

# The separation of powers at the International Criminal Court

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door

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## 1 Introduction

The *raison d'être* of law systems is not to protect society against individuals, but rather to protect the individual against the power of the State.<sup>1</sup> This is probably the most important reason why there should be a separation of powers between the judiciary, legislative and executive branches. Does this also hold true for the International Criminal Court (ICC)? And, if so, to what extent? Does the political-executive factor govern the ICC system, the judiciary or is there an overarching legislature? Although the ICC became operative in 2002, these pertinent questions only surfaced within the ICC in 2013, eleven years later, in the so-called *Flotilla* incident, which led to a heavily debated Pre-Trial Chamber decision on July 16th 2015.

## 2 Separation of powers at the ICC called into question

It is 31 May 2010, 4.26 a.m., when special forces (the Sayeret Matkal) of the Israeli Defense Forces (IDF) board the civilian vessel *Mavi Marmara*, a supposedly humanitarian relief vessel on its way to Gaza, sailing under the flag of the Union of the Comoros.

The *Mavi Marmara* was allegedly part of a 'humanitarian aid flotilla' consisting of six vessels transporting people and humanitarian supplies, while heading for the Gaza strip.<sup>2</sup> At 72 nautical miles from land, after the flotilla had ignored several warnings by the IDF to change course, the IDF boarded and took over the flotilla. The vessels ignored the naval blockade, which the Israeli authorities had situated in the context of the ongoing armed conflict with Hamas since Operation Cast Lead in 2009. The military operation on board of the *Mavi Marmara* led to the death of ten activists on board of this vessel, while seven IDF soldiers were injured, two of which were initially in a critical condition.<sup>3</sup> Moreover, 16 activists were arrested by the IDF, because they refused to identify themselves.<sup>4</sup> Activists who agreed to be deported were flown home at Israel's expense, the activists who did not agree were interrogated at a prison facility.<sup>5</sup>

The events that subsequently unfolded would, in 2010, become subject to four investigations, resulting in different findings. Firstly, the UN Human Rights Council established a fact-finding mission and concluded that the IDF violated international law and committed human rights violations against passengers during the interception of the flotilla.<sup>6</sup> Secondly, the UN Secretary-General appointed a four-member panel of inquiry chaired by Geoffrey Palmer and vice-chaired by Alvaro Uribe, whose findings were to a great ex-

tent based on the national investigations conducted by Israel and Turkey and were laid down in the Palmer-Uribe report.<sup>7</sup> Thirdly, the Turkish government established a national commission of inquiry.<sup>8</sup> The fourth investigation was initiated by the Israeli Government establishing an investigative commission, presided by Israeli Supreme Court Judge Jacob Turkel, resulting in the Turkel-report.<sup>9</sup> Whereas the Turkish commission of inquiry concluded that Israel had violated human rights, such as the right to life and fundamental freedoms, as well as the law of freedom of the high seas, the Israeli investigative commission concluded, *inter alia*, that the IDF's interception of the flotilla was in conformity with customary international law and the rules governing the use of force, now that the flotilla was attempting to breach a blockade.<sup>10</sup> In the same vein, the UN Human Rights Council arrived at a different finding than the Palmer panel. Whereas the UN Human Rights Council called the Israeli action against the flotilla 'clearly unlawful',<sup>11</sup> the Palmer panel tried to refrain from judging the matter of legal liability.<sup>12</sup> It did conclude, however, on the basis of the information gathered, that (*inter alia*):

'The fundamental principle of freedom of navigation on the high seas is subject to only certain limited exceptions under international law [...]. The naval blockade was imposed as a legitimate security measure in order to prevent weapons from entering Gaza by sea and its implementation complied with the requirements of international law.'<sup>13</sup>

As to the nature of the *Flotilla* itself, the Palmer panel held that:

'Although people are entitled to express their political views, the flotilla acted recklessly in attempting to breach the naval blockade. The majority of the flotilla participants had no violent intentions, but there exist serious questions about the conduct, true nature and objectives of the flotilla organizers, particularly IHH. The actions of the flotilla needlessly carried the potential for escalation.'<sup>14</sup>

On the other hand, it was also critical *vis-à-vis* the IDF operation as such: 'Israel's decision to board the vessels with such substantial force at a great distance from the blockade zone and with no final warning immediately prior to the boarding was excessive and unreasonable.'<sup>15</sup>

However, the Panel accepted that:

‘Israeli Defense Forces personnel faced significant, organized and violent resistance from a group of passengers when they boarded the *Mavi Marmara* requiring them to use force for their own protection’.<sup>16</sup>

On 14 May 2013 the Union of the Comoros – a State Party to the ICC – referred the *Mavi Marmara* situation to the Office of the Prosecutor (OTP) of the ICC, saying that the IDF committed war crimes (*inter alia* ‘willful killing’, ‘torture or inhuman treatment’ and ‘willfully causing great suffering’) and crimes against humanity (*inter alia* ‘acts of murder’, ‘torture’ and ‘other inhumane acts’), seeking for a prosecution of the ‘most responsible’ officers.<sup>17</sup>

After a preliminary investigation, the OTP concluded on 6 November 2014 not to initiate an investigation into the situation. Under the ICC system, the referring State Party may seek recourse at the Pre-Trial Chamber, composed of three judges.<sup>18</sup> This system was introduced in 1998 – when the final version of the Rome Statute was adopted – to provide the entity that originally referred the situation to the Prosecutor with a mechanism to invoke the power of the Pre-Trial Chamber.<sup>19</sup> The applicable provision, article 53(3)(a) ICCSt., is, however, ‘not in any way to infringe on the independence of the Prosecutor’.<sup>20</sup> Furthermore, the provision does not provide guidance as to whether the Prosecutor is bound by a request for reconsideration of the Pre-Trial Chamber.<sup>21</sup>

For the first time in the history of the ICC, this review was invoked by a State Party and, for the first time, the Pre-Trial Chamber decided to overturn the decision of the Prosecutor.<sup>22</sup> In a two to one majority ruling it was held that the Prosecutor’s conclusion that the potential cases arising from an investigation into the situation would be of insufficient gravity to justify further action by the ICC was based on a combination of five flawed assessments.<sup>23</sup> The majority found, for example, that the Prosecutor had erred in its assessment of the manner of the commission of the identified crimes, particularly related to the question whether the identified crimes were ‘systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians’.<sup>24</sup> The controversy of these findings is exemplified by the dissenting opinion of Judge Peter Kovács (part of the Pre-Trial Chamber) who concluded that:

‘It is clear that not only was it the *Mavi Marmara*’s intention to breach the blockade, but this was its main purpose, as an act of protest. With this in mind, Israeli forces had a right to capture the vessel in protection of their blockade. Furthermore, irrespective of this right, it was a logical reaction. Faced with a potential breach of the blockade, the IDF acted out of necessity.’<sup>25</sup>

As to the law, Judge Kovács observed in his dissenting opinion that:

[T]he use of force by the IDF, in the chaos of its execution, potentially crossed the line of proportionality. Although the UN commissions in their *ex post facto* evaluations argued that the IDF use of force was disproportionate, the relevant legal test under article 8(2)(b)(iv) of the Statute is not what one could have predicted in hindsight. The issue at stake is whether IDF forces could have reasonably foreseen that their actions would result in disproportionate harm, at the time the operation was launched, and in those particular circumstances.<sup>26</sup>

Not only was there controversy with respect to the legal interpretation of the facts, but also with respect to the doctrine of separation of powers. Conducting a review of the OTP's decision under article 53(3)(a) of the Statute may invade the domain of the Prosecution. As observed by judge Kovács:

‘As a matter of law, the Chamber is not legally compelled to address the application of Comoros on the *merits* solely because the State has requested it to do so. Rather the Chamber is called upon to conduct such a review on the merits *only* if it is convinced that the issues raised in said application reveal clear error(s) on the part of the Prosecutor, which prompt such a review and reconsideration of her decision.’<sup>27</sup>

The word ‘may’ is used twice in article 53(3)(a) of the Statute, which makes it clear that, ‘as a matter of principle, conducting a full-fledged review of the Prosecutor’s decision is neither a duty nor automatic. Rather it entails that the Pre-Trial Chamber enjoys a margin of discretion to filter those applications which warrant review on the merits from those which to not deserve the Court’s attention’.<sup>28</sup>

### 3 Separation of powers within international law

Therefore, the controversy raised by the *Mavi Marmari* situation had not so much to do with a review procedure as such, but rather with the fundamental issue as to the separation of powers within the International Criminal Court. The Pre-Trial Chamber decision was criticized by some scholars and NGOs for invading the domain of the Prosecutor who, as article 42(1) ICCSt. stipulates, ‘shall act independently as a separate organ of the Court.’<sup>29</sup> This prosecutorial independence, which is also reflected in article 67 ICCSt., implies that

the OTP 'has nearly exclusive authority regarding whom to charge, what charges to bring and whether to amend or withdraw charges.'<sup>30</sup> Were the ICC judges really taking over the position of the Prosecution? And if so, are they authorized to do so?

