

# The International Criminal Court in Côte d'Ivoire: Impartiality at Stake?

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## Abstract

*The trial of former Ivorian president Laurent Gbagbo at the International Criminal Court (ICC) has provoked major controversy in Côte d'Ivoire and the wider Ivorian diaspora. While both pro-Gbagbo and pro-Ouattara sides reportedly committed abuses during the 2010-2011 crisis, the ICC Prosecutor pursued a sequenced prosecutorial strategy. Critics deplore the alleged lack of perceived impartiality in this approach. This article provides a critical assessment of this strategy and offers a novel theoretical framework to glean new findings around the norm of prosecutorial impartiality. First, the controversy around the Prosecutor's strategy arguably reveals a tension between a 'legalist' and a 'political' vision of impartiality. While the Prosecutor's strategy is in accordance with the legalist vision, its actions are criticized based on the political vision. The dispute between the Prosecutor and her critics thus reflects the tension between being impartial and being seen as impartial, or between the demands of procedural impartiality and political neutrality. Second, the Office of the Prosecutor's (OTP) approach to the Côte d'Ivoire situation is arguably the product of a 'tactical rapport' between the OTP and the government, i.e. of the relationship between the tactics used by the OTP to operate as an effective prosecutorial body and the tactics used by national authorities to navigate the post-crisis transition.*

## 1. Introduction

Putting former president of Côte d'Ivoire Laurent Gbagbo in the dock at the International Criminal Court (ICC) was a milestone for the Office of the Prosecutor (OTP) — one that has sparked much criticism. Charged with crimes against humanity allegedly committed during the 2010-2011 post-electoral crisis, Gbagbo is the first former head of state to be tried by the ICC. Following his refusal to accept the internationally-recognized victory of Alassane Ouattara in the 2010 presidential elections, hostilities between pro-Gbagbo and pro-Ouattara armed supporters left more than 3,000 people dead. According to the national and international commissions of inquiry, both sides allegedly committed violations of international criminal law.<sup>1</sup> During the crisis, President Ouattara repeatedly requested the ICC Prosecutor to intervene. After the crisis, in October 2011, ICC judges granted the Prosecutor's

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<sup>1</sup> *Report of the independent, international commission of inquiry on Côte d'Ivoire*, A/HRC/17/48, 6 June 2011, at 1. Commission Nationale d'Enquête, *Rapport d'enquête sur les violations des droits de l'homme et du droit international humanitaire survenues dans la période du 31 octobre 2010 au 15 mai 2011* (2012) 1-35, at 30.

request to launch an investigation *proprio motu*, following the Article 12(3) declaration issued years earlier by then-President Laurent Gbagbo.

Since both sides are accused of committing grave crimes, yet one side is in power, the OTP faced a fundamental challenge in crafting its strategy: how to effectively investigate both the pro-Gbagbo and pro-Ouattara sides impartially without jeopardizing the needed cooperation of the Ouattara administration. Indeed, the ICC Prosecutor can be understood as a ‘dependent-independent’ Prosecutor: she is mandated to investigate and prosecute impartially and independently, yet is fundamentally dependent on states’ cooperation to do so. Due to the ICC’s inherent structure, she must consider, as part of her work, the reliability of state cooperation, which is a fluctuating function of the government’s evolving interests. Yet, how much can the Prosecutor take state cooperation into account without compromising her impartiality?

The OTP has always insisted its ‘sequenced’ approach to this situation would not be at the cost of impartiality.<sup>2</sup> This meant that, pragmatically, the OTP would first focus on alleged crimes committed by the pro-Gbagbo side and would later extend investigations to the pro-Ouattara side. ICC arrest warrants were issued for ex-President Laurent Gbagbo, ex-First Lady Simone Gbagbo, and former pro-Gbagbo political youth movement leader Charles Blé Goudé. At the time of writing, both Laurent Gbagbo and Charles Blé Goudé are on trial for crimes against humanity. No public arrest warrants have been issued as a result of investigations into the pro-Ouattara side.

As further explained in Section 3, critics of all types, ranging from Gbagbo’s political allies<sup>3</sup>, to national<sup>4</sup> and international human rights and victims’ groups<sup>5</sup>, to United Nations<sup>6</sup> and former diplomatic representatives<sup>7</sup> criticize the perceived single-sidedness or even bias of the OTP’s sequenced strategy. They broadly argue that the OTP’s approach may improperly bolster the national authorities and exacerbate political divisions by perpetuating victor’s

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<sup>2</sup> BBC News, ‘ICC prosecutor arrives in Ivory Coast to probe abuses’, 15 October 2011, available online at <http://www.bbc.co.uk/news/world-africa-15319222> (visited 31 May 2017).

<sup>3</sup> ‘Invité Afrique: Pascal Affi N’guessan, président du FPI, ex-Premier ministre ivoirien’, *RFI*, 26 March 2014, available online at <http://www.rfi.fr/emission/20140326-pascal-affi-nguessan-president-fpi-ex-premier-ministre-ivoirien/> (visited 31 May 2017).

<sup>4</sup> BBC News, ‘Côte d’Ivoire: critiques contre la CPI’, 4 October 2014, available online at [http://www.bbc.com/afrique/region/2014/10/141004\\_ivoiry-osc](http://www.bbc.com/afrique/region/2014/10/141004_ivoiry-osc) (visited 31 May 2017).

<sup>5</sup> C. Boisbouvier, ‘Affaire Gbagbo: Jean-Marie Fardeau, directeur France de HRW’, *RFI*, 13 June 2014, available online at <http://www.rfi.fr/emission/20140613-cpi-gbagbo-jean-marie-fardeau-human-rights-watch-hwr-> (visited 7 June 2017).

<sup>6</sup> *Report of the Independent Expert on the situation of human rights in Côte d’Ivoire*, Doudou Diène, UN Doc. A/HRC/25/73, 13 January 2014, at summary and §§ 48, 61, and 89(c).

<sup>7</sup> L. Bigot, ‘Procès Gbagbo: où sont les bourreaux du camp du Bien?’, *Le Monde*, 2 May 2016, available online at [http://www.lemonde.fr/afrique/article/2016/02/05/procès-gbagbo-ou-sont-les-bourreaux-du-camp-du-bien\\_4860079\\_3212.html](http://www.lemonde.fr/afrique/article/2016/02/05/procès-gbagbo-ou-sont-les-bourreaux-du-camp-du-bien_4860079_3212.html) (visited 31 May 2017).

justice, rather than helping ‘re-balance’ a polarized country.<sup>8</sup> Further, some accuse the OTP of cementing a biased *dénouement* by justifying *ex post facto* the French-led military operation that facilitated Gbagbo’s arrest.<sup>9</sup> On the other hand, these views are not universal and only represent one side of the debate. Indeed, the current ICC Prosecutor has rejected them absolutely: the ‘accusation that we have been biased is totally wrong.’<sup>10</sup> Whatever the situation, critiques of ‘impartiality’ gain extra salience in Côte d’Ivoire due to the country’s highly polarized struggle for political power. Often expressed as ‘otherization’ of fellow Ivorian nationals or residents, this polarization led to the targeting of victims based on characteristics of their individual and collective identity, giving rise to ‘tit-for-tat’ retaliation.<sup>11</sup> The division of the Ivorian electorate was also seen through Ouattara’s narrow margin of victory.<sup>12</sup>

