



Fourth Judicial Seminar of the International Criminal Court: **DISCIPLINARY MECHANISMS APPLICABLE TO JUDGES**

Thursday, 20 January 2022, 14:00-16:30hrs CET

SUMMARY REPORT

The Fourth Judicial Seminar of the International Criminal Court (ICC, Court) was held on Thursday 20 January under the topic “Disciplinary Mechanism Applicable to Judges”. Due to restrictions posed by the Covid-19 pandemic, the event was held on a virtual platform. The Seminar was highly successful with a strong turnout,¹ active participation of the invitees, and rich and focused discussions.

As detailed in the concept note of the Seminar, which is contained in Annex 1, the main impetus for the choice of topic was the fact that the ICC, together with the Assembly of States Parties to the Rome Statute, the Court’s legislative body, is embarking on the consideration of a set of recommendations, in the context of a broader review process, for amending the current disciplinary mechanism in place for the Court’s judges and other elected officials. At the same time, the question of judiciary disciplinary mechanisms is a topic of relevance for all judicial systems, and as such, it was considered fruitful for the Judicial Seminar, which aims to provide on an annual basis a forum for frank, professional exchanges of views between senior judges from international, regional and national jurisdictions on topics of mutual interest.

The programme of the Seminar, which is contained in Annex 2, contained three main elements in addition to the opening and closing remarks: an introduction to the theme by the United Nations Special Rapporteur on the independence of judges and lawyers as a leading expert in the field; a session focusing on the experiences of national and regional jurisdictions; and a session focusing on the ICC’s judicial disciplinary system and the recommendations for amending it.

As the Seminar took place under Chatham House rules, this report presents an overall summary of the main points raised during the discussions, without attributing specific statement to any individual speakers or participants.

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Certain key principles were raised during the Seminar by many different speakers.

In particular, the sensitive relationship between judicial independence and the accountability of judges was repeatedly emphasised. It was stated that the two concepts are complementary dimensions of an effective judicial system, whether national or multilateral. Both are essential for the rule of law as well as for the confidence which courts in a democratic society must

¹ There was a total of ca. 65 participants, including numerous chief justices or presidents of supreme courts. All regional groups were represented by judges from several countries.

inspire in the public. Judges must be – and be seen to be - independent, but not unaccountable. This applies to international courts as much it does to national courts; the perception of an international court is crucial for the acceptance of its judgments as well as for the integrity of the institution.

Even the most perfect democratic system of the rule of law cannot guarantee that all judges will be beyond reproach; consequently, there must be an appropriate mechanism to ensure that judges can be held to account for misconduct committed in the course of their official duties, as well as outside the official duties, where such misconduct undermines confidence in the ability of the judge to discharge their judicial functions. While society provides natural oversight, it is not sufficient on its own. An effective accountability mechanism is not only repressive in nature; it also has a preventive function, for instance in the combat against corruption in the judiciary.

A key question is how to build a strong accountability mechanism without jeopardising or undermining judicial independence. In order to avoid abuses of power and improper influence on the judiciary, a clear set of standards must exist in order to prevent attempts to hold justice operators to account in an arbitrary manner.

Consequently, a carefully crafted system of checks and balances is essential. The need for maintaining judicial independence must be balanced against the equally significant need to have a disciplinary regime in place which ensures judicial accountability in line with maintaining public confidence in the justice system.

Indeed, many speakers highlighted the crucial importance of safeguarding the judiciary from political influence or interference, pointing out that this concern extends to judicial accountability mechanisms, which must in themselves be independent. This aspect must be carefully considered in the design of such mechanisms relating to judges.

Several examples were cited of concrete situations in different jurisdictions where the executive or legislative branch of government had used disciplinary mechanisms as a means of political interference with the functions of the judiciary, thereby undermining judicial independence.

Accordingly, the paramount importance of the separation of powers was underlined. As one participant put it, the greatest enemy of the rule of law is when a judge is afraid to pass a judgment unfavourable to the government.