Before we can answer these intriguing questions which go to the heart of the ICC system, the question of perennial concern is: does the doctrine of separation of powers as such apply to international criminal tribunals, that is, trials that go beyond domestic criminal trials? Did the French philosopher Charles de Montesquieu have international criminal proceedings in mind when he wrote his book 'De l'Esprit des Lois' (The Spirit of the Laws) more than 200 years ago in 1748?

In this book, De Montesquieu challenged slavery and sought ways to increase freedom and to abandon tyranny. According to De Montesquieu this could be achieved through a 'separation of powers'. By separating executive, judicial and legislative powers, the three branches could control each other and prevent that one power would attain the upper hand. This form of control can contribute to a system where the 'rule of law' (in other words equal treatment of people subject to the law instead of arbitrary decision-making) predominates. As noted by Montesquieu:

"There is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the notables or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions."<sup>31</sup>

The rationale of this concept was simply to prevent abuse of power and protect the citizens against the State. Justice Louis Brandeis of the US Supreme Court embraced and justified this doctrine in 1926 as follows:

"The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."<sup>32</sup>

Returning to the preliminary question: does this philosophical fuelled doctrine also apply to international criminal tribunals, more particularly the ICC?

Some scholars answer this question in the negative, arguing that the principle of separation of powers can play no role within international criminal law simply because international criminal law 'lacks a central legislature and a central enforcement body'.

For instance, the South African jurist John Dugard observes that the UN cannot be perceived as a world government. International law lacks developed institutions such as found in national law systems, which leads to questions pertaining to the very existence of international law. Therefore, the question posed by professor Dugard whether international law has a law-making body, an executive power and a judicial system is a prerequisite one.<sup>33</sup> The UN comes close to being an executive body, but 'it lacks the power to direct states to comply with the law; and it lacks a permanent police force to punish violators of the law.'<sup>34</sup>

## 4 External versus internal separation of powers

At this juncture, within international criminal tribunals, one should perhaps differentiate between two types of separation of powers: external separation of powers and internal separation of powers.

In order to understand the functioning of the ICC, having these two types of the separation of powers in mind can be beneficial.

When one refers to the role of the OTP as being an independent organ, within the ICC, therefore separated from the bench, for example when it concerns the prosecutorial role within the context of the *Mavi Marmara* incident, one touches upon the aspect of internal separation of powers. When one refers to international criminal law as lacking a central legislative body, one touches upon external separation of powers.

## 5 External separation of powers within international criminal tribunals

Let us first delve deeper into the last type of separation of powers within the ICC system. Does it exist and, if not, do we need it? As to the first part of these questions: does the doctrine of separation of powers exist at the level of

the ICC? The answer seems to be: not in the way Charles de Montesquieu envisioned.

One of the most innovative features – from a perspective of separation of powers – of the modern international criminal tribunals is the power of the judges themselves to draft and amend the so-called Rules of Procedure and Evidence (RPEs) which actually regulate how the trials are to be conducted.<sup>35</sup> In fact, the judge acts – partially – as a legislature. Justice Antonio Cassese, the late and former President of the ICTY, underscored this ‘unnatural’ role of the bench at the ICTY and ICTR:

‘Let me also add that the Judges of our Tribunal, besides fulfilling judicial duties also have a unique legislative task, in that they pass and amend the Rules of Procedure and Evidence, what I would call our ‘Code of Criminal Procedure.’<sup>36</sup>

This legislative activism on part of judges increased considerably over the last years. In 1945, the International Military Tribunal (IMT) at Nuremberg adopted only eleven Rules of Procedure and Evidence. The International Military Tribunal for the Far East (IMFTE) or the Tokyo Tribunal comprised only nine Rules of Procedure and Evidence.<sup>37</sup> This can be contrasted by the number of Rules adopted by contemporary international criminal tribunals and the ICC. The ICTY RPEs have been revised 49 times over the course of almost 20 years and entail 127 provisions.<sup>38</sup> The ICC RPEs consist now of 225 provisions. It is thus fair to say that the norms created by the judges dominate the very nature of trial proceedings before international criminal tribunals.<sup>39</sup>

Apart from the interrelation with the principle of legality,<sup>40</sup> does such judicial activism contravene judicial independence, affecting the authority and credibility of an institution such as the ICC?<sup>41</sup> The answer could be affirmative once this rule-making power would go beyond mere clarification or elaborations of existing rules, but rather to rule-making in order to remedy situations for legal-political convenience. An example thereof might be the *Barayagwiza* Reconsideration Decision of 31 March 2000.<sup>42</sup> In its decision of 3 November 1999, the ICTR Appeals Chamber ordered the unconditional and immediate release of Mr Barayagwiza and to make arrangements to send him to Cameroon – where he had been detained before his transfer to the Tribunal – because the length of his detention greatly exceeded the acceptable human rights standard.<sup>43</sup> Barayagwiza’s fundamental rights had been violated and the prosecution’s failure to prosecute amounted to negligence. Therefore, the Appeals Chamber dismissed Barayagwiza’s indictment and ordered his immediate release.<sup>44</sup> The Government of Rwanda reacted heavily on this de-

cision and threatened to stop all cooperation with the Tribunal if the Appeals Chamber would reach an unfavorable decision on the Motion for Review.<sup>45</sup> The Prosecutor immediately filed a Motion for Review and, pending this motion, Barayagwiza remained in the ICTR's custody.<sup>46</sup> While the Motion for Review was pending, the ICTR judges amended the Rules of Procedure and Evidence during the 7th plenary meeting. Rule 72(H) was added to further define 'an objection based on the form of the indictment'. This Rule limited the appeals brought under the existing Rule 72(D). The new Rule 72(I) required a bench of three appeals judges to review appeals brought under Rule 72(D), thereby ensuring compliance with the newly added Rule 72(H).<sup>47</sup> On 31 March 2000, the Appeals Chamber reversed the Decision of 3 November 1999, finding that Barayagwiza was already aware of the general nature of the charges against him while he was in Cameroon's custody and that the delay in his transfer could not be attributed to the Tribunal.<sup>48</sup> The amendments of the Rules seem to derive from pressure from the Rwandan government and resulted in a reversal of the decision. The amendments to Rule 72 RPE bar a defendant from challenging the 'legality of his arrest, detention and transfer to the custody of the Tribunal'.<sup>49</sup> The Appeals Chamber's ruling based upon said amendments exemplifies the danger for in international criminal tribunal for becoming subject of being a political law-maker and judge at the same time.

## **6 External separation of powers and rule-making powers at the ICC**

### *6.1 The indirect powers of the judiciary*

The rule-making power of judges also emerged at the ICC, and did raise similar questions external separation of powers being properly endorsed. As a preliminary observation, one must note that, unlike the ICTY-ICTR practice, the ICC Statute as such does not empower the judges to draft the RPEs. Article 51(1) ICCSt. endows this power to the Assembly of States Parties (ASP), dictating that the ICC Rules must be adopted by a two-third majority of members of the ASP. Article 51 ICCSt. only attributes this rule-making power to the judges in urgent cases, in which event the judges, by a two-third majority, may enact rules provisionally. Noticeably, the initial International Law Commission's (ILC) draft statute for the ICC stipulated that the RPE were to be drafted by the judges, whereupon a conference of States Parties had to approve them.<sup>50</sup>

The fact that the ILC draft was not embraced, could perhaps be seen as a deliberate choice for external separation of powers.<sup>51</sup> The same underlying goal can be found in Article 51(4) ICCSt., which provides that:

‘The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.’

