of the performance of their functions.

On the other hand, in disciplinary cases that do not involve the IOM, the parties can both claim, in case of an adverse decision, that the IOM should have been involved pursuant to Section 33 of the IOM Operational Mandate, which provides: “All reports of misconduct or serious misconduct, including possible unlawful acts, made against an elected official, staff member or contractor shall, if received by the Court, be submitted to the IOM”.⁵⁰ The Court could claim that, in the absence of proper implementation pursuant to Section 2.1 of the Presidential Directive of 9 December 2003, the requirement of referral to the IOM under Section 33 of its Operational Mandate did not apply, but the challenging party could rely on the fact that the ASP is the legitimate authority of the Court, in charge of

⁴⁹ IER Report, para. 285, p. 93, see above note 2.

⁵⁰ See above note 45.

establishing the IOM pursuant to Article 112(4) of the Rome Statute and on the *tu patere legem quam ipse fecisti* principle in support of her or his challenge. Additionally, the ICC failure to comply with its Presidential Directive of 9 December 2003 with respect to the implementation of the Operational Mandate of the IOM cannot be used by the Court against a litigant pursuant to the *nemo auditur suam propriam turpitudinem allegans* principle.⁵¹

The abovementioned policy gaps impacting on staff appeal and disciplinary cases are highly prejudicial to the overall perception of the Court's adherence to the highest integrity standards. It is also a factor of the major vulnerability of the Court in staff litigation cases. Most disturbingly, it also feeds a perception of a double standard between those staff members who are well acquainted with the policy gaps impacting on the integrity of internal proceedings – or well-advised – and the others. The members of the first category, which necessarily includes the vast majority of the high management of the Court, can, if they like, enjoy quasi-total impunity for any misconduct, as they know that they can rely on the existing irregularities to quash any adverse decision, and can negotiate amicable settlements in a position of force. For the second category, which necessarily includes the vast majority of the lower level, non-managerial staff of the Court, it feeds a perception of helplessness against the potential abuses they may endure from the higher management, falling in the first category, in full impunity. All in all, the impossibility of safeguarding the integrity of staff appeal and disciplinary cases questions the very existence of the rule of law in the institution mandated to be the central body of international criminal justice. This is a situation that no responsible manager of the Court should normally leave unaddressed, once aware of it.

21.3.4. Anti-Fraud and Whistleblowing Policies

In 2014, the ICC promulgated the general principles of its anti-fraud and whistleblowing policies by way of Presidential Directive ICC/PRES/D/2014/002 of 13 May 2014⁵² and Presidential Directive ICC/PRES/D/2014/003 of 8 October 2014⁵³ respectively. Both Directives provide, at Sections 6.1 and 5.1 respectively, that they shall be translated into relevant

⁵¹ ILOAT, Judgment, 4 February 2004, No. 2318, p. 6 (<http://www.legal-tools.org/doc/35b9a6/>).

⁵² ICC Anti-Fraud Policy, see above note 16.

⁵³ ICC Whistleblowing and Whistleblower Protection Policy, see above note 17.

administrative issuances to ensure a comprehensive system to combat fraud and to protect whistle-blowers. As already flagged by the International Criminal Court Bar Association in February 2018,⁵⁴ with the exception of an Administrative Instruction of 6 October 2015 on Financial Disclosure,⁵⁵ no such procedure was promulgated. The principles of the ICC Anti-Fraud and Whistleblowing Policies are yet to be implemented by appropriate procedures. The failure to promulgate procedures for the implementation of the Anti-Fraud and Whistleblowing Policies is in breach of Section 5.2 of the Presidential Directive of 9 December 2003, which affirms the responsibility of the ICC management for ensuring that “new issuances or amendments to existing issuances are promulgated as required”.