This article focuses on the OTP’s sequenced prosecutorial strategy in Côte d’Ivoire in the context of this criticism. It does not seek to pass any judgment on the Prosecutor’s impartiality. Rather, it first asks what the controversy over the OTP’s actions reveals about the norm of prosecutorial impartiality itself and then examines why the OTP adopted such a strategy. In doing so, it provides a critical assessment of the OTP’s sequenced prosecutorial strategy—and its critics—by problematizing the implementation of several of its strategic guidelines, namely the Policy Paper on Case Selection and Prioritisation<sup>13</sup> and the Code of Conduct for the Office of the Prosecutor.<sup>14</sup>

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<sup>8</sup> M. Suma, ‘En Côte d’Ivoire, la justice piétine sur la crise post-electorale de 2010-2011’, *Le Monde*, 18 August 2016, available online at [http://www.lemonde.fr/afrique/article/2016/08/18/en-cote-d-ivoire-la-justice-pietine-sur-la-crise-post-electorale-de-2010-2011\\_4984404\\_3212.html](http://www.lemonde.fr/afrique/article/2016/08/18/en-cote-d-ivoire-la-justice-pietine-sur-la-crise-post-electorale-de-2010-2011_4984404_3212.html) (visited 7 June 2017); See also concerns expressed by two former heads of state in B. Mieu and C. Boisbouvier, ‘Côte d’Ivoire: pourquoi la galaxie Gbagbo croit en sa bonne étoile’, *Jeune Afrique*, 27 February 2017, available online at <http://www.jeuneafrique.com/mag/404792/politique/cote-divoire-galaxie-gbagbo-croit-bonne-etoile/> (visited 7 June 2017).

<sup>9</sup> B. Mieu and C. Boisbouvier, *supra* note 8.

<sup>10</sup> International Bar Association, ‘The Vienna Interviews: Fatou Bensouda’, 14 December 2015, available online at <http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=f97baf93-ad16-4c94-8956-480a8d3a9d4f> (visited 31 May 2017).

<sup>11</sup> S. Straus, ‘“It’s Sheer Horror Here”: Patterns of Violence during the first four months of Côte d’Ivoire’s Post-Electoral Crisis’, 110 *African Affairs* (2011) 481-489, at 487.

<sup>12</sup> Y.J. Choi, Special Representative for the Secretary-General, ‘Statement on the Certification of the Result of the Second Round of the Presidential Election Held on 28 November 2010’, 3 December 2010, § 10, available online at [http://www.un.org/en/peacekeeping/missions/unoci/documents/unoci\\_srgs\\_certification\\_en\\_03122010.pdf](http://www.un.org/en/peacekeeping/missions/unoci/documents/unoci_srgs_certification_en_03122010.pdf) (visited 8 June 2017).

<sup>13</sup> ICC Office of the Prosecutor (OTP), *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, available online at [https://www.icc-cpi.int/itemsdocuments/20160915\\_otp-policy\\_case-selection\\_eng.pdf](https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf) (visited 31 May 2017).

<sup>14</sup> OTP, *Code of Conduct for the Office of the Prosecutor*, 5 September 2013, available online at <https://www.icc-cpi.int/iccdocs/PIDS/docs/Code%20of%20Conduct%20for%20the%20office%20of%20the%20Prosecutor.pdf> (visited 31 May 2017).

Looking beyond Côte d'Ivoire, this article's novel theoretical framework and argument could generate fresh discussion around the OTP's case selection in self-referral situations, namely Uganda, Democratic Republic of Congo, and Mali.<sup>15</sup> Across these situations, the OTP faced comparable challenges and criticisms over alleged bias, namely because ICC arrest warrants targeted only non-governmental forces. Indeed, this article's conclusions could be applied to all situations in which a government requested the ICC to investigate over an armed conflict where allegedly all sides, including government-aligned forces themselves, bear responsibility for violations of international criminal law. However, compared to other situations, in Côte d'Ivoire the ICC has more forcefully insisted—from the beginning—that its sequenced approach would concern investigations on both sides of the conflict.

The article's focus is two-pronged. First, it argues that the controversy around the OTP's prosecutorial strategy in Côte d'Ivoire is not the inevitable result of the classic tension between effectiveness and impartiality, whereby the Prosecutor must prioritize feasible and 'winnable' prosecutions over acting impartially. Rather, an analysis of the controversy reveals a tension *within* the norm of prosecutorial impartiality itself. The norm is arguably composed of two related yet distinct visions of impartiality: a 'legalist' one and a 'political' one. The legalist vision of impartiality dictates that the Prosecutor must apply the same legal methods and criteria to all persons equally, irrespective of their political affiliation. It does not require the Prosecutor to consciously avoid influencing the domestic balance of power and, relatedly, does not require the Prosecutor to conduct investigations into the various sides simultaneously. In contrast, the political vision of impartiality dictates that the Prosecutor should remain politically neutral by ensuring its actions do not appear to favour one side of the domestic balance of power. Relatedly, it requires investigations and prosecutions to be conducted simultaneously towards both sides of the political divide. Both visions compose the norm of impartiality, yet, as seen in Côte d'Ivoire, they can be at odds. While the Prosecutor's sequenced strategy is in accordance with the legalist vision of impartiality, its actions are criticized based on the political vision of impartiality. Put simply, the controversy can be understood as the clash between these two visions, or between the expectations of *procedural impartiality* and *perceived political neutrality*.

Second, this article asks why the Prosecutor adopted a sequenced strategy. The OTP's strategy is arguably the product of what we could call a *tactical rapport* between the OTP and

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<sup>15</sup> While the ICC investigation in Côte d'Ivoire was formally based on *proprio motu* powers following an Art. 12(3) declaration, politically it presents features comparable to investigations arising from self-referrals.

the government. In other words, the strategy is the result of how the tactics used by the OTP to operate as an effective prosecutorial body interact with the tactics used by the government to steer the country through the post-crisis transition. Indeed, investigations into the pro-Gbagbo side were deemed more feasible, while investigations into the pro-Ouattara side were complicated by the politico-military clout held by those likely to be investigated. By simultaneously investigating those affiliated to the sitting Ouattara-led government in parallel with those linked to the previous Gbagbo-led government, the OTP risked sawing off the branch it was sitting on, i.e. cooperation by Ivorian authorities. This is because, by cooperating with ICC investigations against influential individuals, the Ouattara government itself risked sawing off the branch it was sitting on, i.e. the support of key figures in the security apparatus.

This article seeks to fill two gaps in existing scholarship. First, unlike the norm of prosecutorial independence,<sup>16</sup> the norm of prosecutorial impartiality is vastly under-studied.<sup>17</sup> Judicial impartiality at international tribunals has received much more scrutiny.<sup>18</sup> Second, there is little academic study of the ICC in Côte d'Ivoire. Writing before the 2010-2011 crisis, Akhavan and McGovern claimed that threats of human rights investigations resonated with national ruling elites' concern with 'keeping up the appearance of sophisticated "civilized" behaviour' and 'helped prevent abuses from escalating into mass murder'.<sup>19</sup> Also, Hillebrecht and Straus recently argued that Ivorian authorities used the ICC to undermine their political opponents.<sup>20</sup> The lack of scholarship on the lightning rod issue of 'political justice' echoes the often rosy assessment of Côte d'Ivoire's progress.

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<sup>16</sup> J. Wouters, S. Verhoeven, and B. Demeyere, 'The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?' 8 *International Criminal Law Review* (2008) 273-318; A. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the ICC', 97 *The American Journal of International Law* (2003) 510-552.

<sup>17</sup> Notable exceptions include L. Côté, 'Independence and Impartiality', in L. Reydam, J. Wouters, and C. Ryngaert (eds), *International Prosecutors* (Oxford University Press, 2012) 319-415; R. Rastan, 'Comment on Victor's Justice & the Viability of Ex Ante Standards', 43 *John Marshall Law Review* (2010) 569-602.

