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## 1. Introduction

During the negotiation of the Rome Statute of the International Criminal Court, the importance of the Court's independence was repeatedly stressed. At the time, delegations understood independence to mean a resistance to political influence, especially originating from States.<sup>1</sup> As one delegate put it, 'the Court should be...independent of any political influence, and its judgements should be given exclusively on the basis of law.'<sup>2</sup> In the view of another delegate, the Court's independence would resist political pressure that consisted of 'the particular rather than the universal, the exclusive rather than the inclusive.'<sup>3</sup> The general consensus was the Court would displace complaints of 'victor's justice' by emancipating law from the machinations of politics. Hence, the Court was founded on a peak confidence in legalism: an ideological belief in law's superiority to politics.<sup>4</sup>

Today, optimism in the Court's legalism has long since waned. More than fifteen years since the Court opened, faith in its independence has undergone a deep malaise, particularly on the African continent.<sup>5</sup> Distrust has been frequently attributed to the Court's 'engine room': The Office of the Prosecutor.<sup>6</sup> Arguably its most public face, the Office is perceived to be synonymous with the Court because its prosecutorial selections are pivotal and tend to draw the most criticism. Those objections begin with the Prosecutor's investigations focusing—almost exclusively—on African States.<sup>7</sup> Furthermore all of the Court's trials and the resulting

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<sup>1</sup> See the *travaux préparatoires* of the Rome Statute (ICCst.): Summary records of the plenary meetings and of the meetings of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15<sup>th</sup> June -17<sup>th</sup> July 1998) A/CONF.183/13 (Vol. II). For example, the Iraqi Delegate remarked '...the Statute of the International Criminal Court should contain clear principles that [confirm] its neutrality and objectivity, its independent role and freedom from the political influences of States and international organisations') para. 33 at 116.

<sup>2</sup> Ibid. para. 41, at 67.

<sup>3</sup> Ibid. para. 9, at 73.

<sup>4</sup> E. A. Posner, *The Perils of Global Legalism* (2009), 21.

<sup>5</sup> See below.

<sup>6</sup> 'Office' hereafter.

<sup>7</sup> There are open investigations in Burundi, Uganda, the Democratic Republic of Congo, two in the Central African Republic, Sudan (Darfur), Libya, Côte d'Ivoire and Mali. At the time of writing is the only investigation beyond the African continent is in Georgia. On the 20<sup>th</sup> of November 2017 the Prosecutor requested authorisation from the Court to initiate an investigation into crimes committed in Afghanistan. For a current list see ICC 'Situations under Investigation' available at <[www.icc-cpi.int/pages/situations.aspx](http://www.icc-cpi.int/pages/situations.aspx)>

eight convictions have been of nationals of African states.<sup>8</sup> In addition, concerns are raised about the Prosecutor's lack of even-handedness in selecting cases across opposing parties to a conflict. These concerns have led to a critique of 'lawfare'<sup>9</sup>, and often arises when the Prosecutor has an unduly close relationship to a government that, *de facto*, shields the state from criminal investigations.<sup>10</sup> Finally and more in general, selections that begin with a UNSC referral also attract opposition. For instance, the UNSC's triggering of the Court's jurisdiction in the situations in Libya and Sudan has underlined the criticism that the Prosecutor is subject to the vagaries of global geo-power politics.<sup>11</sup>

Unsurprisingly, many African governments have become deeply opposed to the Court and have helped generate a narrative about its political bias. The governments of Uganda and Sudan have been regular critics, and, notoriously, the Kenyan government actively campaigned against the Court and its Prosecutor.<sup>12</sup> Such has been the widespread perception of the Court's bias that South Africa and Gambia have attempted to withdraw from the Rome Statute, before Burundi, recently, became the first state to formally do so.<sup>13</sup> At the 2017 African Union

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<sup>8</sup> Five of these convictions were the obstruction of the administration of justice and the tampering of witness evidence. See *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment Pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, 19<sup>th</sup> October 2016). The remaining 'core' convictions are those of Thomas Lubanga in *The Prosecutor v. Thomas Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, 14 March 2012; Germain Katanga in *The Prosecutor v. Germain Katanga*, Judgment Pursuant to Article 74 of the Statute ICC-01/04-01/07-3436, 7 March 2014 and Ahmad Al Faqi Al Mahdi in *The Prosecutor v Al Faqi Al Mahdi* Judgment and Sentence ICC-01/12-01/15-171 27 September 2016. The ICC Appeals Chamber recently overturned the conviction of Jean-Pierre Bemba for crimes against humanity and war crimes; See *The Prosecutor v Jean-Pierre Bemba* Judgment on the appeal of Jean-Pierre Bemba Gombo against Trial Chamber III 'Judgment Pursuant to Article 74 of the Statute', ICC 01-05-01-08 A 8 June 2018.

<sup>9</sup> The premise of 'lawfare' is the use of the Court to attach scrutiny and stigma to political adversaries. See A. Tiemessen, 'The International Criminal Court and the Lawfare of Judicial Intervention' (2015) *International Relations* 1.

<sup>10</sup> A notable example is the self-referral by the Ugandan Government for crimes committed by members of the Lord's Resistance Army, including its leader Joseph Kony. The referral subsequently led to a perception that the Prosecutor was blind to atrocities committed by Ugandan Government forces. See P. S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide* (2015), 187-197.

<sup>11</sup> For an overview of the 'politics' of prosecution decisions see A. Tiemessen, 'The International Criminal Court and the politics of prosecutions' (2014) 18 *International Journal of Human Rights* 444.

<sup>12</sup> See, indicatively, C. Gaffey, 'Uganda: Museveni Calls ICC 'Useless'...' 13 May 2016 available at <[www.newsweek.com/uganda-museveni-prompts-western-leaders-walkout-icc-useless-459605](http://www.newsweek.com/uganda-museveni-prompts-western-leaders-walkout-icc-useless-459605)> and generally A. Taylor, 'Why so many African leaders hate the International Criminal Court' 15 June 2015 available at <[www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?utm\\_term=.782bf65a4c89](http://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?utm_term=.782bf65a4c89)> For a discussion on how Kenyan leaders, in particular Uhuru Kenyatta and William Ruto, campaigned against the ICC, see L. Nicholls, *The International Criminal Court and the End of Impunity in Kenya* (2015), 133-176.

<sup>13</sup> Burundi's withdrawal from the Rome Statute took effect on 27 October 2017. See UN Burundi: Withdrawal Reference: C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification) [www.treaties.un.org/doc/publication/cn/2016/cn.805.2016-eng.pdf](http://www.treaties.un.org/doc/publication/cn/2016/cn.805.2016-eng.pdf) The South African government, after a domestic legal challenge, retracted their intention to withdraw from the Rome

summit, the sentiments of many governments were expressed in a strategy that contemplated a collective withdrawal from the Rome Statute, and which began by declaring the Court was ‘riddled with... struggles over its perceived legitimacy’.<sup>14</sup>

Poor perceptions from African governments have come to be expected, but the Prosecutor has persistently distinguished the importance of ‘affected communities’.<sup>15</sup> Prosecutions are conducted in the name of these communities (comprised of victims and those most affected by alleged crimes) and they are the essential audience where justice must be seen to be done.<sup>16</sup> Evidence from the ICTY and ICTR indicates that perceptions of political bias among such communities can be highly damaging to a tribunal’s perceived legitimacy.<sup>17</sup> Of course, these perceptions are shaped by a multitude of factors including ethnic affiliations, psychological biases and media distortions.<sup>18</sup> Nonetheless, the ICC’s effectiveness depends on attracting perceived legitimacy among affected communities if justice—whenever it comes—is to be seen to be done.<sup>19</sup> In this regard there is some cause to be optimistic about

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Statute, but is currently considering alternative options. The President of Gambia has also restored the country’s commitment to the Rome Statute after the previous incumbent of the Presidency had labelled the Court racist and declared an intent to withdraw. See BBC News, ‘South Africa Revokes ICC Withdrawal after Court ruling 8 March 2017 available at <http://www.bbc.co.uk/news/world-africa-39204035>’; P. Saine and L. Jahateh, ‘Gambia announces plans to stay in International Criminal Court’ (13 February 2017) available at <[www.reuters.com/article/us-gambia-justice-icc/gambia-announces-plans-to-stay-in-international-criminal-court-idUSKBN15S2HF](http://www.reuters.com/article/us-gambia-justice-icc/gambia-announces-plans-to-stay-in-international-criminal-court-idUSKBN15S2HF)> .

<sup>14</sup> For the original draft AU strategy see ‘Withdrawal Strategy Document’ (Draft 2)’ (12 January 2017) available at <[www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan\\_2017.pdf](http://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf)>. See also Elise Keppler, ‘AU’s ICC Withdrawal Strategy Less than Meets the Eye: Opposition to Withdrawal by States’ <<https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye>>

<sup>15</sup> See, indicatively ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: justice will ultimately be dispensed for LRA crimes available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-02-2015-ug>> and F. Bensouda, ‘Our Resolve to Create a More Just World Must Remain Firm’ (3 September 2015) available at <[www.ictj.org/debate/article/our-resolve-create-more-just-world-must-remain-firm](http://www.ictj.org/debate/article/our-resolve-create-more-just-world-must-remain-firm)>.

<sup>16</sup> International Criminal Court Strategic Plan 2013-2017 (interim update July 2015), at 6 (Judicial and Prosecutorial Goal 1.7); ‘Strategic Plan for Outreach of the International Criminal Court ICC-ASP/5/12 (29 September 2006), at 3.

<sup>17</sup> For example; J. N. Clark, *International Trials and Reconciliation: Assessing the Impact of the ICTY* (2014); S. Ford, ‘A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms’ (2012) 45 *V and. J. Transnat’l L* 405, at 458-468; S. K. Ivkovich and J. Hagan, *Reclaiming Justice: The International Tribunals for the Former Yugoslavia and Local Courts* (2011)

<sup>18</sup> See, for example, M. Milanović, ‘The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem’ (2016) 110 *AJIL* 233.

<sup>19</sup> J. Ramji-Nogales, ‘Designing Bespoke Transitional Justice: A Pluralist Process Approach’ (2010) 32(1) *Michigan Journal of International Law* 1, 15; Y. M. Dutton, ‘Bridging the Legitimacy Divide: The International Criminal Court’s Domestic Perception Challenge’ 10 August 2017, 56 *Columbia Journal of Transnational Law* 70

the Court's effectiveness,<sup>20</sup> but it remains imperative for the Court to be seen as legitimate within the communities, that, ultimately, help to achieve its mandate.

