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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.*

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Does the International Criminal Court Really Need an Ethics Charter?

Suhail Mohammed and Salim A. Nakhjavani*

22.1. Introduction

In December 2018, the Assembly of States Parties ('ASP') received the report of its external auditor on Human Resources Management.[1] The report – which draws on 25 interviews with officials and staff, and the results of a staff questionnaire – includes the following puzzling observations:

> The Court does not have an ethics charter. This situation may be surprising given its mission. However, the first chapter of the Staff Regulations, in article 1.2 on "fundamental values", addresses various points that may be covered by such a charter: general rights and obligations, confidentiality, honorary distinctions, gifts or remuneration, conflicts of interest, employment and activities outside the Court, and the use of the Court's property. Although it has *real legal significance*, it *does not have the moral impact of an ethics charter binding on staff*.[2]

Having made these observations, the external auditor reaches his finding:

> In its regulations, the International Criminal Court has a series of legal rules regarding ethics but without requiring its staff to adhere to a more complete "ethics charter", which would add

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1 ICC, Final audit report on Human Resources management, 24 July 2018, ICC-ASP/17/7 ('Audit report') (https://www.legal-tools.org/doc/5qtwby/).

2 *Ibid*., para. 238 (emphasis added).

> to the *statutory aspect a moral message adapted to a jurisdiction*.[3]

A straightforward recommendation follows: "The External auditor recommends that the ICC develop and publish an ethics charter".[4]

One year later, the requisite report on Human Resources Management was tabled for the consideration of the ASP.[5] There was no direct mention of an ethics charter, which, it seemed, had been politely shelved, in the best traditions of the international civil service.[6] Rather, "[a]ctivities are also planned to reinforce the Court's ethical framework, including training on harassment prevention and strengthening informal conflict resolution mechanisms".[7]

The situation may indeed be "surprising", but for reasons other than the one identified by the external auditor. The Court has made two of these other reasons explicit. First, the current focus on harassment prevention is prompted by painful realities about the apparent prevalence of harassment, sexual harassment, and abuse of authority at the ICC[8] that may not have been disclosed to the external auditor or were omitted from the external auditor's report. Second, the (mis)management of misconduct has become a serious institutional risk to the mandate of the ICC, and a costly one.[9]

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3 *Ibid*., p. 38, "Finding", under paras. 238–240 (emphasis added).

4 *Ibid*., "Recommendation 9".

5 ICC, Report of the Court on Human Resources Management, 25 July 2019, ICC-ASP/18/4 ('Report of the Court on Human Resources Management') (https://www.legal-tools.org/doc/pys2zp/).

6 See, for instance, Philip Allott's satirical critique, *Curing the Madness of the Intergovernmental World*, 8 July 2014, p. 4 (originally given as "The Idea of International Society", Alec Roche Lecture, 2006, Oxford, available on the web site of the Squire Law Library, University of Cambridge).

7 Report of the Court on Human Resources Management, para. 13, p. 2, see above note 5.

8 See ICC, Annual Report of the head of the Independent Oversight Mechanism ('IOM'), 11 November 2019, ICC-ASP/18/22, para. 14, p. 4 (https://www.legal-tools.org/doc/2u1ipr/), noting that complaints of harassment, sexual harassment and abuse of authority made up just over 40 per cent of the 32 complaints to the IOM between 1 October 2018 and 30 October 2019.

9 See, for example, ICC, Report of the Committee on Budget and Finance on the work of its thirty-second session, 3 June 2019, paras. 140–152 (https://www.legal-tools.org/doc/q91xoa/); noting specifically "with concern the increased number of litigation cases and their significant financial impact" (para. 149), and provision of almost EUR 1 million for some 27 cases pending before the International Labour Organization Administrative Tribunal.

One further reason remains obscure, at least in public documents issued by the ICC so far: its "moral message" to its staff is *not missing*.

This observation finds clear expression in the Final Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System, dated 30 September 2020. The Independent Expert Review, which was authorised by ICC-ASP/18/Res.7, takes up the recommendation of the external auditor for the adoption of a single Court-wide Ethics Charter laying down the minimum professional standards expected of all individuals working with the Court.

The rationale behind the recommendation of the Independent Expert Review was that the existing ethical framework is "fragmented, and does not provide for clear common principles and minimum standards applicable to all individuals affiliated with the Court".[10] A unified, Court-wide Ethics Charter would, according to the Expert Review, "unite all individuals affiliated with the Court under the same principles, under the One Court Principle".[11]

The Independent Expert Review, then, makes one thing clear: it is not the case that the ICC is missing a "moral message", but rather that this message is clouded, as a consequence of the fragmented presentation of the ICC's multiple ethical codes and instruments.

The ICC normative framework is clothed with not less than six codes of ethical and professional conduct, aside from the content of the Statute itself, Article 1.2 of the Staff Regulations, and the moral authority of the solemn undertakings of officials and staff. These are, in order of entry into force: the Code of Judicial Ethics, adopted by the judges of the Court (2005);[12] the Code of Professional Conduct for counsel, adopted by the ASP (2005);[13] the Code of Conduct for Investigators, promulgated by the Registrar (2008);[14] the Code of Conduct for Staff Members, promulgated

[10] ICC, Independent Expert Review of the International Criminal Court and Rome Statute System, Final Report, 30 September 2020 (https://www.legal-tools.org/doc/cv19d5/).

[11] *Ibid*.

[12] ICC, Code of Judicial Ethics, 2 January 2005, ICC-BD/02-01/05 (https://www.legal-tools.org/doc/383f8f/).

[13] ICC, Code of Professional Conduct for counsel, 2 December 2005, ICC-ASP/4/Res.1 (https://www.legal-tools.org/doc/f9ed33).

[14] ICC, Code of conduct for investigators, 10 September 2008, ICC/AI/2008/005 ('ICC Code of conduct for investigators') (https://legal-tools.org/doc/c86582).

by the Registrar (2011);[15] the Code of Conduct for the Office of the Prosecutor, promulgated by the Prosecutor (2013);[16] and the Code of Conduct for Intermediaries (2014).[17] A notable exclusion from this panoply of profession-specific standards appears to be the interpreters' and translators' profession, which was subject to specific ethical standards at the International Criminal Tribunal for the former Yugoslavia[18] and the Special Court for Sierra Leone.[19]

So, the ICC's "moral message" to its staff is not missing. Far from it – at least on paper. But transmission does not imply reception. The real question is how the message is translated into action, both individually and collectively. And the real challenge is that there may be little appetite for the promulgation of yet more ethical standards in a social space already inundated by expressions of moral righteousness, and in a world weary of empty speech.