<sup>18</sup> Y. Shany and S. Horowitz, 'Judicial Independence in The Hague and Freetown', 21 *Leiden Journal of International Law* (2008) 113-129.

<sup>19</sup> P. Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism', 31 *Human Rights Quarterly* (2009) 625-654, at 636; M. McGovern, 'Proleptic Justice: The Threat of Investigation as a Deterrent to Human Rights Abuses in Côte d'Ivoire', in K. M. Clarke and M. Goodale (eds), *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge University Press, 2010) 67-86, at 71.

<sup>20</sup> C. Hillebrecht and S. Straus, 'Who Pursues the Perpetrators? State Cooperation with the ICC', 39 *Human Rights Quarterly* (2017) 162-188; L.N. Malu, 'The International Criminal Court and the Complex Road to Peace in Côte d'Ivoire', 16 *International Criminal Law Review* (2016) 826-855; J-P. Malewa, 'Perceptions de la "justice des vainqueurs": engagements de la CPI et processus de paix et de réconciliation en Ouganda, en République démocratique du Congo et en Côte d'Ivoire', 2 *Afrique et développement* (2015) 143-175.

Indeed, Côte d'Ivoire is hailed by the UN, France and other states as a rare success story in post-conflict transition, evidenced by the impressive economic growth and the first-ever peaceful presidential elections held in 2015.<sup>21</sup> Many Ivorians, however, claim the country is sitting on a volcano. The politics of justice play a key role in the continuation of crisis-era dynamics and societal cleavages.<sup>22</sup> As the spokesperson for the truth commission noted, calm does not mean there is peace.<sup>23</sup>

Covering events between November 2010 and March 2017, this study is based on documentary material and elite interviews conducted in Abidjan, The Hague, and Paris. The interviewees include members of the ICC Office of the Prosecutor, representatives of national and international human rights groups, members of the Ivorian government, opposition, and judiciary, as well as current and former diplomats. After having provided contextual background regarding the ICC's involvement in Côte d'Ivoire (Section 2) and after having given a brief account of the criticisms surrounding such involvement (Section 3), this article unveils the discursive underpinnings of the debate between the OTP and its critics: the two contrasting visions of impartiality (Section 4). Analyzing the interplay between these two visions reveals how the OTP and its critics, from different understandings of impartiality, often speak at cross-purposes. Then, the article will show how the OTP made choices based on the opportunities and challenges stemming from the Ivorian context and informed by their experiences in other cases (Section 5). Finally, the article suggests that an open discussion around prosecutorial impartiality may help to mitigate the difficulties of fulfilling the high expectations connected to international criminal justice (Section 6).

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<sup>21</sup> Security Council Press Release, 'Peacekeeping Operation to Leave Côte d'Ivoire after 14 Years, Mission Chief tells Security Council, Citing Peaceful Polls, Referendum Success', SC/12711, 8 February 2017, available online at <https://www.un.org/press/en/2017/sc12711.doc.htm> (visited 7 June 2017); Statement by Ambassador Mark Lyall Grant of the UK Mission to the UN, to the Security Council Debate on Peacebuilding in the aftermath of conflict, 14 January 2015, available online at <https://www.gov.uk/government/speeches/peacebuilding-requires-sustained-political-attention-and-financial-support> (visited 31 May 2017); See statements by France and other members of the UN Security Council as they unanimously adopted Resolution 2284 (2016). UN Security Council, 'The situation in Côte d'Ivoire', S/PV.7681, 28 April 2016, available online at [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_pv\\_7681.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7681.pdf) (visited 7 June 2017)

<sup>22</sup> When discussing the alleged 'politicality' of the ICC, it is important to remember the difference, as explained by Robinson, between two usages of the word 'political': 'political<sub>1</sub>' and 'political<sub>2</sub>'. 'Political<sub>1</sub>' refers to an instrumentalized use of legal argumentation as a mere pretext to pursue a predetermined political agenda. In contrast, 'political<sub>2</sub>' refers to the fact that legal decisions are usually based on the decision-makers' background, training, and experience – decisions that will inevitably have some external impact. Shifting the discussion from the dominant 'political<sub>1</sub>' perspective, this article analyses the Côte d'Ivoire investigation through the lens of the 'political<sub>2</sub>' perspective, which better reckons with the existing factual circumstances and with the constraints of engaging in post-conflict justice. See D. Robinson, 'Inescapable Dyads: Why the ICC Cannot Win', 28 *Leiden Journal of International Law* (2015) 323-347, at 345-346.

<sup>23</sup> Interview with Séry Bailly, Spokesperson of the Dialogue, Truth and Reconciliation Commission, Abidjan, 17 November 2015.

## 2. Background: The ICC in Côte d'Ivoire

The involvement of the ICC in Côte d'Ivoire began in 2003, several months after an attempted *coup d'état* on 19 September 2002 sparked the civil war. On 18 April 2003, the Gbagbo-led government issued an Article 12(3) declaration, thereby accepting the ICC's jurisdiction for an undetermined period of time.<sup>24</sup> The government likely sought to gain international support whilst undermining the rebels, whom President Gbagbo held responsible for partitioning the country and compromising his ability to govern.<sup>25</sup> The OTP opened a preliminary examination in October 2003 but did not open investigations until after the 2010-2011 post-electoral crisis.

Sparked by incumbent President Gbagbo's refusal to accept his opponent Ouattara's UN-certified electoral victory, the 2010-2011 crisis featured two presidents and four armed forces: pro-Gbagbo forces, pro-Ouattara forces, a UN peacekeeping force, and a French-led *Opération Licorne*. Pro-Gbagbo forces were composed of the state armed forces, known as the *Forces de Défense et de Sécurité*, armed youth militia (including the *Jeunes Patriotes*), and mercenaries. These forces were accused by the UN of targeting real or perceived political opposition members and foreigners and, according to Human Rights Watch, reportedly committed most of the abuses in Abidjan.<sup>26</sup> Pro-Ouattara forces were composed of the *Forces Nouvelles* led by former commanders of the rebellion, known as 'ComZones'. These forces also included a tribal defense group known as the 'Dozos', another armed group known as the 'Invisible Commando,' and mercenaries. These groups were accused of committing abuses as they took control of the south, especially the massacre in the western town of Duékoué.

During the 2010-2011 crisis, contested President Ouattara twice reconfirmed the Article 12(3) declaration issued by Gbagbo in 2003—the first time on 14 December 2010 and again on 3 May 2011, shortly after Gbagbo's arrest.<sup>27</sup> In March 2011, Gbagbo's cabinet also

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<sup>24</sup> République de Côte d'Ivoire, 'Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale', 18 April 2003, available online at <https://www.icc-cpi.int/NR/rdonlyres/FF9939C2-8E97-4463-934C-BC8F351BA013/279779/ICDE1.pdf> (visited 31 May 2017).

<sup>25</sup> JeuneAfrique, 'Laurent Gbagbo: l'interview vérité', 10 January 2010, available online at <http://www.jeuneafrique.com/199207/politique/laurent-gbagbo-l-interview-v-rit/> (visited 7 June 2017).

<sup>26</sup> UN News Service, 'Death toll from post-electoral violence in Côte d'Ivoire rising', UN reports, 24 March 2011, available online at <http://www.refworld.org/docid/4d92beb5e.html> (visited 31 May 2017); Human Rights Watch (HRW), *Côte d'Ivoire: Crimes against humanity by Gbagbo forces*, 15 March 2011, available online at <https://www.hrw.org/news/2011/03/15/cote-divoire-crimes-against-humanity-gbagbo-forces> (visited 31 May 2017).

