

SYSTEMS FOR PROTECTING JUDICIAL INTEGRITY IN INTERNATIONAL COURTS

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1. In the last 70 years the world has seen a steep rise in the number of international courts and tribunals, in particular in the fields of human rights and criminal justice. It is therefore more important than ever to ensure that the most skilled judges are appointed to these courts, that they act with integrity, and that they are held accountable if they fall short of international standards.

2. There are several dozens of international courts operating today. The challenges the judges in these courts face resemble those of the judges at the national level. They are further compounded by the dual nature of international courts – in that they are not only judicial institutions but also international organizations.

3. In my presentation today, I will discuss three issues. I will do so by focusing on international **criminal** courts and tribunals, and specifically the International Criminal Court. The three issues are:

First, the procedure for selection and appointment of international judges;

Second, the mechanisms for addressing misconduct of judges appointed to international courts; and

Third, the importance of judicial collegiality.

(A) The selection and appointment of judges

4. The requirements and procedure for judicial appointments to international courts have been called ‘scattered and haphazard’ and ‘shrouded in mystery’.²

5. At the International Criminal Court, the judiciary is composed of 18 judges elected for a non-renewable term of 9 years. The process of selecting judges is conducted and controlled by ICC States Parties.³ A candidate for an ICC Judge must have one of two sets of expertise: established competence in criminal law and procedure (list A judges) OR established competence in relevant areas of international law (list B judges). The latter means that individuals with no practical experience in criminal proceedings can – and do - become judges

² Paul Mahoney, ‘The International Judiciary – Independence and Accountability’, *The Law and Practice of International Courts and Tribunals* 7 (2008) 313–349, at 324.

³ Silvia Fernández de Gurmendi, ‘Judges: Selection, Competence, Collegiality’, 112 *AJIL Unbound* (2008) 163–167, at 163.

of the Court.⁴ This provision was contentious during the negotiations of the Rome Statute.⁵ The view prevailed that allowing only candidates with experience in criminal matters would be too limiting for an international court like the ICC. The provision continues to be the subject of some debate.

6. Some civil society organizations and academics have advocated for elimination of List B. In 2020, the Panel of Independent Experts, appointed by the Assembly of States Parties to review the governance and workings of the ICC, also suggested that the time may have come for a change. The Panel appealed to the Assembly of States Parties, the Court's governing body, composed of representatives of all States Parties, that the time may have come to review the criteria applicable to and the profiles of candidates from List B, emphasizing the importance of criminal trial experience to the work of the Court (*See Recommendation 379*).⁶

7. As for the procedure of appointment ... Candidates for ICC judges are nominated by States Parties to the ICC and must be nationals of States Parties. The candidates are then assessed by an Advisory Committee that interviews the candidates and reports on their qualifications. The Committee members serve in their personal capacity and several of them are former ICC judges.⁷ The nominees for judges are however ultimately voted on by the Assembly of States Parties (article 36 ICC Statute).

8. The assessments of the Advisory Committee are non-binding; States Parties are not obliged to consider them. Nonetheless, the Advisory Committee is important since it is the only body that systematically looks at the competency of candidates during the process in order to evaluate their qualifications and assess whether they have the necessary language skills.⁸ Analysing its reports through the years, one can observe that the Committee is gradually

⁴ In the current composition, 11 judges at the ICC have been elected from List A and 7 judges have been elected from List B (status in April 2022). See <https://www.icc-cpi.int/sites/default/files/Publications/JudgesENG.pdf> (accessed 22.04.2022).

⁵ See eKai Ambos (ed), 'Rome Statute of the International Criminal Court: Article-by-Article Commentary' (Article 36), 4th Edition, 2022, 1448-1459; Michael Bohlander, 'Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the recruitment of Judges at the ICC and other International Criminal Courts', 12 *New Criminal Law Review* (2009).

⁶ Independent Expert Review of the International Criminal Court and the Rome Statute System (Final Report), 30 September 2020, paras. 961-977 and recommendations R371 – R380. The Report is available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

⁷ Advisory Committee on nominations of judges of the International Criminal Court, ASP Information (Updated 17.12.2021), <https://asp.icc-cpi.int/ACN> (accessed 22.04.2022).

⁸ Silvia Fernández de Gurmendi, 'Judges: Selection, Competence, Collegiality', 112 *AJIL Unbound* (2018), at 165.

becoming more assertive in its recommendations to States Parties. While it does not rank the candidates, it does include observations which in turn do allow drawing some comparisons amongst the candidates.

