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The Independence and Empowerment of International Criminal Tribunals

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ARTICLE

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The Independence and Empowerment of International Criminal Tribunals

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Independent and empowered courts are a requirement for the establishment of the international rule of law. To be independent and empowered, the four elements of political differentiation, organizational capacity, political competence, and political legitimacy must be present.¹ Political differentiation requires judges to be insulated, e.g., defined tenure, protection of salary, and security, but also accountable in their ethics, management, regulatory compliance, and performance.² Organizational capacity exists if there is a balance between efficiency and effectiveness in the court's handling of its cases and the administration of justice.³ Political competence requires that judges be representative of the people that they serve and are of the highest quality.⁴ Finally, political legitimacy balances the requirement that courts enforce their rulings and jurisdiction against the need for comity, not overreaching into the domain of others.⁵ This study set out to explore these eight components of judicial independence and empowerment and to discover where international tribunals, such as the International Criminal Court, Kosovo Specialist Chambers, and International Residual Mechanism for Criminal Tribunals, need to improve to establish and maintain independence and the rule of law.

I. THE FIRST INTERNATIONAL CRIMINAL COURTS

After World War II, the Allies created the International Military Tribunal (IMT) in Nuremberg for the prosecution of war crimes and for crimes against humanity that were committed within the European and African theaters. "Crimes against humanity" were defined in the Charter of the IMT, as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war"⁶ In addition, the Allied Powers established the International Military Tribunal for The Far East (IMTFE) in Tokyo to prosecute war crimes that were committed within that theater of war. These two tribunals constitute the origin of International Criminal law.

1. PETER M. KOELLING, *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 9 (Peter M. Koelling ed., 2016).

2. *Id.* at 10–11.

3. *Id.* at 14–17.

4. *Id.* at 18.

5. *Id.* at 20.

6. Charter of the International Military Tribunal art. 6, § 3, Mar. 15, 1951, 251 U.N.T.S. 284.

When the United Nations (UN) was formed, it created an International Court of Justice as an organ of the United Nations.⁷ The role of this court is to settle disputes submitted by states, it was not established for the prosecution of individuals for violations of war crimes, crimes against humanity, or human rights that occurred in Nuremberg and Tokyo.⁸

II. THE RE-ESTABLISHMENT OF INTERNATIONAL CRIMINAL TRIBUNALS

The collapse of communism in Eastern Europe beginning in 1989 caused a diminishment of the central power in Yugoslavia and led to the country's dissolution into smaller states.⁹ Years of religious, ethnic, and cultural grievances in some communities pushed the region into conflict and fragmentation and led to grave violations of human rights and genocide.¹⁰ When confronted with this crisis, the UN took steps to find justice for the peoples within the former Yugoslavia. UN Security Council Resolution 808 in February of 1993 established an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."¹¹ The city of the Hague in the Netherlands was home to the International Court of Justice and invited the UN to establish this new court there. The institution, its rules, operating procedures, administration, and staffing all had to be built from scratch. In 1994, it issued its first indictment and proceeded to hold more than 100 trials plus additional proceedings until its closure in 2017 when it transferred its responsibilities to the

7. U.N. Charter art. 92; *see also Statute of the International Court of Justice*, UNITED NATIONS, <https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice> [<https://perma.cc/6L2W-QDFP>] ("The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.")

8. *See How the Court Works*, INT'L CT. OF JUST., <https://www.icj-cij.org/how-the-court-works> [<https://perma.cc/96AT-JNY4>] (explaining how the International Court of Justice may entertain only two types of cases: "legal disputes between States submitted to it by them . . . and requests for advisory opinions on legal questions referred to it by [UN] organs and specialized agencies").

9. *The Breakup of Yugoslavia, 1990-1992*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1989-1992/breakup-yugoslavia> [<https://perma.cc/3A9E-RTBL>].