<sup>27</sup> Côte d'Ivoire ultimately ratified the Rome Statute on 15 February 2013.

sent a memo to the ICC regarding alleged crimes committed by pro-Ouattara forces.<sup>28</sup> On 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request to open an investigation *proprio motu*. The ICC issued arrest warrants for Laurent Gbagbo, Simone Gbagbo, and Charles Blé Goudé. Dismissing accusations of bias, Prosecutor Bensouda announced in March 2015 that the Office 'couldn't start both sides at the same time' but would start investigations into the pro-Ouattara side in mid-2015.<sup>29</sup>

Since the ICC proceedings so far mirror the one-sided domestic prosecutions pursued by the Ouattara administration, as only pro-Gbagbo allies have been tried for conflict-related crimes, critics question the OTP's impartiality. In 2015, over 75 members of Gbagbo's entourage were tried domestically for crimes against state security.<sup>30</sup> Simone Gbagbo was also tried domestically and sentenced to twenty years' imprisonment.<sup>31</sup> In March 2017, she was acquitted in a subsequent trial for crimes against humanity and war crimes.<sup>32</sup> In July 2015, officials confirmed that judicial summons had been issued for several former ComZones, who remain free.<sup>33</sup> Impunity for pro-Ouattara forces is a powerful rallying cry for those calling for impartial prosecutions, both nationally and internationally. They argue, for instance, that ICC prosecutions regarding the Duékoué massacre, where several hundred civilians were killed over two days and which remains unpunished, would satisfy the required criteria for admissibility, including gravity.<sup>34</sup>

### 3. The Critics

Critics towards the OTP come from a variety of sources. Starting with the least surprising, Gbagbo's lead lawyer at the ICC began his opening statement by highlighting the Prosecutor's silence regarding alleged crimes committed by pro-Ouattara forces. For him, the silence unduly legitimizes pro-Ouattara forces, leading 'us to think that there are two groups,

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<sup>28</sup> Request for authorisation of an investigation pursuant to article 15, *Situation in the Republic of Côte d'Ivoire* (ICC-02/11-3), OTP, 23 June 2011, § 21.

<sup>29</sup> 'Investigations against pro-Ouattara camp to begin mid-2015, says ICC chief prosecutor', *France24*, 31 March 2015, available online at <http://www.france24.com/en/20150331-interview-fatou-bensouda-icc-chief-prosecutor-investigations/> (visited 31 May 2017).

<sup>30</sup> BBC News, 'Ivory Coast's former first lady Simone Gbagbo jailed', 10 March 2015, available online at <http://www.bbc.co.uk/news/world-africa-31809073> (visited 7 June 2017).

<sup>31</sup> *Ibid.*

<sup>32</sup> C. Rainfroy, 'Côte d'Ivoire: Simone Gbagbo acquittée de crime contre l'Humanité et de crime de guerre', *JeuneAfrique*, 29 March 2017, available online at <http://www.jeuneafrique.com/422338/societe/cote-divoire-simone-gbagbo-acquittee-de-crimes-contre-lhumanite-de-crimes-de-guerre/> (visited 7 June 2017).

<sup>33</sup> Le Monde Afrique, 'Côte d'Ivoire: deux anciens chefs rebelles pro-Ouattara inculpés', 8 July 2015, available online at [http://www.lemonde.fr/afrique/article/2015/07/08/cote-d-ivoire-deux-anciens-chefs-rebelles-pro-ouattara-inculpes\\_4675895\\_3212.html](http://www.lemonde.fr/afrique/article/2015/07/08/cote-d-ivoire-deux-anciens-chefs-rebelles-pro-ouattara-inculpes_4675895_3212.html) (visited 7 June 2017).

<sup>34</sup> Interview with Rodrigue Dadjé, lawyer for Simone Gbagbo, Abidjan, 13 November 2015.

the good guys, the bad guys, good versus evil’. It is not ‘what you would expect of a serious and impartial investigation’.<sup>35</sup>

Members of Gbagbo’s political party, the *Front Populaire Ivoirien*, repeatedly echo this perspective.<sup>36</sup> During the 2015 presidential election campaign, opposition candidates loudly criticized the ICC’s strategy and misleadingly promised they would bring Gbagbo home.<sup>37</sup> University professors, including some former pro-Gbagbo politicians, also criticized the ICC’s alleged bias.<sup>38</sup> In his ICC testimony, Sam Mohamed Jichi (popularly known as ‘*Sam l’Africain*’), a pro-Gbagbo politician who appeared as a witness for the OTP, deplored the Prosecutor’s strategy. He argued it amounted to asking only one side how the fight developed, as if that side was fighting alone ‘like a crazy person’. ‘I get the impression that the facts I am asked to explain only concern us. That makes me very uncomfortable, Your Honour.’<sup>39</sup>

National human rights groups have also expressed criticism. The president of one of the foremost national human rights groups lamented that ‘the ICC regularly comes to Abidjan but is only prosecuting the pro-Gbagbo, even though we know that ... both sides are guilty and their responsibility has been established.’<sup>40</sup> According to a survey in Abidjan, 46% of respondents held negative views about the ICC, citing most frequently the perception that the Court is pursuing only one group (24%) or that it is biased toward the government (9%).<sup>41</sup>

International human rights groups—generally supporters of the Court—equally express concern at the ICC’s approach.<sup>42</sup> Also, the United Nations Independent Expert on Human Rights in Côte d’Ivoire noted that the perception of asymmetric justice at the national

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<sup>35</sup> Both quotes from Trial Hearing, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-T-11-ENG), Trial Chamber I, 1 February 2016, respectively at 9 and 7.

<sup>36</sup> RFI, *supra* note 3.

<sup>37</sup> S. Rosenberg, ‘How did the ICC trial of Laurent Gbagbo impact the elections in Côte d’Ivoire?’, *Democracy in Africa*, 13 November 2015, available online at <http://democracyinafrica.org/how-did-the-icc-trial-of-laurent-gbagbo-impact-the-elections-in-cote-divoire/> (visited 31 May 2017).

<sup>38</sup> F. Soudan, ‘Albert Bourgi: “La CPI est influencée par les grandes puissances”’, *JeuneAfrique*, 25 February 2014, available online at <http://www.jeuneafrique.com/134469/politique/albert-bourgi-la-cpi-est-influenc-e-par-les-grandes-puissances/> (visited 31 May 2017); R.K. Kessié, H. Oulaye, and F. Tano (eds), *Cour pénale internationale: l’introuvable preuve contre le président Gbagbo* (L’Harmattan, 2013).

<sup>39</sup> Author’s translation from Trial Hearing, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-T-25-Red-FRA) Trial Chamber I, 7 March 2016, at 99.

<sup>40</sup> BBC News, *supra* note 4.

<sup>41</sup> P. Pham and P. Vinck, *Fragile Peace, Elusive Justice: Population-Based Survey on Perceptions and Attitudes about Security and Justice in Abidjan, Côte d’Ivoire* (2014), at 26.