In this context, this article enquires into the Office's ability to persuade affected communities that the Court is politically independent. Specifically, the article analyses rhetoric; understood as the use of persuasive language, either verbal or written, directed towards given audiences.<sup>21</sup> The analysis focuses on the Office's 'public communications', namely its own projection of information to an audience external to the organisation. These are in contrast to organisational communications that have an internal audience, such as the Prosecutor's courtroom advocacy which is confined to the particulars of the case and is generally directed towards the bench.<sup>22</sup> The article selects rhetoric used to defend, explain or otherwise convey the Court's political independence and, specifically, targets expressions of legalism. These expressions are pervasively found across the Office's public communications, and is a self-evident choice because legalism countervails politics; by definition, it is 'sealed off from politics, and cannot...amount to political preference.'<sup>23</sup> Fundamentally, legalism is used as a legitimisation strategy; providing justifications that seek to attribute validity (and inspire confidence) in the Office's decision-making.<sup>24</sup> The ensuing analysis reveals the limits of legalism's persuasiveness but first the article begins by establishing the significance of the Office's rhetoric.

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<sup>20</sup> A recent survey in Kenya of 507 randomly selected individuals found only 34.3% agreed with the statement 'The International Criminal Court, ICC, or The Hague is biased against Africa.' In particular victims—defined as those who suffered or observed violence—revealed 60% disagreed with the statement that the Court is biased. See T. Alleblas et al, 'Is the International Criminal Court biased against Africans? Kenyan Victims don't think so' *The Washington Post* (6 March 2017); Y. Dutton et al, 'Collective Identity, Memories of Violence and Belief in a Biased International Criminal Court: Evidence from Kenya' (22 August 2017) available at < [www.ssrn.com/sol3/papers.cfm?abstract\\_id=3014844](http://www.ssrn.com/sol3/papers.cfm?abstract_id=3014844)> .

<sup>21</sup> See C. Soanes and A. Stevenson (eds.), *Oxford Dictionary of English* (2010), 1524. This accords with James Boyd White's definition; the art of 'establishing the probable by arguing from our sense of the probable'; J. B White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) *52 U Chi L Rev* 684, at 687.

<sup>22</sup> See generally, M. F. Hoffman and D. J. Ford, *Organisational Rhetoric: Situations and Strategies* (2010), 209-232.

<sup>23</sup> The use of legalism is related to demonstrating the Office's impartiality in its prosecution selections. Impartiality and independence are closely linked; the former denoting the equal and fair treatment of cases and the latter referring to freedom and the absence of external affiliation or interference. The lack of independence provides grounds to question the existence of impartiality, but the converse is true; the existence of impartiality supports a claim to independence. See Stevenson, *supra* note 21, at 888; Luc Côte, 'Independence and Impartiality' in Luc Reydamts et al (eds.), *International Prosecutors* (2012), 357-9; On legitimisation, see generally, T. Dickson, 'Shklar's Legalism and the Liberal Paradox' (2015) *22(2) Constellations* 188, at 196.

<sup>24</sup> R. Cipriani, 'The Sociology of Legitimation: an Introduction' (1987) *35(2) Current Sociology* 1.

## 2. Rhetoric

The study of rhetoric has long been a part of the ‘law and literature’ movement.<sup>25</sup> Law has been described as the ‘very profession of rhetoric’<sup>26</sup> and legal argumentation and advocacy is interwoven with persuasion.<sup>27</sup> However, hitherto, there has been limited research exploring its role in respect of the ICC. Existing literature has tended to subsume rhetoric found in announcements, declarations or statements for case-specific purposes, or within notions such as ‘dialogue’ or ‘practice’.<sup>28</sup> Similarly, the literature on the Court and legalism has focused on their general relationship with one another, rather than a particular actor’s use of legalism in their rhetoric.<sup>29</sup> Put another way, literature on the Court has lacked a discrete treatment of rhetoric that distinguishes an actor, a context and the content of the rhetoric being communicated. The present article compensates for the lack of specificity by distinguishing the Office, a context of distrust in the Court’s political independence, and the content of legalism. In so doing, the article stimulates reflections about the Office’s discursive conventions that may resonate with other international legal actors. In this light, the Office’s rhetoric is significant for, at least, three reasons.

First, rhetoric is significant because its function of persuasion depends on the audience to whom the rhetoric is addressed.<sup>30</sup> Persuasion is a process of psychological change in

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<sup>25</sup> See, S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989); P. Brooks and P. Gewirtz (eds.), *Law’s Stories: Narrative and Rhetoric in the Law* (1996); A. Sarat and T. R. Kearns (eds.), *The Rhetoric of Law* (1996); G. Wetlaufer, ‘Rhetoric and its Denial in Legal Discourse’ (1990) 76 *Virginia Law Review* 1545

<sup>26</sup> A. Sarat (ed.), *Rhetorical Processes and Legal Judgments: How Language and Arguments Shape Struggles for Rights and Powers* (2016), 127.

<sup>27</sup> The dictionary defines ‘advocacy’ as ‘the public support for or recommendation of a particular cause or policy’ See Soanes and Stevenson, *supra* note 21, at 25.

<sup>28</sup> See for example; D. Rogers, ‘Prosecutors’ Opening Statements: The Rhetoric of Law, Politics and Silent War’ in N. Hayashi and C. M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (2017), 325-350; L. J. M Seymour ‘The ICC and Africa: Rhetoric, Hypocrisy Management, and Legitimacy’ in K. M. Clarke, A. S. Knotterus and E. de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (2016), 107-127; K. A. Rodman, ‘Justice as a Dialogue Between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding’ (2014) 12 *JICJ* 437; S. Kendall and S. Nouwen, ‘Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood’ (2014) 76 *Law and Contemporary Problems* 235.

<sup>29</sup> See for example, M. de Hoon, ‘The Future of the International Criminal Court: On Critique, Legalism and Strengthening the ICC’s Legitimacy’ (2017) 17 *Intl Crim L Rev* 591; J. M Czarnetsky and R. J. Rychlak, ‘An Empire of Law: Legalism and the International Criminal Court’ (2003) 79(1) *Notre Dame Law Review* 55.

<sup>30</sup> P. Goodrich, ‘Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language’ (1984) 4(1) *OJLS* 88, 95.

recipients pertaining to their actions or beliefs, i.e. being persuaded to do, or believe something.

<sup>31</sup> It is inherently communicational with those seeking to persuade using language to influence and modify attitudes, beliefs and the existing perceptions of the audience. <sup>32</sup> Thus rhetoric has an interdependent connection to an audience that is defined as an ‘ensemble of those whom the speaker wishes to influence by his argumentation.’<sup>33</sup> On the one hand, an analysis of the Office’s rhetoric highlights the Court’s ‘audience dilemma’; an expectation that the Court must ‘speak to’ a range of audiences, from abstract entities (such as the ‘international community’) to concrete constituencies (such as victims). <sup>34</sup> However, by the same token, rhetoric invites the identification of a concrete audience upon whom the rhetoric’s persuasiveness can be analysed. In so doing, rhetoric offers insight into the Office’s effectiveness in establishing a meaningful two-way communication to those most affected by the commission of atrocities.<sup>35</sup>

Second, and relatedly, rhetoric is a ubiquitous social practice that has a behavioural impact on audiences. <sup>36</sup> Rhetoric, in its nature, determines the range of political ideas that people encounter and thus shapes the ideas that become a part of a society’s common understandings; helping to enable (or disable) groups to challenge existing social structures.<sup>37</sup> Hence, rhetoric is a component of the Office’s expressive function, namely, its broadcast of messages and norms that helps construct a consensus across a given society. <sup>38</sup> In this sense, rhetoric is a pedagogic tool that can cast a shadow on affected communities and in so doing, illuminates the Office’s effectiveness in promoting behavioural change that helps to achieve

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<sup>31</sup> See Soanes and Stevenson, *supra* note 21, at 1327.

<sup>32</sup> M. Dainton and E. D. Zelle, *Applying Communication Theory for Professional Life: A Practical Introduction* (2014), 103-4. See also G. S. Jowett and V. O. Donnell, *Propaganda and Persuasion* (2014), 38-39.

<sup>33</sup> C. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (1969), 19.

<sup>34</sup> M. R. Damaska ‘What is the Point of International Criminal Justice’ (2008) 83 *Chi-Kent L. Rev* 329, at 347-9; M. M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33(2) *Michigan Journal of International Law* 265.

<sup>35</sup> See ICC Strategic Plans, *supra* note 16.

<sup>36</sup> See Kendall and Nouwen, *supra* note 28, at 260.

<sup>37</sup> K. Coe, ‘Rhetoric, Political’ in G. Mazzoleni et al (eds.), *The International Encyclopaedia of Political Communication* (2015), 1428.

<sup>38</sup> See T. Meijers and M. Glasius, ‘Trials as Messages of Justice: What should be expected of international criminal courts?’ (2016) 30 *Ethics and International Affairs* 429, 432-4; M. Drumbl, *Atrocity, Punishment and International Law* (2007), 173-9.

the Court's goals e.g. the prevention of crimes and more indirectly, peace, stability and reconciliation.<sup>39</sup>

Third, rhetoric is significant for its deeper relationship with the 'truth'. Both concepts are commonly understood to be hostile to one another with rhetoric having a pejorative association to terms such as deception, falsehood or pretence.<sup>40</sup> Indeed, Locke described rhetoric as being invented 'for nothing else, but to insinuate wrong ideas...'<sup>41</sup> However, Aristotle argued rhetoric is not inimical to truth but was necessary to enable the discovery of facts and to mobilise support from an audience.<sup>42</sup> Admittedly, rhetoric can argue the truth in several ways and its very contestability reinforces differing baselines with which to assess truth.<sup>43</sup> For instance disagreements about rhetoric's claims to truth are acute in the context of legal argumentation (e.g. the interpretation of facts, concepts and meanings) because both legal arguments and rhetoric are premised on probability rather than certainty, and thus share an 'all-or nothing' desire to secure the assent of an audience.<sup>44</sup> Nevertheless, rhetoric need not be approached with an *a priori* scepticism; rather its analysis is a heuristic technique that can expose an attempt at persuasion that distorts the truth.<sup>45</sup> Thus the rhetoric's denial or reliance on truth can help determine the effectiveness of the Office's persuasion strategy towards affected communities.