This provision reflects the principle of legal certainty in procedural matters to the benefit of the defendant which principle may be jeopardized in case of frequent judicial activism as to the RPE.<sup>52</sup> The more reserved role for judicial law-making at the ICC as opposed to the ICTY-ICTR is most likely due to the different context within which the two *ad hoc* tribunals operated; that is, based upon a Chapter VII resolution in order to ensure international peace and security in two specific regions, whereas the ICC is not framed on such a resolution.<sup>53</sup>

An example of the ICC judges acting as quasi-legislature which might go beyond the concept of external separation of powers, can be found the Kenya situation. The vice-president of Kenya, William Ruto, the first sitting vice-president of an ICC State Party put on trial, faced the dilemma of being obliged to be present in Court at The Hague and at the same time (co-)governing his country. At different African Union meetings, the government of Kenya had criticized the ICC’s statutory requirement that a defendant must be present at trial.<sup>54</sup> On 28 February 2013 Ruto, jointly with his co-accused Joshua Sang, petitioned to the ICC to be excused from being physically present at trial under the condition that he would be present through video link technology.<sup>55</sup> On 17 April 2013, the Ruto defense sought permission from the Chamber to excuse Mr Ruto from continuous presence at trial because of his public duties and to consider the video link application in the alternative to this application.<sup>56</sup> At the time of his filing, no provision existed to govern this situation. Yet, the ICC judges created the ground work for a rule change. On 18 June 2013, Trial Chamber V(A) granted Mr Ruto’s request in part, while requiring his presence during the opening and closing statements, the victim’s statements (when delivered in person), the delivery of the judgment and, if applicable, the sentencing hearings, the sentencing, the victim impact hearings and any other attendance directed by the Chamber.<sup>57</sup> The Trial Chamber found that:

‘In exceptional circumstances, however, the Chamber may exercise its discretion under Article 64(6)(f) of the Statute to excuse an accused, on a case-by-case basis, from continuous presence at trial. The exceptional circumstances that would make such excusal reasonable would include situations in which an accused person has important functions of an extraordinary dimension to perform.’<sup>58</sup>

The Chamber went on saying:

‘[T]he demands of the office of the executive vice president of a State may meet the requirements of the test, depending on what those functions are. For, few tasks are more important and extraordinary in their dimension as to have a principal role in the management of the affairs and destiny of a State and all its people, and their relationship with the world, for any period of time.’<sup>59</sup>

At its face, excusing an accused from trial based on his official capacity contravenes article 63(1) ICCSt., requiring that ‘the accused shall be present at trial’ and article 27(1) ICCSt. reading that:

‘This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.’<sup>60</sup>

The Chamber did not find an inconsistency with article 27(1) ICCSt. It held that said provision was aimed at ensuring that a holder of public office would not be immune from prosecution; an aim that could still be achieved even if the accused would be tried in absentia.<sup>61</sup>

The prosecutor appealed this decision, while the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda were granted leave to submit *amicus curiae* observations on the interpretation of article 63 ICCSt. Judge Ušacka dissented against the leave to submit *amicus curiae* observations as it would contravene the separation of powers principle. She noted that ‘a distinction must be drawn between the role of the judiciary, on the one hand, and the role of States Parties, on the other hand.’<sup>62</sup> Tanzania, Rwanda, Burundi, Eritrea and Uganda observed with respect to article 63 ICCSt. that it had to be interpreted:

‘[I]n a broad an flexible manner, which ‘encourages State cooperation in the widest possible set out circumstances and without jeopardising the constitutional responsibilities of leaders’, as well as the ‘balance to be struck between those subject to the Court’s jurisdiction but who also occupy high office’.<sup>63</sup>

Should states be made part of the legal interpretation process of a provision under the pretext of State cooperation? States Parties drafting Rules of Procedure and Evidence is one thing; judicial interpretation and application of these RPEs is another thing.<sup>64</sup> As Judge Ušacka observed, the (external) separation of powers doctrine should be adhered to:

‘The judiciary is bound to interpret and apply the law as set out in the Court’s legal texts and in accordance with article 21 of the Statute, while the States Parties, through the Assembly of States Parties, act as the legislative body of the Court. A strict separation between these roles must be observed in order to preserve the independence of the judiciary.’<sup>65</sup>

On 25 October 2013, the Appeals Chamber unanimously reversed the Trial Chamber’s decision to exempt Mr Ruto from trial. Even though the Appeals Chamber found that the Trial Chamber has discretion in excusing an accused from trial in exceptional circumstances, it found that the Trial Chamber had interpreted its discretion too broadly.<sup>66</sup> The broad interpretation resulted in a ‘blanket excusal’ for Ruto before the trial had even commenced, making ‘his absence the general rule and his presence an exception’.<sup>67</sup> The Appeals Chamber imposed the following restrictions on the Trial Chamber’s discretion to excuse an accused from presence at trial:

‘(i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.’<sup>68</sup>

A month after the Appeals Chamber's reversal of the Trial Chamber's holding to excuse Ruto from trial, the Assembly of States Parties (ASP) convened and drafted Rule 134 *quater*, which reads:

'An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only [...]'<sup>69</sup>

Just over two weeks later, on 16 December 2013, Mr Ruto's defense team petitioned to have this rule applied for the vice-president.<sup>70</sup> On 15 January 2014, the Chamber delivered an oral ruling during the Status Conference in which it conditionally excused Mr Ruto from presence at trial.<sup>71</sup> On 18 February 2014, Trial Chamber V(A) delivered the reasons for the excusal decision taken during said Status Conference.<sup>72</sup>

In conclusion, the Ruto example illustrates that, albeit indirectly, the ICC judges – while interpreting existing procedural norms – may be at the basis of creating new rules, despite the ASP being the ICC legislative body. This 'indirect' rule making power may perhaps be fuelled by *realpolitik*. This factor might have played a role in the Kenya example where the African Union put political pressure on the ICC proceedings against the Kenyan Presidency.<sup>73</sup>

## 6.2 *The antagonistic role of the Assembly of States Parties*

The ASP as a primary rule-making mechanism within the ICC seems not in line with external separation of powers. This can be best illustrated by a recent example. In September 2015, Kenya announced that it would urge the Assembly of States Parties to push for another amendment to a rule.<sup>74</sup> Kenya contests the admission of pre-recorded evidence in the case against Mr Ruto.<sup>75</sup> Rule 68 of the ICC RPE, titled 'Prior recorded testimony', which was amended by the ASP on 27 November 2013,<sup>76</sup> gives several instances under which the introduction of previously recorded testimony – if the witness who gave this testimony is not present before the Trial Chamber – is allowed:

- (a) Both the prosecutor and the defence had the opportunity to examine the witness during the recording.
- (b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused [...]
- (c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that can-

not be overcome with reasonable diligence, unavailable to testify orally [...]

- (d) The prior recorded testimony comes from a person who has been subjected to interference [...].<sup>77</sup>

In the *Ruto* case, judges had agreed to admit pre-recorded evidence from witnesses who renounced their testimony afterwards providing the Prosecutor with an opening to use the statements of witnesses who have pulled out, disappeared or recanted their testimonies.<sup>78</sup> Upon this decision, Kenya's ambassador to the UN Mr Kamau wrote a letter to the ASP and the Presidency of the ICC, stating that the judges' decision was 'regrettable and improper', since this Rule 68, as Mr Kamau held, was not meant to cover the Kenya case.<sup>79</sup> If the ASP were to amend this Rule, it would exemplify the potential power of the States Parties to – through the ASP – insert their own geopolitical agenda into (pending) ICC proceedings. Such a development would further erode the external separation of powers within the ICC. Notwithstanding that the system of the ICC was meant to attribute to the judges a more modest role when it concerns the drafting of the RPE, in practice this resulted in an increasing influence of state parties on the ICC rule making system.

### 6.3 Conclusions

Hence, despite external separation of powers within the ICC system being envisioned by the Assembly of States Parties, the practice is more diffuse as the Kenya example illustrates. Does it make the system lacunose? Perhaps, but not necessarily if one acknowledges that hardly any alternative exists. Professor Bassiouni, one of the founding fathers of the ICC, suggested in the realm of the ICTY-ICTR that proposed rules (which relate to substantive issues) should be approved by the Security Council.<sup>80</sup> Yet, this suggestion would not solve the problem of preserving the very nature of separation of powers since the Security Council is a political body. As to the prevalence of the doctrine of external separation of powers within the ICC, the only solution seems to be the creation of a specific procedure for the review of proposed (new or amended) rules by an independent organ of experts which do not have any affiliation with the ASP, the OTP or the bench, to which the organs of the ICC can submit such proposals.<sup>81</sup>

The next paragraph will turn to the concept of internal separation of powers. Separation of powers within the ICC internally even more affects the legitimacy of the Court and the endeavour to ensure fair trials.