<sup>42</sup> FIDH, *Côte d’Ivoire: ‘La Lutte Contre l’Impunité à la Croisée des Chemins*’, October 2013, available online at <https://www.fidh.org/IMG/pdf/cotedivoirefr2013.pdf> (visited 31 May 2017); Amnesty International, *The Victors’ Law: The Human Rights Situation Two Years After the Post-Electoral Crisis*, 26 February 2013), available online at <https://www.amnesty.org/en/documents/afr31/001/2013/en/> (visited 31 May 2017).

level was reinforced by the ICC's activities.<sup>43</sup> Further, for one former official from the French Ministry of Foreign Affairs at the time of the Ivorian crisis, the OTP's selectivity perpetuates the Manichean portrayal of Gbagbo's side as 'the bad guys' and Ouattara's side as 'the good guys'.<sup>44</sup>

At the same time, many support and understand the ICC's sequenced approach. The aforementioned survey recorded that 47% of respondents held positive views of the ICC—about the same percentage as those who reported negative views. Further, the president of a coalition of victims' groups stated that the ICC's strategy is not necessarily wrong: '[a]ll the crimes that occurred ... must be punished without distinction. If this must start with the trial of Blé Goudé and Gbagbo, so be it.'<sup>45</sup>

By virtue of working in politically-charged contexts, the *sui generis* ICC Prosecutor has been, and will continue to be, accused of partiality. Nevertheless, scrutinizing the disagreement between the Prosecutor and her critics is crucial, because prosecutorial impartiality 'will to a large extent reflect on the credibility of the whole international judicial institution'.<sup>46</sup> Indeed, by being and appearing impartial, the Prosecutor can help counter the most common charge raised against the Court, i.e. 'that it will become a source of "politicized" prosecutions'.<sup>47</sup> The OTP deemed the 'misperception' that the Office is insufficiently impartial to be a 'primary strategic risk'.<sup>48</sup> The theoretical framework presented below can help generate more nuanced debate surrounding the dynamics and discourse around prosecutorial impartiality.

#### 4. The Dual Notions of Prosecutorial Impartiality

Before beginning their respective duties at the ICC, the judges and the Prosecutor take the same oath, in which they commit to executing their duties impartially.<sup>49</sup> However, the particular nature of their impartiality is distinct. Like judicial impartiality, prosecutorial impartiality is understood as upholding the equality of individuals under the law by

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<sup>43</sup> *Report of the Independent Expert on the situation of human rights in Côte d'Ivoire, Doudou Diène, supra* note 6.

<sup>44</sup> L. Bigot, *supra* note 7.

<sup>45</sup> A. Panaité, "'Pour le moment, c'est une justice des vainqueurs'", *IvoireJustice*, 28 April 2015, available online at <https://ivoirejustice.net/article/pour-le-moment-cest-une-justice-des-vainqueurs> (visited 17 April 2017).

<sup>46</sup> Côté, *Independence and Impartiality, supra* note 17, at 357.

<sup>47</sup> Danner, *supra* note 16, at 537.

<sup>48</sup> OTP, *Strategic Plan 2016-2018*, 6 July 2015, available at [https://www.icc-cpi.int/iccdocs/otp/070715-otp\\_strategic\\_plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/070715-otp_strategic_plan_2016-2018.pdf) (visited 31 May 2017).

<sup>49</sup> Art. 45 ICCSt.

exclusively acting based on the law and evidence, making informed and unbiased decisions whilst shedding any prejudice, preferences, interests, or ideological leanings.

However, the Prosecutor occupies a delicate position under the ICC's adversarial procedural system. Paradoxically, she must be impartial while nevertheless being a 'party' to the case. As crisply expressed by Judge Shahabuddeen, while being a 'party' to the case, the Prosecutor shall not be 'partisan'.<sup>50</sup> Yet, the Prosecutor is potentially vulnerable to accusations of partisanship at every stage in her decision-making process, from the selection of situations, events, cases, to the timing of investigations.

This article focuses in particular on accusations of partisanship related to case selection. But the existence of these accusations is not necessarily inconsistent with the OTP's view that it *is* acting impartially. As said *supra*, this discrepancy depends on the fact that the norm of prosecutorial impartiality can be assessed from two different points of view: a 'legalist' and a 'political' vision of impartiality. Reflecting the 'dual quality' of norms in international relations, these visions can be at odds and in tension with each other, thereby generating disagreement over the norm's meaning in practice.<sup>51</sup> On the one hand, for the legalist vision, the norm of impartiality is stable enough to guide behaviour: abiding by it *is sufficient* to be seen as impartial. On the other hand, for the political vision, the norm of impartiality is not an objective truth but rather a flexible and inter-subjectively shared belief: abiding by it is *not necessarily sufficient* to be seen as impartial.<sup>52</sup>

### ***A. Legalist Vision of Impartiality***

The legalist vision of impartiality is the vision most clearly enshrined in the Rome Statute. The Prosecutor commits to examining allegations against all parties within a particular situation in order to assess whether persons belonging to those groups bear criminal responsibility. As outlined in the OTP's Policy Paper on Case Selection and Prioritisation, the Prosecutor shall 'apply the same processes, methods, criteria, and thresholds for members of all groups', without any distinction based on grounds outlined in Articles 27(1) and 21(3) ICC Statute, namely 'gender ... age, race, color, language, religion or belief, political or other

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<sup>50</sup> Separate Opinion of Judge Shahabuddeen, Decision on Prosecutor's Request for Review or Reconsideration, *Barayagwiza* (ICTR 97-19-AR72), Appeals Chamber, 31 March 2000, § 68.

<sup>51</sup> A. Wiener, 'The Dual Quality of Norms and Governance Beyond the State: Sociological and Normative Approaches to "Interaction"', 10 *Critical Review of International Social and Political Philosophy* (2007), 47-69.

<sup>52</sup> E. P. Rhoads, *Taking Sides in Peacekeeping: Impartiality and the Future of the United Nations* (Oxford University Press, 2016), at 28.

opinion, national, ethnic or social origin, wealth, birth, or other status’, including official capacity.<sup>53</sup>

Embedded in the *procedural and internal dimension* of the Prosecutor’s decision-making process, the legalist vision refers to a person’s ‘state of mind’ in relation to the issues and parties.<sup>54</sup> It views impartiality as descriptive and predictive, generating ‘expectations as to what will, in fact, be done in a particular situation’.<sup>55</sup> As the hallmark of a fair process, such impartial conduct encompasses even-handedness among possible targets of investigations and ‘fair-minded and objective treatment of persons and issues’.<sup>56</sup> Outlining criteria for impartial behaviour, the OTP Code of Conduct requires officials to respect the presumption of innocence of the accused, refrain from expressing an opinion regarding the parties, and avoid participating ‘in any matter in which their impartiality might reasonably be doubted on any ground’.<sup>57</sup> According to Article 42(7) of the ICC Statute, participation in any such matter shall lead to the disqualification of the Prosecutor and Deputy Prosecutor from the case.

Additionally, in a ‘spectacular’ statutory reinforcement of prosecutorial impartiality, the ICC Prosecutor must ‘investigate incriminating and exonerating circumstances equally’.<sup>58</sup> In its Policy Paper on Case Selection and Prioritisation, the OTP asserts that the case hypothesis may be adjusted based on a fair and objective evaluation of both incriminating and exonerating evidence.<sup>59</sup> In Prosecutor Bensouda’s words, the OTP’s ‘standardized, clear, transparent, and predictable working methods’ provide the Court with ‘the necessary legitimacy as a strictly judicial actor, in order to function effectively in a highly political international environment’.<sup>60</sup>

### ***B. Political Vision of Impartiality***

However, while the OTP is acting impartially based on the legalist vision, much criticism of its strategy is grounded in the other vision of prosecutorial impartiality, namely the political one. Through this lens, the Prosecutor’s impartiality is judged based on its appearance of *political neutrality*. Judgment is based on the perception of prosecutorial choices, especially scrutinizing their palpable effects on the balance of power in the domestic political landscape.

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<sup>53</sup> OTP, *Policy Paper*, *supra* note 13, §§19-20; Articles 27 and 21(3) ICCSt.