10. *Id.*

11. S.C. Res. 808 ¶ 1, U.N. SCOR, 48th Sess., 3175th mtg. U.N. Doc S/RES/808 (1993).

International Residual Mechanism for Criminal Tribunals (IRMCT) created by the UN.¹²

Following the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Security Council established a tribunal for Rwanda in 1994 after social unrest and genocide by armed militias occurred there earlier in the year. Located in Arusha, Tanzania, the court held more than fifty trials, holding more than sixty individuals accountable for their crimes.¹³ It closed in 2014, transferring its responsibilities to the IRMCT as well.¹⁴

The Yugoslavia and Rwanda courts and the Mechanism were entities of the UN, but there are several other international tribunals that are not.¹⁵ While these courts were created with the assistance or in partnership with the UN, they are independent institutions, not UN entities. These include The Special Court for Sierra Leone, which was established in 2002 and dissolved in 2013.¹⁶ The court was created by the government of Sierra Leone and the United Nations.¹⁷ In 2013, the jurisdiction of the court was moved to the Residual Special Court for Sierra Leone.¹⁸ In 2006, the UN along with the government of Cambodia established The Extraordinary Chambers in The Courts of Cambodia (ECCC).¹⁹ The purpose of this court was to prosecute the human rights abuses that were committed by the Khmer Rouge during their reign of terror in the 1970s. In 2005, the UN along with the government of Lebanon established the

12. *Judgement List*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/cases/judgement-list#1996> [<https://perma.cc/WPP6-64G3>].

13. *See* S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (explaining the process of the international tribunal to prosecute people responsible for genocide and other serious crimes in violations of international law).

14. *Transfer of all Closed Cases' Records from the ICTY to the MICT is Finalised*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS (July 1, 2015), <https://www.irmct.org/en/news/transfer-all-closed-cases%E2%80%99-records-icty-mict-finalised> [<https://perma.cc/57GN-YZ8L>].

15. *See* U.N. GAOR, 78th Sess., 19th plen. Mtg., U.N. Doc. GA/12545 (Oct. 18, 2023) (describing the mechanism used for the closure of the Rwanda and former Yugoslavia tribunals).

16. Sierra Leone Special Court Agreement, 2002 (Ratification) Act (2002).

17. *Id.*

18. *Home*, RESIDUAL SPECIAL COURT FOR SIERRA LEONE, <https://rscsl.org/> [<https://perma.cc/R2ET-8MF7>].

19. *Section IV: Khmer Rouge tribunal, Paragraph 2: Welcomes the promulgation of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA (Dec. 19, 2001, 7:00 AM), <https://www.eccc.gov.kh/en/chronologies/unga-ares56169-section-iv-khmer-rouge-tribunal-paragraph-2-welcomes-promulgation-law-e> [<https://perma.cc/LD3V-7RF2>].

Special Tribunal for Lebanon, which did its work from 2007 to 2023.²⁰ The purpose of this court was to prosecute the parties responsible for the terrorist assassination of former Prime Minister Rafiq Hariri and others as a part of a bomb that exploded in downtown Beirut, which killed many and injured hundreds more.²¹ It also had jurisdiction related to specific assassinations by the bomb that occurred at or near the time of the assassination of Mr. Hariri.²² Each of these courts had to create their own institutions to begin their work.

Because of these *ad hoc* courts being created and essentially reinventing the wheel each time a new situation arose, it was determined that a permanent organization should be in place to investigate and try these types of crimes. This idea was the birth of the International Criminal Court (ICC).²³ Like the International Court of Justice, it is a permanent tribunal as opposed to an *ad hoc* tribunal. Although encouraged by the UN in its creation, it is not a part of the UN.²⁴ The ICC was established by the Rome Statute, an agreement and treaty among the state parties that were signatories to it.²⁵ Although the United States was actively involved in the drafting of the statute and were signatories, it has never been ratified by the Senate. The ICC began functioning on July 1, 2002.²⁶ The ICC continues in its operation, investigation, and prosecution of war crimes, genocide, and other violations of human rights.