Moreover, any proposal for additional normative standards must be assessed against the compliance burden of near-inevitable *double deontology.* We use this term to refer to a situation of being "subject simultaneously to two [or more] professional codes of conduct".[20] Indeed, it may be more accurate, in the context of the ICC, to refer to *multiple deontology*, and to distinguish two forms: *horizontal* and *vertical*. They encompass situations where a lawyer is bound by multiple codes of ethical conduct within the ICC normative framework (*horizontal multiple deontology*); and also between the ICC framework and their home State(s) of registration, admission or enrolment for purposes of legal practice (*vertical multiple deontology*).

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15 ICC, Code of Conduct for Staff Members, 4 April 2011, ICC/AI/2011/002 (https://legal-tools.org/doc/75f9db).

16 ICC, Code of Conduct for the Office of the Prosecutor, 5 September 2013 ('OTP Code') (https://legal-tools.org/doc/3e11eb).

17 ICC, Code of Conduct for Intermediaries, 1 March 2014 (https://legal-tools.org/doc/eac2f0).

18 International Criminal Tribunal for the former Yugoslavia, the Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the former Yugoslavia, 8 March 1999, IT/144 (https://www.legal-tools.org/doc/xix9r7/).

19 Special Court for Sierra Leone, Code of Ethics for Interpreters and Translators Employed by the Special Court for Sierra Leone, 25 May 2004 (https://legal-tools.org/doc/c56846).

20 Council of Bars and Law Societies of Europe, *Guidelines for Bars and Law Societies on Free Movement of Lawyers within the European Union*, p. 9. The English term comes from the original French ("double déontologie").

We attempt to proceed scientifically in our ethical analysis. As Ibn Sina proposed in his treatise, *al-Burhân*,[21] one appropriate method to acquire first principles is *tajriba*, or experimentation.[22] Ibn Sina's account of *tajriba* follows a two-step process,[23] which we have adapted to assist us in answering the question with which this chapter opens: "Does the International Criminal Court really need an ethics charter?".

Our first step in this 'thought experiment' is to assess whether the current existing framework is capable of communicating and entrenching the ICC's "moral message". The second step will use this premise in a syllogism to show that this existing capability militates against the need for an additional ethics charter, as recommended by the external auditor on Human Resources Management.

In the first step, we analyse, in particular, whether the proper implementation of the existing ethical codes can entrench the culture of ethics contained in this "moral message" to its staff. We then consider whether the publication of an additional ethics charter may actually retard the achievement of the external auditor's specified objectives, because of the added 'compliance burden' flowing, in part, from problems of *double deontology*.

In the second step, we will consider the specific objectives that are implied – and appear to underpin – the external auditor's recommendation for an additional ethics charter. We will then examine whether the conclusions from the first step of our analysis would satisfy the external auditor's objectives.

Our experimentation may not be double-blind, but it is blind in at least one respect – problematically, but inevitably: we do not know, and can never know, the reality of the lived ethics of staff in the offices and corridors of the ICC. Our analysis does not rest on qualitative or quantitative methodology, on surveys of staff. To quote Maurice Mendelson in a new context, we must "beware of the 'weaving of nets to sieve the mist'".[24]

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21 Ash-shifâ, al-Burhân, A. Badawi (eds.), *Cairo: Association of Authorship*, Translation and Publication Press, 1966.

22 Jon McGinnis, "Scientific Methodologies in Medieval Islam", in *Journal of the History of Philosophy*, July 2003, vol. 41, no. 3, p. 307.

23 *Ibid*., p. 317.

24 Maurice H. Mendelson, "The Formation of Customary International Law", in *Recueil des cours*, 1998, vol. 272, p. 174, citing D.J. Enright, *The Alluring Problem: An Essay on Irony*, 1986, p. 5.

22.2. Does the Existing Ethical Framework Communicate a "Moral Message"?

The external auditor's report suggests that an "ethics charter" be developed, which would "add to the statutory aspect a moral message adapted to a jurisdiction".[25] The report suggests that the envisioned charter canvass the following points, which echo the "fundamental values" contemplated in Article 1.2 of the Staff Regulations: "general rights and obligations, confidentiality, honorary distinctions, gifts or remuneration, conflicts of interest, employment and activities outside the Court, and use of the Court's property".[26] It appears that the "moral message", which the external auditor finds apposite can be adequately delivered in the form of codified guidelines in respect of the above-mentioned points. The question, then, is whether or not the existing framework addresses these points in sufficient detail to convey the "moral message" envisioned by the external auditor. To frame this question in another way, how might the external auditor have responded to question: Does the ICC's existing ethical framework *already* contain the "moral message" that the proposed ethics charter seeks to communicate?

In a nutshell, our answer is yes. The substantiation lies in the constellation of ICC codes of conduct that have already entered into force. In proving this, we will analyse these codes (with a specific focus on the OTP's Code of Conduct, given its relative breadth and depth, and its infancy) through the prism of "fundamental values" which the external auditor recommended that the ICC codify through the proposed ethics charter. Additionally, the robustness of these existing codes will be tested against what information is publicly available on past ethical lapses and failures involving ICC staff and officials.

The OTP's Code of Conduct begins by laying out five fundamental rules.[27] These rules enshrine the values of independence, impartiality, non-discrimination, respect for the rule of law, a dedication to upholding fundamental human rights, and maintaining the integrity of the Court.[28] These five fundamental rules are reiterated in Section 4 of the OTP's Code of Conduct, titled "General Principles". The foundation and principles of this Code echo the "fundamental values" that are contemplated in Article 1.2 of

[25] Audit report, p. 38, "Finding", under paras. 238–240, see above note 1.

[26] *Ibid*., para. 239.

[27] ICC Code of conduct for investigators, see above note 14.

[28] *Ibid*.

the Staff Regulations which forms the basis for the external auditor's recommendation. This is the first demonstration of the congruency between the OTP's Code of Conduct and the proposed ethics charter.

The next point of analysis is Section 3 of the OTP's Code of Conduct, the "Purpose of the Code". This section explains that the Code seeks to "establish a set of minimum standards of conduct […] as a supplement to the general standards of conduct as promulgated in the Code of Conduct for Staff Members, the Staff Regulations, the Staff Rules, the Code of Conduct for Investigators and any other document that may be relevant to the performance of their duties". In addition to this, the General Principles of the OTP's Code of Conduct (found in Section 4) explicitly indicates that the OTP is to be primarily guided by, *inter alia*, the principle of "professional ethics and integrity". The external auditor's report explains that the existing standards contained in Article 1.2 of the Staff Regulations "has a series of legal rules regarding ethics but without requiring its staff to adhere to a more complete ethics charter".[29] The OTP's Code of Conduct, it seems, has the potential to function as the "complete ethics charter" that has been contemplated by the external auditor, in respect of a subset of staff – those serving in the OTP. This is premised on the fact that the OTP's Code of Conduct not only expands upon the "legal rules regarding ethics" (which are located in Article 1.2 of the Staff Regulations), but also requires the staff of the OTP to adhere to these clearly defined standards of conduct. Both of these points, at least on their face, seem to achieve the objectives laid out by the external auditor. Additionally, the manner in which the OTP's Code of Conduct functions seems to align with the objectives of the external auditor in that it supplements the "fundamental values" in Article 1.2 of the Staff Regulations, instead of subsuming that Article.