9. Some researchers have noted that States in their nominations and elections of judges tend to overlook merit in favour of political interests. A widely publicized report by the *Open Society Justice Initiative*⁹, published a few years ago, found that in practice States often did not follow open, transparent and merit-based processes when nominating candidates. The Report noted instances where nominees were approached privately by their government, rather than being nominated through open, competitive processes. It highlighted that States sometimes nominate a candidate simply due to a nominee's political connections, amidst processes that are non-existent, or that take place behind closed doors.¹⁰

10. The same Report also reported a pattern of vote trading among countries and regional blocs, and political campaigning. This is problematic because it can result in the election of less-qualified candidates and a bench dominated by a handful of States.¹¹

11. A similar procedure for judicial appointment as at the ICC has been followed at some other international criminal courts and tribunals. At the United Nations *ad hoc* tribunals for former Yugoslavia and Rwanda and their successor – the International Residual Mechanism for Criminal Tribunals – for example, judges have been elected by the General Assembly of the United Nations.¹²

12. The selection of judges at the youngest **hybrid criminal** court – the Kosovo Specialist Chambers in The Hague – is different. Whilst States retain the power to nominate candidates, an independent selection panel is responsible for the assessment of judicial candidates and selection of judges, as well as for making recommendations for the appointment of the President and Vice- President. There is no State voting. The Selection Panel is composed of

⁹ Open Society Justice Initiative, 'Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court' (2019), available at <https://www.justiceinitiative.org/uploads/a43771ed-8c93-424f-ac83-b0317feb23b7/raising-the-bar-20191112.pdf> (accessed 22.04.2022).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Article 10 IRMCT Statute; Articles 13 and 13*bis* Updated ICTY Statute; Articles 12 and 12*bis* Updated ICTR Statute.

three international members, where at least two members must be international judges with substantial international criminal experience.¹³

13. Once appointed, judges at international criminal courts and tribunals, serve as international officers, and must act independently from the State that nominated them or any other external influence.

14. Whilst I am not aware that the *manner of election* would have led to concerns about a judge's lack of judicial independence as such, the highly politicised nature of nominations and elections is not ideal.

(B) Misconduct and disciplinary measures

15. At the ICC - the Statute, Rules of Procedure and Evidence and the Regulations of the Court include detailed substantive and procedural provisions on accountability of judges for misconduct.

16. The Independent Expert Report on the ICC in 2020 included a striking observation about the working environment in the judicial chambers. It noted complaints about harassment and bullying by some Judges. The Independent Experts noted that the complaints appear not to have been adequately addressed, allegedly due to the perceived unaccountability of Judges.¹⁴

17. The ICC provisions differentiate between two categories of sanctionable behaviour when committed by a Judge: serious misconduct or a serious breach of duty, for which a judge may be removed from office AND misconduct of a less serious nature, which is subject to disciplinary measures. Disciplinary measures against judges may take the form of a reprimand or a pecuniary sanction.¹⁵

¹³ Article 28 Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office.

¹⁴ Independent Expert Review of the International Criminal Court and the Rome Statute System (Final Report), 30 September 2020, para. 72.

¹⁵ For a concise overview see: Fourth Judicial Seminar of the International Criminal Court, 'Disciplinary Mechanisms Applicable to Judges', 20 January 2022, <https://www.icc-cpi.int/sites/default/files/2022-04/2022-Judicial-Seminar-report-ENG.pdf> (accessed 22.04.2022).

18. The detailed legal framework of the Statute, the Rules and the Regulations of the Court ensures that judges cannot be removed from office for frivolous reasons or on political grounds, and that the procedure respects the principle of due process.

19. The disciplinary procedure in place at the ICC to remove a judge has two steps.¹⁶ *First*, a two thirds majority vote of all 18 judges is required to refer an offending judge to the Assembly of States Parties. *Then*, a two-third majority of the votes in the Assembly of States Parties is required for a judge to actually be removed from office.

20. Importantly, a judge can only be removed if he or she is found to have committed **serious** misconduct or a **serious** breach of his or her duties under the Statute.¹⁷

21. Non serious misconduct must be understood to encompass all other misconduct or breach of duty. In this case any disciplinary measure against a judge is taken by the Presidency, composed of three judges – the President of the Court and two vice-presidents.¹⁸

22. In the 20 year history of the ICC, I am not aware of any public record of a vote on removal taking place, nor is there any public record of another disciplinary measure imposed against a judge.

23. Complaints for all types of misconduct – serious or of a lesser nature - are investigated by the Independent Oversight Mechanism (IOM), a non-judicial subsidiary body of the Assembly of States Parties. In 2018 this body was given a more prominent role in the processing of complaints, as well as the power to initiate proceedings *ex officio*.¹⁹

24. The independent experts reviewing the ICC questioned the Mechanism’s suitability to investigate Judges effectively and credibly. They instead proposed to create an *ad hoc* judicial investigation panel and a first instance panel as non-permanent entities which could be called

¹⁶ Article 46 ICC Statute.