In addition to the formal breach that is the failure to promulgate the procedures required to implement the Anti-Fraud and Whistleblowing policies, whistle-blowers in the Court are left with no procedure to seek and obtain protection against retaliation. In the absence of procedures, *bona fide* whistle-blowers reporting perceived fraud or unsatisfactory conduct in compliance with their duty as staff members under Section 4.1 of the Anti-Fraud Policy and/or Section 1.3(a) of the Whistleblowing Policy have no procedural venue to obtain the protection against retaliation theoretically offered to them under Section 4.4 of the Anti-Fraud Policy and/or Sections 2.2 and 4.5 of the Whistleblowing Policy. Like for the IOM, the IER report takes note of the symptom when it reads that “there is a perception from staff that individuals who officially complain may still bear a personal risk and the repercussions, including possible reprisals for a staff member, if publicly known, stand very high”,⁵⁶ but it does not identify the cause. The non-implementation of appropriate procedures to protect whistle-blowers and/or those reporting fraud constitutes, in itself, a violation of the afore-said policies, providing a valid ground for seeking compensation before the ILOAT for the Court’s failure to comply with its duty to protect. More generally, this failure questions the genuineness of the Court’s stated commitment to combat fraud and protect whistle-blowers, and the adherence of its management to the corresponding high standard of integrity. Read in light of the policy gaps affecting the integrity of internal disciplinary proced-

⁵⁴ Legal Analysis of ICC Internal Accountability Mechanisms and Policies, see above note 47.

⁵⁵ ICC, Disclosure Requirements – Financial Disclosure Programme of the Court (‘ICC-FDP’) and IPSAS related party disclosures, 6 October 2015, ICC/AI/2015/005 (<http://www.legal-tools.org/doc/bbdb4c/>).

⁵⁶ IER Report, para. 287, p. 94, see above note 2.

ings before the ICC (see Section 21.3.3. above), this lack of compliance provides more substance to the perception of impunity for misconduct, it plays as a further deterrent to the fulfilment of staff members' reporting obligations, and further questions the existence of the rule of law within the Court.

21.3.5. Protection of Information

The framework principles governing the protection of information within the ICC are provided in a three-page Presidential Directive of 8 March 2005 entitled "Information Security Policy".⁵⁷ This Presidential Directive basically requires that all 'users' of information produced, transmitted and stored for and by the Court "must comply with the security provisions and restrictions placed on them by the Court" and further underlines that the policy is binding both on the Court and "all those who seek access to its information". The ICC Information Protection Policy promulgated by Administrative Instruction ICC/AI/2007/001 of 19 June 2007⁵⁸ governs most aspects of the classification of ICC records, in any medium or form, judicial and non-judicial alike. It defines the protection levels applicable to information within the ICC, the criteria applicable to the classification of information. It also provides rules governing its classification and handling, dissemination on a 'need-to-know' basis and disclosure of classified information, and the actions to be taken in cases of suspected compromise of information security, including potential disciplinary action.

On 4 December 2013, the ICC amended Regulation 14 of the Regulations of the Registry ('RoR') and redefined the levels of confidentiality applicable to its judicial records. The four levels of classification under Regulation 14 of the RoR are now: (a) 'Public', which is similar to 'UNCLASSIFIED' under Section 5.4 of the ICC Information Protection Policy; (b) 'Confidential', which is similar to '[ICC] CONFIDENTIAL' under Section 5.10 of the ICC Information Protection Policy; (c) 'Under Seal', which is similar to '[ICC] SECRET' under Section 5.13 of the ICC Information Protection Policy; and (d) 'Secret', which has no equivalent under the ICC Information Protection Policy. The classification '[ICC] RESTRICTED' provided under Sections 3.3(b) and 5.5-5.7 of the ICC Information Protec-

⁵⁷ ICC, Information Security Policy, 8 March 2005, ICC/PRESG/2005/001 (<http://www.legal-tools.org/doc/3ae5ed/>).

⁵⁸ ICC, ICC Information Protection Policy, 19 June 2007, ICC/AI/2007/001 (<https://www.legal-tools.org/doc/04b126/>).

tion Policy also has no equivalent under Regulation 14 of the RoR; in contrast, it is defined as the default classification for unmarked documents under Section 5.14 of the ICC Information Protection Policy.

