



Report 2nd Meeting – Generic Recommendations in the Independent Expert Review (IER) Report of the International Criminal Court and Rome Statute System

On December 5, 2020, Africa Legal Aid (AFLA) held the 2nd meeting of its Gender Mentoring Training Programme for Judges of International Courts and Tribunals. The topic of the discussion was *Generic Recommendations in the Independent Expert Review (IER) Report of the International Criminal Court and Rome Statute System*.

The meeting was attended by:

Judge Reine Alapini-Gansou, Judge of the ICC, Former Member of the African Commission on Human and Peoples' Rights.

Judge Solomy Bossa, Judge of the ICC; Former Judge of UN IRMCT; Former Judge of the ICTR; Former Judge of the African Court on Human and Peoples' Rights.

Judge Luz Ibáñez Carranza, Judge of the ICC; Former Superior National Prosecutor of Peru.

Judge Florence Mumba (Chair), Judge of the Supreme Court Chamber of the ECCC; Former Judge and Vice President of the ICTY; Former Judge of the Appeals Chamber of the ICTY and ICTR; Former Judge of the Supreme Court of Zambia.

Judge Janet Nosworthy, Judge of the STL; Former Judge of the ICTY.

Judge Kimberly Prost, Judge of the ICC, Former Judge of the ICTY.

Judge Julia Sebutinde, Judge of the ICJ; Former Judge of the SCSL.

Evelyn A. Ankumah, Coordinator of the Gender Mentoring Training Programme for Judges; Executive Director of AFLA.

Gabrielle Louise McIntyre, Co-Coordinator of the Gender Mentoring Training Programme for Judges; Chairperson of the Truth, Reconciliation and National Unity Commission of the Seychelles; Former Chef de Cabinet and Principle Legal Advisor to the President of IRMCT and four successive Presidents of the ICTY.

The Participants welcomed Judge Luz Ibáñez Carranza of the ICC Appeals Chamber who had been unable to attend the first meeting. After introducing herself, Judge Carranza expressed her enthusiasm and willingness to share her experiences with her fellow female judges.

The agenda for the meeting was extracted from the (generic) recommendations in the Report of the Independent Expert Review (IER) of the International Criminal Court and the Rome Statute System which were applicable to other international tribunals and courts.

Participants adopted the following agenda items for discussion:

1. All international courts and tribunals are criticized for their expense and purported lack of efficiencies. How best can international courts address this criticism? Are performance indicators an appropriate tool for international criminal courts? Can performance indicators be useful in dispelling criticism of efficiencies?

2. International courts are generally structured around three organs: Registry, Prosecution and Chambers. Tension between the three organs has often been a feature of international courts. For example, tensions have arisen between the Chambers and Registry over the allocation of resources, and between the Prosecution and Chambers over the outcome of proceedings. How can the relationship and working culture between the organs be optimized? What is the optimal working relationship between the three organs?
3. Staff surveys at international courts often indicate low morale on the part of staff stemming from perceived unfairness in work practices and abuses of authority on the part of superiors. What role can and should judges play in managing staff and building and maintaining a positive workplace culture?
4. The ICC was the first international court to adopt a Code of Conduct for Judges. Should alleged breaches of the Code be dealt with internally by the Judges or sourced out to an external set of international judges?
5. It was well known that Judges of the International Court of Justice for many years engaged in private arbitration work while serving on the bench as did Judges at the ICTY. Should there be a prohibition on judges to engage in any judicial activity that is not within the jurisdiction of their court? Is there a genuine public interest in a requirement for disclosure of all other professional activities?
6. All international courts are subjects to forms of management oversight; the ICTY, ICTR and now Mechanism are subject to the oversight of the Security Council; the STL the Management Committee and the ICC the Assembly of States Parties. What is the appropriate relationship of these oversight bodies to the judiciary? Should the relationship be regulated in any way?
7. What role do judges play in ensuring accountability on the part of the Court's leadership?
8. The election of Presidents of international courts have typically involved lobbying on the part of candidates, including identification of the professional advantages to individual Judges from a candidate's assumption of the Presidency. Given that the election of the President is an internal matter to the Judges, and based on their personal choice of candidate, what interest do external interlocutors have in that process? Is there a need to increase transparency in the election process?
9. All international courts face issues with respect to the volume of evidence presented in a case, typically by the Prosecutor. At the ICTY and ICTR failures of timely disclosure on the part of the Prosecutor were a typical element in most cases. Even after many years of experience disclosure practices on the part of the Prosecutor did not evidence a marked improvement and there was a perception that those failures came to be accepted by the judiciary as part and parcel of the international criminal justice process.