20. S.C. Res. 1595, ¶ 1 (Apr. 7, 2005).

21. *The Special Tribunal for Lebanon*, COUNSEL (Jan. 31, 2012), <https://www.counselmagazine.co.uk/articles/the-special-tribunal-lebanon> [https://perma.cc/44C6-4UPM].

22. *Special Tribunal for Lebanon*, AM. UNIV. WASHINGTON COLL. OF L. WAR CRIMES RSCH. OFF., <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/resource-court-information-and-external-links/resources/special-tribunal-for-lebanon/> [https://perma.cc/6VYC-DNHK].

23. See THE ICC AT A GLANCE, INT'L CRIM. CT., <https://www.icc-cpi.int/sites/default/files/Publications/ICCAAtAGlanceENG.pdf> [https://perma.cc/4YJ4-C66H] (“The international community has long aspired to the creation of a permanent international court and, in the 20th century, it reached consensus on definitions of genocide, crimes against humanity and war crimes.”).

24. *Id.*

25. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 22 U.S.C. 7421, 2187 U.N.T.S. 38544.

26. THE ICC AT A GLANCE, *supra* note 23.

In addition to these courts, a recently established court is the Kosovo Specialist Chambers.²⁷ This tribunal was established by the government of Kosovo with the participation of the European Union (EU). It is so designated as specialist chambers and a specialist prosecutor because they are technically courts of Kosovo created to handle particular matters, however, they are staffed by EU personnel and only international judges sit on the tribunal. It is in many ways similar to the ICTY and Special Tribunal for Lebanon in its organizational structure, rules of procedure and evidence, and rules of administration.

III. STRUCTURED INTERVIEWS

In order to get a better understanding of the most important components of judicial independence and empowerment in the work and operation of the international tribunals as identified above, I undertook the opportunity to interview individuals who had worked in those tribunals in various capacities. This section of the paper is based on a qualitative methodology of structured interviews of fourteen individuals who have worked at various levels within international criminal tribunals. As most have worked within such tribunals for years, they have held various roles ranging from legal assistants, student interns, analysts, librarians, and clerks, to court officers, lawyers, registrars, judges, oversight committee members, and other administrative roles. The interviewees represented more than fifty separate job titles in a total of five international tribunals and a variety of other international organizations and programs. The interviews were conducted in 2022 and were primarily in person or also over the Internet.

The initial participants were selected based on their experience in various tribunals within separate organs of them. The international tribunals being discussed all consist of three to four separate administrative units which are described as organs of the Tribunal. These organs include the chambers, which is led by the president of the court, the prosecutor's office headed by the prosecutor and the registry, which provides the administrative support for the tribunal and is headed by the registrar. The Special Tribunal for Lebanon created a fourth organ for the defense, which was independent of the

27. *Background*, KOSOVO SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFF., <https://www.scp-ks.org/en/background> [<https://perma.cc/7G5S-VWPE>].

other three organs and led by a chief legal office.²⁸ The head of the Defense office made up one of the four organizational leaders of the tribunal. Other tribunals place the defense office within the registry. The tribunals also have oversight from committees appointed by the state parties or contributing nations. Initially, individuals who had worked in each of the four organs were selected for these interviews, further participants were then selected based on the recommendation of prior interviewees.

The purpose of the interviews was to focus on the components necessary to establish and maintain judicial independence and for the improvement of the administration of international justice. The structure of the interview process began by asking the interviewees to give a brief history of their careers and to describe their current roles. They were next asked a general question as to what they saw as the purpose of such international tribunals. Then, they were asked to identify what aspects of this system of international tribunals they thought the tribunals did well. We then moved to a discussion of what they thought the tribunals did not do well. Clarifying questions were asked to understand the relation of the subjects discussed to the components of independence and empowerment. The follow-up to the question about what needed to be improved was how they would go about improving the problems identified. The structured interview format is intended to elicit the insight and knowledge of the interviewees in a consistent manner upon similar subjects without implying a specific answer or guiding them in any particular direction. Follow-up questions would be asked based on the subject matter that was brought forth by the interviewee. Most of the interviews were thirty to fifty minutes long.