As a result of the amendment of Regulation 14 of the RoR, the ICC Information Protection Policy of 2007 has become largely obsolete. The numerous inconsistencies between this policy and the other instruments of the Court is a factor of high insecurity for the daily operations of the Court, in particular its judicial activities. Some of these risks were flagged in February 2018 by the International Criminal Court Bar Association.⁵⁹ As a consequence of the largely perceived obsolescence of the ICC Information Protection Policy, there is now a wide consensus within the Court as to its inapplicability, which has led to a Court-wide tacit agreement to disregard it, instead of amending it. As a matter of general practice, the Office of the Prosecutor does not mark judicial documents – in particular witness statements – which are not (yet) filed in the records of a case or situation proceedings as to their level of classification, or marks them as [ICC] RESTRICTED only. Accordingly, these witness statements shall be deemed [ICC] RESTRICTED only under the ICC Information Protection Policy and are not confidential – and thus public – under Regulation 14 of the RoR. This situation creates a high risk of incidental or malevolent dissemination of highly sensitive information compromising the protection of victims, witnesses and other persons at risk on account of such information. *Bona fide* recipients of such sensitive information may not know that this information is classified, because it is not marked so, and may disseminate it further, thus increasing the risk. The sensitivity of this information should normally require, by nature, its classification as Confidential. This issue was raised before the Court in the *Gbagbo and Blé Goudé* case.⁶⁰ Trial Chamber I confirmed that witness statements – though not marked – were

⁵⁹ Legal Analysis of ICC Internal Accountability Mechanisms and Policies, see above note 47.

⁶⁰ In French only: ICC, *Le Procureur c. Laurent Gbagbo et Charles Blé Goudé*, Version Publique Expurgée du Rapport du Conseiller Juridique désigné en vertu de la règle 74 du Règlement de procédure et de preuve pour assister le témoin P-0046, 21 Février 2017, ICC-02/11-01/15-810-Red, paras. 18–19 (<https://www.legal-tools.org/doc/e61f0c/>); ICC, *Le Procureur c. Laurent Gbagbo et Charles Blé Goudé*, Observations Additionnelles relatives à l'immunité du témoin P-0046 et à la confidentialité de sa déposition auprès des enquêteurs du Bureau du Procureur, 20 Février 2017, ICC-02/11-01/15-815, paras. 7–14 (<https://www.legal-tools.org/doc/621750/>).

classified confidential⁶¹ and instructed the Office of the Prosecutor to reassess the degree of compliance of its practice with the relevant administrative instructions of the Court.⁶² Nothing has been done after this ruling to address this issue. One cannot exclude that the Office of the Prosecutor's persistent failure to mark and protect its witnesses' statements properly had an impact on its capacity to present a case that may support a conviction at trial, and on the acquittal of the two accused persons on 15 January 2019: how could the Prosecutor secure witness evidence without protecting the confidentiality of their statements properly? Not marking these documents and information, if confidential, amounts to a compromise under Section 1.7 of the ICC Information Protection Policy, and to unsatisfactory conduct incurring potential disciplinary action under its Section 40.3. As long as the Office of the Prosecutor will persist in not protecting its witnesses' statements properly, one can see this as a reason – not a justification – for not addressing the issues impacting on the integrity of disciplinary proceedings already mentioned (see Section 21.3.3. above).

The consequences of the failure to ensure the confidentiality of witnesses' statements on the fairness of the ICC proceedings is a matter for judicial determination by judges. However, at the same time, the absence of appropriate marking is placing victims, witnesses and other persons at risk on account of unmarked information.

In any case, the obsolescence of the 2007 ICC Information Protection Policy cannot serve as a justification for disregarding it, but rather triggers a duty to review it pursuant to Section 5.2 of the Presidential Directive of 9 December 2003. As for the previous aspects, the ICC management is in breach of this Presidential Directive for not having reviewed and adapted the ICC Information Protection Policy to the new version of Regulation 14 of the Regulations of the Registry since, at least, December 2013. This is a serious responsibility that the ICC management is once again accepting, endangering the Court's witnesses, victims, staff members, and other persons at risk on account of the activities of the Court, whereas their protection is considered a shared responsibility of "all the organs of the Court and

⁶¹ ICC, *Le Procureur c. Laurent Gbagbo et Charles Blé Goudé*, Transcript of 15 February 2017, ICC-02/11-01/15, p. 3, lines 6-11 (<https://www.legal-tools.org/doc/9f8359/>).