The external auditor's recommendation, however, was not solely aimed at the OTP. Indeed, it was envisioned that the proposed ethics charter would be applicable to all ICC staff. This, presumably, intended to not only include the ICC's four constituent organs, but also the counsel who practise before the Court. It is worth noting, then, that the same commitment to the "fundamental values" contained in Article 1.2 of the Staff Regulations has been made binding on members of each of these offices (including counsel who practise before the Court) through their own separately applicable codes of conduct. These codes of conduct rightly vary in rela-

[29] Audit report, p. 38, "Finding", under paras. 238–240, see above note 1.

tion to the specific duties that flow from fundamental values, and differ accordingly in terms of the management of conflicts of interests, confidentiality, general obligations, remuneration and employment outside of the Court. However, the essence of these codes remains the same: that they are a set of ethical and professional guidelines which regulate standards of conduct in relation to the fundamental values in Article 1.2 of the Staff Regulations. This fact is mostly uncontroversial, and is easily ascertainable from the explicit language of each of these individual codes. The content of each of these codes, which have entered into force over a period between 2005 and 2011, would seem to satisfy the external auditor's objectives in the same manner as we described in relation to the OTP's Code of Conduct.

However, an ethics charter that broadly commits itself to upholding the "fundamental values" contained in Article 1.2 of the Staff Regulations but fails to provide more definitive guidelines on *how* that can be achieved will only ring hollow.

The next point that must be addressed, then, is whether the existing of codes are – at least formally – capable of practicably fulfilling that commitment. It is helpful to address this point through the lens of the actual language of the existing guidelines, but perhaps more effective to do so through an analysis of how these guidelines would (and could have been) applied in publicly disclosed ethical lapses or failures which have affected the Court in the past. We turn to consider three specific incidents arising during the *Lubanga* trial; in respect of the Prosecutor's editorial in the Darfur situation;[30] and during the *Ruto and Sang* and *Gbagbo* trials.

22.2.1. The *Lubanga* Trial

The ethical turbulence associated with the *Lubanga* trial has been well documented.[31] The issue was the disclosure of confidential documents by the OTP during the course of the trial. During the trial, the Prosecutor had failed to disclose a cache of documents which contained potentially exculpatory evidence, citing "confidentiality" as the rationale for such conduct.[32] This failure was characterised as a "wholesale and serious abuse" by the Trial Chamber.[33] The question that must be answered here is, firstly,

[30] See Section 22.2.2. and note 36 below. See also Milan Markovic, "The ICC Prosecutor's Missing Code of Conduct", in *Texas International Law Journal*, 2011, vol. 47, no. 1.

[31] For a deeper discussion surrounding this particular case, see *ibid*.

[32] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, ICC-01/04-01/06, para. 17.

[33] *Ibid*., para. 76.

whether the existing OTP Code of Conduct – which would have been directly applicable, had it been in force at the material time – would have been capable of providing adequate guidance in relation to this issue; and secondly, if that is not the case, whether the proposed ethics charter would be capable of providing suitable guidance in this same instance.

The OTP's Code of Conduct appears to address the issue of disclosure of documents in Section 3. This section, however, is broadly stated, and simply places an emphasis on the OTP's obligation to

> comply with the applicable rules on disclosure of evidence and inspection of material in the possession or control of the Office in a manner that facilitates the fair and expeditious conduct of the proceedings and fully respects the rights of the person under investigation or the accused, with due regard for the protection of victims and witnesses.

The breadth of this rule has been critiqued by commentators,[34] as it does not provide "any useful clarity or guidance to members of the OTP to aid their interpretation of the Statute".[35] It certainly does not go as far as the draft rule on disclosure that has been proposed by Markovic,[36] which would provide strict guidelines as to the legal steps that the OTP ought to follow in respect of the disclosure of confidential documents during the trial process.

In our view, the broad terms of the duty of confidentiality in the OTP's Code do not limit the effectiveness of its ethical standards concerning the issue of confidentiality. This is because, in our view, the Code of Conduct ought not to constitute a crystallised guideline on trial procedure or strategy. Its primary function is to provide an ethical and professional underpinning which must be borne in mind when devising strategies which, really, are a matter of procedural and evidentiary law, not ethics, and should always be guided by the ICC Statute, the Rules of Procedure and Evidence, and previous decisions made by the Court (where appropriate).[37] In this regard, the current Code of Conduct fulfils its purpose. That is because it places an imperative on the OTP to interpret these sources of law

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34 Lawrence Pacewicz, "International Criminal Court Code of Conduct for the Office of the Prosecutor", in *International Legal Materials*, 2014, vol. 53, no. 2, p. 398.

35 *Ibid*.

36 Markovic, 2011, pp. 221–222, see above note 30.

37 Rome Statute of the International Criminal Court, 17 July 1998, Article 21 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

in such a manner that fulfils its obligation in terms of Section 3, while also affording the OTP the flexibility required to properly pursue prosecutions, as required by the mandate of that Office. What staff are guided to weigh is this interface between the Code of Conduct and the law governing trials at the ICC.

For the sake of argument, let us assume that the OTP's current Code of Conduct fails to provide adequate guidance with respect to the issue of disclosure. The question that then arises is whether the external auditor's proposed ethics charter would be capable of filling the gap. We do not think it would, for straightforward reasons: the external auditor's proposal is not specifically aimed at the OTP. Instead, it is aimed at ICC staff in general. Such a charter could only be couched as generally – if not more so – as the OTP's existing Code of Conduct, which is tailored to idiosyncratic issues such as prosecutorial obligations of disclosure. To the extent the OTP's Code of Conduct were deficient in the depth of guidance on disclosure, the more effective solution would likely be to amend or supplement the existing Code of Conduct, not to promulgate an ethics charter.

22.2.2. The Darfur Situation and the Prosecutor's Editorial

In 2010, the Appeals Chamber reversed the Pre-Trial Chamber's decision to grant an arrest warrant for Omar Al-Bashir for crimes committed in Darfur during the period of March 2003 to July 2008.[38] The ratio that underpinned this decision was that the Pre-Trial Chamber applied the incorrect standard of proof in determining whether an arrest warrant ought to have been granted.[39] Almost immediately thereafter, the Prosecutor, Luis Moreno-Ocampo, authored a piece which was published in *The Guardian*, titled "Now end this Darfur denial".[40]

In the piece, the Prosecutor claimed that the original decision by the Pre-Trial Chamber had found that "Bashir's forces have raped on a mass scale in Darfur" and had "deliberately inflict[ed] on the Fur, Masalit and Zaghawa ethnic groups living conditions calculated to bring about their

[38] ICC, The *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Appeals Chamber, Judgment on Appeal Against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010, ICC-02/05-01/09-73, para. 2 (https://www.legal-tools.org/doc/9ada8e/).