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<sup>39</sup> See M. R. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chi-Kent L.Rev* 329, 343 and M. Minow, C. C True-Frost and A Whiting (eds.), *The First Global Prosecutor: Promise and Constraints* (2015), 363. The Office's didactic function includes maximising the impact of its activities (e.g. the preliminary examination, investigation and trial) as, in its own words, 'mere announcement of ICC activities can have a preventive impact' See ICC OTP 'Paper on some policy issues before the Office of the Prosecutor' (September 2003), 3; See OTP 'Prosecutorial Strategy 2009-2012' (1 February 2010), 7; See also DW Conflict Zone, 'Fatou Bensouda Interview with Tim Sebastian' (26 January 2016) available at <<http://www.dw.com/en/storify-fatou-bensouda-on-dwzone/a-19016835>> ; F. Bensouda 'Looking Back, Looking Ahead-Reflections from the Office of the Prosecutor of the ICC' (2012) 11 *Wash. U. Global Stud. L. Rev.* 437.

<sup>40</sup> This is captured by an alternative dictionary definition of rhetoric, noting that its persuasive effect implies a lack of sincerity. See Soanes and Stevenson, *supra* note 21, at 1524 and Goodrich, *supra* note 30, at 88.

<sup>41</sup> J. Locke, *An Essay Concerning Human Understanding* Book Three (1824), 41.

<sup>42</sup> Aristotle, *The Art of Rhetoric* in H. C. Lawson-Tancred (translation) (1991), 74 para. 1355a.

<sup>43</sup> I. Venzke, 'What makes for a Valid Legal Argument?' (2014) 11 *LJIL* 811, at 812-3.

<sup>44</sup> I. Scobbie, 'Rhetoric, Persuasion and Interpretation in International Law' in A. Bianchi, D. Peat, and M. Windsor (eds.), *Interpretation in International Law* (2015), 64.; Perelman and Olbrechts-Tyteca, *supra* note 33, at 19.

<sup>45</sup> See Aristotle, *supra* note 42, at 74 para. 1355a. See also Fish, *supra* note 25, at 479.

### 3. Methodology

The study of rhetoric does not fit within ‘a tidy academic pigeonhole.’<sup>46</sup> Rhetoric is a phenomena of multi-disciplinary interest and the literature is found, among others, within the disciplines of linguistics, political science and psychology.<sup>47</sup> For instance, in political science, Alan Finlayson’s development of the ‘rhetorical political analysis’ demonstrates the benefits of using rhetorical concepts to investigate arguments, and the ‘*proofs* actors bring forward in justifying claims and giving reasons for others to share them.’<sup>48</sup> Similarly, rhetoric can be located within a ‘sister’ analysis of discourse that targets texts and ‘language in use’, and enables the examination of socially constructed meanings that explain the world around us.<sup>49</sup> Thus this article’s application of a rhetorical analysis to an international legal actor contributes to an emerging interdisciplinary dialogue.

The article’s method recognises that rhetoric is instrumental to persuasion and hence proceeds by way of an Aristotelian analysis. For Aristotle, rhetoric was the power to observe the available modes of persuasion of any particular matter.<sup>50</sup> The three classical modes of persuasion include: enhancing the credibility of the speaker (*ethos*), maximising the effect of the rhetoric on the emotional dispositions of its audience (*pathos*), and finally using deductive arguments to demonstrate that a particular position is true (*logos*).<sup>51</sup> The present analysis adopts these modes as a framework to analyse the legalism within the Office’s public communications.

Recognising the category of public communications acknowledges its collective importance to an organisation’s ‘public relations’. The practice of public relations is concerned

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<sup>46</sup> S. Condor, C. Tileaga, and M. Billig, ‘Political Rhetoric’ in L. Huddy, D O’Sears and J. S. Levy (eds.), *The Oxford Handbook of Political Psychology* (2013), 286.

<sup>47</sup> This accounts for the contested definitions of rhetoric and its interchangeable use with terms such as ‘argument’, ‘discourse’ and ‘language’. For an overview of these diverse disciplinary perspectives see *ibid*.

<sup>48</sup> See J. Atkins and A. Finlayson, ‘... A 40-Year Old Black Man Made the Point to Me’: Everyday Knowledge and the Performance of Leadership in Contemporary British Politics’ (2012) 61(1) *Political Studies* 161, at 162 citing originally A. Finlayson, ‘Political science, political ideas and rhetoric’ (2004) 3(4) *Economy and Society* 528.

<sup>49</sup> J. Gee and M. Handford, *The Routledge Handbook of Discourse Analysis* (2012), 1-6.

<sup>50</sup> See Aristotle, *supra* note 42, at 74 para. 1356a.

<sup>51</sup> *Ibid.* para. 1356a

with the ‘common meeting ground’ between an organisation and society at large, and includes the management of organisational reputation by a cumulative effort to influence the opinions and behaviour of relevant audiences.<sup>52</sup> In respect of the Office, the Rome Statute is wholly silent on the agenda of public relations. Instead, it is left to the Court’s Registry to strategically co-ordinate and manages the Office’s public communications across three integrated spheres of activity: external relations, public information and outreach.<sup>53</sup> The latter two activities are processes; public information is about articulating the principles, objectives and activities of the Court to the public at large and to target audiences, and outreach is about establishing a two-way communication with affected communities that can promote support for the Court’s work. However, crucially, the strategy insists on the integration of activities because they are ‘complementary and involve mutually reinforcing goals, priorities and messages.’<sup>54</sup> The Court-wide public information strategy also emphasises the importance of co-ordination and harmony with outreach activities.<sup>55</sup> Thus, the Court’s public communications are based on activities that prioritise the significance of having a consistent message towards affected communities.<sup>56</sup>

These communications can be motivated by any number of concerns or priorities; they can be made through various mediums (e.g. directly published online, by media channels or through the spoken word) but are essentially connected in being made public. These include media interviews, statements and speeches, but one might also add an equally under-scrutinised form of communications: policies. The Office’s published policies are motivated by transparency and the discharge of its mandate by way of explaining its activities, legal criteria

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<sup>52</sup> See E. Bernays, *Crystallising Public Opinion* (1961) (New Edition), at iii-iv; The Chartered Institute of Public Relations, ‘What is PR?’ available at <<https://www.cipr.co.uk/content/careers-advice/what-pr>>

<sup>53</sup> ICC, Integrated Strategy for External Relations, Public Information and Outreach (18 April 2007), at 3. External Relations is the process that aims towards building and maintaining support and co-operation with the Court, and is the dialogue between the Court and States Parties, Non-States Parties, international organisations, NGO’s and other key partners.

<sup>54</sup> *Ibid.* at 5.

<sup>55</sup> See ICC-ASP/8/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, at 5, para 33-4 and ICC-ASP/9/29, Report of the court on the public information strategy 2011-2013, at 2, para 3.

<sup>56</sup> See also IBA/ICC Monitoring and Outreach Program, ICC External Communications: Delivering Information and Fairness (June 2011) and Coalition for the International Criminal Court, ‘Key Principles for ICC Communications’ (March 2015) available at <[www.iccnw.org/documents/CommsTeamInformalCommentsRevision13MAR15.pdf](http://www.iccnw.org/documents/CommsTeamInformalCommentsRevision13MAR15.pdf)>

and decisions. These policies continue and develop the two-way communication between the Office and affected communities.<sup>57</sup>

Nonetheless a category of ‘public communications’ can create some methodological limitations. Notably, it does not recognise—precisely— the aim, context, medium and justification of the communication. For instance, scholarship has often highlighted the importance of medium, pithily captured by ‘the medium is the message.’<sup>58</sup> Furthermore, it does not acknowledge the importance of the ‘rhetorical situation’, namely, that rhetoric seeks to modify a set of exigencies produced by persons and/or events.<sup>59</sup> The category also excludes the more forensic attention paid to rhetoric’s arrangement, delivery and style including its particular argumentative scheme- a ‘*topoi*’<sup>60</sup> alongside the use of prose and persuasive devices, e.g. analogy, metaphor or metonym.<sup>61</sup> Put simply, a category of public communications masks the fact that rhetoric is ‘always for, and adapted to a specific cause and a specific occasion.’<sup>62</sup>

These may be reasonable reservations but the present aim is not to analyse the persuasiveness of every instance of legalism accounting for its aim, context, medium and justification. Indeed, to do so would ignore the fact that definitive judgements about persuasion require an empirical assessment (of individual opinions), that, in any case, is notoriously difficult to conduct.<sup>63</sup> As Kant argued, actual persuasion is bound up in the character of the individual subject; it only has private validity and is objectively difficult to rationalise.<sup>64</sup> By

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<sup>57</sup> See OTP Policies and Strategies, available at <<https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx>> ; See also A. Coco and M. Cross, Foreword (Special Issue: The International Criminal Court’s Policies and Strategies) (2017) 15 *JICJ* 407, at 408.

<sup>58</sup> This phrase is attributed to Marshall McLuhan and refers to how the precise medium of the message (rather than its content) has a social effect that produces its own message. See M. McLuhan, *Understanding Media: The Extensions of Man* (1964).

<sup>59</sup> L. F. Bitzer, ‘The Rhetorical Situation’ (1968) 1 *Philosophy and Rhetoric* 1

<sup>60</sup> This translates to ‘place or location’ but in the context of Aristotle’s treatise tends to refer to a strategy for argumentation. See Aristotle, *supra* note 42, at 183-214, para. 1392a-1403b.

<sup>61</sup> *Ibid.* at 215-44, para 1404a-1414a and more generally for a range of persuasive techniques see W. Farnsworth, *Farnsworth’s Classical English Rhetoric* (2010).

<sup>62</sup> A. Finlayson, ‘Proving, Pleasing, Persuading? Rhetoric in Contemporary British Politics’ (2014) 85(4) *The Political Quarterly* 428, 432. Aristotle also classified rhetoric into differing genres (the deliberative, the epideictic and the judicial).

<sup>63</sup> See Coe, *supra* note 37, at 1432.

<sup>64</sup> I. Kant, *Critique of Pure Reason* In N. Kemp-Smith translation (1929) 645, at para A820/ B848

contrast, this article's starting point is legalism, and its widespread expressions within a range of the Office's public communications. In so doing, the analysis recognises that rhetoric and ideology are intertwined; both possess their own strategy and style of persuading a defined audience.<sup>65</sup> Thus, an analysis of the persuasiveness of legalism enables an assessment of the ideology of legalism too. The article turns to clarify legalism before turning to its expressions within the Office's public communications.

