

# Reviewing the Review: What Needs to Change at the International Criminal Court?

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On the 20th of November 2020, the British Institute of International and Comparative Law (BIICL) hosted a webinar titled: '[Reviewing the Review: What Needs to Change at the International Criminal Court?](#)'. Chaired by Shehzad Charania MBE, the webinar examined the Independent Expert Review (IER) of the International Criminal Court (ICC), a review which had been commissioned by the ICC Assembly of States Parties (ASP) and which submitted its report on the 30th of September 2020.

The overall mandate of the IER is to "identify ways to strengthen the ICC and the Rome Statute system in order to promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning" (para 1). For this purpose, the IER experts included 384 recommendations on "specific complex technical issues" (para 2) aimed at enhancing the Court's effectiveness and efficiency.

During the webinar, a panel of experts which included Judge Silvia Fernández de Gurmendi (Former ICC President), Dr Douglas Guilfoyle (UNSW Canberra), Prof Dr Elies Van Sliedregt (University of Leeds), and Angela Mudukuti (International Criminal Justice Lawyer), discussed some of the contradictions and controversies concerning the Court's performance and functioning as expressed within the IER. In turn, I have summarised the following core segments discussed during the webinar: (1) Governance; (2) Culture; (3) the Office of the Prosecutor (OTP); (4) the Judiciary; and (5) the Court's relations with the ASP.

## 1. GOVERNANCE

The first segment concerned the role of governance. According to the experts, "the ICC is both a judicial entity and an international organisation" (para 26). This 'dual nature' of the Court, as described by the experts, is paradoxical. The Chair rightfully noted that, on the one hand, the Court, as a judicial entity ought to benefit from "absolute judicial independence" and that, on the other hand, as an international organisation, States Parties "reasonably expect to guide and shape the institution". As such, a distinction is made in the IER through the employment of a robust 'three-layered model of governance'.

The aforementioned model, in congruent with the provisions of the Rome Statute, consists of the three core pillars of the ICC: Judicial and Prosecutorial Activity (Layer 1); Administration of Justice (Layer 2); and Administration of the International Organisation (Layer 3). The IER experts emphasise that each layer has its respective framework and requires different degrees of independence and accountability (para 33).

According to Judge Fernández, the model serves as a useful tool to understand all the responsibilities the Court ought to undertake. In addition, Judge Fernández recognised that despite the 'dual nature' of the Court, all layers are interconnected. Contrastingly, Prof Van Sliedregt respectfully suggested that the layers are not interdependent and that, instead, one layer influences the others. Importantly, Ms. Mudukuti stated that the model clearly establishes the line of authority, whilst also preserving the 'one Court principle' enshrined within Layer 3.

I will now turn to the element of judicial independence under the governance model. Judicial independence under Layer 1, in the view of the IER experts, requires that judges and prosecutors are free from interference, fear or favour in decision making. The IER experts state that: "there can be no auditing of judicial activity by States Parties, ASP or external actors" (para 33). However, it is not certain, in this governance model, how actions of serious misconduct against judges and prosecutors would be confronted. Whilst safeguards to the independence are necessary in facilitating a fair trial and the credibility of the court, it appears that judges and prosecutors might be protected from necessary oversight. In short, it is implied that any accountability on the judiciary would impede on the judges' discretion to make judgements in accordance with the facts of the case and the law.

However, Dr Guilfoyle validly noted that "the function of the court is not to be independent, but to perform a judicial function impartially". He further exemplified this distinction stating that "impartiality is supported by two elements: independence on the one hand, and accountability on the other." Therefore, if for instance the Court had impartiality without accountability, there would be

dysfunction in the criminal justice process.

## **2. CULTURE**

The second segment of the webinar discussion concerned the working culture of the ICC. The IER experts claim that the Court appears to be suffering "internally from distrust [...] and a culture of fear" (para 62). Furthermore, complaints of bullying and harassment, particularly against women, appear a much concurrent, albeit significant issue (para 209).

Addressing the IER experts' findings on bullying and harassment, Ms. Mudukuti made credible comparisons between the number of cases of sexual harassment and the lack of women in managerial positions. I concur with her view that the Court needs "leaders of high moral character" who not only condemn but also effectively address inappropriate behaviour.

Further, the IER experts note the prevalence of "low morale" amongst elected officials and staff members in chambers (para 72). Despite this, the majority of staff continue to work in Chambers due to "the nature and uniqueness of the role" (para 73). For this purpose, the IER experts recommend adopting a policy of tenure to address the challenge of staff stagnation. Dr Guilfoyle suggested that "a policy of tenure would address culture issues between the Court and the ASP". Likewise, Prof Van Sliedregt, stated that a policy of tenure ought to be reinforced with secondments, staff development, promotions, and appraisals. Whereas Judge Fernández suggested a more pragmatic approach. In her view, a combination of stability and change is needed. Crucially, a policy of tenure ought to be adopted in each organ of the organisation.