Is untimely disclosure by the Prosecutor an acceptable practice and what measures can the judiciary take to improve disclosure practices?

10. All international workplaces face issues of collegiality and international courts are no exception. Indeed, the challenges to judicial collegiality at international courts are increased by the caliber of the judges who are representative of the best their national system has to offer. The environment can be highly competitive, particularly amongst male judges. What impact does a lack of collegiality have on the work environment and the morale of judges? Do female judges have a special role to play in building a collegial work environment? What practical steps can be implemented by female judges with their male colleagues?
11. Acquittals have harmed issues of collegiality at the ad hoc Tribunals and led to crisis of confidence in the integrity of judicial proceedings in the broader international community. Should judges be disclosing their views on the decision making of their colleagues to external interlocutors? How supportive should judges be of each other externally?
12. What measures can be implemented to increase cultural diversity amongst the staff of the Court. Should quotas be adopted and strictly enforced with respect to the nationality of staff members and precedence given to nationality over merit in the recruitment of staff?
13. How important is consistency of decision making for the legitimacy and authority of international criminal justice within a particular court but also amongst international criminal justice mechanisms?

Discussion

The debate amongst Judges in relation to all of these items was lively and informative. Recurring points of the discussion included the tensions between the organs of court, the propriety of external interference on internal leadership matters, the necessity for the adoption of measures to increase gender and racial diversity at all levels of the court, the importance of fostering a collegial working environment for all staff members, the necessity of independence oversight/enforcement mechanisms and the appropriateness or lack thereof of judges engaging in employment outside of the court. Participants shared their experiences, suggestions and recommendations on all of these issues throughout the discussion of the specific agenda items.

One of the challenges identified by the Participants was the expense and purported lack of efficiency of international criminal justice mechanisms. There was broad agreement of the importance of performance indicators to objectively identify problem areas. It was observed that too often what constitutes efficiency is analysed subjectively. In relation to the ICC, it was noted that indicators are across-court, and not limited to chambers. It was agreed that an additional benefit of performance indicators is that courts are able to demonstrate efficiencies and or improvements in performance over time to their oversight bodies.

The Judges noted that outside pressure to complete cases risked adversely impacting their work. [There is a maxim: ‘justice delayed is justice denied’. However, it is fair to say that justice, and in particular, international criminal justice, does take time]. It was suggested that the courts may benefit from meetings involving all three organs: Chambers, Prosecution and the Registry to identify how efficiencies could be improved without compromising the independence of judges. It was also noted that further training of staff from all organs of the Court may assist courts in improving their overall performance.

Participants also suggested that meetings between the organs on work practices may also improve some of the traditional tensions between them and also develop broader understanding of the challenges each organ faces in the discharge of their responsibilities in an efficient and effective manner.

The need for judges to play a role *vis a vis* appraisal of staff assigned to them was also discussed. Participants further suggested the need for a proper management system to deal with staff grievances. It was noted that in most international courts and tribunals, staff members believe there is no transparent or objective way of bringing a complaint against a judge. Participants discussed the need for a better complaints system to be established including an external complaints body where staff are assured of independence and objectivity and where the fear of retaliation is minimised.