#### 4. Legalism

Most interpretations of legalism begin with the writing of Judith Shklar. Her critique in *Legalism: Law, Morals and Political Trials* has been described as offering the 'single most significant reckoning with the politics of international criminal justice ever written.'<sup>66</sup> In her view, legalism is the 'ethical attitude that holds moral conduct to be a matter of rule following and moral relationships to consist of duties and rights determined by rules.'<sup>67</sup> For legalists, rules are viewed as the only guide to decision-making, and compliance with them is a moral mode of being in the world.<sup>68</sup> Thus, legalism ascribes greatest priority to present laws (*lex lata*) and compliance with them is seen as a clear black or white, yes-or-no judgement.<sup>69</sup>

Nonetheless, many references to Shklar tend to overlook her distinction between two kinds of legalism. First, a 'professional legalism' as the operative ideology of lawyers; internal to the legal profession and comprised of beliefs, habits and tendencies of rule-orientated lawyers. This kind of legalism consists of thinking of law as simply 'there', as a discrete entity, and is rooted in the legal profession's view of its own functions.<sup>70</sup> Second, a 'political legalism'

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<sup>65</sup> A. Finlayson, 'Rhetoric and the Political Theory of Ideologies' (2012) 60(4) *Political Studies* 751, 763. See generally, A. Finlayson, 'Ideology and Political Rhetoric' in M. Freeden and M. Stears (eds.), *The Oxford Handbook of Political Ideologies* (2013)

<sup>66</sup> S. Moyn, 'Judith Shklar on the Philosophy of International Criminal Law' (2014) 14 (4/5) *Intl Crim L Rev* 717, at 717

<sup>67</sup> J. N. Shklar, *Legalism: Law, Morals and Political Trials* (1986) 111.

<sup>68</sup> This is associated with *nullum crimen sine lege*. See R. West, 'Reconsidering Legalism' (2003) 88 *Minnesota Law Review* 119, 122 and A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25(2) *LJIL* 491, at 492.

<sup>69</sup> V Popovski, 'Legality and Legitimacy of International Criminal Tribunals' in R. Falk, M. Juergensmeyer and V. Popovski (eds.), *Legality and Legitimacy in Global Affairs* (2012) 408.

<sup>70</sup> See Shklar, *supra* note 67, at 35.

as an external projected ideology; one that is inserted into complex and diverse political environments that contain multiple, and often competing ideologies.<sup>71</sup> Here, legalism interprets politics as the antithesis of law; law is neutral, objective and best orientated towards justice; politics is rejected as competitive, egotistical and vague.<sup>72</sup> Of course ‘political legalism’ produces a dichotomy that exposes an assumption: legalism views itself as ‘doing or solving’ political dilemmas better than politics itself can. This is the claimed virtue of legalism; it presents itself as an improvement on politics but, in so doing, disregards the connection that law has with political values because its very premise is to divorce or hide those values.<sup>73</sup>

Before turning to the Office’s public communications, there are some fundamental explanations for a recourse to legalism. First, the Prosecutor is a member of an ‘interpretive community’ of international lawyers that possesses a set of cultural assumptions and beliefs that would admit a vocabulary of legalism as a matter of common sense.<sup>74</sup> This community is encompassed within an ensemble of international actors, or a broader ‘epistemic community’ (e.g. academics, campaigners, civil society, diplomats ) that gathered at the Rome Conference. Common to both communities is the use of legalism as the only ‘correct and proper’ way to think (and speak) about international criminal law.<sup>75</sup> Second, the articulation of legalism generally prevails across international law, and is arguably a symptom of what Martti Koskenniemi calls managerialism. For Koskenniemi, managerialism involves international lawyers placing exclusive attention on compliance with rules and technocratic practices, rather than having a meaningful engagement with the reasons why such rules and practices exist, and

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<sup>71</sup> See Shklar, *supra* note 67, at viii.

<sup>72</sup> See Shklar, *supra* note 67, at 111. For an alternative interpretation of ‘political’ see S. Nouwen and W. G Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2011) 21(4) *EJIL* 941, at 945.

<sup>73</sup> Z. Bankowski, ‘Don’t think about it: Legalism and Legality’ (1993) 15 *Rechtstheorie Beiheft* 45, at 47.

<sup>74</sup> The concept of interpretive community is originally attributed to the work of Stanley Fish. See Fish, *supra* note 25, at 141. See also J. d’Aspremont, ‘The Professionalization of International Law’ in J. d’Aspremont et al (eds.), *International Law as a Profession* (2017), 30.

<sup>75</sup> A. Bianchi, *International Law Theories* (2016), 12.

the (political) purposes they ultimately serve.<sup>76</sup> In this sense, international lawyers' use of legalism is, by nature, a deeply embedded community and managerial practice.

There have been innumerable expressions of legalism within the Office's public communications. These have occurred in various contexts, over an indeterminate period of time and with variable frequency. It is not within the present scope to explore them all, or to attribute them, more or less, to the tenure of either Luis Moreno Ocampo or Fatou Bensouda. For present purposes, Judith Shklar's classification of legalism can help to organise its most common expressions.

Shklar's account of professional legalism, referring to the practice of law, or its own discrete science,<sup>77</sup> helps to explain three identifiable expressions. Taking the first, the Office reinforces a Court-wide message that it is a judicial institution, with an exclusive judicial mandate. The Court's website stresses that it is free from political control, and is only dictated by the legal criteria found in treaty texts.<sup>78</sup> The content of webpages affirms that the Prosecutor is independent, impartial and that 'political considerations never form part of the Office's decision making.'<sup>79</sup> Secondly, and most commonly, legalism is used to demonstrate a commitment to professional impartiality. The Prosecutor, in many speeches, has been keen to declare she makes no decisions out of fear or favour.<sup>80</sup> In so doing she, in adherence to the law's neutrality and objectivity, often stresses that 'politics and political considerations have no place and play no part in the decisions taken by the Office and in the execution of its

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<sup>76</sup> M. Koskenniemi, 'The Politics of International Law-20 Years Later', (2009) 20 *EJIL* 7, at 15-16.

<sup>77</sup> See Shklar, *supra* note 67, at 8-9.

<sup>78</sup> ICC, 'Understanding the International Criminal Court' available at < <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> > .

<sup>79</sup> ICC 'About The OTP' available at <<https://www.icc-cpi.int/about/otp/Pages/default.aspx>>

<sup>80</sup> F. Bensouda, Speech at the 52<sup>nd</sup> Munich Security Conference (15<sup>th</sup> February 2014); available at <<https://www.securityconference.de/en/activities/munich-security-conference/msc-2016/speeches/speech-by-fatou-bensouda/>> ; Fatou Bensouda Speech at a seminar hosted by the Attorney General of the Federation and Ministry of Justice of Nigeria International Seminar (24<sup>th</sup> February 2014) available at <<https://www.icc-cpi.int/iccdocs/otp/SpeechProsecutor-AbujaNigeriaFra.pdf>> ; S. Charania 'Without Fear or Favour-An Interview with the ICC Prosecutor Fatou Bensouda' (October 15<sup>th</sup> 2015) available at <<http://justiceinconflict.org/2015/10/15/without-fear-or-favour-an-interview-with-the-icc-prosecutor-fatou-bensouda/>> ; Statement of the Prosecutor of the International Criminal Court, F. Bensouda: 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine' (2<sup>nd</sup> September 2015) available at <[https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-st-14-09-02.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-st-14-09-02.aspx)> .

independent and impartial mandate'.<sup>81</sup> In addition, the Prosecutor in newspaper editorials, and in declared policy, has reinforced legalism by insisting that the Court's mandate will 'never be compromised by political expediency.'<sup>82</sup> More subtly, the third expression captures positivism in terms of jurisdictional limits and terminological interpretation. For instance, the Prosecutor, in person and in press releases, has stressed that she is only guided by the Rome Statute and often cites the Preamble to elaborate on her aims.<sup>83</sup> Hence, the Prosecutor explains the boundaries of her decision-making by implicitly articulating the rules of treaty interpretation.<sup>84</sup> Such an approach also distinguishes the Prosecutor's professional identity; as former Prosecutor Luis Moreno- Ocampo once stated: 'I follow evidence. I'm a criminal prosecutor; I'm not a political analyst.'<sup>85</sup>

Shklar's account of 'political legalism' helps explain two further expressions. Political legalism is about casting law as an uncompromising culture of rule-following that is sustained by depicting politics as irrational and essentially 'a species of war'.<sup>86</sup> Gerry Simpson describes this version as 'transcendent' in its desire to implicate politics by law's ruination.<sup>87</sup> In this regard, the Office makes a concerted endeavour to elevate the law's significance as a means to deflect, offset (and remove) any negative association with politics. Thus, the Office uses legalism normatively, articulating law in terms of its contribution to political and social goals

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<sup>81</sup> See for example, 'The Determination of the Office of the Prosecutor on the communication received in relation to Egypt' (8 May 2014) available at < <https://www.icc-cpi.int/Pages/item.aspx?name=pr1003>> .

<sup>82</sup> F. Bensouda, 'The Truth about ICC and Gaza' *The Guardian*, 29th August 2014 available at <<http://www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine>>; See OTP Interests of Justice Policy Paper (1 September 2007).

<sup>83</sup> The Preamble of the ICCSt. cites two main goals; 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.' There are innumerable examples of rhetoric that refers to the ICCSt. and/or the Preamble; See F. Bensouda, 'Local Prosecution of International Crimes: Challenges and Prospects' (4<sup>th</sup> November 2014) Opening Remarks 7<sup>th</sup> Colloquium of International Prosecutor(s) < <https://www.icc-cpi.int/iccdocs/otp/otp-statement-141105.pdf>> ; 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' (16<sup>th</sup> January 2015) ICC Press Release <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>> .

<sup>84</sup> See the Vienna Convention on the Law of Treaties Articles 31(1), 31(2) (General Rule of Interpretation).

<sup>85</sup> International Peace Institute L. Moreno-Ocampo: 'I follow evidence, not politics' (January 20<sup>th</sup> 2012) <<https://www.ipinst.org/2012/01/moreno-ocampo-i-follow-evidence-not-politics>> . Current Prosecutor Fatou Bensouda has expressed similar sentiment stating: 'We are a new tool, a judicial tool, not a tool in the hands of politicians who think they can decide when to plug or unplug us.' See D. Smith, 'New Chief Prosecutor Defends International Criminal Court' *The Guardian* 23 May 2012.

<sup>86</sup> See Shklar, *supra* note 67, at 122.