[39] *Ibid*., paras. 41–42.

[40] Luis Moreno-Ocampo, "Now end this Darfur denial", *The Guardian*, 15 July 2010.

physical destruction".[41] The Pre-Trial Chamber, however, had made no such findings; instead, it had only made a determination in relation to the granting of a warrant of arrest under Article 58(1) of the Rome Statute.[42] The misleading nature of this editorial was widely criticised, with some going so far as suggesting that its publication constituted sufficient grounds to consider removing the Prosecutor from office.[43]

The same reflective question that we applied to the *Lubanga* issue must be applied in this instance, too. Would the OTP's Code of Conduct – were it in force at the material time – have provided adequate clarity on this issue of extrajudicial speech; and if not, would the external auditor's proposed ethics charter be capable of providing such clarity?

Section 8 of the OTP's Code of Conduct, titled "Public Expression and Association", is dedicated to addressing the issue of prosecutorial speech. Article 39 under that section specifically addresses the issue of extrajudicial speech, stating that

> Members of the Office shall refrain from making any public pronouncements, outside the context of the proceedings before the Court, that they know, or reasonably ought to know, may be disseminated by means of public communication, and may have a substantial likelihood of prejudicing the judicial proceedings or the rights of any person in the proceedings before the Court.

This standard of conduct seems to be capable of directly addressing the issue that had arisen in respect of the Al-Bashir editorial, insofar as it provides an almost explicit prohibition on speech that would "prejudic[e] […] the rights of any person in proceedings before the Court". In the Al-Bashir case, such prejudice takes the form of the derogation of Al-Bashir's right to be presumed innocent until proven guilty before the Court.[44]

The standard does not, however, follow the more detailed iteration advanced by Markovic,[45] which would prohibit "speaking to the media about the merits of particular cases or the guilt or innocence of certain accused before judgment by the Court, and making any public statements re-

41 *Ibid*; see also, Markovic, 2011, p. 230, see above note 30.

42 *Ibid*.

43 Kevin Jon Heller, "The Remarkable Arrogance of the ICC Prosecutor", *Opinio Juris*, 20 July 2010 (available on its web site).

44 Markovic, 2011, p. 231, see above note 30.

45 *Ibid*., p. 235.

garding the character, credibility, reputation, or record of an accused or any witness".[46] This version is more comprehensive than what is contained in the existing OTP Code of Conduct, but ultimately seeks to protect against the same harm as contemplated by Section 8 of that Code: prejudicing the rights of persons in proceedings before the Court. The existing Code is effective in preventing this harm, as has been acknowledged by academic commentators.[47] This is despite the existing rule being cast in broader terms than those Markovic envisioned. The rationale for this is that his catalogue of protected targets of extrajudicial speech – "the character, credibility, reputation, or record of an accused" person – are generally accepted as ingredients of a fair trial. The existing Code, then, takes each of these considerations into account, while simply framing them in the context of fair trial rights. In this regard, the guidance of the OTP's Code appears sufficient, in the sense that it would have curbed the publication of comment in the nature of the Prosecutor's editorial.

Limits on extrajudicial speech also apply to counsel practising before the Court, as well as comments made by judges before whom the proceedings are unfolding. In this respect, the Code of Professional Conduct for Counsel and the Code of Judicial Ethics find application.

The Code of Professional Conduct for Counsel implicitly addresses this issue in Article 24(1), where it is stated that "Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute". This Article, cast broadly, seems to encompass extrajudicial speech to the extent that it is capable of prejudicing the rights of persons in proceedings before the Court (and thus the proceedings themselves). The guidelines in this respect are less specific than those which apply to the OTP. This distinction, however, is not inappropriate when one considers the higher duty of care that is applicable to the OTP.[48] Notwithstanding that difference, the Code of Professional Conduct for Counsel provides the necessary framework to address the issue of extrajudicial speech of the kind that is reflected in the Prosecutor's editorial.

Similarly, the Code of Judicial Ethics – in Article 9 – clearly and unequivocally prohibits judges from commenting on pending cases. This pro-

[46] *Ibid*.

[47] Pacewicz, 2014, p. 398, see above note 34.

[48] *Ibid*., fn. 259.

hibition is reflective of the stringent level of impartiality that is expected of ICC judges. This prohibition ensures that no person appearing in proceedings before the Court – and thus before the judges of the Court – will be thought to be denied the presumption of innocence that the Rome Statute affords to them.

Let us assume, once again for the sake of argument, that these existing codes do not go far enough with regard to the regulation of extrajudicial speech for the purpose of protecting the rights of persons in proceedings before the Court. The question, once again, is whether the proposed ethics charter would be sufficient in achieving that goal, when overlaid on the existing codes.

Any ethics charter applicable across the ICC to all staff would not be capable of providing staff serving in each organ, or counsel who practise before the Court, with anything more comprehensive than what their currently existing codes already provide for. A general ethics charter can only address issues, well, generally. It is likely to be incapable of addressing the differing 'standards of expression' that are appropriate for each individual office. The guidelines would be sparser than what already exists, and would not overcome the same shortcomings that might have already been identified in respect of the existing ethical framework. It is for this reason, we suggest, that the external auditor's proposed ethics charter would do nothing more than what has already been done.

22.2.3. The *Ruto and Sang* and *Gbagbo* Trials

The *Ruto and Sang* trial,[49] like the *Lubanga* trial, is "one of ICC legend".[50] The *Ruto* and *Sang* trial saw Kenyan defendants appear before the Court, having been charged with crimes against humanity.[51] In this case, the Trial Chamber noted its concern regarding the Prosecutor's various disclosure failures, and needed to make an order ensuring that the Prosecution would act in full conformity with its disclosure obligations.[52] The ethical breach

[49] ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, ICC-01/09-01/11.

[50] Constance Rachel Turnbull, "Understanding and Improving the 2013 Code of Conduct for the Office of the Prosecutor for the International Criminal Court", in *Georgetown Journal of Legal Ethics*, 2018, vol. 31, p. 891.

[51] *Ibid*.