¹⁷ Article 46 ICC Statute; Rule 24 ICC Rules.

¹⁸ Article 47 ICC statute; Rule 25 ICC Rules. *See also* Fourth Judicial Seminar of the International Criminal Court, ‘Disciplinary Mechanisms Applicable to Judges’, 20 January 2022, <https://www.icc-cpi.int/sites/default/files/2022-04/2022-Judicial-Seminar-report-ENG.pdf> (accessed 22.04.2022).

¹⁹ For the legal framework and reports of the IOM see the ASP website at <https://asp.icc-cpi.int/IOM> (last accessed 22.04.2022). *See also* Fourth Judicial Seminar of the International Criminal Court, ‘Disciplinary Mechanisms Applicable to Judges’, 20 January 2022, <https://www.icc-cpi.int/sites/default/files/2022-04/2022-Judicial-Seminar-report-ENG.pdf> (accessed 22.04.2022).

upon to investigate and hear allegations of misconduct against ICC judges. In the long term, the experts recommended the establishment of a Judicial Council for the ICC as a fully-fledged disciplinary entity. Under this proposal, the Judicial Council would consist of former or current national or international judges.²⁰

25. ICC judges have also adopted a code of judicial ethics back in 2005. The Code was revised and amended in January last year. Key amendments were made to the provision concerning integrity, such as including an express reference to judicial collegiality, an explicit prohibition of any form of discrimination, harassment and abuse of authority, and a new paragraph elaborating on ethical obligations in connection with the election of the Presidency. The updated version of the Code also included concepts such as loyalty to the Court.²¹

26. The amendment and the judicial seminar held earlier this year dedicated to disciplinary mechanisms applicable to judges shows that the ICC judges are engaged on this topic, now perhaps more than ever.

(C) Judicial Collegiality

27. This brings me to my third and final point today – importance of judicial collegiality. The alleged *lack* of collegiality amongst judges at some international courts has been discussed at some length in articles and blogosphere. Academics have found signs of lack of judicial collegiality in scathing separate opinions and public statements of some members of the judicial bench.²²

²⁰ Independent Expert Review of the International Criminal Court and the Rome Statute System (Final Report), 30 September 2020, paras. 265-268 and recommendations R108-R109. *See also* Fourth Judicial Seminar of the International Criminal Court, ‘Disciplinary Mechanisms Applicable to Judges’, 20 January 2022, <https://www.icc-cpi.int/sites/default/files/2022-04/2022-Judicial-Seminar-report-ENG.pdf> (accessed 22.04.2022).

²¹ ICC Code of Judicial Ethics (2021), Press Release 27 January 2021, available at <https://www.icc-cpi.int/news/icc-judges-amend-code-judicial-ethics> (accessed 22.04.2022).

²² Hemi Mistry, ‘The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals’, 17(4) *International Criminal Law Review* (2017) 703, at 718–721. *See also* Douglas Guilfoyle, ‘Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis’, *Melbourne Journal of International Law* (2019); Andrea Carcano, ‘On the exercise of the judicial function at the International Criminal Court: Issues of credibility and structural design’, *Questions of International Law* 31.03.2020, available at http://www.qil-qdi.org/wp-content/uploads/2020/03/02_Legitimacy-ICC_CARCANO_FIN.pdf (accessed 22.04.2022).

28. Former ICC President, Judge De Gurmendi also observed that ‘collegial discussions are sometimes frustrated to no purpose [because] judges of the Court have persistently invoked their judicial independence as a barrier to collegial discussions’, although the two may well coexist.²³

29. I can only echo Judge De Gurmendi’s views in that judicial independence is fully compatible with judicial cohesion, although the latter may sometimes be more difficult to achieve in international courts where there is a great diversity of legal traditions, professional backgrounds and nationalities than in national jurisdictions where judges share a pre-existing common culture.²⁴

Conclusion

30. Esteemed Delegates, Honourable Judges – international criminal courts and tribunals play an important role in today’s world and their decisions impact on many lives. The three aspects I have highlighted today – appointments, accountability and collegiality of judges – all play a role in ensuring public confidence in these courts, just like at the national level.

31. By and large international judges, and certainly judges I have worked with and appeared before in my career so far, have been the epitome of integrity and competence. Some of them I even see here today. That is, however, not to say that there is no room for improvement. There is always room for improvement. And judges reflecting on these important issues, like you are doing at this conference today, is key.

Thank you.

[End]

²³ Silvia Fernández de Gurmendi, ‘Judges: Selection, Competence, Collegiality’ 112 AJIL Unbound (2018), at 167.

²⁴ Hemi Mistry, ‘The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals’ (2017), at 711.