## 7 Internal separation of powers: Regulation 55

The *Ruto* case is an example of the diffuse role of external separation of powers within the ICC; separation of powers internally within the organs of the ICC is an even more sensitive subject, affecting the fairness and legitimacy of ICC proceedings directly. The separation of powers within the ICC may be questioned in view of the power of the ICC judges to initiate an amendment of the charges or liability modes. This mechanism was implemented in the so-called ‘Regulations of the Court’. The Regulations of the Court were adopted by the ICC judges in May 2004 and entered into force without opposition from the Assembly of States Parties.<sup>82</sup> The Regulations are intended to regulate the ‘routine functioning’ of the ICC<sup>83</sup> and ‘shall be read subject to the Statute and Rules’.<sup>84</sup> In the *Gbagbo and Blé Goudé* case, Trial Chamber I underlined that the Regulations ‘do not exist for their own sake, but for the purpose of the Chamber performing its duty under article 64 of the Statute’.<sup>85</sup> In the application of the Regulations, the overall function of the Chamber (namely, to ensure a fair, expeditious and impartial trial) must be borne in mind.<sup>86</sup> It is the Chamber’s duty to ‘strike the balance’ if factors pull in opposite directions.<sup>87</sup> The Rules of Procedure and Evidence, on the other hand, are an instrument for the application of the Rome Statute.<sup>88</sup> The RPEs should be read in conjunction with – but are subordinate to – the Rome Statute.<sup>89</sup>

One of the Regulations is Regulation 55, titled ‘Authority of the Chamber to Modify the Legal Characterisation of Facts’. Under Regulation 55(1), the Trial Chamber ‘may change the legal characterisation of facts [...] without exceeding the facts and circumstances described in the charges.’<sup>90</sup> Regulation 55(2) provides that: ‘If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility [...]’ The phrase ‘at any time during the trial’ turned out to be controversial. In the *Gbagbo and Blé Goudé* case, the Trial Chamber noted that ‘there is some disagreement among trial chambers’ as to the meaning of this phrase.<sup>91</sup> If ‘at any time during the trial’ means that ‘a Chamber may only give notice of the possibility that the legal characterization is subject to change after commencement, then there could be no ‘exceptional circumstances’ warranting giving notice now’, less than three months before the commencement of the Trial.<sup>92</sup> The justification for changing the legal characterization of facts is given by the ICC judges themselves saying that it enables the Chamber ‘to close accountability gaps, a purpose that is fully consistent with the Statute’.<sup>93</sup> If the Chamber would not have the possibility to change the legal characterization as confirmed by the Pre-Trial Chamber, there would exist a ‘risk of acquittals that are merely the

result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect.<sup>94</sup> Should such a ‘mechanism’ be within the mandate of an independent court? De Montesquieu would most likely answer this question in the negative.

To the benefit of the ICC, it should be observed that the ICC judges are conscious that Regulation 55 is an extraordinary instrument. ICC Judge Cuno Tarfusser, President of the Pre-Trial Chamber division of the ICC, wrote in the ICC Pre-Trial Manual that it ‘should be used only sparingly if absolutely warranted’. He found that the Trial Chamber should only adjudicate confirmed charges (including alternative liability modes), as this ‘should limit the improper use of regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial.’<sup>95</sup>

On the other hand, Regulation 55 was invoked by the judges in the *Lubanga* and *Katanga* cases and sparked controversy from the perspective of internal separation of powers. Moreover, judges being able to modify the charges *proprio motu* may have serious consequences for the accused. In the *Lubanga* case, the Appeals Chamber held that the judges do not have this power under the Rome Statute with respect to ‘facts and circumstances not alleged by the Prosecutor’.<sup>96</sup> Yet, when the Trial Chamber gave notice to invoke Regulation 55 in order to amend Katanga’s liability mode from indirect co-perpetration under article 25(3)(a) ICCSt. to accessory liability under article 25(3)(d) ICCSt., the Appeals Chamber did not reverse this decision.<sup>97</sup>

In the *Lubanga* case, Regulation 55 was invoked by the judges twice in the course of the trial proceedings. In May 2009, the legal representatives of the victims requested the Trial Chamber to invoke Regulation 55 to have the crimes of sexual slavery and inhuman or cruel treatment included, which were not part of the initial indictment.<sup>98</sup> Pursuant to the application of Regulation 55, Lubanga – who was originally charged with six counts of the war crime of conscripting and enlisting child soldiers – became subject of ‘new’ charges, namely:

- Sexual slavery as a crime against humanity;
- Sexual slavery as a war crime in international armed conflict;
- Sexual slavery as a war crime in non-international armed conflict;
- Inhuman treatment as a war crime;
- Cruel treatment as a war crime in non-international armed conflict.<sup>99</sup>

Adding charges during trial is not without consequences for the accused’s right to prepare an effective defense.<sup>100</sup> The ordinary procedure to have an

embedded indictment amended is in article 61(9) ICCSt. This provision requires a new confirmation hearing if charges are added or substituted by more serious charges. It also requires that such amendments are made by the Prosecutor herself – not the judges – and only after the confirmation of charges and *before* the trial has commenced. Article 74(2) ICCSt. furthermore stipulates that ‘[t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges’. This procedure was therefore not pursued when the Trial Chamber gave notice to add new charges and amend confirmed ones.<sup>101</sup> The unfairness to the accused seems evident, as was also clearly outlined by Judge Fulford in his dissenting opinion:

‘The facts of a criminal case frequently – in reality, invariably – change and develop as the trial unfolds, and under the approach preferred by the majority, the accused could be confronted, at any stage, with a re-characterization based on the new facts and circumstances that have emerged during the trial.’<sup>102</sup>

Both the defense and prosecution appealed the majority’s decision. In its judgment of 8 December 2009, the Appeals Chamber found that Regulation 55 allows for a re-characterization of the facts and circumstances contained in the charges, provided that it is done by the Prosecutor. It considered that giving the ‘Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute.’<sup>103</sup> The Appeals Chamber referred the case back to the Trial Chamber, as the Trial Chamber had not given a sufficient explanation of the facts and circumstances that it would take into account for the change in the legal characterization, did not provide any details as to the elements of the offences, nor considered how these elements were covered by the facts and circumstances described in the charges.<sup>104</sup> On 8 December 2010, the Trial Chamber ultimately rejected the idea to add new charges in the middle of the trial.<sup>105</sup>

What if the Trial Chamber would have added new charges during trial? By giving notice to re-characterize the facts upon submissions of the victim’s representatives, as the Trial Chamber initially did in its notice of 14 July 2009, the doctrine of internal separation of powers was not complied with: within the ICC system, it is the OTP that should bring the charges against the accused, not the victims.<sup>106</sup> Invading the prosecutorial discretion as to what case to prosecute or not, inheres the risk of contravening the (internal) separation of powers principle; a principle that might also protect the legitimacy

of an international criminal justice system. As noted by one scholar, ‘the legitimacy of the international criminal law system rests on a clear separation of roles between those who create the rules and those who apply them’.<sup>107</sup>

Regulation 55 was invoked a second time in the *Lubanga* case just before the trial reached its end. Trial Chamber I applied Regulation 55 to re-characterize the nature of the armed conflict (from international to a non-international armed conflict).<sup>108</sup> The existence of an armed conflict, is a requisite element of the war crimes provisions in the Rome Statute.

Once the prosecutor is unable to demonstrate the existence of an armed conflict, the accused will necessarily have to be acquitted. Yet, in the *Lubanga* case, this could be avoided by re-characterizing the nature of the armed conflict. Ultimately, Mr Thomas Lubanga was convicted for enlisting and conscripting child soldiers during an (internal) armed conflict.

The invocation of Regulation 55 most likely had a detrimental effect to the defense of another defendant, Mr Katanga. In November 2012, less than a month before the trial judgment in this case was to be delivered, Trial Chamber II *proprio motu* applied Regulation 55 to amend the liability mode from principal perpetration under article 25(3)(a) ICCSt. to accessory liability under article 25(3)(d) ICCSt.<sup>109</sup> Katanga’s defense strategy at trial was aimed at demonstrating that he had no control over the alleged crimes, which is a material element of the liability mode of indirect co-perpetration under article 25(3)(a) ICCSt. He testified on his own behalf at trial, stating that he knew of the crimes committed by his subordinates and that he possibly indirectly contributed to the crimes, but that he lacked control over the crimes.<sup>110</sup> This ‘transparency’ backfired at Katanga, as the Trial Chamber decided to amend the liability mode – with the Appeal Chamber’s approval – mainly based on Katanga’s own testimony. The majority of the Appeals Chamber justified the Trial Chamber’s power to do so by holding:

‘[T]he review that the Appeals Chamber can undertake at this stage of the proceedings is a limited one, in that the Impugned Decision would be erroneous only if it were immediately apparent to the Appeals Chamber, at this stage, that the change in the legal characterization contemplated by the Trial Chamber would exceed the facts and circumstances described in the charges.’<sup>111</sup>