[52] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, ICC-01/09-01/11, para 59.

that tainted the *Gbagbo* trial[53] was of a similar nature. In that case, the issue in question revolved around the (dis)use of evidence which "might have cut against the investigative angle".[54]

As stated previously, the heart of our enquiry is whether the existing ethical framework provides (or would have provided) adequate guidelines that, if applied in these cases, would have provided greater clarity in respect of the intersection between disclosure of evidence, confidentiality and objective truth-seeking. The second step of the enquiry also reflects our previous undertakings and, therefore, addresses whether the external auditor's proposed ethics charter would provide better guidance in respect of this same intersection.

Sections 1 and 3 of the OTP's Code of Conduct are particularly helpful in this respect. Section 1 provides clear guidance as to how a Prosecutor ought to deal with the objective truth-seeking component of this enquiry. In addressing this issue, Rule 49 explains that:

> In compliance with the duty to establish the truth under article 54(1)(a) of the Statute, the Office shall investigate incriminating and exonerating circumstances equally in all steps involved in the planning and conduct of investigative and prosecutorial activities. In particular, Members of the Office shall: […] b) consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the prosecution.

This is particularly helpful as it frames the ethical duties of the OTP through a statutory lens, namely Article 54(1)(a) of the Rome Statute, as well as a professional and ethical responsibility to not discriminate between incriminating and exonerating evidence. This is particularly helpful in cases such as *Ruto and Sang* and *Gbagbo*, as it crystallises a specific instance when the Prosecutor must actively consider Article 54(1)(a), which places an obligation on him or her to "investigate incriminating and exonerating circumstances equally" – namely when assessing evidence during the case-preparative phase. The helpfulness of Rule 49 is buttressed by the language of Rule 49(b), which is far more comprehensive than the statutory duty contained in Article 54(1)(a) in that it places particular emphasis on the manner in which the OTP should assess evidence which may disadvantage

[53] ICC, *The Prosecutor v. Laurent Gbagbo*, Trial Chamber, ICC-02/11-01/11-49.

[54] Turnbull, 2018, p. 892, see above note 50.

the Prosecutor's case. The existence of this rule, according to Turnbull, "means that it is unlikely that such abuses will be repeated without prosecutorial sanctions".[55]

Section 3 of the OTP Code would have found expression, too. Rule 53(a) obliges the OTP to disclose any evidence (within the boundaries of the applicable rules on disclosure) "that shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence". This rule, like Rule 49(a), provides the OTP with clear guidance as to how it should conduct itself in respect of the disclosure of evidence which may exonerate a person in proceedings before the Court. The existence of this rule, much like Rule 49(a), would ostensibly reduce the probability of instances of the *Ruto and Sang* or *Gbagbo* kind unfolding in the future.

As with the issue of extrajudicial expression, the issue of failing to disclose evidence which is determined to be prejudicial to one's own case, but which appears to be objectively true, is one that poses an ethical challenge to counsel who appear before the Court, and not only the OTP. In this respect, the Code of Professional Conduct for Counsel is instructive. Article 24(3) of that document is particularly applicable in such instances. It states that "Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous". This obligation embedded in Article 24(3) mirrors that which is made binding upon the OTP in Rules 49 and 53, insofar as it can be reasonably understood that actively withholding of evidence on the basis that it is prejudicial to one's own case constitutes deception of the Court. This understanding can hardly be seen as controversial, and the applicability of Article 24(3) is therefore a natural corollary of such conduct. In this regard, it is clear that counsel, when dealing with situations such as those which arose in the cases of *Ruto and Sang* and *Gbagbo*, would be properly guided as to how they should (and should not) conduct themselves during the course of proceedings.

At this juncture we ask once again whether an additional set of guidelines – the proposed ethics charter – would supplement the effectiveness of the existing codes. Once again, any Court-wide ethics charter would necessarily be cast in general terms. Such a charter could only reit-

[55] *Ibid*.

erate the general legal obligation to assess evidence impartially. This obligation, then, would likely resemble the normative content of Article 54(1)(a), but be made applicable to a broader range of ICC staff than that article, which concerns only the OTP. This general proposition, then, will provide a certain degree of guidance in the sense that it places an ethical duty on members of the Court, which will function in tandem with the statutory duty that exists in the Rome Statute. This guidance, however, will not be any more comprehensive – nor any more helpful – than the existing codes of conduct, which not only confer the same 'dual duty' onto the Court's staff, but also goes on to further explain the specific importance of assessing and disclosing evidence which would be prejudicial to one's own case. The external auditor's proposed ethics charter, then, will provide no further guidance than what is contained within the existing ethical framework.

22.2.4. Reflection

Each of the above-mentioned incidents falls into various constituents of the "fundamental value" composite that the external auditor's proposal seeks to construct. As has been demonstrated, the existing statutory framework at the ICC is sufficiently robust to achieve such construction on its own. Put otherwise, the "moral message" which the external auditor wishes to communicate through the publication of an ethics charter is capable of being delivered by the existing constellation of ethical codes in force at the ICC.

22.3. Entrenching the ICC's "Moral Message" in Practice

Having established that the necessary "moral message" has, at least formally, been promulgated to the staff serving at every constituent office of the ICC, we must now consider how this "moral message" might permeate at the level of culture.[56] We will then consider whether an additional ethics charter would be helpful in further entrenching the "moral message".

The literature in management science makes plain that the mere existence of ethics charters and codes of conduct, does not in itself guarantee

[56] The distinction that we have drawn between "formal" and "informal" communication refers to the difference between having an ethical framework in place and ensuring the implementation of that ethical framework in a manner that results in the adoption of the ethical values contained within that framework.

ethical conduct by staff within an organisation.[57] This is especially true in instances when enforcement is lacking.[58] There is no reason why this logic would not apply to the ICC, whose robust ethical framework, it would appear, has not spontaneously generated virtue in all individuals under all circumstances.

We first explore some of the reasons which may render the ICC's existing ethical framework susceptible to serious ethical breaches, and secondly, consider approaches that might mitigate this risk of breaches of this kind.

A great many large organisations have fallen into ethical default, despite having ethical guidelines in place.[59] This fact prefaces the first leg of our analysis, that being some of the reasons which render organisations susceptible to ethical breach, even when those organisations are governed by robust ethical frameworks. Webley and Werner[60] suggest that the chasm between "policy and practice" is rooted in two interlinked considerations: a) ineffective ethics programmes (which we understand as referring to 'formal' implementation, such as an ethics code) and b) deficiencies in corporate culture – in other words, a lack of embedding.[61]

In respect of the first factor, Webley and Werner suggest that an ineffective ethics code might "only encompass a narrow set of issues without addressing wider obligations or commitments".[62] Additionally, it is suggested that an ineffective ethics code may constitute nothing more than "a set of rules that the employees are expected to follow, rather than values-based and providing guidance on how to handle ethical dilemmas".[63] Lastly, Webley and Webber suggest that another hallmark of an ineffective ethics

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57 Simon Webley and Andrea Werner, "Corporate Codes of Ethics: Necessary But Not Sufficient", in *Business Ethics: A European Review*, 2008, vol. 17, no. 4, p. 405; Pablo Ruiz, Ricardo Martinez, Cristina Diaz and Job Rodrigo, "Level of Coherence Among Ethics Program Components and Its Impact on Ethical Intent", in *Journal of Business Ethics*, 2015, vol. 128, no. 4, pp. 725–742.