<sup>54</sup> Côté, *Independence and Impartiality*, *supra* note 17, at 358.

<sup>55</sup> Rhoads, *supra* note 52, at 27.

<sup>56</sup> OTP, *Code of Conduct*, *supra* note 14, §§ 29-31.

<sup>57</sup> *Ibid.*

<sup>58</sup> Art. 54(1)(a) ICCSt.; Côté, *Independence and Impartiality*, *supra* note 17, at 359-360.

<sup>59</sup> OTP, *Policy Paper*, *supra* note 13, § 22.

<sup>60</sup> F. Bensouda, ‘Reflections from the International Criminal Court Prosecutor’, 45 *Case Western Reserve Journal of International Law* (2012) 505-511, at 506.

The question to be asked is ‘did the Prosecutor’s decision appear to benefit one side of the conflict?’ As a commentator put it, international prosecutors ‘have to exercise their discretionary powers in total impartiality, avoiding the semblance of appearance on the side of the victors or the powerful’.<sup>61</sup>

The need to appear politically neutral is thus the second part, in Rhoads’ term, of the ‘composite norm’ of prosecutorial impartiality. As famously stated by a United States Supreme Court Justice, ‘[j]ustice must satisfy the appearance of justice’.<sup>62</sup> The European Court of Human Rights also concluded that ‘even appearances [of impartiality] may be of a certain importance’.<sup>63</sup> Hence, despite the hardships and tribulations of working in contexts of conflict, the OTP must consider the optics of impartiality. Not only does it need to *be* impartial, it also needs to *be seen* as impartial. In contrast to the procedural and internal dimension of the legalist notion, the political notion of impartiality can be viewed as the perceptual and externalized dimension of the Prosecutor’s decision-making process.

The need to appear impartial is absent from the OTP Policy Paper on Case Selection and Prioritisation but is implicitly referred to in the OTP Code of Conduct. OTP staff are prohibited from engaging in any form of public expression and association that would ‘affect or appear to affect the independence and/or impartiality of the Office’ as well as from participating in any matter ‘in which their impartiality might reasonably be doubted on any ground’.<sup>64</sup> The OTP can safeguard its appearance of impartiality by respecting such guidelines. – but only to a *limited* extent. Even if the OTP refrains from any form of expression or association that would put their impartiality into question, it would be subject to accusations of partiality if its actions appear to shift the domestic political balance.

### ***C. Legalist vs. Political Visions***

The controversy over the OTP’s prosecutorial strategy can thus be understood as a dispute between the legalist and political visions of impartiality. They clash on two aspects of the ICC’s work: (a) the impact of the ICC’s intervention on the domestic balance of power and (b) the timing of the ICC’s investigations and prosecutions.

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<sup>61</sup> L. Côté, ‘Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law’, 3 *Journal of International Criminal Justice* (2005) 162-186, at 175.

<sup>62</sup> *Offut v. United States*, 348 U.S. 11, 14 (1954).

<sup>63</sup> Judgment, *Daktaras v Lithuania*, ECtHR (2000), Appl no. 42095/98, 10 October 2000, §§ 30-32. Cited in Côté, *Independence and Impartiality*, *supra* note 17, at 358.

<sup>64</sup> OTP, *Code of Conduct*, *supra* note 14, §§ 31, 37, and 71(f). The draft OTP Code of Conduct, which was not formally adopted, included more explicit guidance. Prosecutors shall ‘be, and appear to be, consistent, objective, impartial and independent’. Secretaries of the International Association of Prosecutors and the Coalition for the ICC, *Code of Professional Conduct for the Prosecutors of the International Criminal Court* (2002), Art. 1(9).

According to the legalist vision, even if procedural requirements of impartiality require that all individuals be treated equally, this applies only to the basis for decision-making. Impartial judgment does not have to ensure that the *outcome* of this treatment is the same. Though it may seem paradoxical, according to the OTP's Policy Paper on Case Selection and Prioritisation, pursuing an impartial strategy 'may in fact lead to different outcomes for different groups'.<sup>65</sup> The Prosecutor will not seek to establish 'equivalence of blame' within a situation nor 'create the appearance of parity between rival parties by selecting cases that would not otherwise meet the criteria'.<sup>66</sup> Nor will the Prosecutor make decisions based on 'regional or ethnic considerations'.<sup>67</sup> In other words, the Prosecutor will not act in an arithmetic fashion and prosecute three from one side and three from the other just to appear 'impartial'.

According to the legalist vision, if the domestic balance of power is tipped as a result of the Prosecutor's actions, so be it. Thus, even if procedural requirements of impartiality dictate that all individuals must be treated equally, there is no requirement in the OTP's mandate that the individuals be investigated and prosecuted at the same time. Put simply, there is *no requirement of simultaneous impartiality*. Pursuing sequenced investigations that first focus on one side of the situation, and later on the other side, is perfectly in line with the OTP's mandate under the Rome Statute.

In contrast, according to the political vision, pursuing an impartial prosecutorial strategy means investigations and prosecutions must be seen to treat all sides equally, and thus be politically neutral and balanced. The Prosecutor's impartiality is thus judged based on whether her actions 'artificially' shift the power relations between conflicting parties. Former Prosecutor Moreno-Ocampo raised expectations of such a balanced approach in 2011, stating he would investigate between three and six individuals.<sup>68</sup> Many Ivorians refer to Ocampo's statement as they expect the remaining cases will come from the pro-Ouattara side.

Counter-intuitively, then, the Prosecutor should avoid tipping the balance of power by shaping prosecutions *according* to the balance of power. The OTP would show it is not a tool for the powerful if, for instance, it investigates the ruling elites and disregards their presumed interests. Paradoxically, the OTP is expected to demonstrate its impartiality by taking into

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<sup>65</sup> OTP, *Policy Paper*, *supra* note 13, §§ 19-20.

<sup>66</sup> *Ibid.*

<sup>67</sup> ICC Presidency Press Release, 'ICC underlines impartiality, reiterates commitment to cooperation with the African Union' (ICC-CPI-20130529-PR908), 29 May 2013, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr908> (visited 31 May 2017).

<sup>68</sup> JeuneAfricque, 'A Abidjan, Moreno-Ocampo promet une enquête "impartiale"', 16 October 2011, available at <http://www.jeuneafrique.com/153404/politique/c-te-d-ivoire-cpi-abidjan-moreno-ocampo-promet-une-enqu-te-impartiale/> (visited 31 May 2017).

account the political and ethnic affiliations of potential accused, thereby violating the tenets of the legalist vision. Indeed, doing so would ‘be seen as biased by those accused and the groups they belong to, particularly in conflicts of an ethnic nature’.<sup>69</sup>

So, underlying the expectation that all individuals must be seen to be treated equally and in a politically neutral and balanced manner is an implicit expectation that they be treated equally *at the same time*. Put simply, there is an *expectation of simultaneous impartiality*. As the leader of an Ivorian human rights organization deplored, ‘[j]ustice delayed is justice denied’.<sup>70</sup>

In sum, whereas the legalist vision expects the Prosecutor to act irrespective of the balance of power, meaning one side of the conflict may inadvertently benefit from sequenced investigations, the political vision expects the Prosecutor to consciously avoid tipping the balance of power by investigating all sides simultaneously. Both are legitimate yet contrasting visions of impartiality. Moreover, both can be criticized, using ‘apology’ or ‘utopia’ arguments.<sup>71</sup> When the Prosecutor acts in accordance with the legalist vision and appears too deferential towards the government, she is criticized based on the political vision, which takes the form of the ‘apology’ critique: she is ‘inappropriately sacrificing and subordinating [her] mandate to considerations other than criminal justice’ by designing her strategy so as to maintain good relations with the government.<sup>72</sup> In contrast, when the Prosecutor acts in accordance with the political vision of impartiality and pursues both sides simultaneously, she is criticized based on the legalist vision, which takes the form of the ‘utopia’ critique: she is ‘not doing enough to maintain relations with partners and thus undermining [her] effectiveness’.<sup>73</sup>

## **5. The Tactical Rapport between the President and the Prosecutor**

An interviewed ICC official dismissed speculation that the OTP deliberately chose, from the beginning, to shelve the investigations into the pro-Ouattara side.<sup>74</sup> Why, then, did the OTP pursue a sequenced prosecutorial strategy? To answer this question, one needs to analyse the

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<sup>69</sup> Côte, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, *supra* note 61, at 175.