The interviews were conducted with the three people present, the interviewee, the interviewer, and a notetaker who would also ask follow-up questions to clarify any of the specific answers. No recordings of the interviews were made but simultaneous notes were taken by both the note taker and the interviewer. These notes were combined and reviewed following the interview. The specific identity of the interviewees is being withheld.

The notes were then subjected to content analysis. Content analysis attempts to identify certain concepts within the text, quantify those concepts,

28. Letter from Patricia O'Brien, UN Legal Counsel, The Launch of the Special Tribunal for Lebanon 2 (Mar. 1, 2009) https://legal.un.org/ola/media/info_from_lc/Lebanon-tribunal-launch.pdf [<https://perma.cc/PR8S-9E2A>].

and determine their relationship to each other. The text of the notes was coded through a process of selective reduction based on words, phrases, and ideas. Through this process, seventy-five distinct concepts were identified. Many of these concepts were identified in the responses of multiple interviewees. From these concepts, several themes were identified based on the relationship and subject matter of each of those particular concepts to each other.

IV. FINDINGS

Eleven main themes emerged from the analysis of these interviews. These themes are trial process, transparency and confidentiality, judicial accountability, judicial selection, staff performance, training, institutional structure, funding, defense, and outreach. The level of agreement among the interviewees in each of these themed areas was surprisingly consistent. Only in a few areas was there direct disagreement. Two concepts that were opposed to each other would be included in the same theme.

The question concerning the purposes of the tribunal was not included in the content analysis. This specific question was developed by the interviewer in order to break the ice and begin a discussion focused on the broad purpose of the tribunals. The idea was to hopefully have the interviewees keep the purposes of the tribunals in mind as they answered the questions with regard to what was done well and what needed improvement. The interviewees expressed various ideas in response to the question that were elements of the rule of law. Several of them responded that the tribunals take cases that a national system cannot handle to make certain they are tried. It may be due to political pressure that would attempt to force the national courts to surrender some judicial independence, or it may be due to the inability to provide security. For an equal number, it was paramount that crimes do not go unpunished and therefore act as a deterrent for future behavior. Others had the view that the purpose was to give victims a voice and an opportunity for justice. Finally, it was important that there was a judgment based on principles, not on politics, and that an actual fair trial could be offered to determine the guilt or innocence of the individuals brought before the tribunals based on law and evidence. None of the answers contradicted other opinions, none were mutually exclusive, and all supported the need for the rule of law.

A. Content Analysis

Each of the eleven themes from the responses to the key questions of what tribunals do well and what needs improvement is comprised of key concepts that give insight into the workings of the tribunals.

B. Trial Process

The theme of trial process reflects two issues, one being due process and the other being speed. A near majority of the interviewees felt that tribunals generally provide due process, seen as an opportunity for the prosecution to present its case without interference, and for the defense to be heard and to put up their case. Overall, they thought the process was equally balanced. Although one respondent felt that it was not enough to simply provide due process and focused on the importance of the public being able to see that this due process is being done. Their view was that courts should undertake to do a better job of making due process visible. This is aligned with the view of Ernest Friesen, the premier leader and scholar of court management, who advocated that courts should not only do justice in individual cases they also must “appear to do justice in individual cases”²⁹