58 Jennifer J. Kish-Gephart, David A. Harrison and Linda Klebe Treviño, "Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work", in *Journal of Applied Psychology*, 2010, vol. 95, no. 1, pp. 1–31.

59 Webley and Werner, 2008, p. 406, see above note 57.

60 *Ibid*.

61 *Ibid*.

62 *Ibid*.

63 *Ibid*.

code addresses employee behaviour, but excludes important decision-makers within the organisation.[64]

As explained above, the ICC's existing framework goes a long way in addressing specific concerns which may arise during the course of a staff member's responsibilities, as well as providing clarity in respect of the broader ethical commitments that the ICC comes to expect from its associates. Additionally, the existing framework is non-discriminatory, in the sense that Article 1.2 of the Staff Regulations is made equally applicable to each and every one of the ICC's staff, irrespective of their role within the organisation.

The next consideration, then, is what Webley and Werner call a "lack of embedding".[65] The authors explain that a gap between practice and policy emerges when an ethical code is not effectively embedded or communicated to the organisation. Simply put, they say, "it is not sufficient to send a booklet to all staff and expect them to adhere to its contents".[66] The importance of ensuring that an ethical code is embedded within an organisation cannot be understated.

In 1994, the US-based Ethics Resource Centre published its first National Business Survey.[67] This survey relied on feedback from approximately 4,000 employees in that country. It found that companies with ethics policies clearly expressed through ethics programmes showed positive upturns in ethical compliance. A negative response was attached to companies which had communicated ethics policies but omitted the expression thereof through proper ethical programmes.[68] The clearest conclusion to be drawn from this report, then, was that the existence of a code without a supporting ethics programme only increases organisational awareness of ethical issues, but does not go far enough in reducing the incidence of ethical breaches.[69]

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64 *Ibid*, citing Brian J. Farrell and Deirdre M. Cobbin, "A Content Analysis of Codes of Ethics in Australian Enterprises", in *Journal of Managerial Psychology*, 1996, vol. 11, no. 1, pp. 37–55.

65 *Ibid*.

66 *Ibid*.

67 Rebecca Goodell, *Ethics in American Business: Policies, Programs and Perceptions Report of a Landmark Survey of U.S. Employees*, Ethics Resource Center, Washington, DC, 1994.

68 *Ibid*.

69 *Ibid*., p. 37.

This finding was repeated in a 2004 Canadian study.[70] This study revolved around 57 interviews of employees and managers of four Canadian companies in respect of the effectiveness of codes of ethics within their organisations. On the back of this conclusion, the author of this study went on to suggest that "the mere existence of a code will be unlikely to influence employee behaviour" and that companies which "merely possess a code might legitimately be subject to allegations of window dressing".[71] The outcomes of these studies suggest that to bolster the probability of ethical compliance within an organisation, that organisation must supplement its ethical code – or in the case of the ICC, the existing constellation of codes of conduct – with an immersive, formal programme that ingrains its ethical commitments into the consciousness of the Court's staff. On this point, structure and function are clearly interlinked. As suggested elsewhere, an expressly virtues- or values-based code may hold more promise than duty-based rules as 'conversation-starters', and not 'conversation-enders' at the ICC, where staff are drawn from different 'home' legal systems and legal cultures.[72]

Another issue that does seem to arise, however, is in relation to what may be limited disciplinary action associated with breaches of the ICC's existing codes of conduct. This is particularly true in relation to the OTP's Code of Conduct.[73]

On 21 July 1998, the late Chief Justice of South Africa – the first of the democratic era – Ismail Mahomed, gave a speech to the International Commission of Jurists in Cape Town. He explained how, absent the exercise of the apparatus of the State in enforcing the orders of courts, they "could easily be reduced to paper tigers with the ferocious capacity to snarl and to roar but no teeth to bite and no sinews to execute their judgments which may then be mockingly reduced to pieces of sterile scholarship, toothless wisdom or pious poetry".[74]

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70 Mark S. Schwartz, "Effective Corporate Codes of Ethics: Perception of Code Users", in *Journal of Business Ethics*, 2004, vol. 55, no. 4, pp. 323–343.

71 *Ibid*.

72 See Salim A. Nakhjavani, "ICC Statute Article 45", Lexsitus Lecture, CILRAP Film, 28 September 2017, Johannesburg (www.cilrap.org/cilrap-film/45-nakhjavani/).

73 Turnbull, 2018, p. 900, see above note 50.

74 Ismail Mahomed, "The Independence of the Judiciary", in *South African Law Journal*, 1998, vol. 115, no. 4, pp. 658-667.

In this same vein, an ethics charter that lacks a disciplinary element, which imposes corrective. sanctions upon those who breach its provisions will be nothing more than "toothless wisdom" (or "pious poetry", depending on one's cynicism). The need for such measures for the proper implementation of an ethics code within an organisation is widely recognised.[75]

Whilst some of the existing codes of conduct (such as the Code of Professional Conduct for Counsel) go into significant depth as to how breaches of that code ought to be dealt with, others (such as the OTP's Code of Conduct) only go so far as extending a right to the Prosecutor to impose appropriate disciplinary measures against members of that office who are found to have breached its provisions.[76] This is problematic when one considers how this regime would function in the instance that the misconduct flows from either a direct instruction from the Prosecutor, or worse still, is conducted by the Prosecutor her- or himself.[77] This lacuna in the OTP's Code should be promptly addressed, as it provides an unwelcome 'impunity-gap' on the ethical plane.

We now turn to impediments to the implementation of an organisation's "moral message" at the level of corporate culture.[78]

In 2005, a second US National Business Ethics Survey found that although the enactment of formal ethical policies did impact ethical outcomes within participating organisations, the outcomes of those policies were also determined by the culture which prevailed within those same organisations.[79] In light of this, Webley and Werner[80] sought to distil the factors which hinder the proliferation of ethical culture within organisations. Their research found that the following points were particularly significant: a) a lack of commitment of top management; b) pressure to meet targets; and c) a fear of retaliation.[81]

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75 Timothy L. Fort, "Steps for Building Ethics Programs", in *Hastings Business Law Journal*, 2005, vol. 1, no. 1, p. 201.

76 OTP Code, para. 75, see above note 16.

77 Turnbull, 2018, p. 900, see above note 50.

78 Webley and Werner, 2008, p. 408, see above note 57.

79 Ethics Resource Center, *National Business Ethics Survey – How Employees View Ethics in Their Organizations 1994–2005*, 2005, Washington, DC.