Whilst the benefits of tenure cannot be overstated, it was equally important that the panellists recognised its challenges to implement. Tenure, in the view of some commentators, could mean the loss of highly skilled staff members. Indeed, more pressingly, tenure could act as 'glass ceiling' preventing staff members from reaching the top of their career. Nevertheless, according to the IER experts' recommendation, "the court should develop a comprehensive strategy on knowledge management, to ensure that critical information and experience is not lost every time a member of staff moves out of the work unit on transfer" (RO10). This, in my view, gives some hope for future decision making at the Court.

## **3. OFFICE OF THE PROSECUTOR**

The third segment concerned the OTP. Despite the lack of a clear and transparent framework governing the OTP, the IER experts raise significant concerns over whether the OTP has been sufficiently resourced by States to reach the high standards of international criminal investigations (para 176). According to the IER experts, the OTP referred to the lack of resources, especially in terms of staff at investigatory level (para 176).

Accordingly, Dr Guilfoyle recognised two fundamental shortcomings in the design and management of the OTP. Firstly, the excessive amount of decisions deferred to ExCom for sign off which often results in some degree of micromanagement and delay (para 148). Secondly, according to the experts, the incumbent Chef de Cabinet is responsible for "providing input into all strategic documents policy papers, reports [and] budget documents" (para 155). Dr Guilfoyle is valid in suggesting that these are two substantial "bottlenecks" in the transmission of information and decision making.

## **4. JUDICIARY**

The fourth segment concerned the judiciary. According to the IER experts, the "lack of collegiality[...] is a factor contributing to the lack of continual and productive working relationships amongst judges" (para 462). Dr Guilfoyle noted that lawyers are "parochial" in nature, in the sense that they are limited by their own domestic practice of criminal law, which is both localised and procedural. Consequently, lawyers will often face challenges integrating into an international legal system. As suggested during the webinar, a more comprehensive and longer induction process for judges in respects to the functions and foundations of the Court could be a useful starting point in improving collegiality amongst the judiciary.

Dr Guilfoyle and Judge Fernández raised equally valid points in respects to the use of statute and policy as a means to improve cohesion within the Court. However, I concur with Fernández' suggestion that these mechanisms ought to be binding to ensure predictability and cohesion of jurisprudence. More importantly, as Ms. Mudukuti suggested, elections and particularly the role of States in nominating judges should not be decided on the basis of political persuasion, but merit alone. Nevertheless, the experts' governance model sets out clearly the responsibilities and activities of States Parties, particularly in respects to the electing of officials (para 27).

## **5. RELATIONS WITH THE ASSEMBLY OF STATES PARTIES**

The fifth and final segment focused on the relations with the ASP. The IER experts note "widespread distrust of the ASP within all organs of the court" (para 948). The IER experts state that States Parties appear more interested in "reducing the budget than in

providing the resources needed for the Court to function fully" (para 949). Equally, many States Parties are frustrated with the Court, which in their view fails to deliver "full value for the funding their taxpayer provides in terms of reducing the incidence of the crimes set out in the Rome Statute" (para 949). What is certain is that where policy prevails over the administration of justice, the institution is faced with complexity albeit volatility. As the IER experts suggest, this mutual distrust and frustration is part and parcel of the nature of the Court as "a unique example of an international criminal justice ecosystem" (para 950). For that reason, Prof Van Sliedregt suggested that the ASP ought to be separate entities, with minimal crossover in terms of personnel.

Instead, Ms. Mudukuti suggested that whilst the ASP has a vital role in terms of implementation, it must be transparent in its decision making. She further stated that, protecting judicial and prosecutorial independence is paramount to the functioning of the Court. However, Judge Fernández stated that the employment of a key performance indicators report would be an effective mechanism in achieving this end. I agree with the latter two reasonings, in so far as its purpose is to ensure accountability and oversight over all organs of the Court.

## CONCLUDING REMARKS

Concluding the webinar, the Chair welcomed views from the panellists in regards to implementation of the IER experts' recommendations. Judge Fernández suggested the use of two mechanisms: performance indicator reports and lesson learned processes, which will ultimately provide clarity on judicial and prosecutorial activities without impeding on its independence. Respectively, Prof Van Sliedregt advocated for greater support amongst staff and staff development.

Dr Guilfoyle, however, advances Judge Fernández' view emphasising that independence is not an end itself. In his view, what is necessary is a Court which is both independent and accountable. Whilst I agree with the panellists' suggestions, improvements in the Courts performance and functioning can only be achieved through an inclusive dialogue between all Court officials across all organs and States Parties. This will inevitably facilitate an understanding of the IER experts' recommendations and help develop a pragmatic approach towards supporting the Court and States Parties, whilst also prioritising the needs of affected communities in situation countries.

The recording of the webinar is available [here](#).

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URL: <https://www.biicl.org/blog/11/reviewing-the-review-what-needs-to-change-at-the-international-criminal-court>