⁶² ICC, *Le Procureur c. Laurent Gbagbo et Charles Blé Goudé*, ICC-02/11-01/15, Transcript of 22 February 2017, p. 48 lines 23-25 to p. 49 lines 1-5 (<https://www.legal-tools.org/doc/4dc909/>).

those involved with the trial”.⁶³ As is the case for field operations, the discrepancy of the current practices of the Office of the Prosecutor with the existing information protection policies provides the only rational explanation – still, not a justification – for the Court’s failure to address the widely known and acknowledged issues impacting the security of classified information within the Court.

Once again, one can only hope that the IER Recommendation R12 mentioned above with respect to the undertaking of a full review of the ICC policy framework will have, despite its lack of specificity, the power to lead the Court to amend and update its Information Protection Policy, inasmuch as there is internal willingness to do so. An offer made, on 30 January 2020, by the author of the present chapter to provide a ready-made amended version of the ICC Information Protection Policy addressing its current flaws was declined the same day, on the sole ground that it came from the author (thus seemingly giving higher priority to the responding staff member’s personal bias against the author, than the superior interest of the Court to protect its information, displaying what integrity normally advises against). Recommendation R12 has thus been ready for implementation with respect to the ICC Information Protection Policy even before it was made, but it is still fiercely resisted.

21.4. Conclusion

This chapter highlighted five examples of gaps in the ICC legal and policy framework. These gaps are serious, and lead to the conclusion that the minimum basic requirements are not met in terms of policy and legal framework, and that the ICC is failing, so far, to provide its staff and officials with the minimal guidance they should receive in order to uphold the highest integrity standards.

In the absence of such guidance, the onus of upholding the highest standard of integrity bears on ICC staff members and officials only. We shall trust in their capacity to do so. The requirements of Articles 36(3)(a), 42(3), 43(3) and 44(2) of the Rome Statute that the ICC Judges, Prosecutor and Registrar shall be persons of high moral character and that the staff members be selected according to the highest standards of efficiency, com-

⁶³ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on various issues related to witnesses’ testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, para. 36 (<https://www.legal-tools.org/doc/8367f1/>).

petency and integrity are there to give trust in their capacity to lead their way towards integrity without the need for such guidance.

The worst, however, is always possible. Like in Victor Hugo's *Ruy Blas*, even allegedly honest ministers and virtuous advisors do sometimes loot their organization.⁶⁴ At paragraphs 15 and 17 of its Judgment No. 4003 issued on 26 June 2018, the ILOAT rules that the behaviour of the former Registrar of the Court, Mr. Herman von Hebel – who was deemed a person of high moral character pursuant to Article 43(3) of the Rome Statute – amounted to “abuse of power, bad faith and retaliation” against one of the four ICC staff members arrested and illegally detained in Zintan in 2012. Though isolated, this instance reminds us that the guarantees provided in the Rome Statute alone, though important, are not all, and fall short from guaranteeing integrity and ethical behaviour in all circumstances.

By persisting in its failure to address the important policy and legal issues detailed in the present contribution and provide the ICC with the robust policy framework called for in the IOM's post-incident report on the Zintan crisis of 21 February 2013, and many times since, up until the more recent IER report of 30 September 2020, the management of the Court and of the ASP as a whole accepted a great risk. Having tried several times to persuade those concerned to take necessary measures, I hope that the present contribution may strengthen the awareness of the importance of the applicable standards of integrity at the ICC.

⁶⁴ Victor Hugo, *Ruy Blas*, III:2 : “Bon appétit, Messieurs ! Ô Ministres intègres ! Conseillers vertueux ! Voilà votre façon de servir, serviteurs qui pillez la maison !”.

Nuremberg Academy Series No. 4 (2020):

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ISBNs: 978-82-8348-190-7 (print) and 978-82-8348-191-4 (e-book).



Torkel Opsahl Academic EPublisher

Via San Gallo 135r

50129 Florence

Italy

URL: www.toaep.org



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