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Review of the International Criminal Court: What's Going On?

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Abstract

The ongoing review of the International Criminal Court is a complex and extensive process that has involved over the years a series of stakeholders and experts to suggest and facilitate the transition. Ranging from budgetary issues to positive complementarity, the review of the ICC has the purpose of redefining the activity of the Court, also achieving as much efficiency as possible. Such process would be under the scope of the hereby insight, which will also focus on the latest developments of December 2022 its conclusive part. The underpinning idea is to give the reader an overview of the reform mechanisms of the ICC, while at the same time to provide some practical examples of how the Court is being shaped.

Keywords

Crime, International Criminal Court, International Criminal Law, Judicial Administration, Prosecution

Premise

The Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court (ICC) held its XXI session from 5 to 9 December 2022 – and with it, the chance to discuss one more time the review of the Court.

The ICC is an international tribunal entitled of investigating and, where warranted, trying individuals charged with the gravest crimes of concern to the international community. Under its Statute, such is the case of genocide, war crimes, crimes against humanity and the crime of aggression. As a Court of last resort, it seeks to *complement*, not replace, national courts. The ICC's functioning is governed by an international treaty called the Rome Statute and other legal texts for procedures, ethics, etc.

In particular, the ICC's Assembly of States Parties represents the management administrative oversight (to the Presidency, the Prosecutor and the Registrar) and legislative body of the ICC. For instance, the ASP adopts the Rules of Procedure and Evidence that do apply to the daily activities of the ICC offices and posts.

Convened yearly, the Assembly houses representatives of those States that have ratified or acceded to the Rome Statute. However, with relevant matters at issue, the ASP of 2022

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was attended by States Parties, Observer States, international and regional organizations as well as non-governmental organizations. In its general debate, the body held two thematic plenary sessions: 1) on cooperation and; 2) on the Review of the International Criminal Court and the Rome Statute system. The latter recalls the importance of reforming the ICC, ensuring its adequateness to the current and upcoming challenges posed by international crime. In addition to that, there seems to be an irremediable need to solve some of the long-lasting issues that impeded or hindered the ICC's work over the years, such as judicial independence, correct reparation of victims, as well outlining the activity of the Office of the Prosecutor (OTP).

In any way, the ongoing reforms come from a well-thought framework that required years to develop.

Reforming the ICC: The Study Group's Activity

Back in 2011 the ASP's Study Group on Governance¹ highlighted in its Report² a number of clusters that the ICC and the Rome Statute system should cope with in order to improve its degree of effectiveness. Namely, these were: i) the relationship between the Court and the Assembly; ii) the strengthening the institutional framework within the Court; and iii) the increase of the efficiency of the criminal process.

With respect to the relationship between the Court and the Assembly, the Study Group on Governance recommended to the Assembly to streamline the Statute. One of the *main reasons* was how the *mandate of judges* had to be extended according to art. 36, para. 10 ICC, although appropriate guarantees for the service and independence of the judges were lacking. The Provision set out that, once a trial/appeal chamber judge had commenced the hearing of evidence in a case, he/she was *duty bound* to complete the case *regardless* of when his/her term came to an end. The decision to extend a judicial mandate was *automatic* and the Presidency had no competence over such a decision. However, the Presidency *did have some power* in the allocation of judges to trial chambers. This revealed the potential to have a significant "impact" on the extension of mandates: i.e. assigning a judge to a certain less complex case in order to let his/her mandate expire and avoid automatic extension. Acknowledging such considerations, the Presidency produced an information note dated 25 August 2011 to address the legal framework on the issue of extension of judges' mandates, on what powers were at the disposal of the Presidency and how these powers would be exercised. Indeed, the Study Group itself recommended to the Assembly the welcoming of this note and, to Presidency, the update on practices and developments with periodical information notes.

From this first cluster ensued the second: strengthening the institutional framework within the Court. The Study Group found among the most concerning issues: a) the powers and competences of the Presidency of the Court in relation to the judiciary; b) the relationship between the Presidency and the Registry with regard to the administration of the Court



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and; c) the accountability of the Office of the Prosecutor, as well as its relationship with the other bodies of the Court. The Group's recommendation in this regard was to open a continuous discussion ("*structured dialogue*", according to recommendation g) of the 2011 Report) on these topics, at the same time suggesting the amendment of the Rules of Procedure and Evidence (RPE). In particular, it was proposed to include a new Rule 4-*bis* where it would be established that "*the Presidency shall, [only] after consultation with the judges, decide on the assignment of judges*". It is worth noting that the latter suggestion had success as the proposed RPE rule is currently in place³.