The majority concluded that it was not ‘immediately apparent that the contemplated change in the legal characterization of the facts would exceed the facts and circumstances described in the charges.’<sup>112</sup> The majority further-

more found that Katanga's right to an impartial trial was not violated by the invocation of Regulation 55. It considered in this regard that:

'[T]he Trial Chamber does not risk being seen as 'performing a prosecutorial function'. Regulation 55 of the Regulations of the Court exists so as to assist the judges in ensuring that justice is done in individual cases by means of giving notice that the legal characterisation of facts may be subject to change in pursuing its duty to establish the truth and 'to close accountability gaps'. Regulation 55 of the Regulations of the Court specifically empowers the Trial Chamber to give such notice, even in the absence of a request by the Prosecutor to that effect. Giving such notice is therefore a neutral judicial act, which, without more, has no impact on the impartiality of the Judges in exercising their powers.'<sup>113</sup>

The question that merits thought, though, is whether 'closing accountability gaps' actually is similar to 'performing a prosecutorial function'. The side effect is that, one of the lessons learned from the Katanga case, the defense – when preparing its defense case – should be overly cautious since it has to anticipate the possibility that the liability mode may be subject to modification. This might seriously impair the rights of the defense. As noted by one scholar:

'[E]ffective criminal defence focuses on rebutting facts *and* rebutting legal characterizations, recharacterizing facts to support new legal characterization during or after trial will almost always substantially undermine the accused's right to effectively prepare his defence.'<sup>114</sup>

In her dissenting opinion, Judge Van den Wyngaert held that the Majority's decision was completely unforeseeable to the defense, while it was rendered at a moment in the procedure that was not anticipated by the defense, preventing it from effectively responding to it.<sup>115</sup> Amending the charges – notably by the judges – on the basis of Regulation 55(2), while using the accused's own testimony at trial to justify for this amendment, jeopardizes the accused's rights.<sup>116</sup>

After all, if the defense would have known that the liability mode could be amended even close toward the end of the trial, it would have most likely adopted a different defense strategy, as was also observed by Judge Van den Wyngaert.<sup>117</sup> Ultimately, the legal re-characterization turned out to be decisive for Mr. Katanga's conviction. The argument that Katanga must have been aware of the possibility that Regulation 55 could be invoked seems un-

sound. If the defendant should have taken this regulation into consideration before he testified under oath, why did the Chamber not consider this possibility itself at the time of the defendant's testimony, and, if it did consider this possibility, why would it not inform the defendant thereof?<sup>118</sup> Now Katanga's own testimony was used as evidence for a re-characterization and thus undermined his well-chosen strategy. As Judge Van den Wyngaert in her dissenting opinion expressed:

'It should come as no surprise that Germain Katanga enthusiastically answered the many questions about his role as a coordinator. Undoubtedly, he was under the impression that the Chamber was interested in his *defence* against the Prosecutor's allegation that he was the top commander of the Ngiti fighters of Walendu-Bindi and that he had total control over their actions. This allegation was crucial for him to be considered an indirect perpetrator under the control theory interpretation of article 25(3)(a). The facts concerning his role as coordinator, about which Germain Katanga testified, were, viewed in this context, purely exculpatory as they undermined the Prosecutor's thesis that he had 'control over the crimes' committed by his subordinates.'<sup>119</sup>

By re-characterizing the liability mode on the basis of Katanga's own testimony, the 'Majority has tuned a perfectly legitimate defence against the confirmed charges into a major point of self-incrimination under a different form of criminal responsibility.'<sup>120</sup> It is likely though that such judicial activism intrudes the doctrine of internal separation of powers. An opposite approach was endorsed by Trial Chamber VII in the *Bemba et al.* case.

In the case against *Bemba et al.* for crimes against the administration of justice under article 70(1)(b) and (c) ICCSt., the OTP also filed an application in which it requested the Chamber to give notice under Regulation 55(2) that the legal characterization of the individual criminal responsibility of the five accused may be subject to change.<sup>121</sup> The liability modes for which the Prosecutor had requested notice under Regulation 55(2), were previously included in the Prosecutor's document containing the charges. Yet, they were rejected in the confirmation decision while the Prosecution did not seek leave to appeal the decision nor did it request to amend the charges pursuant to article 61(9) ICCSt. The Pre-Trial Chamber declined to confirm the charges for the liability modes for which the Prosecutor was now trying to invoke Regulation 55(2).<sup>122</sup> As a result, Trial Chamber VII rejected the Prosecutor's request to give notice pursuant to Regulation 55(2). It considered that:

‘Granting the Request – at this point in time, before the commencement of the trial and in the absence of any specific justification – would call into question the findings of the Pre-Trial Chamber. It would furthermore provide the Prosecution with an opportunity to *de facto* appeal of the decision on the confirmation of the charges.’<sup>123</sup>

As to the invocation of Regulation 55(2) the Chamber noted:

‘While in exceptional circumstances it might be necessary to provide notice at this stage of the proceedings, the Chamber does not consider that this should be a mechanism whereby the Prosecution immediately seeks to start a procedure which aims at modifying the legal characterization of the confirmed charges and reintroduces modes of liability which were just rejected by the Pre-Trial Chamber.’<sup>124</sup>

The *Bemba et al.* ruling serves as an example of how Regulation 55 could be fairly balanced against the rights of the accused.

In conclusion, this paragraph has shown that the current system within the ICC whereby the judges are imbued with the power to *proprio motu* initiate a modification of the charges in terms of liability modes endangers the principle of internal separation of powers, which principle should also be honored within the system of international criminal justice. After all, it affects the legitimacy of such a system. Seen from the perspective of the model of ‘protection’ (that is, a model of governance based on the idea that the people must be protected against all forms of criminality and where the government has a monopoly over ‘fact finding’), a provision such as Regulation 55 might be justified, which is the approach taken by the Appeals Chamber as illustrated above. Yet, such provision becomes questionable when one perceives a law-system as a mechanism to protect the people against the power of the State. This latter mechanism can be found in a model of ‘restriction’, which intends to restrict the government’s power over its citizens. This model is based on the ‘social contract’ theory, which assumes that people are born as free individuals, therefore inhere certain natural rights (right to life, right to freedom, equality, etc.). These rights and freedoms may (only) be restricted, in order to obtain protection and to avoid misery and pain (which is known as the ‘social contract’).<sup>125</sup> Moreover, within the separation of powers doctrine this might even be seen as *ultra vires*. The (indirect) involvement of the ICC judiciary in the law-making process, which *stricto sensu* invades the doctrine of external separation of powers seems, from a perspective of legal certainty, less serious than the invasion of internal separation of powers.

## 8 Separation of powers and the *Flotilla* incident

Turning now back to the *Flotilla* incident (see *supra*, paragraph 1), the question merits thought as to whether the Pre-Trial Chamber of the ICC went beyond its mandate as envisioned under article 53(3)(a) ICCSt. From the perspective of the rationale of the doctrine of internal separation of powers – which, as we noted, should apply to international criminal tribunals – the answer seems to be affirmative; the judiciary of an international criminal tribunal, particularly a permanent court such as the ICC, should not serve as a substitution of the role of the public prosecutor in that it – at a preliminary phase whereby the prosecutor is in the best position to make the evidentiary assessment – replaces the prosecutorial assessment by its own opinion. In her dissenting opinion in the *Gbagbo* Confirmation of the Charges Decision, Judge Van den Wyngaert illustrates the relevance of a proper evidentiary assessment in an early stage of the proceedings by the Office of the Prosecutor:

‘However, charges should only be confirmed if the evidence has a realistic chance of supporting a conviction beyond reasonable doubt. I am, of course, aware that the applicable standard for confirmation is considerably lower than at trial. At the confirmation stage the Prosecutor may even be given the benefit of the doubt when there are questions about the credibility of certain witnesses or the probative value of particular documents. However, there must be at least enough of an evidentiary basis to sustain a possible conviction on the assumption that these questions are resolved in favour of the Prosecutor at trial. If it is clear that, even if the available evidence is taken at its highest, there is a substantial doubt that this will be enough to support a conviction, there is no point in confirming the charges.’<sup>126</sup>

These observations underline the necessity that the Court should not intervene once the prosecution finds the evidence to be too poor to commit a case to trial.

## 9 Towards a new test

The question arises as to what could be a more sound solution to preserve internal separation of powers. The approach taken by some commonwealth courts seems more suitable to anticipate the internal separation of powers. In *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.*, for example, the High

Court of Australia held that a reviewing court constantly take its limited role *vis-à-vis* the exercise of an administrative decision in mind: it is not the function of the court to substitute its own decision for that of the authority.<sup>127</sup> Under this doctrine, courts therefore are only permitted to assess whether the decision taken on the basis of the discretionary power is *patently unreasonable*.