<sup>87</sup> G. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (2007), 19-20

particularly in the field of conflict resolution and crime prevention. The use is captured pithily by the words of former Prosecutor Moreno-Ocampo, ‘...experience has taught us that law is the only efficient way to prevent recurrent violence and atrocities.’<sup>88</sup> In another speech Fatou Bensouda provided a more striking example, complemented by a literary use of a *synecdoche*<sup>89</sup>, presenting the ICC as ‘the law’, alongside the imagery of force:

I firmly believe in the power of the law to stop and prevent violence, and to pacify communities gripped by conflict. I believe in the law as an instrument to affect constructive change. Through the might of the law, we can highlight the brutality and barbaric nature of these crimes; we can hold perpetrators accountable, and, crucially... [establish] new norms of acceptable conduct.<sup>90</sup>

The Prosecutor also uses legalism creatively in casting the law as an agent of normative political change and thereby removing the implication that law is tainted by undesirable bias against states. These include, somewhat incredulously, speculating about the Court’s role in guaranteeing peaceful elections on the African continent.<sup>91</sup> In particular, and more frequently, the Prosecutor uses law as a metonym for justice and has expressed that the ‘law sets one standard for everyone...and provides justice for all.’<sup>92</sup> This extends to describing the Court as

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<sup>88</sup> L. Moreno Ocampo, ‘Building a Future on Peace and Justice: The International Criminal Court’ in K. Ambos, J. Large and M. Wierda (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development (The Nuremberg Declaration on Peace and Justice)* (Springer 2009), 13.

<sup>89</sup> A type of metonym i.e. a figure of speech where a concept, place or thing is replaced by something closely associated to it e.g. ‘The Hague’ can be used to refer to the International Criminal Court. A synecdoche is specifically where a part is used to refer to the whole, or the whole refers to one its parts. For example ‘bread’ can be used to represent food in general as in the expression ‘breadwinner’ or, by contrast one can refer to a whole nation when specifically referring to its football team.

<sup>90</sup> F. Bensouda, ‘The investigation and prosecution of sexual and gender-based crimes: reflections from the Office of the Prosecutor’ (24<sup>th</sup> August 2015) (The Hague Academy of International Law Advanced Course on International Criminal Law Special Focus: Gender Justice) available at <<https://www.hagueacademy.nl/wp-content/uploads/2015/03/Opening-keynote-speech-The-Hague-Academy-of-International-Law-Advanced-Course-on-International-Criminal-Law.pdf>>

<sup>91</sup> ‘In Africa, for instance, there have been close to 20 presidential elections in 2012 or 2013. Most of them have gone relatively peacefully. I am not giving credit to the ICC for that. History will judge that, but the ICC has a role to play... I firmly believe the world is a better place for having the ICC as an institution. I just want us to ask this question: What would the world be like without an ICC?’ F. Bensouda, ‘We Should at all Costs Prevent the ICC from being Politicised’ (2014) 62(1) VEREINTE NATIONEN – German Review on the United Nations (<[http://www.dgvn.de/fileadmin/user\\_upload/DOKUMENTE/English\\_Documents/Interview\\_Fatou\\_Bensouda.pdf](http://www.dgvn.de/fileadmin/user_upload/DOKUMENTE/English_Documents/Interview_Fatou_Bensouda.pdf)> .

<sup>92</sup> F. B. Bensouda, ‘Reflections from the International Criminal Court Prosecutor’ (2012) 45 *V and. J. Transnat'l L* 955, at 956

a ‘credible, professional, independent instrument of international justice’<sup>93</sup> but also places the Court as the arbiter of providing a ‘real justice [that] has to be guided solely by the law and the evidence’<sup>94</sup>. Taken in context, the Prosecutor’s rhetoric consistently encapsulates justice by a frequently-aided, ‘protected embrace of the law’<sup>95</sup>.

The final expression of legalism finds expression in John Austin’s command or coercive orientation of law.<sup>96</sup> Legalism has a ‘strong-arm’ effect that capitalises on law’s ability to produce a monopoly of force and coerce compliance from other (political) actors.<sup>97</sup> Taking the words of former Prosecutor Ocampo, ‘other actors *have* to adjust to the law’<sup>98</sup> and, in the language of Fatou Bensouda, there is a dogged determination to use the ‘full power of the law’.<sup>99</sup> In this guise the Office’s rhetoric presupposes the significance of the Court’s role in conflict-affected societies and the need for compliance. For example, in a speech in 2014, Fatou Bensouda stated:

The ICC is a fact of life and all players in the international arena must adjust their behaviour to the reality that this new player in the international scene is committed to fulfilling its mandate of ending impunity for mass crimes that tear at the fabric of society and threaten the peace, security and well-being of the world.<sup>100</sup>

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<sup>93</sup> F. Bensouda, Remarks to the 25<sup>th</sup> Diplomatic Briefing (26 March 2015), 5

<sup>94</sup> See Bensouda, *supra* note 92, at 959.

<sup>95</sup> See for example, F. Bensouda, Address at the First Plenary, ‘Fifteenth Session of the Assembly of States Parties’ (16 November 2016) 9; see also Bensouda Munich Speech, *supra* note 80.

<sup>96</sup> J. Austin, *The Province of Jurisprudence Determined* (1832).

<sup>97</sup> See Shklar, *supra* note 67, at 131.

<sup>98</sup> My emphasis. See L. Moreno-Ocampo, Prosecutor of the International Criminal Court, ‘Keynote Address’ Council on Foreign Relations (4<sup>th</sup> February 2010) available at <<https://www.icc-cpi.int/NR/rdonlyres/A80CDDDD-8A9A-432E-97CE-F6EAD700B5AE/281527/100204ProsecutorsspeechforCFR.pdf>> .

<sup>99</sup> See for example, F. Bensouda, ‘Opening Remarks: Launch of the ICC Office of the Prosecutor’s Policy Paper on Sexual Violence and Gender-Based Crimes’ (7 November 2014); F. Bensouda, ‘Our Resolve to Create a More Just World Must Remain Firm’ (3 September 2015) <[www.ictj.org/debate/article/our-resolve-create-more-just-world-must-remain-firm](http://www.ictj.org/debate/article/our-resolve-create-more-just-world-must-remain-firm)>

<sup>100</sup> F. Bensouda ‘Africa and the ICC: A Decade on. Africa and the International Criminal Court: Lessons Learned and Synergies Ahead’ (9-10 September 2014) 3 available at <<http://www.africalegalaid.com/news/statement-by-fatou-bensouda-prosecutor-of-the-icc>> .

Here, the Office's rhetoric reinforces the mandatory nature of the Rome Statute and how its very existence 'impact(s) on conflict management efforts.'<sup>101</sup> As Office policy elaborates, 'The issue is no longer whether we agree or disagree with the pursuit of justice in moral or practical terms. It is the law.'<sup>102</sup> Taking more nuanced examples, Fatou Bensouda has regularly warned of the consequences of not supporting the ICC. For instance, she has contended that 'backing the ICC is to support humanity's progress towards a more just world'<sup>103</sup> and cautioned that 'without the ICC, we will regress into an even more turbulent world where chaos, volatility and violence take the upper hand as inevitable norms.'<sup>104</sup> The implication of such rhetoric is that those who do not comply with the Rome Statute are on the 'wrong side' and either accept or are indifferent to the impunity and violence the Court is helping to tackle.

Admittedly, these expressions of legalism are accompanied by the adjacent language in the communication but this does not detract from the fact that legalism is undoubtedly one of the Office's 'key messages'; clear and short statements that are consistently reiterated.<sup>105</sup> This resonates with the Court's Integrated Strategy and its stress on 'core message themes'; accurate but simple messages that reach a non-specialist audience that explain the need for co-operation and/or situate the Court as part of the international justice movement.<sup>106</sup> Such core messages presupposes an organisation's intent to use them to persuade its target audiences. The article now extends Shklar's critique and exposes the limits of legalism's persuasiveness vis-à-vis affected communities.

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<sup>101</sup> OTP Policy Paper on Interests of Justice (1 September 2007) 4.

<sup>102</sup> *Ibid.*

<sup>103</sup> F. Bensouda, Diplomatic Briefing in The Hague (9 October 2017) 15.

<sup>104</sup> See Bensouda, *supra* note 95, at 8.

<sup>105</sup> Key messages are an essential part of an organisation's public relations and regularly promoting them is part of running effective media and PR campaigns. This is a fundamental principle found in communications, marketing, public relations, and media studies literature as well as practical training materials. See A. E. Gordon, *Public Relations* (2011) 6-25; C. E. Carroll et al, 'Key messages and message integrity as concepts and metrics in communication evaluation' (2014) 14 *Journal of Communication Management* 386, at 389.

<sup>106</sup> See Integrated Strategy, *supra* note 53, at 4-5.

## 4.1 Ethos

For Aristotle the first rhetorical mode of persuasion concerned the character of the speaker or their ethos.<sup>107</sup> This mode is concerned with persuasion that enhances the speaker's credibility and 'must come about in the course of the speech, not through the speaker's being believed in advance to be of a certain character.'<sup>108</sup> Aristotle clarifies that a speaker's existing credibility, originating within the community to which she belongs, is the strongest component of persuasiveness (characterised as their 'situated ethos').<sup>109</sup> This ethos includes their professional expertise, reputation and even what Max Weber called 'charismatic authority'; a set of exemplary personal leadership qualities.<sup>110</sup> Nonetheless, Aristotle's target is the causal flow in the opposing direction, namely, whether the speaker's rhetoric can elevate their situated ethos in the eyes of the audience (their 'constructed ethos').<sup>111</sup> Thus, in the analysis of rhetoric, the speaker's constructed ethos should, in general, elevate or remind the audience of their situated ethos.

The central question that follows is whether legalism can elevate the Prosecutor's situated ethos. One can answer this question by asking why legalism is attractive to lawyers. The answer, almost certainly, is found in its essential content: law. As Kieran McEvoy argues, the temptation of legalism lies within the seduction of law; its affinity to values such as certainty, objectivity and rationality.<sup>112</sup> Furthermore, legalism helps articulate an ordered world where the law is glorious and superior because of its presumed civilising and rationalising function.<sup>113</sup> This function provides law with a positive force that is boosted by the

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<sup>107</sup> See Aristotle, *supra* note 42, at 74 para. 1356a. The Greek origin of the word 'ethos' means 'nature or disposition' See Soanes and Stevenson, *supra* note 21, at 601.

<sup>108</sup> See Aristotle, *supra* note 42, at 74 para. 1356a.

<sup>109</sup> M. Burke, 'Rhetoric and Poetics: The Classical Heritage of Stylistics' in M. Burke (ed.), *The Routledge Handbook of Stylistics* (2014), 24-30

<sup>110</sup> See Aristotle, *supra* note 42, at 141 para. 1378a and Max Weber, 'Politics as a Vocation' in H. H Gerth and C. Wright Mills (eds.), *From Max Weber: Essays in Sociology* (1995), 79.