Conclusively, in order to increase the efficiency of the criminal process, the Study Group recommended the establishment of an internal working group or the use of any suitable mechanism to streamline the criminal process in collaboration with States Parties. Hence, such a mechanism could become at the eyes of the Study Group members a priority channel between the Court and States Parties to achieve appropriate changes of the legal framework of the Court whenever needed. Indeed, a Review Mechanism, as *infra* discussed, has been established by the ASP since 2020.

In 2012, the very same Group focused on new clusters⁴, such as iv) expediting the criminal process; and v) enhancing the transparency and predictability of the budgetary process. The speeding up of criminal process becomes relevant when it comes to the admission of its repercussions on justice ("*justice delayed was justice denied*"). However, the report refrained from suggesting amendments to the Statute since they "*would take considerable more time to enter into force; therefore it was considered that amendments to the Statute did not constitute a feasible means, at this stage, to provide timely redress to any problems relating to the criminal procedures*"⁵. Hence, it was accepted that it would be the Court's practice to and expertise to provide for the basis to amend the Rules of Procedures – intended as a less difficult text to amend nonetheless.

Moreover, as anticipated in Annex 1 of the 2012 Report, a year later an actual roadmap⁶ was formulated by the experts of the Group. Most importantly, the *driving principles* of the reform of the ICC's were plainly stated in the document: a) to preserve the rights granted within the Rome Statute, in particular preserve the right to a fair trial; b) to respect the independence of the Court; c) to expedite the criminal process of the ICC; and d) to preserve the *delicate balance between the world's principal legal systems*, as enshrined in the Rome Statute. It was also noted that the roadmap would be without prejudice to the statutory and regulatory framework of the Rome Statute. This meant that States, judges or the Prosecutor could put forward proposals outside the auspices of the roadmap if they so desired. Nevertheless, it was accepted that all participants would be encouraged to engage in the roadmap so as to avoid a disparate and unstructured approach to any proposals on amending the criminal procedures.

Finally, the Study Group agreed that any process of review should not be driven by budgetary considerations; instead, the driving factor would be to ensure that proceedings



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were being conducted *fairly* and *expeditiously*. Budgetary issues are considered one of the reasons of the failings of the Court, especially in cases of States' browbeating of Court officials to reduce the budget⁷. Fortunately, in accordance with the so-called "One Court" principle, a process of centralization of the budget is being undertaken by the ICC and the issue would be eventually addressed in a short time⁸.

Similar reports from the Study Group, ruling principles and clusters of the reforms, can be tracked in the 2014-2019 period⁹.

From 2019 Onwards: The Independent Expert Review

Following the 2019 Matrix¹⁰, the ASP decided¹¹ to commission an Independent Expert Review starting 1 January 2020 with a view to making *concrete, achievable* and *actionable* recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system. The ASP also appointed a new Group of Independent Experts, and it inaugurated the *supra* mentioned Review Mechanism for 2021¹². The task accredited to the Mechanism is "*planning, coordinating, keeping track and regularly reporting to the Assembly Presidency and the Bureau on the assessment of the recommendations contained in the Report of the Group of Independent Experts*". The Review Mechanism, in other words, was created to answer the need to address the ICC's priority amendments in a structured, holistic and results-oriented way.

As a quick example of how the framework is being developed, in 2020 the Independent Experts found critical issues in complementarity application of ICC's jurisdiction¹³. After all literature is consistent with the idea that if the Court wants to be truly successful and reduce the number of violations committed globally, it should use its complementarity powers much more¹⁴.