<sup>70</sup> Interview with president of an Ivorian human rights organization, Abidjan, 3 December 2015.

<sup>71</sup> M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 1989). In brief, an apology critique argues that a given prosecutorial decision is too close to political power, thus undermining its independence. Conversely, a utopia critique argues that a given decision is too far divorced from political power, thus lacking undermining its potential effectiveness.

<sup>72</sup> Robinson, *supra* note 22, at 341.

<sup>73</sup> *Ibid*, at 339.

<sup>74</sup> Confidential interview with two ICC officials, The Hague, 21 September 2016.

*tactical rapport* between the sitting government and the OTP, i.e. the interaction between their respective interests.

The Ouattara administration had an interest in defending its legitimacy as a government capable of steering the country through the post-crisis transition. The OTP had an interest in defending its legitimacy as an effective prosecutorial body. Thus, the latter pursued a sequenced strategy to optimize its chances of conducting effective investigations and prosecutions against at least some alleged perpetrators. Referring to the Côte d'Ivoire case, ICC Deputy Prosecutor James Stewart insisted that the OTP would be impartial but, '[s]ometimes ... [y]ou have to make a choice between action and paralysis and between pragmatism and ideals. And I think if you choose pragmatic action, you really shouldn't be criticized'.<sup>75</sup> The section below dissects the tactical rapport by examining how both internal and external factors may have shaped the Office's decision-making.<sup>76</sup>

#### ***A. High Stakes, Limited Resources***

The *first* internal factor relates to the high stakes in the Côte d'Ivoire situation, creating a particular pressure for the OTP to secure convictions. Robert Jackson, referring to the Nuremberg trial, famously stated that '[c]ourts try cases, but cases also try courts'.<sup>77</sup> As the first former head of state tried by the ICC, Laurent Gbagbo's trial is certainly one such case. The imperative to win may also have grown as the disintegration of the cases against Kenyan President Uhuru Kenyatta and Vice-President William Ruto could be deemed symbolic of the ICC's ineffectiveness. The OTP could not risk losing such a similar case, in which abuses were committed in the wake of a contested election by two sides, with one side closely linked to high-ranking members of the sitting government.

The *second* internal factor relates to resource limitations. The OTP consistently claimed that while investigations covered abuses committed by all parties, resource constraints forced them to prioritize the Gbagbo case.<sup>78</sup> Unforeseen developments, such as the Mali self-referral and the transfers of Bosco Ntaganda and Dominic Ongwen, further stretched the ICC's resources. Faced with a limited budget and multiple investigations with uncertain futures, the Prosecutor decided to 'prioritize and focus on those investigations that

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<sup>75</sup> M. Kersten, 'In the ICC's Interest: Between "Pragmatism" and "Idealism"?', *Justice in Conflict*, 16 July 2013, available online at <https://justiceinconflict.org/2013/07/16/in-the-iccs-interest-between-pragmatism-and-idealism/> (visited 7 June 2017).

<sup>76</sup> OTP, *Code of Conduct*, *supra* note 14, § 51.

<sup>77</sup> R. Jackson, 'The rule of law among nations', 39 *ASIL Proceedings* (1945) 10-19, at 15.

<sup>78</sup> OTP, *Strategic Plan June 2012-2015*, 11 October 2013, at 14, available online at <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> (visited 7 June 2017); OTP, *Strategic Plan 2016-2018*, *supra* note 48, at 18.

seem most urgent or the most likely to move forward'.<sup>79</sup> The impact of resource limitation is often underestimated.

In light of these internal factors, as well as the opportunities and challenges inherent to the Ivorian context, the likelihood of successfully investigating the Gbagbo side appeared high. Laurent and Simone Gbagbo were already detained.<sup>80</sup> President Ouattara had committed to cooperating with the ICC, as stated in both aforementioned confirmations of Article 12(3) declaration confirmations, and had institutional interests in weakening his opposition, which still retained significant support amongst Ivorians.<sup>81</sup> Due to the presence of journalists, defectors from the Gbagbo side, and UN and French officials, there was significant evidence available in Abidjan, where pro-Gbagbo forces were accused of committing many abuses.<sup>82</sup> Further, in the wake of the crisis, conducting investigations in Abidjan was more feasible than in the west — due to continued insecurity in the latter area, scene of many abuses by pro-Ouattara forces.<sup>83</sup> Finally, as international consensus viewed Gbagbo as the main obstacle towards peace, the Prosecutor had significant diplomatic support, and possibly even pressure.<sup>84</sup>

Thus, according to an OTP official, the OTP was able to quickly open cases against the Gbagbo side. 'There was a lot of information, videos and allegations about the events in Abidjan. These pieces of evidence pointed us fairly quickly to those persons who we believe were responsible for part of the crimes.'<sup>85</sup> It was crucial to not let evidence succumb to the perils of time. 'When you have a team working on a particular event—we talk about events, not one side or the other side—you don't leave it and rush to another.' There is actually 'strong inertia when we open investigations. It is not as if when you get results in one case, you can move on to the other. It's the opposite.'<sup>86</sup> As evidence is gathered, and the viability of a given case improves, increased resources are needed to process, translate, analyse the

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<sup>79</sup> A. Whiting, 'Dynamic Investigative Practice at the International Criminal Court', 76 *Law and Contemporary Problems* (2014) 163-189, at 176.

<sup>80</sup> France24, 'Côte d'Ivoire: Simone Gbagbo transférée à Abidjan', 2 December 2014, available online at <http://www.france24.com/fr/20141202-cote-ivoire-transfert-simone-gbagbo-odienne-abidjan-proces> (visited 7 June 2017).

<sup>81</sup> According to UN-certified electoral results, Gbagbo received 45.9% of the vote. See Choi, *supra* note 12.

<sup>82</sup> Straus, *supra* note 11, at 483.

<sup>83</sup> *Letter dated 15 October 2012 from the Chair of the Security Council Committee established pursuant to resolution 1572 (2004) concerning Côte d'Ivoire addressed to the President of the Security Council*, S/2012/766, 15 October 2012, § 5-7, at 3.

<sup>84</sup> The UN Security Council Resolution 1975 (2011) established targeted sanctions against Laurent Gbagbo, citing 'obstruction of the peace and reconciliation process, rejection of the results of the presidential election.' SC Res. 1975, 30 March 2011.

<sup>85</sup> Statement released by an advisor to Prosecutor Bensouda, reported in V. Leeuwen, 'ICC: Getting Gbagbo was a priority', JusticeHub, 14 April 2015, available at <https://justicehub.org/article/icc-getting-gbagbo-was-priority> (visited 31 May 2017).

<sup>86</sup> Confidential interview with two OTP officials, The Hague, 21 September 2016.

information, and develop a strategy. ‘We had to sequence investigations because we managed to achieve results.’<sup>87</sup> This higher likelihood of conducting effective investigations, of course, does not mean the case against Gbagbo and Blé Goudé will ultimately result in a conviction.