The *patently unreasonable* test was developed in 1948 by the English Court of Appeal in a case called *Associated Provincial Picture Houses v. Wednesbury Corporation*.<sup>128</sup> The case was brought by Provincial Picture Housings, a cinema that wanted to open on Sunday, but was faced by unreasonable restrictions imposed by the licensing corporation (Wednesbury). Under the Sunday Entertainments Act 1932 cinemas were allowed to open on Sunday, provided that they had a license thereto and subject to conditions the licensing authority saw fit. Wednesbury had granted Associated a license under the condition that children under the age of 15 would not be allowed, not even if accompanied by an adult. Provincial Picture Housings claimed that this restriction was illegal and unreasonable. Lord Greene, the judge presiding over the appeal, made clear that the applicable provision of the Sunday Entertainments Act was widely drawn in that it granted the licensing authority absolute discretion to impose conditions. The conditions imposed by Wednesbury were therefore not deemed illegal. Interestingly, Associated had not only claimed the condition was illegal, it had also alleged it was unreasonable. Lord Greene found that unreasonableness may be invoked as an independent ground for review, distinguishable from illegality. Thus, in his view, courts can interfere, if a decision 'is so unreasonable that no reasonable authority could ever have come to it'.<sup>129</sup> Lord Greene opted for a restrictive application of the unreasonableness test, pointing out that something overwhelming is required to prove that a decision is unreasonable. It must be 'something so absurd that no sensible person could ever dream that it lay within the powers of the authority'.<sup>130</sup>

Likewise, in 1979, in a case called *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, the Canadian Supreme Court, added *patent unreasonableness* to its arsenal.<sup>131</sup> When it applies this test the court will ask whether the position taken by the agency was so patently unreasonable that it cannot be rationally supported by the relevant legislation. This very deferential standard is akin to *Wednesbury's* unreasonableness, which undoubtedly served as its model. In *Canada v. Public Service Alliance of Canada*, Cory J. commented that 'it is not enough that the decision of the board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational'.<sup>132</sup> In *State (Keegan) v. Stardust Victim's Compensation Tribunal*, Henchy J. considered that the test of unreasonableness in judicial

review lay in considering whether the impugned decision ‘plainly and unambiguously flies in the face of fundamental reason and common sense.’<sup>133</sup> This is widely viewed as an authoritative formulation of the *patently unreasonable* test.<sup>134</sup> It should be noted that the test applies particularly in situations in which the discretionary decision was based on unique professional experience and knowledge that go beyond the normal expertise of judges. This is also the case with prosecutorial decisions that remain in the prosecutorial – rather than the judicial – realm, such as decisions not to investigate.

Applying the *patently unreasonableness* test restrictively might be beneficial for several reasons. It can preserve the proper division of labour between the courts and the executive. If judges were allowed to consider the mere reasonableness of administrative decisions, they would in fact be invited to substitute their own views for those of the administration. *Patently unreasonable* is more objective, because it is supposed to be more obvious.

In the *Flotilla* case, the majority of the Pre-Trial Chamber replaced, according to the *amicus curiae* observations of the European Centre for Law and Justice, the discretion of the Prosecutor with its own, thus imposing an unacceptable standard of review.<sup>135</sup> This endangers the OTP’s independence and discretionary powers, and might run contrary to what was explicitly envisaged by the drafters of the Rome Statute in order to contribute to the proper functioning of the Court.<sup>136</sup> In a Commentary to the Rome Statute, the prosecutorial independence was qualified as the ‘principal manifestation of the statutory principle of prosecutorial independence’.<sup>137</sup> In the same Commentary, it was said that:

‘The principle of the independence of the Office of the Prosecutor is based on the interest of impartial justice on which the credibility and legitimacy of the criminal justice process depends. At the core of any notion of prosecutorial discretion lies the power to decide whether or not to investigate and prosecute.’<sup>138</sup>

It is tenable that the decision of the Prosecutor not to investigate the *Flotilla* incident would have passed this *patently unreasonable* test.

## 10 Conclusions

This inaugural address arrives at its main findings. It has been shown that at the very heart of a sophisticated law system lies the principle of separation of

powers, as being a principle of ‘natural justice’, a principle which – as Charles de Montesquieu demonstrated in 1748 – might have attained the status of a *jus cogens* norm within international law. It was furthermore shown that this doctrine is imbued with two exponents: external and internal separation of powers.

The practice of international criminal tribunals has yet demonstrated that – mindful that international law as such is not equipped with a strict independent legislative organ – the judiciary within these international criminal tribunals is (indirectly) involved in the law-making process. Although compared to the ICTY and ICTR, the ICC judiciary is more modestly empowered to draft the Rules of Procedure and Evidence, it is fair to say that the doctrine of external separation of powers is not firmly rooted within the ICC system.

When it concerns internal separation of powers, the analysis of the ICC practice reveals a similar outcome. Several precedents within the ICC practice are indicative that this doctrine is not strictly adhered to. Several Regulation 55 rulings attest to this observation, while also the Pre-Trial Chamber ruling in the *Flotilla* case comes close to an erosion of said doctrine. Even when the ICC system is predicated upon a ‘truth finding’ process, it should be mindful of the external effects of a non-observance of the principle of internal separation of powers. The primary essence of a law system is not to protect society against the individual but rather to protect the individual against the power of the State.<sup>139</sup> The laws of international criminal tribunals should serve the same overarching purpose.

The separation of powers doctrine could be seen as an exponent of said ‘social contract’ theory; its rationale is to prevent arbitrary decisions and to ensure fundamental rights to freedom. Therefore, the major (adversarial) law systems in the world do not embrace a practice whereby the judge *proprio motu* may initiate a change of the charges.<sup>140</sup> The latter notion is to be deemed of greater value for mankind than any ‘truth finding’ argument. It is in this spirit that the following proposals are suggested to the institution of the ICC:

- (i) The Assembly of States Parties should have no standing when it concerns the interpretation and application *in concreto* of Rules of Procedure and Evidence, nor should it have standing to amend the RPEs pending an ICC trial in order to achieve a certain legal outcome;
- (ii) The test for judicial review under article 53(3)(a) ICCSt. should be that of ‘patently unreasonable test’;
- (iii) Regulation 55 should be deleted in its entirety or, in the alternative, the text of Regulation 55 should be amplified in that the words ‘at any time’

are deleted and instead the words ‘timely before the start of the trial’ (that is the Prosecution case) are included.

- (iv) As the potential detrimental effects on the rights of the accused increase (for instance, change of liability mode) the test of Regulation 55 should be stricter.
- (v) The judges should not be empowered to invoke Regulation 55 *proprio motu*; rather, it should be the exclusive responsibility of the Prosecutor.
- (vi) Finally, in terms of external separation of power; the rule-making power within the ICC system should preferably be transferred to an independent organ or body (of experts).

These six suggestions will harness the institute of the ICC against challenges pertaining to lack of legitimacy and fairness. At the same time, it will endorse the most valuable right of mankind: freedom. As expressed by the former President of the United States John Quincy Adams arguing the Amistad case for the Sierra Leonean captives before the US Supreme Court in 1841 in order to abandon slavery in the US:

‘Well, gentlemen, I must say I differ with the keen minds of the South and with our President, who apparently shares their views, offering that the natural state of mankind is instead – and I know this is a controversial idea – is freedom. Is freedom. And the proof is the length to which a man, woman or child will go to regain it once taken. He will break loose his chains. He will decimate his enemies. He will try and try, against all odds, against all prejudices, to get home.’<sup>141</sup>

Ik heb gezegd.