Complementarity assessments – in relation to the potential cases under the Prosecutor's consideration – are usually preceded by a preliminary examination (PE) that can lead to the ousting of the ICC jurisdiction when the domestic jurisdiction has already covered the same matter (same conduct test). Therefore, the OTP needs to determine with clarity the conduct it is investigating in order to let complementarity work and that would be possible through the preliminary examination itself. The Experts found a "*widespread concern among many external stakeholders that by applying the admissibility test prospectively, the OTP is exceeding its mandate*". In addition, complementarity assessments are obstructed by the lack of time limits for States to produce evidence of the concrete, tangible, and progressive *steps being taken* by them during the PE stage. In these cases, on one hand, "*there are no benchmarks or criteria for the states to satisfy in order to convince the OTP to close a PE*" (excess of OTP's power). On the other hand, the Prosecutor should be ensured in a fixed time regarding the proper activation of domestic jurisdiction (lack of OTP's activation capacity). Therefore, the Experts strongly suggested the introduction of a time limit for evidence during the PE stage to "*remedy what has*



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become an untenable situation for the OTP". Every recommendation was further expanded and later collected in an *ad hoc* Comprehensive Action Plan¹⁵.

The previously analyzed recommendation, like the others prospected in the Independent Expert Review of 2021, was subject to comments and solutions provided for by the OTP¹⁶. This proves the existence of an *actual dialogue* between the experts and any corresponding office or body. With respect to the given example, the OTP appeared to agree "*with the goal of articulating an end-point to a PE, but this goal may best be met through a benchmarking process, rather than by the imposition of an artificially rigid timeline*"¹⁷. This was an answer articulated on the grounds of the OTP's *experience* that allows it to create benchmarks criteria for PE, maintaining a certain degree of flexibility rather than having fixed deadlines. One might say that the chosen setup would be the right place to start to develop the OTP "*in an effective body for prosecuting international crimes*"¹⁸.

Where Are We at Nowadays? The 2022 Turning Point

On 30 June 2022 another Report of the Review Mechanism on the overall progress of its work was published. In particular, as Annex II to the Report, the Mechanism proposes to further keep track of implementation through a timeline that will be developed in the assessment process and reflected in the yearly Matrix¹⁹. This is in fact proved itself as a key tool not only to take an overarching look at the recommendations as a whole. As of now, it also allows one to monitor the status of single recommendations, giving details on their positive/negative assessment, the existence of amendments and, finally, their eventual implementation.

For instance, the aforementioned recommendations regarding the inclusion of benchmarks in preliminary examinations by the OTP have achieved a positive "*Result assessment*" but, at date, not any implementation yet.

In general, from 2022 there seemed to be a turning point in this long-lasting review process since >30 recommendations were implemented in that year, and at the moment many others are indexed to be "*immediately*" implemented.

In September 2022, the judges of the ICC held their annual judicial retreat in Syracuse with the support of the Italian government. During the retreat, the judges had the occasion to agree or disagree on reforms in response to the Independent Expert Review recommendations of two years before (2020, in the same text of the recommendations forwarded to the OTP). Specifically, the ICC judges pledged to implement the recommendations concerning victims' participation to the trial and the corresponding reparations process. Such direction would be the answer to those believing that the ICC experienced a difficult time characterized by a poor selection of cases and charges. This



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is reflected in the Appeals Chamber decision in *Bemba* which left victims of those crimes in the Central African Republic without any redress²⁰.

Another problem would be the interference with witnesses. It is argued that interference with witnesses finds its root causes in lengthy investigations and a non-objective, partisan approach to investigations. Some scholars maintain that the judge in the Pre-Trial Chamber should have a stronger role in the pre-trial investigations that may assist in reducing the instances of witness interference²¹. On the matter, *instead* it was the OTP that undertook an improvement process, with a recommendation on the reporting on compliance with source evaluation of witnesses (R307) being “*immediately*” implemented according to the 2022 Report.

Additionally, the ICC Judges in Syracuse agreed on amending the Code of Judicial Ethics to provide that the Court’s “*Administrative Instruction on Investigations of Unsatisfactory Conduct*” and the “*Administrative Instruction on Addressing Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority*” do apply to judges. The hoped result of such action is to bolster transparency, accountability and the application of consistent principles, procedures and obligations to *all categories* of persons working at the Court. Therefore, such meeting represents yet another instance of how the complex ICC review mechanisms are working, becoming one among plenty of fora for the purpose of reform.

As mentioned in the Premise, in 2022 the ASP held its XXI session where it once more discussed the review of the International Criminal Court and the Rome Statute.