<sup>111</sup> *Ibid.*

<sup>112</sup> K. McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' *J. Law & Soc.* (2008) 411, 414-416

<sup>113</sup> *Ibid.* 416-417; See also J. Shklar, 'In Defense of Legalism' (1966) 19 *Journal of Legal Education* 51, 58.

condemnation that unlawful actions attract. On these terms, it is easy to see how the use of legalism could elevate the Prosecutor's situated ethos.

This claim can be further evidenced by way of illustrating her use of professional legalism. Primarily professional legalism valorises the principle that lawyers mechanically apply their expert idiom to whatever (political) reality is presented to them.<sup>114</sup> It conveys 'safety' and is associated with lawyers being guardians of procedural correctness e.g. it honours the rules of *sub-judice*.<sup>115</sup> More generally, it captures legalism's historical symbolism to use law (rather than violence) in response to criminality and, evokes Robert Jackson's celebrated Nuremberg address.<sup>116</sup> Finally, and unquestionably, professional legalism captures international criminal law's 'progress narrative'<sup>117</sup> that culminated in the creation of the ICC; a legalistic model of justice that transcends politics.<sup>118</sup> This narrative idealises the delivery of an 'impartial, majestic justice'<sup>119</sup> that is based on the Court's operational distance from the political contestations of domestic societies.<sup>120</sup>

However, much of this appeal depends on precisely how the Prosecutor's situated ethos is understood. Legalism is appealing if one understands her ethos in traditional terms: apolitical, conservative, client-based and based on procedural probity.<sup>121</sup> However, conversely, the Prosecutor's situated ethos can also be understood in deeply political terms,

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<sup>114</sup> F. Hoffmann, 'Facing the Abyss: International Law Before the Political' in M. Goldoni and C. McCorkindale (eds.), *Hannah Arendt and the Law* (2012), 180.

<sup>115</sup> The Office's respect for this rule is imperative after previous challenges from defence counsel and cautions from the Chambers about the Prosecutor's public comments. These challenges, amongst other things, have alleged the Prosecutor's public statements, including press releases, have displayed bias that is prejudicial to the fair trial of the accused. See, for example, *The Prosecutor v Callixte Mbarushimana*, Defence Request for an Order to Preserve the Impartiality of Proceedings, ICC-01/04/01/10-14, 9 November 2010; *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the press interview with Ms Le Fraper du Hellen, ICC-01/04-01/06-2433, 12 May 2010, 19-20.

<sup>116</sup> e.g. to 'submit captive enemies to the judgement of the law.' See R. Jackson, Opening Statement, Nuremberg Trial Proceedings Volume 2 (Wednesday 21<sup>st</sup> November 1945) available at <<http://avalon.law.yale.edu/imt/11-21-45.asp>> .

<sup>117</sup> Progress narratives depict a linear line of incremental development, moving from an abstract, politicised collection of principles to a formal, organised and legitimated framework based on law. See Andre Vartan Armenian, 'Selectivity in International Criminal Law' (2016) 16 *ICLR* 1, at 2; M. Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28 *LJIL* 743, at 748-9.

<sup>118</sup> See Czarnetsky and Rychlak, *supra* note 17, at 62.

<sup>119</sup> See Simpson, *supra* note 87, at 30.

<sup>120</sup> P. Clark, 'Distant Justice: The Politics of the International Criminal Court in Africa' (27<sup>th</sup> October 2014) available at <<https://podcasts.ox.ac.uk/distant-justice-politics-international-criminal-court-africa>> .

<sup>121</sup> See generally K. McEvoy and R. Rebouche, 'Mobilising the Professions? Lawyers, Politics and the Collective Legal Conscience' in J. Morrison, K. McEvoy and G. Anthony (eds.), *Judges, Transition and Human Rights* (2007), 284

one more akin to a ‘cause-lawyer’: a lawyer with an activist mission to trigger social change in societies.<sup>122</sup> As a cause-lawyer, the Prosecutor contributes to the Court’s goals including the prevention of crimes, and the promotion of peace, stability and reconciliation in affected communities. Her conduct encompasses the promotion of domestic prosecutions, engaging with civil society groups and advocating publically on behalf of victims. These are all deeply political activities. Crucially, her use of political legalism, championing law in the achievement of justice and conflict resolution, appeals more to a cause-lawyer ethos; an identity deeply woven with political and social activism.<sup>123</sup>

Here lies the problem; the co-existence of her traditional and cause-lawyer identities can produce an unclear message about her relationship to politics. Her traditional ethos is based on a premise of political detachment, but her cause-lawyer ethos is based on a premise of political attachment. There is no comfortable equilibrium; her expressions of political legalism dilute the appeal of professional legalism, and her use of the latter betrays the fact that, outside the courtroom, she does not act or talk like a traditional lawyer but is closer to that of a campaigner. In other words, both types of situated ethos generate a friction with one another and produce a cognitive dissonance at the centre of the Prosecutor’s identity. From the perspective of affected communities that are the recipients of the Prosecutor’s rhetoric, her expressions of legalism are likely to confuse because they make opposing claims about her political positioning. Thus, one can conclude that legalism’s persuasiveness about the Court’s political independence, makes a much weaker appeal to ethos than is first assumed.

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<sup>122</sup> The literature on cause-lawyering is considerable, however for a concise overview see K. McEvoy, ‘What Did the Lawyers Do During the War?’ Neutrality, Conflict and the Culture of Quietism’ (2011) 74(3) *MLR* 350, 354.

<sup>123</sup> For example, see the many references to victims in Statement of ICC Prosecutor, Fatou Bensouda, before the UNSC on the Situation in Darfur, pursuant to UNSCR 1593 (2005) (13<sup>th</sup> December 2016)

## 4.2. Pathos

The purpose of pathos in rhetoric is to elicit emotional support among the audience at which the rhetoric is targeted.<sup>124</sup> Pathos is about the stirring of an emotional disposition and consequently rhetoric must recognise that the judgements of an audience will differ when they are aggrieved or pleased, sympathetic or in a state of revulsion.<sup>125</sup> For Aristotle, the rhetorician must understand a range of emotions (e.g. anger, pity, fear, favour and envy) to help inform the use of rhetoric that, ideally, can heighten its degree of persuasion.<sup>126</sup>

To address whether legalism can elicit emotional support among affected communities, one must acknowledge the indeterminacy of ‘emotional support’. Emotion is a complex, psychological and highly subjective phenomena. Hence rhetoric’s appeal to emotion can only be based on a *general* presupposing of an audience’s perceptions; what they will perceive positively and be willing to emotionally accept. Of course, no single audience is a *tabula rasa* but is, in fact, comprised of individuals that carry socially conditioned beliefs and convictions.<sup>127</sup> Similarly, the degree and nature of ‘support’ is open to interpretation. Rhetoric can attract a range of support although it need not be of a degree that conclusively leads to persuasion, but should, as a minimum, establish a foundation for persuasion. This foundation may rest on ‘diffuse support’; a reasonable and stable acceptance of an institution but that does not always extend to satisfaction with its every decision.<sup>128</sup> However, in this sense, legalism’s appeal to pathos within affected communities is likely to be limited.

First, legalism’s primary appeal is to notions of legality but, lacks a commensurate appeal to perceived legitimacy wherein emotion is located. Legality is the belief in the validity

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<sup>124</sup> Pathos is quality that tends to evoke a particular emotional disposition and is most often associated with sadness or sympathy. See Soanes and Stevenson, *supra* note 21, at 1302.

<sup>125</sup> See Aristotle, *supra* note 42, at 74 para. 1356a.

<sup>126</sup> See Aristotle, *supra* note 42, at 139-171 para. 1378b-1388b.

<sup>127</sup> See Scobbie, *supra* note 44, at 69-71. See also John Locke, *An Essay Concerning Human Understanding* (1997), 105

<sup>128</sup> Y. Lupu, ‘International Judicial Legitimacy: Lessons from National Courts’ (2013) 14 *Theoretical Inquiries in Law* 437, at 440-1; V. A. Baird, ‘Building Institutional Legitimacy: The Role of Procedural Justice’ (2001) 54 *Political Research Quarterly* 333, at 339.

of a statute, rationally created rules and the discharge of statutory obligations.<sup>129</sup> By contrast, perceived legitimacy is a psychological acceptance or belief in an entity's authority and right to rule.<sup>130</sup> It is a phenomenon shaped by a range of causes that help to produce an individual's perceptions. These can be described as audience 'anchors'<sup>131</sup> and can be based on their ethnic, political, religious or social affiliations. These anchors, in turn, can produce cognitive biases and emotionally-driven reasoning that hardens resistance towards messages countering those anchors.<sup>132</sup> Rhetoric thus should target those anchors because emotional persuasion requires altering sets of internal assumptions that make up a listener's frame of reference.<sup>133</sup> In this light, legalism offers too little as its privileging of legality is, at best, only a component of perceived legitimacy but does not exhaust it. In so doing, legalism circumvents the complex blend of affiliations that make up individual perceptions within affected communities.<sup>134</sup>

Second, and relatedly, legalism's limited appeal to emotion can be attributed to its very uniformity. Legalism's attraction is that it is a general 'one size fits all' rhetoric that speaks to multiple audiences at the same time. However, the Office's prevalent usage imagines a single, and rather abstract audience; something that finds expression in the concept of a 'universal audience'—namely a systematized construction in the mind of the speaker of an ideal audience capable of assenting to its claims.<sup>135</sup> This being the case, the universal audience is not a concrete or material entity (with typically diverse sectional interests) but is constructed by the rhetoric (and the speaker) itself.<sup>136</sup> Leaving the conceptual concerns aside, one could defend the uniformity of legalism if it had *general* emotional utility; however, it is not clear that it does

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<sup>129</sup> See Weber, *supra* note 110, at 79.

<sup>130</sup> There is considerable literature on perceived legitimacy. Most definitions associate the concept with sociological (or Weberian) legitimacy. See S. Vasilev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in N. Hayashi and C. M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (2017); H. Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) 4(2) *Amsterdam Law Forum* 4

<sup>131</sup> See G. S. Jowett and V. O'Donnell, *Propaganda and Persuasion* (2014), 39.

<sup>132</sup> See Milanović, *supra* note 18; See Clark, *supra* note 17, at 58-83.

<sup>133</sup> C. S. Clements, 'Perception and Persuasion in Legal Argumentation: Using Informal Infallacies and Cognitive Biases to Win the War of Words' (2013) *Brigham Young University Law Review* 319, at 330-1.

<sup>134</sup> See Vasilev, *supra* note 130, at 77-81.