## Notes

1. Geert-Jan Knoops, 'Gerechtelijke dwalingen: De rechtsstaat in het geding,' *Groene Amsterdammer*, 25 April 2013.
2. Geoffrey Palmer, Alvaro Uribe, Joseph Ciechanover Itzhar, Süleyman Özdem Sanberk, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011 (hereinafter: Palmer-Uribe Report).
3. 'IDF forces met with pre-planned violence when attempting to board flotilla,' Israel Ministry of Foreign Affairs, 31 May 2010, accessed 21 September 2015. [http://mfa.gov.il/MFA/PressRoom/2010/Pages/Israel\\_Navy\\_warns\\_flotilla\\_31-May-2010.aspx](http://mfa.gov.il/MFA/PressRoom/2010/Pages/Israel_Navy_warns_flotilla_31-May-2010.aspx).
4. Yaakov Katz, 'Nine dead in vicious conflict aboard the 'Mavi Marmara',' *Jerusalem Post*, 6 January 2010, <http://www.jpost.com/Israel/Nine-dead-in-Vicious-conflict-aboard-Mavi-Marmara>.
5. *Ibid.*
6. UN Human Rights Council, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, A/HRC/15/21 (27 September 2010).
7. Palmer-Uribe Report; on 2 August 2010, the UN Secretary-General established a Panel of Inquiry on the 31 May 2010 Flotilla Incident. The Palmer-Uribe report is based on reports of national investigations conducted by Israel and Turkey that the panel received and reviewed.
8. Turkish National Commission of Inquiry, *Interim Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza* (September 2010), available at: [http://dosyalar.hurriyet.com.tr/mavimarmara\\_rapor.pdf](http://dosyalar.hurriyet.com.tr/mavimarmara_rapor.pdf).
9. The Turkel Commission, *The Public Commission to Examine the Maritime Incident of 31 May 2010*, 23 January 2011 (hereinafter: Turkel report).
10. Turkel report, para. 255; Turkish National Commission of Inquiry, *Interim Report*.
11. UN Human Rights Council, *Report of the international fact-finding mission to investigate violations of international law*, para. 262. (hereinafter: UN Human Rights Council report)
12. Palmer-Uribe Report, p. 3.
13. *Ibid.*, p. 4; the UN Human Rights Council concluded that the blockade was unlawful, see UN Human Rights Council report, para. 261.
14. Palmer-Uribe Report, p. 4; the UN Human Rights Council concluded with respect to the passengers on board of the ships forming part of the flotilla: 'All the passengers [...] who appeared before the Mission impressed the members as persons genuinely committed to the spirit of humanitarianism and imbued with a deep and genuine concern for the welfare of the inhabitants of Gaza.' See UN Human Rights Council report, para. 273.
15. Palmer-Uribe Report, p. 4.
16. *Ibid.*
17. Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation, Received by the ICC prosecutor on 14

May 2013, accessed 30 October 2015. <http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>

18. Article 53(3)(a) ICCSt. provides: 'At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.'
19. Morten Bergsmo and Pieter Kruger, 'Article 53,' in *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, ed. Otto Triffterer (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 712.
20. *Ibid.*, 713.
21. *Ibid.*
22. *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, ICC-01/13-3-Red, Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation, 29 January 2015; *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015.
23. *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, para. 49; The Pre-Trial Chamber found that the validity of the Prosecutor's conclusion was affected by a combination of: '(i) the Prosecutor's failure to consider that the persons likely to be the object of the investigation into the situation could include those who bear the greatest responsibility for the identified crimes; (ii) the Prosecutor's error as to how the scale of the identified crimes can be taken into account for the assessment of the gravity of the identified crimes; (iii) the Prosecutor's error in correctly appreciating the nature of the identified crimes; (iv) the Prosecutor's error in fact in properly assessing the manner of commission of the identified crimes, in particular with respect to the question whether the identified crimes may have been 'systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians'; and (v) the Prosecutor's error in determining the impact of the identified crimes'.
24. *Ibid.*
25. *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Partly Dissenting Opinion of Judge Peter Kovács, 16 July 2015, para. 32.
26. *Ibid.*, para. 38 (emphasis added).
27. *Ibid.*, para. 2.
28. *Ibid.*, para. 3.
29. See article 42(1) ICCSt.
30. Kevin Jon Heller, 'A stick to hit the accused with': the legal recharacterization of facts under regulation 55', in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn (Oxford: Oxford University Press, 2015), 994.
31. Charles De Montesquieu, *The Spirits of Laws* (New York: Hafner Press, 1949), 152.

32. *Myers v. United States*, 272 U.S. 52, 272 U.S. 240, 272 U.S. 293 (1926); see also *Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11-901, Submissions of the Government of the Republic of Kenya as *Amicus Curiae* in Response to the Prosecutor's 'Notification of the Removal of a witness from the Prosecutor's Witness List and Application for an Adjournment of the Provisional Trial Date', 12 February 2014, para. 69.
33. John Dugard, *International Law: A South African Perspective* (Kenwyn: Juta & Co Ltd., 2000), 2-3.
34. *Ibid.*, 3.
35. Mia Swart, 'Ad hoc rules for ad hoc tribunals? The rule-making power of the judges of the ICTY and ICTR', *South African Journal on Human Rights*, 18 (2002): 570.
36. Speech by Antonio Cassese at the meeting between Secretary General Kofi Annan and the judges of the ICTY (3 March 1997), cited in Mia Swart, 'Ad hoc rules for ad hoc tribunals?' *South African Journal on Human Rights* 18, 4 (2002): 575.
37. The RPEs for the IMFTE were adopted on 25 April 1946.
38. The ICTR RPE consists of 126 provisions.
39. See also Mia Swart, 'Ad hoc rules for ad hoc tribunals?': 572.
40. Some authors call this into question, see Mia Swart, 'Ad hoc rules for ad hoc tribunals?': 571, 588.
41. *Ibid.*, 589; Swart answers this question in the affirmative.
42. *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's request for review or reconsideration), 31 March 2000; see also Mia Swart, 'Ad hoc rules for ad hoc tribunals?': 573.
43. *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, Appeals Chamber, 3 November 1999, para. 113.
44. *Ibid.*
45. *Barayagwiza*, Decision, para. 34.
46. See *Barayagwiza*, Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber's Decision Rendered on 3 November 1999; *Barayagwiza*, Request for Stay of Execution, 1 December 1999; see also Mia Swart, 'Ad hoc rules for ad hoc tribunals?': 582.
47. Mia Swart, 'Ad hoc rules for ad hoc tribunals?': 584.
48. *Barayagwiza v. Prosecutor*, Decision; Mia Swart, 'Ad hoc rules for ad hoc tribunals?': 585.
49. Mia Swart, 'Ad hoc rules for ad hoc tribunals?': 585; as outlined by Swart 'Rule 72 D states that preliminary motions are *without* interlocutory appeal except under very limited circumstances [...]. The procedural precedent set by the *Barayagwiza v. Prosecutor*, Decision whereby an accused could challenge the legality of his arrest, detention and transfer to the custody of the Tribunal, was reversed by the amendment to Rule 72. Any future appeal under Rule 72 concerning issues surrounding unlawful arrest, detention or transfer would fail under the new test set forth in ICTR Sub-rule 72 (H) and (I).' See, Mia Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda* (Bakwena Printers, 2006), 275.

50. Bruce Broomhall, 'Article 51', in *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, ed. Otto Triffterer (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 680.
51. Mia Swart, 'Ad hoc rules for ad hoc tribunals?': 575.
52. *Ibid.*: 576.
53. *Ibid.*; G.G.J. Knoops, *International and Internationalized Criminal Courts: The New Face of International Peace and Security* (The Hague: Boom Juridische Uitgevers, 2003).
54. See for example, 'African Union summit on ICC pullout over Ruto trial', *BBC News*, 20 September 2013, <http://www.bbc.com/news/world-africa-24173557>.
55. *Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11-660, Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link, 28 February 2013.
56. *Ruto and Sang*, Defence Request pursuant to Article 63(1) of the Rome Statute, 17 April 2013.
57. *Ruto and Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013.
58. *Ibid.*, para. 49.
59. *Ibid.*, para. 50.
60. Article 27(1) ICCSt. (emphasis added).
61. *Ruto and Sang*, Decision on Mr Ruto's Request, para. 67, 70-71.
62. *Ruto and Sang*, Dissenting Opinion of Judge Anita Ušacka, 13 September 2013, para. 4.
63. *Ibid.*, para. 2.
64. *Ibid.*
65. *Ibid.*, para. 4.
66. *Ruto and Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 25 October 2013, para. 56.
67. *Ibid.*, para. 63.
68. *Ibid.*, para. 62.
69. See Resolution ICC-ASP/12/Res.7, Amendments to the Rules of Procedure and Evidence, adopted at the 12th plenary meeting on 27 November 2013.
70. *Ruto and Sang*, Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134 *quater* of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial, 16 December 2013.
71. Status Conference, ICC-01/09-01/11-T-72-ENG, page 67, line 2 – page 68, line 1.
72. *Ruto and Sang*, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, 18 February 2014.
73. See, for example, 'African Union summit on ICC pullout over Ruto trial', *BBC News*.
74. 'Kenya seeks change in ICC rule,' *Daily Nation*, 8 September 2015, <http://www.nation.co.ke/news/politics/Kenya-seeks-change-in-ICC-rule/-/1064/2863426/-/7h2cuvz/-/index.html>.
75. *Ibid.*
76. Resolution ICC-ASP/12/Res.7 adopted on 27 November 2013.