In the resulting Resolution²² some relevant statements were made. Firstly, the mandate of the Review Mechanism inaugurated in 2021 – whose work was indeed welcomed and praised by the Resolution in paras. 2, 5, 6, 12 – has been *extended* for another year. Such appreciation leads to think that the continuous report of the Review Mechanism has been deemed as greatly useful to speed up the process. One might wonder if the 2022 drastic reform acceleration can also be explained by setting up the Mechanism at issue. Secondly, the ASP interestingly *took a stand* on a specific recommendation, R105 (tenure), for which the Review Mechanism served as the platform for assessment. In fact, in order to encourage *fresh thinking* and bring *more dynamism* to the Court, a recommended system of tenure should be adopted by the Court. The system should stipulate a maximum tenure of circa 5-9 years for positions in the General Services Section (P-5), and should admit few, if any exceptions. The ASP endorses the positive assessment of such recommendation, envisaging its introduction as of 1 January 2024. The referred date happens to be before another important meeting.

The Future of ICC: Political Will

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The next session of the ASP will be held from 4 to 14 December 2023 at the United Nations Headquarters in New York. Notably, the event is expected to shed more light on the accomplishments made by the ICC and the direction to take on the reforms. One might question if the present reforming actions can overcome most ICC issues.

Apparently, not every issue of the ICC seems to have been addressed at date, nor would be discussed soon. In truth, improving the tools of the ICC and its bodies is *futile* if their application turns to be limited by political choices.

This is reflected in the scarce political will to prosecute head of States or other high profile State officials except the ones from African countries – notwithstanding the “no immunity and no exemption” clause of article 27 ICC²³. Such disparity of treatment led the African Union as an international organization to support mass withdrawal from the Rome Statute by its Member States.

Similarly, another political issue is the absence of superpowers and many other countries not participating to the ICC. Eminent scholars considered that a return to customary law would add value to the jurisprudence of the Court, making it more universal and a source of inspiration for domestic jurisdictions including those in countries which have not ratified the Statute²⁴. The Court should also engage with other role players, including the Security Council²⁵. However, no sign of such adjustments can be tracked in the current Action Plan to reform the ICC.

Nonetheless, the Action Plan in place encompasses Recommendation no. 169, which outlines a strategy for responding to political attacks on the Court by non-States Parties. The ASP should be prepared to speak up in the Court’s defense, given that its dignity and political impartiality seriously inhibits its ability to defend itself against unsubstantiated and biased attacks. However, this represents a poor commitment evidently unrequited and, at the same time, incapable of solving the aforementioned critical political issue.

In other words, besides the already identified clusters (relationship between the Court and the Assembly; strengthening the institutional framework within the Court; increase of the efficiency of the criminal process; expediting the criminal process; enhancing the transparency and predictability of the budgetary process) perhaps another “political engagement” cluster should be added to the roadmap of the ICC’s Reform.

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¹ The Study Group on Governance was established via a resolution of the Assembly of States Parties in December 2010 (ICC-ASP/9/Res.2). The Study Group was established “to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence [...]”; and “to facilitate the dialogue referred to in paragraph 1 with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau”.

² ICC Assembly of States Parties, *Report of the Bureau on the Study Group on Governance*, 22 November 2011, X Session of 12-21 December 2011, New York, ICC-ASP/10/30.

³ See <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

⁴ ICC Assembly of States Parties, *Report of the Bureau on the Study Group on Governance*, 23 October 2012, XI Session of 14-22 December 2012, The Hague, ICC-ASP/11/31

⁵ *Ibidem*, para. 11.

⁶ ICC Assembly of State Parties, *Study Group on Governance Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties*, 31 October 2012, XII Session of 20-28 November 2013, The Hague, ICC-ASP/12/37/Add.1.

⁷ C. Ferstman *Efficiencies that Sacrifice Effectiveness will Lead to an Empty Court: Reforms are not Quick Fix Responses to External Criticisms*, in *ICC Forum*, 2019.

⁸ Review Mechanism: Comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action, as appropriate, 2021, section XIII Preliminary Examinations, let. B. Length of PE activities, R132-R142, available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/RM-Comprehensive%20Action%20Plan-ENG.pdf. The recommendations’ implications is defined as “ongoing” according to the 2022 Report of the Review Mechanism.