<sup>135</sup> See Perelman and Olbrechts-Tyteca, *supra* note 33, at 19.

<sup>136</sup> See Scobbie, *supra* note 44, at 69-71.

have such utility. The appropriate starting point for such a determination is to identify the emotion legalism seeks to inspire. In the most part, legalism makes the same general assumption that its audience lacks confidence in the Court's detachment from politics. The question thus becomes whether legalism does inspire such confidence among affected communities.

Aristotle explained confidence as requiring 'the remoteness of fearsome things and the proximity of salutary ones.'<sup>137</sup> In other words, the near presence of something can inspire a belief in the certainty or favourability of something, combined with the distancing of whatever causes distrust or a lack of belief.<sup>138</sup> However, on these terms, it is not at all convincing that legalism does inspire confidence but, rather, can become somewhat self-defeating. It is the perception of the Court's politics including its bias that is legalism's target for persuasion. However, paradoxically, the use of legalism and its combined stress on law and the Rome Statute is, if anything, likely to remind affected communities of the Court's spatial and moral distance. In so doing, legalism maintains the Court's distance, rather than helping to collapse it and thus, perpetuates the existing space for distrust about its politics.

There is further reason to doubt legalism's ability to inspire confidence. Lying within legalism is an emotional deficit, one it produces by encouraging a disconnection between the law and the political. However, in the space between law and politics lies the value that is of most emotional concern to affected communities: justice. For legalists, the pursuit of justice is articulated and understood as the intensification of legalism.<sup>139</sup> By contrast, and at a minimum, affected communities are likely to perceive legalism as insufficiently expressive of justice because justice is pluralistic, and politically and socially constructed. In conflict-affected societies, many non-legal mechanisms and strategies (e.g. truth and reconciliation

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<sup>137</sup> See Aristotle, *supra* note 42, at 156 para. 1383a.

<sup>138</sup> This is consistent with the dictionary definition of confidence: See Soanes and Stevenson, *supra* note 21, at 365.

<sup>139</sup> See Shklar, *supra* note 67, at 117-19.

commissions,) can contribute to justice processes. To argue, as legalism does, that law has a monopoly on justice often leads to international criminal tribunals overselling their ability to achieve truth and reconciliation and other goals associated with post-conflict nation building.

<sup>140</sup> Legalism, thus, tends to engender perennial disappointment; its preference for a simple answer cuts through the moral ambiguities of justice. <sup>141</sup> For the potential victims of crimes, the position is aptly surmised by Kamari Maxine Clarke: ‘We ask for justice, you give us law.’<sup>142</sup> Hence, the resulting impact of legalism on affected communities is likely to do little to build confidence; it over-promises and subsequently under-delivers.

One can predict that legalism is unlikely to produce sufficient pathos to persuade affected communities of the Court’s political independence. This is not to say that legalism has no emotional appeal; one could argue that legalism inspires emotional certainty. This might be appealing to some within affected communities that have endured the sheer lawlessness that can give rise to the commission of atrocities. But even then, legalism is ill-equipped to appeal to pathos because it closes the space for emotional acknowledgement in its urgency to point to law as a remedy. Put another way, it is inextricably bound with the telos of rhetoric: victory rather than cure. <sup>143</sup> In contrast legalism is far better-equipped at reinforcing the pre-existing pathos of idealistic international criminal lawyers that refuse to acknowledge the Court’s complex political dimensions. <sup>144</sup> Undeniably, legalism epitomises the Office’s own organisational ‘personality’ and is symptomatic of its own ideological ‘echo-chamber’ <sup>145</sup> One can conclude that legalism is highly persuasive for communities of international lawyers

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<sup>140</sup> See McEvoy, *supra* note 112, at 426.

<sup>141</sup> F. Pirie and J. Scheele, *Legalism: Community and Justice* (2014) 1-4.

<sup>142</sup> K. M. Clarke, ‘We ask for justice, you give us law’: ‘The rule of law, economic markets and the reconfiguration of victimhood’ in C. De Vos, S. Kendall and C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015) 272.

<sup>143</sup> P. Goodrich, ‘Jani anglorum, Signs, Symptoms, Slips and Interpretation in Law’ in C. Douzinas, P. Goodrich and Y. Hachamovitch (eds.), *Politics, Postmodernity and Critical Legal Studies* (2004), 127.

<sup>144</sup> S. Moyn, ‘Judith Shklar versus the International Criminal Court’ (2013) 4(3) *Humanity* 473, 494

<sup>145</sup> The figurative meaning of an echo-chamber refers to environments where the views of a narrow set of persons are amplified and reinforced but, by implication, exclude or are less receptive to those persons with opposing views.

disposed to agreement, but will generally lack persuasiveness within affected communities that do not share such a disposition.

### 4.3. Logos

Aristotle's principle of logos pertains to the central principles of logic, reason and proof.<sup>146</sup> He drew a distinction between logic and rhetoric; logic is rooted in arguments based on certainty, reason and truth, and rhetoric is rooted in persuasive techniques about subjects based on possibilities and probabilities.<sup>147</sup> However, for logic to be persuasive, he stressed the role of rhetorical syllogisms, (or more specifically an *enthymeme*) and the demonstration of reasoning to show that something *is* the case.<sup>148</sup> Building on his previous work on dialectics, Aristotle argued that syllogisms are based on a process of deduction.<sup>149</sup> Deductive arguments thus tend to adopt a 'major or minor premise-conclusion' structure. A common example of this is 'All men are mortal. Socrates is a man. Therefore Socrates is mortal.'<sup>150</sup>

However, as Aristotle discussed, rhetoric often omits certain premises that would otherwise be significant in dialectical practice.<sup>151</sup> One could not expect the audience of rhetoric to follow through several deductive steps, so a general premise can be located within a sign argument. A sign is an inductive presentation of something existing that the audience, *a priori*, needs to accept, so that a syllogism can be derived and a valid deduction established. To provide Aristotle's example, 'He is ill, since he has a fever.' This is an example of a syllogism that cannot be refuted if the sign of having a fever is true, as, *ergo*, he must therefore be ill (as it is not possible to be otherwise).<sup>152</sup>

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<sup>146</sup> The Greek origin of the term logos is 'word, reason'. Logos is also the origin of the word logic. See Soanes and Stevenson, *supra* note 21, at 1040.

<sup>147</sup> See Aristotle, *supra* note 42, at 76-78 para. 1357a-1358a.

<sup>148</sup> *Ibid.* 75-77 para. 1356b-1357b.

<sup>149</sup> Deductive reasoning is based on drawing logical inferences from a general rule that can then form the basis for specific conclusions.

<sup>150</sup> This example is common in discussions on Aristotle and deduction, see for example M. Meyer, 'Aristotle's Rhetoric' (2012) 31(2) *Topoi* 249, at 251

<sup>151</sup> See Aristotle, *supra* note 42, at 77-78 para. 1357b.

<sup>152</sup> *Ibid.*

Turning to the Prosecutor's use of legalism, one may analyse its rhetorical structure in the following way. First, the implicit sign argument is that the law is neutral in all matters. Flowing from the sign, is an indication of legalism's major premise that, the law rejects the political. Thus, the intended conclusion from this premise is that the Prosecutor's decision-making cannot contain political factors and hence any given decision is not political. At first glance, this syllogistic structure may be deductively persuasive, but the underlying question is the extent to which both the sign argument and the major premise withstand scrutiny. If both the sign and the major premise are demonstrably questionable, then the persuasiveness of legalism is commensurately reduced.

In relation to the sign argument, to accept that the law is neutral ignores the extent to which law is a technique for 'ends prescribed by politics', or simply, that law is politics transformed.<sup>153</sup> It is no news that there is a politics of international (criminal) law,<sup>154</sup> but what is critical is how the law's logic is perceived. Here, the perception the sign argument is attempting to maintain is unlikely to be sustainable. Inevitably, individuals within affected communities, or simply the 'man in the street' tend to personify the law by questioning its very origin in the political order.<sup>155</sup> In short, '...the law is not an abstraction. It cannot be understood independently of the political foundation on which it rests and of the political interests which it serves.'<sup>156</sup> Thus, a given perception of law is shaped not only by one's background and personal perspective, but crucially, the political system in which law exists.

Of course, the evaluation of the major premise does not escape a similar set of criticisms. The law is not perceived in a vacuum and thus legalism (and its inherent minimalism) is likely to be perceived as simply endorsing the structural biases of the Court. If one is critical of these biases and views them as part of the problem, then, the only concern is

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<sup>153</sup> See Simpson, *supra* note 87, at 23.

<sup>154</sup> M. Koskenniemi, 'The Politics of International Law' (1990) 1(1) *EJIL* 4, at 8

<sup>155</sup> E. H. Carr, *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (1946) 178-179

<sup>156</sup> *Ibid.*

whether institutions are *good* and the decisions they make are the *right* ones.<sup>157</sup> Here, legalism is also weak because it is inherently unable to provide an answer to the most relevant normative question. The question legalism prefers to answer is simply whether the law admits the political, but, the more normative question being asked, that legalism fails to answer, is what sort of politics is legalism maintaining?<sup>158</sup>

Further evidence of legalism's logical weaknesses can be located in the Prosecutor's use of professional legalism and its insistence that rule application and rule following does not accommodate political factors. The insistence, however, unravels if one looks closely at the rules themselves. Of course, one might argue that all rules provide general categories into which particular (political) situations need to fit.<sup>159</sup> This being true, it is undoubtedly the case that the Court's jurisdiction is based on a set of rules that are intrinsically permeable to political considerations.

Principally, the Office's selections all require a degree of political assessment. These begin with whether to accept a referral to the Court by either a government (including a self-referral), or by the UNSC in accordance with Chapter VII of the UN Charter, or whether to initiate an investigation *proprio motu* (on his/her impulse).<sup>160</sup> At this stage the Office may make a political judgment in selecting a situation and often resorts to making a determination about whether the situation is of 'sufficient gravity.'<sup>161</sup> Furthermore, under Article 53(1) (a)-(c) of the Rome Statute, the Prosecutor must consider admissibility i.e. the tests of 'complementarity' and 'gravity'<sup>162</sup> and determine whether to decline to proceed with an investigation or

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<sup>157</sup> M. Koskenniemi, *The Fate of Public International Law: Between Technique and Politics* (2007) 70 (1) *MLR* 1, 18-19

<sup>158</sup> See Shklar, *supra* note 67, at 144.

<sup>159</sup> See Pirie and Scheele, *supra* note 141, at 140-141.

<sup>160</sup> Art. 14.; Art. 13(b).; and Art. 15 ICCSt..