The discussions reflected that while certain highly important key norms exist, there is no single best practice as to the design of a judicial disciplinary mechanism, and several solutions exist in national jurisdictions around the world. In many countries, the disciplinary mechanism is integrated in a national council for the judiciary. In others, the disciplinary mechanism is an independent panel or committee outside the national council, if such exists. Finally, in many countries the disciplinary mechanism is incorporated in the court system. All these models are feasible, as long as the accountability mechanism functions with independence and impartiality.

An important element in guaranteeing the independence of disciplinary mechanism relates to the procedure for the appointment of the members of such a mechanism. Several speakers

emphasised in this regard the importance of preventing a politicised appointment process, which could open the door to the political control of the disciplinary body by the executive or legislative branch.

The importance of soft law instruments such as codes of conduct for judges was highlighted.

Several speakers drew attention to the importance of having in place a scale of sanctions of in response to infractions of different severity. Depending on the jurisdiction, such sanctions may include for instance de-rostering, private and public censure, and the withholding of pay, while the removal from office remains the ultimate sanction.

In accordance with the United Nations Basic Principles on the Independence of the Judiciary, judges should be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. Furthermore, the decision on removal must be taken only by an independent and impartial body pursuant to a fair hearing.

A comment was made to the effect that legal provisions on the types of conduct that may be sanctioned should be as clear and explicit as possible, not leaving too wide a margin of interpretation to the disciplinary panels. Where the grounds for removal from office or disciplinary action are very vague, there is a higher risk that they could be used in an improper way. It was also commented that the sanctionable offences should include sexual harassment.

Interventions reflected that case-law on disciplinary proceedings seems to be generally rare, but where it exists, it can provide valuable guidance.

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While a number of common models of accountability mechanisms exist at the national level, it was stated that there is no readily identifiable model of such a mechanism for international courts.

A description of the ICC's current disciplinary mechanism applicable to judges was given. Under that system, set out in articles 46-47 of the Rome Statute and further developed in the Rules of Procedure and Evidence and the Regulations of the Court, two categories of sanctionable behaviour are differentiated: serious misconduct or a serious breach of duty, which is subject to removal from office, and misconduct of a less serious nature, subject to disciplinary measures which may take the form of a reprimand or a pecuniary sanction.

In accordance with international norms, the judge against whom allegations are made enjoys guarantees of a fair process and has full opportunity to present and receive evidence, to make written submissions, and to provide answers to any questions put to him or her. It was also noted that the ICC has in place a whistle-blower policy, which provides for protection for a person that makes allegations against an elected official of the Court.

It was further explained that following an amendment to the Rules of Procedure and Evidence adopted by the Assembly of States Parties in 2018, the Independent Oversight Mechanism (IOM), a subsidiary body of the Assembly, had been given a more prominent role in the processing of complaints, as well as the power to initiate proceedings *proprio motu*, thus taking over functions that had previously lain with the Court's Presidency.

A considerable portion of the Seminar was devoted to discussing recommendations made by a group of independent experts for amending the ICC's current system, in a report commissioned in the context of a broader review process. The experts considered the current disciplinary system not to be ideal, *inter alia* due to the role of the IOM – a non-judicial subsidiary body of the ASP – in investigating allegations against judges. The report of the experts made a number of recommendations which can be divided into proposals for the short term and those for the long term.

In the short term, the experts proposed the creation of an *ad hoc* judicial investigation panel and a first instance panel as non-permanent entities which could be called upon to investigate and hear, respectively, allegations of misconduct against ICC judges. The IOM would still retain a role in receiving and conducting an initial screening of complaints. Within this proposed short-term solution, the ultimate power to impose sanctions would remain unchanged from the current system – the removal of a judge from office requiring a two-third majority decision by the plenary of judges followed by a two-third majority decision by the Assembly, while the power to impose disciplinary measures rests with the Court's Presidency.

In the long term, the experts recommended the establishment of a Judicial Council for the ICC as a fully-fledged disciplinary entity, either as a subsidiary body of the Assembly of States Parties or as a body under a new article of the Rome Statute. Under this proposal, the Judicial Council would consist of former or current national or international judges.

In an even longer perspective, the experts recommended that the Judicial Council could serve several international tribunals and courts, to ensure coherence in standards and to rationalise expenses.