With regards to the fourth agenda item, it was suggested that breaches of a code of conduct should be dealt with both internally among judges and outsourced externally where necessary. It was observed that while it is important for judges to review the conduct of their peers, in some cases it could harm collegiality among judges. Therefore, minor offences should be dealt with internally and more serious offences should be outsourced to an independent body.

The pitfalls and potential benefits of judges being involved in employment outside the courts they were elected to were highlighted. Participants expressed concerns about judges undertaking private arbitrations with long durations, and the impact this has on perceptions of judicial integrity, as well as on the judges’ ability to commit fully to their judicial work. Some Participants were of the view that judges should not engage in private work that detracts from their ability to fully and efficiently discharge their judicial functions considering that it was unfair to both their judicial colleagues and the broader international community for them to do so.

Participants also noted that there are instances clearly defined where engaging in employment outside of the court is allowed; for example, when judges are not actively involved in a case at the beginning of their term. It was emphasised that those seeking to become judges of international courts and tribunals understand what will be expected of them.

On the issue of the relationship between international courts and their oversight bodies, Participants highlighted the important role which such bodies play in the overall working of the court. However, the relationship which courts have with such bodies should not interfere with the independence of the judges. Participants further observed that judges have the responsibility to ensure that their oversight bodies do not make decisions concerning their judicial work and related responsibilities without prior proper consultations with the judges.

The need to better define and shape the relationship between the Judges and their Presidency was discussed. It was noted that in most international courts, the Presidency is of political

interest to states parties and therefore external actors inevitably become involved in the internal election process. However, the Judges expressed the view that, the election of a President of a court is an expression of a judge's judicial independence and should be conducted without external interference. Participants discussed the need to establish more judicious and transparent procedures for election of the Presidents.

With regards to the ninth agenda item, Participants recognized that it has become common for international courts and tribunals to be confronted with large volumes of evidence, and issues related to the timeliness of such submissions. The Judges highlighted the need to address these challenges, which impact the case, as well as the work of judges. The Judges agreed that timelines imposed should be rigorously abided by and sanctions imposed for transgressions where necessary.

Participants candidly discussed the gender dynamics within international courts and tribunals, largely caused by the male-dominated nature of these courts, and the unequitable representation of women. Participants shared first-hand experiences where the points of view of female judges were easily dismissed, yet quickly embraced when male judges expressed the same opinions. Even after breaking the barriers to enter the world of international courts and tribunals, Participants still struggled to navigate a space for themselves because of the continued dominance of men. It was agreed that in such an environment there was a need for female judges to show support and collegiality to fellow female judges. It was observed that the controversies of gender dynamics in international courts are not incidental but structural issues, which require work, to strengthen first equality, and then collegiality as well as training on gender sensitivity.

Issues of gender and racial dynamics were also discussed in relation to the diversity of the staff of the courts at all levels. Participants disclosed two issues which impede increasing diversity: the lack of diverse and qualified applicants at all levels of the selection process and deliberate interference in the selection procedure of staff. The Judges emphasised that there needs to be a commitment from everyone involved in the courts to ensure diversity. It was observed that adopting more stringent and transparent hiring practices which are scrutinized at all stages of the process would facilitate increased diversity.

On the eleventh agenda item, the Judges noted that disagreement amongst judges is inevitable. However, disagreements should not impact collegiality. Participants made it clear that deliberations between judges are confidential and individuals who communicate the details of deliberations to outsiders threaten the credibility of the work of the court. It is important that judges are supportive of their colleagues, even in moments of disagreement. Participants stressed that judges must be careful when making comments that can call the integrity of the bench into question.

Lastly, Participants observed that where there is established jurisprudence from other tribunals or internally established jurisprudence, it is important to maintain consistency.

At the close of the meeting, the Judges expressed how much they looked forward to subsequent meetings. They reiterated the need to continue to support one another, and the need to enhance international legal frameworks, in order to deliver global justice.