The other issue under the trial process theme is that of speed or the lack thereof. The majority of the respondents felt these cases were much too slow. Although they did point to different aspects of the trials which caused this delay, some were unavoidable, while others could possibly be ameliorated. A few identified the common law system of the prosecution leading the case rather than the judge as one of the causes of delay, as the civil criminal system is much swifter. Others contended that it is the mix of civil law and common law approaches where the rules of the tribunal try to balance the use of both systems that causes confusion and delay.³⁰ The tribunals do this because the judges and lawyers all come from different systems and want them reflected in the procedures. Several respondents felt that although the court seems slow it is the size and the seriousness of the cases with the significant amounts of evidence that was a source of delay, but that

29. *What is Court Management?*, NATIONAL ASSOCIATION OF COURT MANAGERS, <https://nacmnet.org/nacm-information-for-students-and-educators/what-is-court-management/> [https://perma.cc/GN7R-ATWA].

30. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 405 (2019).

it was important for the tribunals to be thorough in their review of the evidence in order to avoid bias or an appearance of bias.

C. Transparency and Confidentiality

Transparency and confidentiality were seen as two sides of the same coin. A number of respondents pointed to the need to improve the transparency of the tribunals for better public understanding and acceptance of the judgments. However, most identified the real need for confidentiality, transparency must be balanced with confidentiality for the purpose of protecting witnesses and victims. Witness protection versus the rights of the accused was a common concept discussed by the interviewees. Many felt that the tribunals by and large do a good job and undertake the task of protecting witnesses and victims from political and physical retaliation seriously. However, one respondent felt that there could be a stronger focus on witness and victim issues and that possibly more funding is needed to successfully fulfill this function.

D. Outreach

Outreach itself is somewhat related to the need for transparency. However, outreach focuses on the needs of the court to be able to explain what is happening, why the court is taking certain actions, and what the processes and procedures will be. A few respondents felt this is important and necessary in order to build the people's confidence in the tribunal. One problem that was addressed by a couple of the respondents is the reliance of the judges on the judgment of the court to speak for itself. The judges explain their reasoning in the judgment and see no need for any additional outreach or explanation of the process. However, the interviewees contend that the length of the judgments, because of the attempt to be thorough, causes the judgments to reach into the thousands of pages and therefore discourage actual review by witnesses, victims, and others in the country. The respondents point out that by failing to speak or otherwise reach out, the court leaves it to the media to interpret the actions of the court. The media does not always have the expertise to analyze the court's action. The media are often unrealistic, unsympathetic, or in opposition to the tribunal.

E. Institutional Structure

There was remarkable consistency and agreement regarding problems with the structure of the tribunals themselves. The majority of the respondents pointed to the issue of the relationship between the president as head of the chambers and whether or not the president should have control or supervision over the registrar. The degree of supervision is neither clear nor specified. Presidents have viewed it broadly while registrars have viewed it narrowly. The respondents agreed that this was not an effective chain of command and most felt that the registrar should be independent, and the judicial and administrative roles should not be blurred together.

F. Funding

A number of respondents discussed the theme of funding. Those that addressed this theme were in agreement that a different funding model is required. They saw the voluntary funding of the tribunals by various nations as problematic. Fundraising is taxing on the officers of the court and the lack of funding affects the sustainability of the tribunal and the ability to do its work. At the same time, they agreed that the tribunals have to be cost-effective in order to get better support. They also pointed out that there should be better financial management and a stronger knowledge of financial issues by the leadership.

G. Defense

The theme of the representation of the defense was raised by several people identifying the need to make sure that the defense has adequate funding to fulfill their job. Although a number of pointed out that because the prosecution has the burden of proof it actually needs greater resources in order to fulfill its mission and that equality of arms does not necessarily require equality of funding. A few also pointed out that the concept of the Defense as an independent organ as was established in the STL is a good and workable concept. The defense should be independent of the registry, but the structure and operations can be improved. However, it should be noted that no current defense counsel was willing to be interviewed.