77. See Rule 68 ICC RPE as amended by resolution ICC-ASP/12/Res.7.
78. See 'Kenya seeks change in ICC rule,' *Daily Nation*; *Ruto and Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015.
79. 'Kenya seeks change in ICC rule,' *Daily Nation*.
80. M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational Publishers Inc., 1996), 824.
81. See, for a similar idea, Mia Swart, 'Ad hoc rules for ad hoc tribunals?': 589.
82. 'Regulations of the Court,' Coalition for the International Criminal Court, accessed 17 September 2015. <http://www.iccnw.org/?mod=regcourtwide>.
83. See Article 52(1) ICCSt.
84. See Regulation 1 of the Regulations of the Court.
85. *Prosecutor v. Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15-228-Conf, Decision on Defence requests for leave to appeal the 'Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents, 18 September 2015, para. 29; Article 64 of the Statute describes the functions and powers of the Trial Chamber; article 64(2) ICCSt. reads: 'The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'; Article 62(8)(b) ICCSt. endows the Chamber with the authority to 'give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner'.
86. *Gbagbo and Blé Goudé*, Decision on Defence requests, para. 30; see Article 64 ICCSt.
87. *Gbagbo and Blé Goudé*, Decision on Defence requests, para. 30.
88. International Criminal Court, Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000), Explanatory note, accessed 17 September 2015. <https://www1.umn.edu/humanrts/instree/iccrulesofprocedure.html>.
89. *Ibid.*
90. See Regulation 55(1).
91. *Gbagbo and Blé Goudé*, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, 19 August 2015, para. 12.
92. *Ibid.*; Trial Chamber I had to decide on the Gbagbo defense request for leave to appeal the Trial Chamber's notification of a possible change in the legal characterization of the facts in the Gbagbo case to include the liability mode of 'superior responsibility' in addition or instead of the ones he was originally charged with. The Trial Chamber notified the parties on 19 August 2015, before the commencement of the Trial, which was set for 10 November 2015. On 10 September 2015, Trial Chamber I granted leave to appeal the notification decision of 19 August 2015.
93. *Ibid.*, para. 9.
94. *Ibid.*, referring to *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06 OA 16, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor Against the Decision of Trial Chamber I of 14 July 2009 Entitled 'Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court', 8

- December 2009, para. 77; *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’, 27 March 2013, para. 22.
95. Judge Cuno Tarfusser, ‘Pre-Trial Practice Manual,’ September 2015, 18, accessed 30 October 2015. [http://www.icc-cpi.int/iccdocs/other/Pre-Trial\\_practice\\_manual\\_%28September\\_2015%29.pdf](http://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_%28September_2015%29.pdf)
  96. *Lubanga Dyilo*, Judgment on the Appeals, para. 94 (see *infra*).
  97. *Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II. (see *infra*).
  98. *Lubanga Dyilo*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, 22 May 2009.
  99. *Lubanga Dyilo*, Decision giving notice to the parties and participants that legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 14 July 2009; see also Kevin Jon Heller, *Opinio Juris*, ‘Recharacterizing’ Facts in Lubanga,’ (blog) posted 10 August 2009, accessed 28 October 2015, <http://opiniojuris.org/2009/08/10/recharacterizing-facts-in-lubanga/>.
  100. See Kevin Jon Heller, ‘A stick to hit the accused with’.
  101. *Lubanga Dyilo*, Decision giving notice to the parties and participants that legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court.
  102. *Lubanga Dyilo*, Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’, 17 July 2009, para. 28.
  103. *Lubanga Dyilo*, Judgment on the Appeals, para. 94; Kevin Jon Heller, ‘A stick to hit the accused with’, 986.
  104. *Lubanga Dyilo*, Judgment on the Appeals, para. 109.
  105. *Lubanga Dyilo*, Decision on the Legal Representatives’ Joint Submissions Concerning the Appeals Chamber’s Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, 8 January 2010, para. 33-36.
  106. Kevin Jon Heller, ‘Recharacterizing’ Facts in Lubanga’.
  107. Dov Jacobs, ‘A Shifting Scale of Power: Who Is in Charge of the Charges at the International Criminal Court?’ in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, eds. William A Schabas et al. (Ashgate, 2013), 222.
  108. *Lubanga Dyilo*, Trial Judgment, 14 March 2012, para. 566.
  109. *Katanga and Ngudjolo Chui*, ICC-01/04-01/07-3319-tENG/FRA, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012.
  110. See also, Kevin Jon Heller, *Opinio Juris*, ‘New essay on the Legal Recharacterization of Facts at the ICC’ (blog), posted 23 December 2013, accessed 24 August

- 2015, <http://opiniojuris.org/2013/12/23/new-essay-legal-recharacterization-facts-icc/>.
111. *Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial. 27 March 2013, para. 46.
  112. *Ibid.*, para. 56.
  113. *Ibid.*, para. 104.
  114. Kevin Jon Heller, “A stick to hit the accused with”, 997.
  115. *Katanga*, ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Christine Van den Wyngaert to the Katanga Judgment, 7 March 2014, para. 36.
  116. *Ibid.*
  117. *Ibid.*, para. 39.
  118. *Ibid.*, para. 56.
  119. *Ibid.*, para. 57.
  120. *Ibid.*, para. 58.
  121. *Prosecutor v. Bemba et al.*, ICC-1/09-01/11-922, Prosecution’s Application for Notice to be given under Regulation 55(2) on the Accused’s Individual Criminal Responsibility, 23 April 2015.
  122. The Prosecutor requested that the charges against Mr Babala and Mr Arido may be recharacterized as direct co-perpetration under Article 25(3)(a) ICCSt., and the charges against all accused be recharacterized under article 25(3)(d) ICCSt.; see *Bemba et al.*, Prosecution’s Application for Notice to be given under Regulation 55(2), paras. 1 and 51.
  123. *Bemba et al.*, Decision on Prosecution Application to Provide Notice pursuant to Regulation 55, 15 September 2015, para. 10.
  124. *Ibid.*, para. 11.
  125. See for example, Manzoor Elahi, ‘Summary of Social Contract Theory by Hobbes, Locke and Rousseau’ (April 4, 2013), <http://dx.doi.org/10.2139/ssrn.2410525>; see also Knoops, ‘Gerechtelijke dwalingen’.
  126. *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/110656-Anx, Dissenting Opinion of Judge Christine van den Wyngaert, 12 June 2014, para. 4.
  127. *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd*, 162 CLR 24, 40-41, 31 July 1986.
  128. *Gascoigne v. Gascoigne*, [1948] 1 KB 223.
  129. *Ibid.*, p. 230.
  130. *Ibid.*, p. 229.
  131. *CUPE, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.
  132. *Peter v. Beblow* (1993) 1SCR 980, 101 DLR (4th) 673, 691.
  133. *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] IR 642.
  134. Hilary Delany, *Judicial Review of Administrative Action, A Comparative Analysis* (Dublin: Round Hall Ltd, 2001), p. 75.
  135. *Situation on registered vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Amicus Curiae* Observations of the European Centre for Law & Justice Pursuant to Rule 103 of the Rules of Procedure and Evidence, 7 August 2015, para. 12.
  136. Article 42(1) ICCSt. reflects the importance of prosecutorial independence, the provision reads: ‘The Office of the Prosecutor shall act independently as a sepa-

- rate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.’
137. Morten Bergsmo and Pieter Kruger, ‘Article 53’, in *Commentary on the Rome Statute of the International Criminal Court. Observers’ Notes, Article by Article*, ed. Otto Triffterer (Baden-Baden: Nomos Verlagsgesellschaft, 1999), p. 702.
  138. Ibid.
  139. Knoops, ‘Gerechtelijke dwalingen’.
  140. Ibid.; Constitutions, laws and regulations are not meant to give the government more powers, but to limit the powers of the government. The fifth amendment to the US Bill of Rights (1791), for example, reads that: ‘No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same office; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation’. Carsten Stahn, ‘Modification of the legal Characterization of the Facts in the ICC System: A portrayal of Regulation 55,’ *Criminal Law Forum* (2005): 16.
  141. ‘Argument of John Quincy Adams, Before the Supreme Court of the United States: in the Case of the United States, Appellants, vs. Cinque, and Others, Africans, Captured in the schooner Amistad, by Lieut. Gedney; 1841,’ The Avalon Project; Documents in Law, history and diplomacy, accessed 28 October 2015. [http://avalon.law.yale.edu/19th\\_century/amistad\\_002.asp](http://avalon.law.yale.edu/19th_century/amistad_002.asp).