80 Webley and Werner, 2008, p. 408, see above note 57.

81 *Ibid*.

The first point is derived from a study conducted in 1999,[82] wherein 10,000 employees from across six different American corporations were interviewed about their experiences with the ethical codes and programmes put in place by their employers. The outcome of this study suggested that "top management commitment was important to the scope and control orientation of corporate ethics programmes", and that "such commitment was the only factor that was strongly associated with having a programme that is orientated towards shared values".[83] These findings, according to Webley and Werner, suggest that a top-down approach to ethics is an important component of developing a culture of ethics within an organisation.[84]

As suggested elsewhere, the OTP's Code provides a useful example of embedding this top-down approach, because of the express and heightened duty on the Prosecutor and Deputy Prosecutors to provide "an impeccable example" to the staff of that Office, and to provide "appropriate guidance, direction and support in the promotion and cultivation of the standards expected of the Office".[85]

The second point was borne out of an ethics survey conducted by the American Management Association in 2005.[86] All 1,000 respondents in this survey were asked "what they considered to be the factors that are most likely to cause people to compromise an organisation's ethical standards".[87] In response, approximately 70 per cent of them referred to the "pressure to meet unrealistic business objectives/deadlines" as being a major factor in this regard.[88]

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82 Linda Klebe Trevino, Gary R. Weaver, David G. Gibson and Barbara Ley Toffler, "Managing Ethics and Legal Compliance: What Works And What Hurts", in *California Management Review*, 1999, vol. 41, no. 2, pp. 131–151.

83 *Ibid*.

84 Webley and Werner, 2008, p. 408, see above note 57.

85 See OTP Code, para. 15, see above note 16; see also Salim A. Nakhjavani, "The Origins and Development of the Code of Conduct" in Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 961 (https://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song).

86 *The Ethical Enterprise – Doing the Right Things in the Right Ways, Today and Tomorrow (A Global Study of Business Ethics 2005-2015)*, American Management Association, New York, 2006; Raymond Baumhart, *An Honest Profit – What Businessmen Say About Ethics in Business*, Holt, Rinehart and Winston, New York, 1968.

87 Webley and Werner, 2008, p. 408, see above note 57.

88 *Ibid*.

This pressure is presumably even more pronounced at an organisation such as the ICC, which has been tasked with the onerous mandate of prosecuting "the most serious of crimes of concern to the international community as a whole".[89] ICC staff, then, are burdened with achieving an objective that transcends that which has been cited by the respondents in the American Management Association's study. This is because their objectives go beyond the realm of commercial enrichment, and, instead, require them to seek justice for victims of gross violations of rights, and for the international community as a whole. In this sense, they carry the weight of the world's expectations on their shoulders. The weight of this expectation will no doubt be an important factor in determining whether or not the ICC's organisational culture is capable of being set up in a manner that upholds the stringent duties contained within the existing ethical framework, while allowing the Court's staff to execute their mandate effectively towards the international community. The three examples of ethical lapses we considered earlier in this chapter are, to our minds, clear indication that the ICC – or the OTP, at the very least – has previously found itself in a position whereby it was able to justify an ethical breach in order to achieve a specific objective: the successful prosecution of persons accused of having committed crimes that "deeply shock the conscience of humanity".[90]

The question that arises here is how to ameliorate the risks that are associated with the pursuit of these weighty objectives. One suggestion is to characterise ethical conduct as an objective in itself. This approach mirrors Webley and Werner's recommendation, which puts ethical considerations at the centre of corporate strategy as a means of promoting an ethical culture within an organisation.[91] This approach holds promise particularly for those organs and actors within the ICC directly responsible for criminal proceedings that preserve the rights of the charged person or the accused, both substantively and procedurally.

An ethical breach by an actor at the core of criminal proceedings may itself vitiate the fairness of those proceedings. Placing emphasis on ethical considerations as an objective in themselves, – as ends, not means – has the potential of not only ensuring that ICC staff are dissuaded from 'cutting corners' to achieve their broader goal of pursuing international jus-

89 ICC Statute, Article 5, see above note 37.

90 ICC Statute, Preamble, 2nd recital, see above note 37.

91 Webley and Werner, 2008, p. 412, see above note 57.

tice, but also ensuring that their progress towards that goal is unimpeachable.

This last suggestion aligns closely with the findings of the 2004 Ethics at Work survey of the UK-based Institute of Business Ethics.[92] About a third of respondents who admitted to witnessing unethical conduct at their workplaces revealed they had chosen not to disclose their observations. This was predicated on the fact that they felt that "speaking up" would jeopardise their job security or place them at odds with their colleagues.[93] Indeed, having to work under a climate of fear or retaliation naturally serves a chilling factor against the disclosure of ethical breaches by persons operating within that workspace. The ICC, like all workplaces, is likely to have cultivated a culture whereby its staff are somewhat hesitant to make such disclosures, whether it be out of fear of castigation or otherwise.

One potential solution that had been advanced during the drafting process of the OTP Code of Conduct, but now finds no expression in the final version of that Code,[94] or of the Code of Professional Conduct for counsel – nor, indeed, in other codes – is the explicit recognition of a feature of a legal culture familiar in all major legal systems. In the practice of law as a liberal profession, or as an independent practitioner (such as barristers, advocates and the like), a great deal of ethical decision-making is premised on seeking informal – but well-informed – advice from more experienced practitioners, on a collegial basis of confidentiality. The informal conversation and advice, once rendered, are consigned to the *oubliette*. Among independent legal practitioners, this culture only 'works' where the more senior practitioner is committed to the independence and integrity of the profession above personal interest.

There is no substantial reason, in our view, why such a channel cannot be brought 'in-house' at the ICC, and for it to exist outside a staff member's management line. It is an advisory role that demands a certain calibre of person, to be sure; but the same check on possible abuse that has embedded this aspect of ethical practice among independent bars and law societies across legal cultures – that is, a longstanding, unwavering commitment to the institution and to the rule of law – must be expected of the

92 S. Webley and P. Dryden, *Ethics at Work: A National Survey*, London: Institute of Business Ethics, 2005.

93 *Ibid*.

94 Nakhjavani, 2017, p. 957, see above note 85.

international civil service. It bears noting that the calibre of person with the demonstrated capacity to consistently subordinate individual to institutional interest – the likes of Noblemaire and Flemming – is not some kind of inaccessible hero of virtue. That person should be nothing other than an ordinary staff member of the Court.