⁹ See <https://asp.icc-cpi.int/Review-Court>.

¹⁰ ICC Draft Working Paper, *Meeting the challenges of today for a stronger Court tomorrow Matrix over possible areas of strengthening the Court and Rome Statute system*, 27 November 2019. The Matrix attempted to distil a number of concrete and actionable issues based on discussions among all the stakeholders. The ASP deems it as a sole starting point and a framework for discussions, or a tool for tracking progress. It did not foreshadow or indicate any particular decisions or other actions.

¹¹ ICC Assembly of State Parties, *Review of the International Criminal Court and the Rome Statute system*, 6 December 2019, ICC-ASP/18/Res.7, Section A

¹² ICC Assembly of State Parties, *Review of the International Criminal Court and the Rome Statute system*, 18 December 2020, ICC-ASP/19/Res.7, para. 4.

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¹³ ICC Assembly of State Parties, *Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report*, 30 September 2020, XIX Session of 7-17 December 2020, ICC-ASP/19/16, paras. 725-728.

¹⁴ J.J. Sarkin, *Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process*, in *International Criminal Law Review*, Vol. 21, No. 1, 2021, p. 27; P. Hobbs, *The Catalysing Effect of the Rome Statute in Africa: Positive Complementarity and Self-Referrals*, in *Criminal Law Forum*, Vol. 31, pp. 345-376; L.E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?*, in *Washington University Global Studies Law Review*, Vol. 12, No. 3, 2013, pp. 451-473.

¹⁵ Review Mechanism: Comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action, as appropriate, 2021, section XIII Preliminary Examinations, let. B. Length of PE activities, R254-R261.

¹⁶ Office of the Prosecutor, Preliminary Analysis of the Recommendations and information on relevant activities undertaken by the Court, 14 April 2021.

¹⁷ *Ibidem*, para. 494.

¹⁸ As required by ICC Judge H.P Kaul, *The International Criminal Court – Current Challenges and Perspectives*, 2011, p. 6.

¹⁹ See p. 18 at <https://asp.icc-cpi.int/sites/asp/files/2022-11/2022-RM-report-progress.pdf>.

²⁰ R. Dicker, *The Court is More Important Now Than Ever*, in *ICC Forum*, 2019. The Author also adds: “One looks forward to the judges formulating a better theory for allowing victims to choose their common legal representative than we saw in the Ongwen case. Victim participation is a bridge to the communities looking to the Court for redress. There is a worrying trend of judges taking over decision-making about who will represent victims in the proceedings.”; in similar fashion speaks J.J. Sarkin, *Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process*, in *International Criminal Law Review*, Vol. 21, No. 1, 2021, pp. 29-30.

²¹ G. Sluitter, *Key Reforms for the Next Decade of the ICC—Towards a Stronger Judicial Role in the Investigations and a More Robust System of Enforcing State Cooperation*, in *ICC Forum*, 2019; As required by ICC Judge H.P Kaul, *The International Criminal Court – Current Challenges and Perspectives*, 2011, pp. 7-8.

²² ICC Assembly of State Parties, *Review of the International Criminal Court and the Rome Statute system*, 9 December 2022, XXI Session of 5-9 December 2022, The Hague, ICC-ASP/21/Res.4

²³ A. Dieng, *Response to Question: “In the Rome Statute’s Third Decade, What Key Reforms Could Make the International Criminal Justice Project Stronger, More Efficient, and More Effective?”*, in *ICC Forum*, 2019. Dieng also states that another worrying trend is the (political) failing by ASP “to impose serious sanctions on countries that have failed to follow through on their international commitments provided for under the Rome Statute”.

²⁴ F. Pocar, *Making the Legal Framework and the Jurisprudence of the ICC more Universal*, in *ICC Forum* 2019; S. Economides, *The International Criminal Court: Reforming the Politics of International Justice*, in *Government and Opposition*, Vol. 38, No. 1, 2003, pp. 43-45; M. De Hoon, *The Future of the International Criminal Court. On Critique, Legalism and Strengthening the icc’s Legitimacy*, in *International Criminal Law Review*, Vol. 17, No. 4, 2017, pp. 605-609.

²⁵ J.J. Sarkin, *Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process*, in *International Criminal Law Review*, Vol. 21, No. 1, 2021, p. 19.

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