### ***B. The Influence of the ComZones***

Even assuming the OTP had sufficient resources, it is arguably unlikely that the Prosecutor would have simultaneously launched parallel investigations into both sides in the situation. This is due to a *third* factor beyond the OTP’s control. Simultaneous investigations risked jeopardizing state cooperation due to the influence held by those most likely to be affected by investigations into the pro-Ouattara side. Aware of its reliance on state cooperation, and anticipating the Ivorian government’s interest in weakening its Gbagbo-affiliated opposition, the OTP could reasonably anticipate the government’s cooperation to conduct effective investigations of the pro-Gbagbo side. However, and crucially, Ouattara’s government had a strong interest in protecting those who would be directly or indirectly affected by ICC investigations into the pro-Ouattara side, namely the ex-ComZones. Issuing arrest warrants for them or their allies would have positioned the OTP in opposition to the government’s stabilization objectives. Both the OTP and the Ouattara administration faced a similar conundrum: how to avoid sawing off the branches they were respectively sitting on.

The OTP’s experience in Kenya serves as a cautionary tale. Its decision to charge high-level influential individuals on both sides of the conflict simultaneously, thereby in accordance with the political vision of impartiality, prompted significant political meddling that contributed to the case’s unravelling—especially when those individuals came to cooperate to some extent. Rejecting accusations of partial investigations in Côte d’Ivoire, the Head of International Cooperation in the OTP explained that the Office has ‘learnt from [its] experience in Kenya that it is better to first secure cooperation from the government.’<sup>88</sup>

Since Ouattara’s fragile legitimacy was linked to his capacity to maintain order, he relied heavily on those who could enforce such stability. After having carried Ouattara to power, the ComZones were put in charge of managing the extremely precarious post-crisis security situation. According to then-Minister of Defense, ‘[t]he solution was to make them

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<sup>87</sup> *Ibid.*

<sup>88</sup> L. Louw-Vaudran, ‘The International Criminal Court has refuted claims that it is being biased in the Côte d’Ivoire case,’ Institute for Security Studies, 22 July 2014, available at <https://issafrica.org/iss-today/avoiding-victors-justice-in-cote-divoire> (visited 31 May 2017).

leaders.’<sup>89</sup> The existence of large quantities of unaccounted weapons and ammunition, some in ex-ComZones’ possession, also remained a liability for the government.<sup>90</sup> Even Simone Gbagbo’s lawyer conceded that Ouattara has little scope to prosecute these individuals. ‘The ComZones are watching him.’<sup>91</sup>

More concretely, simultaneous investigations would have brought practical challenges relating to victim and witness protection. First, the risk of intimidation faced by witnesses who would help to build a case against pro-Ouattara leaders was high. Indeed, according to an observer very familiar with the dynamics within the security apparatus, some military leaders are unable to sanction the former ComZones.<sup>92</sup> Ivorian Ministry of Justice officials acknowledged that lack of domestic protection measures may discourage witnesses and victims, particularly victims of crimes committed by pro-Ouattara forces, to come forward.<sup>93</sup> As seen in Kenya, the OTP’s limited ability to manage the potential security risks can lead to sometimes-fatal consequences.

A second practical challenge still relates to the difficulties in gaining the trust and cooperation of witnesses and victims of crimes by pro-Ouattara forces. As they broadly come from pro-Gbagbo communities, they deplore Gbagbo’s arrest and are sceptical of engaging with governmental or ICC initiatives. Indeed, members of the truth commission noted reluctance in certain communities to engage with justice-related mechanisms.<sup>94</sup> Viewed together, the limited resources, the risk of jeopardizing cooperation by Ivorian authorities, and concerns regarding victims and witnesses constituted significant challenges to launching parallel and simultaneous investigations into crimes committed by pro-Gbagbo and pro-Ouattara forces.

## 6. Conclusion

This article does not argue that the Prosecutor’s sequenced prosecutorial strategy is biased. Being external to the decision-making process, this author cannot truly know how the OTP’s decision-making process evolved. However, it is reasonable to argue that the OTP is acting

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<sup>89</sup> J. Bavier, ‘Why gold threatens Ivory Coast’s peace,’ *Reuters*, 7 May 2015, available at <http://www.reuters.com/article/us-ivorycoast-gold-army-specialreport-idUSKBN0NS0V620150507> (visited 31 May 2017).

<sup>90</sup> *Ibid.*

<sup>91</sup> Interview with Habiba Touré, lawyer for Simone Gbagbo, Paris, 5 May 2016.

<sup>92</sup> Interview with official from international organization, Abidjan, 15 December 2015.

<sup>93</sup> HRW, *Turning Rhetoric Into Reality: Accountability for Serious International Crimes in Côte d’Ivoire*, 3 April 2013, available at <https://www.hrw.org/report/2013/04/03/turning-rhetoric-reality/accountability-serious-international-crimes-cote-divoire> (visited 31 May 2017), at 54.

<sup>94</sup> Respectively, interview with former staff members of the Commission on Dialogue, Truth and Reconciliation, Abidjan, 11 November 2015 and 26 November 2015.

impartially in accordance with the vision of impartiality most clearly enshrined in the Rome Statute: the legalist vision. It can pursue investigations at different times and does not need to consider upsetting the balance of power. On the other hand, critics can reasonably argue the OTP is not acting impartially, based on a distinct yet nevertheless sensible vision of impartiality: the political vision. According to this vision, the Prosecutor must avoid shifting the balance of power by reinforcing the victor's strength, and therefore must investigate both sides simultaneously.

In this context, this article highlights two broader systemic problems of international criminal justice. First, critics and defenders of the OTP's impartiality often speak at cross-purposes. Second, and relatedly, in light of the practical constraints presented in situations based on self-referrals, it is highly challenging—perhaps even impossible?—for the Prosecutor to fully uphold both visions of impartiality at once. Analysing the tactical rapport between the OTP and the national authorities helps explain—without necessarily justifying—the sluggish pace of 'balanced' justice.

Looking toward the future, the OTP's investigations into the pro-Ouattara side will likely lead to new cases. Depending on the accused and the status of domestic investigations, the Ivorian government may cease to cooperate with the OTP. If the OTP considers the Ivorian government is purposely shielding the accused from criminal investigation, the OTP may at that point highlight such conditional state cooperation as evidence of the challenges to effectively investigate all sides, thereby shifting the spotlight away from the OTP's alleged partisanship and toward the Ivorian government's selectivity.

In the meantime, as a practical measure to break the discursive impasse between the OTP and its critics, the Prosecutor can generate nuanced discussion around the principles of international criminal justice by acknowledging the distinct visions of prosecutorial impartiality. Claiming the Court to be apolitical, yet without explaining *how* the Prosecutor is maintaining its impartiality, counter-intuitively increases the scope for criticism. Rather, by explaining more explicitly that the Office is upholding impartiality as envisioned in the Rome Statute (and consequently in the OTP's policy documents and guidelines), the Prosecutor could equally acknowledge that this vision of impartiality is not universally shared.

Engaging in this conversation, whilst continuing investigations and prosecutions into both sides, is crucial. As cautioned by a leader of a human rights organization, '[t]he ICC must know that the steps it takes today are the steps Côte d'Ivoire will walk in tomorrow.

People will have scores to settle.<sup>95</sup> Just as the political reality of Côte d'Ivoire inevitably shapes the options available to the OTP, the actions taken by the OTP shape the country's political present and future.

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<sup>95</sup> Interview with leader of an Ivorian human rights organization, Abidjan, 3 December 2015.