<sup>161</sup> In reality the OTP resorts to making judgments about the relative gravity of a situation to justify either proceeding or declining to proceed. This use exposes the concept as vague and subjective and can readily mask political considerations See W A. Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (OUP 2012) 86; See generally, M. M. DeGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 *Fordham Int' LJ* 1400.

<sup>162</sup> See Art. 17(2) (a-c) ICCSt.

prosecution ‘in the interests of justice’.<sup>163</sup> By nature these are judgements that cannot be based on applying legalistic criteria, but are shaped by political sensitivities.<sup>164</sup> These sensitivities are also incorporated in the final choice of defendant, who, in principle, ought to hold ‘the greatest responsibility’ for the most serious crimes.<sup>165</sup> And yet, selecting the ‘best’ individual to prosecute requires a blend of objective and subjective determinations that reconciles available evidence, enforcement capability, and other prosaic questions such as how limited resources should be directed.<sup>166</sup> Moreover, international criminal prosecution policies (and therefore selection decisions), inherently, account for the social context of conflict settings.<sup>167</sup> Thus, the logical weakness of legalism’s major premise is its betrayal of the Prosecutor’s decision-making realities; it masks the ‘politics in law’ by presenting law as an autonomous and independent framework, but politics gives the Prosecutor her ‘rough content’ and driving force.<sup>168</sup> To put it rather bluntly, legalism presents a vision of law ‘as legalism wants it to be, not as it actually is.’<sup>169</sup>

It might be said these logical weaknesses only apply in reference to professional legalism and the same cannot be said with respect to political legalism. However, the Prosecutor’s use of political legalism tends to produce its own fallacy. Its use is based on improving the state of politics by advancing the law as a remedy for justice and conflict resolution, and, by mandating compliance and co-operation from other political actors. However, political legalism’s premise is to simultaneously dismiss and marginalise politics and so cannot, effectively, improve the environment in which politics is actively operating.<sup>170</sup>

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<sup>163</sup> See Art. 53(1) (c) and Art 53(2) (c) ICCSt.

<sup>164</sup> See OTP Interests of Justice Policy Paper (1 September 2007) at 4. The consideration of political and social context is now explicitly incorporated (e.g. the Prosecutor is expected to assess whether a selected case impacts the occurrence of on-going or future crimes. See Policy Paper on Case Selection and Prioritisation. (15 September 2016) 16.

<sup>165</sup> *Situation in the Republic of Cote d’Ivoire* (Request for authorisation of an investigation pursuant to article 15) (23 June 2011) para. 45-46 and generally R J. Goldstone, *For Humanity: Reflections of a war crimes investigator* (2000), 105-6

<sup>166</sup> See OTP Policy Paper on Case Selection and Prioritisation (15 September 2016), 6 para. 12.

<sup>167</sup> UNSC Report of the Secretary General ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ S/2004 616\* (23<sup>rd</sup> August 2004), 15.

<sup>168</sup> Miro Cerar, ‘The Relationship between Law and Politics’ (2009) 15(1) *Ann. Surv. Int’l & Comp. L.* 19, 20-21.

<sup>169</sup> See Shklar, *supra* note 67, at 35.

<sup>170</sup> M. Koskeniemi, ‘What is International Law For?’ in Malcolm Evans (ed), *International Law* (2014), 48.

In fact, this kind of legalism maintains a pretence of political agnosticism so it can champion law as the ‘better’ politics, but this bias towards formalism simply reflects the law’s value (and misery) of being the surface upon which political preferences are contested.<sup>171</sup> In this sense, the Prosecutor’s use of political legalism is completely circular; it reproduces the tensions between law and the political, rather than helping to address those tensions.

There are thus significant reasons to doubt that legalism provides a logical or rational explanation of the Court’s political independence. That does not mean to say, that which is demonstrably rational, is always persuasive. Rationalism does not have a monopoly on what someone believes to be true. Truth is contested and incommensurable; an individual may not believe a rational truth in favour of other ‘truths’ that subjectively conforms to emotional disposition. For instance in conflict societies where myths and revisionism are rife, people may be more willing to believe emotional accounts that have come to acquire a ‘logic of their own.’<sup>172</sup> On that basis, and as explained earlier, legalism lacks an emotional resonance that has come to, increasingly in today’s society, drive persuasion.<sup>173</sup> Furthermore, as this section identified, legalism lacks sufficient logical support and, at best, enjoys only an ‘appearance of veracity’ that is likely to further limit its persuasiveness among affected communities.

## **5. Conclusion and Recommendations**

In today’s political climate the motives behind rhetoric are increasingly the object of distrust, particularly, its ability to confuse claims about objective truth. One could argue this is merely the continuation of a historical trend; from Plato to figures of the enlightenment many have subscribed to the view that rhetoric is a ‘machinery of persuasion [that]... can never fail to rid

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<sup>171</sup> Ibid.

<sup>172</sup> S. Brammertz, ‘Address of Mr. Serge Brammertz, Prosecutor, Mechanism for International Criminal Tribunals and International Criminal Tribunal for the Former Yugoslavia to the United Nations Security Council’ (7 March 2017) <<http://www.unmict.org/sites/default/files/statements-and-speeches/170607-prosecutor-unscc-en.pdf>>

<sup>173</sup> For a recent discussion on ‘post-truth’ see M. D’Ancona, *Post Truth: The New War on Truth and How to Fight Back* (2017), 23-34.

one completely of the lurking suspicion that one is being artfully hoodwinked.’<sup>174</sup> At the centre of philosophical distrust is the belief that rhetoric is inherently antagonistic to rationalism. This article has not argued that rhetoric ought to defeat rationalism but rather began, as Aristotle argued, on the premise that rationalism depends on rhetoric if facts and logic is to be persuasive.

In this light, the article outlined that, in the context of affected communities lacking trust in the Court’s independence, the Office of the Prosecutor has adopted a rhetoric relying on legalism. A rhetorical analysis of legalism reveals it makes a weak appeal to ethos, has a limited appeal to pathos, and, perhaps most troublingly, does not possess sufficient logos to demonstrate its premise is true. Legalism, as the art of rhetoric, has limited persuasiveness and leads to the conclusion that it is a weak tactic of legitimation. Legalism, as a statement of fact, lacks verifiability and leads to the conclusion that its promises are hollow. In combination, one might contend that instances of legalism are disingenuous and utterances of a platitude that can have a delegitimising effect; the exact opposite of what is intended. Just as soberly, it helps make the case that legalism, as the progress narrative of international criminal law, is becoming well-worn.

It is hoped this article may stimulate renewed research in the direction of communication strategies, and the content and effect of rhetoric on specific audiences. It follows that this article may also have implications for other international legal actors and institutions; specifically, their rhetoric in public communications, attempts at legitimation and their desire to improve perceived legitimacy within essential audiences. The political independence of international institutions is all too frequently attacked and their response to such attacks often requires rhetoric that accommodates persuasion *and* rationalism—qualities that are not mutually exclusive but should be made to depend on one another. Otherwise, and

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<sup>174</sup> I. Kant, *The Critique of Judgement* in J. C. Meredith (translation) (1911), at 327.

using the Office as an example, if rhetoric was to prioritise persuasion then it would dangerously invite the use of subterfuge and could fundamentally undermine the Court's legitimacy. Alternatively, if rhetoric were to prioritise rationalism then it would admit the Court's real political dependencies, but that would undermine the effectiveness of any persuasion strategy and could be no less detrimental to the Court's legitimacy. Admittedly, those intent on seeing bias will locate every means to do so, and other actors (e.g. the media or political elites) may be more effective at influencing public opinion. Nonetheless, however futile the endeavour, it does not follow that institutional persuasion strategies should be abandoned. The consequences of doing so are likely to be considerably more damaging than a strategy that has only a slight or modest impact. Put simply, silence is unaffordable. In this light, the following recommendations may help the Office improve its rhetoric towards those communities that are essential to the Court's perceived legitimacy.

First, the recognition of legalism's limited persuasiveness does not mean that the Office should abandon it within its public communications. To recognise legalism's limits of persuasion is not to argue for its premature removal as changes in organisational rhetoric should occur incrementally. Rhetoric may need to be sustained in the medium term in spite of limited persuasion e.g. for continuity and consistency in messaging. In any case, in spite of its flaws, displacing legalism is no easy task, for it is deeply entrenched within the minds of international criminal lawyers; it is not only a way of saying, but a habitual way of acting and thinking.<sup>175</sup> That being the case, the Office, in the interim, might carefully reflect on its language surrounding legalism, and the way in which it, generally, can compensate for legalism's shortfall in ethos, pathos and logos. This could include a renewed thoughtfulness as to diction, narrative and style, and further explanation as to the Court's jurisdiction. The Office's desire

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<sup>175</sup> See Pirie and Scheele, *supra* note 141, at 131.

to maintain legalism and be ‘on message’ does not exclude a more imaginative exercise of rhetoric elsewhere.

Second, the Office should commit to a deeper understanding of emotional anchors within affected communities (including those that originate in ethnicity, nationality, political preference etc.) With a more judicious use of empirical research and survey data, her public communications should specify exactly the audience perceptions that she intends to speak to, and her rhetoric can thus be more context sensitive and culturally-specific.<sup>176</sup> Her communications can then be subject to later empirical evaluation as to an alteration or change in opinions. This is not an argument for her to pander to emotions, but to genuinely understand them, and so, develop a more meaningful two-way dialogue. This might require the development of counter-narratives or stories that defend the Court by speaking to ‘head and heart alike.’<sup>177</sup> This is no doubt challenging, but if the Office’s rhetoric wants to compete in what it sees is a ‘marketplace of falsehoods’ about the Court, then, it must start to meaningfully recognise the emotional imperatives of those to whom the rhetoric is addressed.

Finally, the Office’s use of persuasive rhetoric is not an end in itself. Persuasive rhetoric will not mean that which is criticised will be improved, or indeed, forgotten. Rhetoric is accompanied by what a listener sees and if reality significantly diverges, then rhetoric will become cyclic and forever doomed to disappoint; generating false expectations and re-entrenching cynicism. For some critics, the Court may never be able to demonstrate its political independence and even, its ultimate worth. Be that as it may, current evidence suggests there is a compelling case for the Office to manage expectations with rhetoric that is humble in its promises. And so, the Prosecutor would be wise to avoid striking triumphalist tones that merely detaches the Court from the communities that are its *raison d’être*.

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<sup>176</sup> See White, *supra* note 14, at 701.

<sup>177</sup> See D’Ancona, *supra* note 173, at 130-1.