Moreover, there is a profound, but often unarticulated ethical dimension to the first principles set out in the ICC Staff Rules: First, "[s]taff taff members of the Court are international civil servants. Their responsibilities as staff members of the Court are not national, but exclusively international";[95] and second, "[t]he interest of the Court and the obligations that staff members have towards it shall always take precedence over their other interests or ties".[96]

22.4. Double Deontology: Desperately Seeking Coherence

The problem of *vertical* double deontology, as between ethical standards binding on legal practitioners at the ICC and in their home States, is not particularly vexing, at first glance. The Code of Professional Conduct for Counsel sidesteps the problem by framing it only in terms of enforcement – the proverbial 'pain point'. That is, the disciplinary regime applicable under the Code operates "without prejudice" to the "disciplinary powers" of any other "disciplinary authority".[97] There is a rule of complementarity *sui generis* that suspends proceedings before the ICC's disciplinary authority in cases where a national authority is acting with respect to the same misconduct, unless the national authority is "unwilling or unable to conclude the disciplinary procedure".[98]

The unstated assumption is that a breach of standards matters less than when one has not yet been caught, and absent the prospect of conflicting disciplinary measures. The approach has a practical basis, nevertheless, because the rule of thumb, across various national jurisdictions, is that counsel appearing in a foreign or international court must uphold all the ethical rules by which they are bound. It is only when their conduct is formally called into question that the Code applicable at the ICC needs to provide a deadlock-breaking mechanism.

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95 ICC, Staff Rules of the International Criminal Court, 27 July 2015, Rule 101.1 ('Staff Rules') (https://www.legal-tools.org/doc/2a5274/).

96 *Ibid*., Rule 101.3.

97 *Ibid*., Rule 101.3.

98 *Ibid*., Article 38(4).

What this Code conspicuously fails to do is to guide counsel on their conduct when the substantive ethical standards of their home jurisdiction and that of the Court conflict. A simple but real example is where counsel are subject to a referral rule in their home jurisdiction, but then accept a contractual appointment as counsel at the ICC without formally suspending their legal practice in their home jurisdiction, where they continue to represent clients and take instructions. Are counsel entitled to insist on a brief from the ICC to be channelled through a solicitor or attorney in their home jurisdiction? Such a brief is unlikely at best. Would counsel then be breaching the referral rule to act for a client facing trial at the ICC?

Horizontal double deontology – as between multiple, overlapping ethical standards applicable at the ICC – is a significantly harder problem. Axiomatically, when overlaid as a general set of standard on the existing, more specific codes, an ethics charter creates an overlap by design. The question is what to do about it.

The OTP provides the most useful example here, because it is guaranteed functional independence by the Rome Statute. Should an OTP staff member disclose actual or imminent misconduct to a person outside the OTP because of their overarching duty to the "interest of the Court" and their "obligations towards it" under Staff Rule 101.3? The OTP's Code itself is clear, in Article 12: "When given reason to believe that a departure from these standards has occurred or is about to occur, Staff members shall report the matter to their supervisors or the Prosecutor".

Resorting to the language of rights and duties starts from an assumption of competition: the duty to act in the interest in the Court is weighed against the duty to report within the OTP reporting line. This is singularly unhelpful, because there is no clear basis on which to 'balance' these duties and reach a concrete ethical decision and course of action. A more useful approach may well be to seek coherence and to inculcate a culture of ethical behaviour centred on the requirements of a coherent life.

Despite the sustained attention of legal theorists, the concept of coherence (especially in legal argument) has proven elusive. In a useful survey of arguments on coherence in legal theory, Bertea observes that:

> While there is wide agreement among contemporary legal theorists on the characterization of coherence in the negative as lack of inconsistencies, it is still a question how coherence might be defined in positive terms. Coherence is generally held to be something more than logical consistency of propo-

> sitions. But it is not entirely clear what this 'something more' amounts to. Thus, coherence is often described in figurative language as the equivalent of 'hanging together', 'making sense as a whole', 'cohesion', 'consonance' and 'speaking with one voice'. A coherent set might then be described as a 'tightly-knit unit'. Which makes coherence a 'kind of internal interconnectedness', a 'plausible connection' that is not lineal and asymmetrical but circular and symmetrical: the elements of a coherent structure are mutually supporting and reinforcing.[99]

We understand coherence this way: rights and duties may conflict. But values and qualities of character do not, if one accepts that each expresses a universal human potentiality of a single human being. How, then, might staff members' duty to act in the interests of the Court and their duty to report misconduct within the OTP reporting line begin to *cohere?*

What emerges immediately is that their ethical reasoning will not rest on abstract conceptions of their duties. They will interrogate the values underlying Staff Rule 101.3 and Article 12 of the OTP Code, in respect of the very specific, finely-grained facts of the misconduct of which they are aware. They will take the OTP Code not as a series of rules, but as a cohesive whole, including its standards on faithful conduct, which include the following four illustrative examples of what it means to fulfil "the trust reposed in the Office of the Prosecutor":

> (a) loyalty to the aims, principles and purposes of the Court;
>
> (b) acting within the boundaries of inherent or delegated powers and functions;
>
> (c) due deference to the authority of the Prosecutor [...];
>
> (d) respect for the principles of this Code, and a concerted effort to prevent, oppose and address any departure therefrom.

At that point, they will take their decision, whatever it might be – one which any reasonably objective disciplinary authority would characterise as a considered, responsible, mature choice.

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[99] Stefano Bertea, "The Arguments from Coherence: Analysis and Evaluation", in *Oxford Journal of Legal Studies*, 2005, vol. 25, no. 3, pp. 371–72 (footnotes omitted).

22.5. What Might the External Auditor Have Hoped to Achieve?

The objective of the external auditor has been outlined in significant detail above, but for the sake of structure, it is probably worth summarising. Simply, the external auditor seeks to supplement the existing statutory framework with a "moral message". This "moral message" should echo the "fundamental values" contained in Article 1.2 of the Staff Regulations. According to the external auditor, the essence of these values is captured by the listed points, those being "general rights and obligations, confidentiality, honorary distinctions, gifts or remuneration, conflicts of interest, employment and activities outside the Court, and use of the Court's property".[100] The external auditor believes that the proposed ethics charter ought to address staff conduct with respect to said points. The existence of guidelines, which address these points is the barometer by which the need for an additional ethics charter ought to be judged.

We have tried to show how the existing ethical framework – both its general statements (as in the Staff Rules) and its details in specific codes – covers and surpasses what could be achieved practically by a single ethics charter covering all staff of the ICC. The real question is implementation, and the problem is complex. It calls for an honest reading of reality at the level of culture – beyond the totting up of complaints filed and complaints resolved. This is important to interrogate the ways that ethical standards are modelled by officials and senior staff; how these standards are embedded in staff orientation and ongoing training; the formal and informal approaches that staff might and actually do take to reach ethical decisions; and the nature, depth and persistence of conversations on ethics among the staff of the Court, both within and between its organs.

[100] Audit report, para. 239, see above note 1.

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