A number of distinct issues were raised in the interventions of the participants in relation to the recommendations of the expert report.

Most notably, several speakers raised questions about the apparent complexity of the solution proposed by the expert report for the short term. It was stated that the simpler the organisation of a disciplinary mechanism and the process, the better. Involving too many bodies could generate repetition of roles and be costly. It was also commented that a lengthy process, with many different stages, will be tedious for the complainant.

Some participants expressed the view that a permanent body in charge of disciplinary matters is preferable to an *ad hoc* body, because the permanency of an organ is seen as a greater guarantee of impartiality.

Several speakers echoed the idea presented in the IER report that in the future several international courts could make use of a joint Judicial Council.

The point was made that the composition of any new entities should observe gender balance.

In reference to the comments about the paramount importance of the separation of powers in a national setting, it was underlined that attention should be paid to the relationship of the Assembly of States Parties and any disciplinary body for the ICC's judges, including in respect of the appointment of such body's members.

One participant expressed the opinion that in the case of international courts as well as the highest-level national courts, a disciplinary body consisting of the plenary or a randomly selected part of the bench is usually a suitable solution.

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With a view to the way forward, it was emphasised that the recommendations of the expert report were at this point only that; they did not constitute formal amendment proposals before the Assembly, and the in-depth consideration of the recommendations had not yet commenced.

The recommendations would need to be discussed thoroughly by the Assembly, the Court and other stakeholders in the coming months. The rich exchange of views and experiences held during the Seminar had given an excellent basis and valuable food for thought for these upcoming discussions. Many pertinent questions had been raised. *Ad hoc* or permanent? Who investigates? Who decides? What should be the structure and the constitutional setup?

Finally, it was reiterated that great care should be exercised when defining the parameters of any new judicial accountability mechanism for the ICC, particularly with a view to safeguarding the Court's judicial independence in the context of the institution's governance.

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(Zoom link :

<https://zoom.us/j/97605434481?pwd=cVBYbkpCSWpYMIBwZlk4d0lUQ1RzQT09>)

CONCEPT NOTE

The 4th Judicial Seminar of the International Criminal Court (ICC) will be held in virtual format on Thursday 20 January 2022, from 14:00 to 16:30 hours (Central European Time), on the same day with the Court's Opening of Judicial Year, which will be streamed live from Courtroom I of the ICC, from 11:00 to 12:00 hours. The Judicial Seminar and the Opening of the Judicial Year follow similar events held in 2018, 2019 and 2020. Due to the global pandemic, they were not held in 2021.

The purpose of the annual Judicial Seminar is to provide a space for a frank exchange of views between senior judges from different jurisdictions on topical issues in the international criminal justice system. The participants of the Judicial Seminar are judges of the ICC, senior judges of the national jurisdictions of the States Parties to the Rome Statute, as well as senior judges of international and regional courts.

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The topic chosen for the ICC's 4th Judicial Seminar is **Disciplinary mechanisms applicable to judges**. An appropriate disciplinary mechanism that provides for the accountability of all officials for misconduct is an essential element of a credible judicial system. At the same time, judicial discipline must be carefully balanced against the principle of judicial independence as a cornerstone of the rule of law.²

The topic is timely for the ICC, as the Court and the Assembly of States Parties to the Rome Statute – the Court's legislative body – are about to commence the consideration of possible amendments to the system currently in place, which is defined in articles 46 and 47 of the [Rome Statute](#) and rules 23 to 32 of the [Rules of Procedure and Evidence](#) of the Court.

In the context of a broader ongoing Review of the Court and the Rome Statute system, a report commissioned from a group of independent experts recommended several changes to the disciplinary system currently in place for the elected officials of the ICC.³ Among other relevant considerations, the experts referred to the various models applied in national jurisdictions, as

well as to international and regional standards, in their analysis.⁴ While the focus of the Court and the Assembly in 2021 has been on other, more urgent priorities contained in the report of

² Generally on the topic, see e.g. "Minimum Judicial Standards V: Disciplinary proceedings and liability of judges", report of the European Network of Councils for the Judiciary, 5 June 2015 ([link](#)).

³ "Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report", 30 September 2020 ([link](#)). See in particular recommendations R108, R109, R125, R126 and R127, and paragraphs 322-327.

⁴ *Ibid.*, see *inter alia* paras. 303 and 323.

the experts, the recommendations related to the disciplinary mechanism will come under closer scrutiny during 2022.

Against this background, the Judicial Seminar will present a valuable opportunity for the judges of the ICC to exchange thoughts and experiences with the most senior judges from national, regional and international judicial systems on an issue that will soon be the subject of discussion at the ICC. At the same time, it is expected that the exchanges at the Judicial Seminar will also be beneficial to the representatives of national, regional and international courts by way of deepening understanding across jurisdictions on practices relating to one of the integral elements of a healthy and credible judicial system.

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The programme of the Seminar (see separate document) will have three main elements:

- 1) A general introduction to the topic by Mr. Diego García-Sayán, United Nations Special Rapporteur on the independence of judges and lawyers, a leading international expert on the topic, who has discussed issues related to judicial disciplinary mechanism in several reports he has issued as UN Special Rapporteur.⁵
- 2) Session 1 focusing on the experiences of national and regional jurisdictions. Three panellists from different jurisdictions will share insights on the topic based on the judicial disciplinary mechanism in their jurisdictions and their application in practice. After their presentations, ample time is reserved for interventions from the (virtual) floor, allowing all interested participants of the Judicial Seminar to share their experiences and for us all to benefit from hearing about different systems in place and how they function.
- 3) Session 2 focusing on the ICC's disciplinary system applicable to judges. The session will include presentations on the ICC's current judicial disciplinary system in place, as well as on the changes to that system proposed by the expert report referred to above, followed by open discussion, allowing for views to be expressed by ICC judges as well as other participants. This will serve to kick off the ICC's consideration of the proposed changes, which will subsequently continue in different settings both internally as well in communication with other relevant entities, notably including the Assembly of States Parties to the Rome Statute as the Court's legislative body.

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To allow for frank an open discussion, the Judicial Seminar will not be broadcast publicly, and online participation will be restricted to designated participants only. Furthermore, the proceedings will take place under Chatham House rules – in other words, while a report reflecting the content of the discussions will be produced and made public, no statements will be attributable to individual participants.

The languages of the Seminar will be the two working languages of the Court, English and French, as well as Spanish, with simultaneous interpretation.

⁵ See *inter alia* "Disciplinary measures against judges and the use of 'disguised' sanctions: report", 17 June 2020 ([link](#)) and "Judicial councils: report", 2 May 2018 ([link](#)). For Mr. García-Sayán's biography, see ([link](#)).

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PROGRAMME

14:00 – 14:15	Welcome and introductory remarks - Judge Piotr Hofmański, ICC President
14:15 - 14:30	International norms and principles relating to judicial disciplinary mechanisms Mr. Diego García-Sayán, United Nations Special Rapporteur on the independence of judges and lawyers
14:30 – 15:30	Session 1: Experiences of national and regional jurisdictions <u>Chair:</u> - Judge Marc Perrin de Brichambaut, ICC Judge <u>Speakers:</u> - Justice Dineke de Groot, President of the Supreme Court of the Netherlands - The Hon. Dame Janice M. Pereira, DBE, LL.D., Chief Justice of the Eastern Caribbean Supreme Court - Dr. Michał Laskowski, President (Criminal Chamber) of the Supreme Court of Poland Followed by open discussion among all participants of the Seminar.
15:30 – 15:40	Break
15:40 – 16:35	Session 2: ICC’s disciplinary mechanism applicable to judges (and changes proposed by the Independent Expert Report) <u>Chair:</u> - Judge Luz del Carmen Ibáñez Carranza, ICC First Vice-President <u>Speakers:</u> - Judge Piotr Hofmański, ICC President - Silvia Fernández de Gurmendi, President of the Assembly of States Parties to the Rome Statute Followed by open discussion among all participants of the Seminar.
16:35 – 16:40	Closing remarks - Judge Piotr Hofmański, ICC President