H. *Staff Performance*

Staff performance is one area in which there was some disagreement. There was strong consensus about the need for a common vision within the organization that can be articulated by the president and registrar. A common vision would assist staff in understanding the purpose and the goal of their duties. A number of respondents thought the staff's workload was too high, while others argued that staff is overpaid for the work they do. There was greater agreement about the problem within the organization of a lack of benchmarks against which to judge staff performance that could lead to stronger measures of performance and more accountability.

I. *Judicial Selection, Judicial and Staff Training, And Judicial Accountability*

By far the strongest areas of concern and consensus were about judicial selection, judicial and staff training, and judicial accountability. The focus for the balance of the paper shall be on these issues. Each of these will be discussed in turn; however, the concepts are somewhat intertwined and encompass a combination of some of the same issues. Following the discussion of judicial accountability, I will then continue to focus on the concepts that comprise accountability including judicial ethics, integrity, and enforcement.

J. *Judicial Selection*

Choosing the best people is a concept that was discussed by almost all of the respondents and concerned both judges and staff; however, the focus of most respondents was on judicial selection. The staff selection process is very formalized and is similar across each of the tribunals. It mimics the UN approach to staff selection and requires multiple steps.³¹ The first step is a review of the individual's CV and background to make certain that they meet the requirements that have been set out in the job announcement itself. If they qualify, they will then be permitted to take a test on subject matter related to the position. These tests are always graded blind and the top three to five candidates then would be selected for a final interview. Such a process has not been in place for judicial selection at the International Criminal Court or any other tribunal. Judges are elected by the state parties.³² In

31. See *Recruitment in the UN*, HR PORTAL, <https://hr.un.org/page/recruitment-un> [<https://perma.cc/933K-854J>] (providing an illustration of how a job is created and ultimately filled).

32. Rome Statute of the International Criminal Court, *supra* note 25 at art. 36.

other courts judges would be appointed by the Secretary General of the UN at the suggestion of a committee within the UN structure. The election process is fairly political. It does not necessarily focus on the qualifications of the individual. Due to this, the ICC began the process where candidates are interviewed by a panel of judges and former judges of the ICC to determine their qualifications and make recommendations to the Assembly of States Parties.³³ It should be noted, however, that the committee has no power to disqualify any candidate. A good illustration is a story that was related by a number of interviewees with regard to an individual who had applied to be a legal officer within a tribunal. Due to some pressure from the representative of the country from which the individual was residing, they were permitted to take the exam for that position even though they did not technically meet the posted job requirements that were laid out in the announcement. The individual did not pass the exam and was not interviewed for the role. However, several months later they became a judge at the tribunal.

The majority of the interviewees thought that there was a grave concern about the quality of the individuals appointed to the bench, especially judges without judicial experience. In one court that sat in panels of three, the panel for one matter consisted of a diplomat with no legal experience and two law professors who had never tried or presided over the trial. This affected both the timing of the judgment and the quality of the proceedings. Some rulings that were made during the course of the trial did not reflect best practices and may have affected the final judgment. There have been questions about judges' language ability being sufficient, even though judges are required to be functional in at least one of the working languages of the court. One individual expressed the need for those who are selected as judges to be dedicated to the mission of the tribunal and put that mission before their personal and political interests while citing specific incidences of such lack of dedication.

K. Training

Almost every single respondent identified training as a key problem within tribunals and a factor they believed could resolve many of the issues

33. Assembly of States Parties, Rep. of the Bureau on the establishment of an Advisory Comm. on nominations of judges of the Int'l Crim. Court, ICC-ASP/10/36 (2011).

or at least ameliorate the problems that interfere with the performance and efficiency of the court. The respondents agreed that both staff and judicial training are needed. Judges should be required to undertake training prior to taking the bench and on a continuous basis. In addition, better training for staff and the leadership of the organization is acutely needed. Judges and lawyers typically lead the organs and other key divisions and sections, but they have little or no training in management and supervision and many have little management experience. The court leadership often has little budget and finance experience, but they are required to manage and account for multimillion-dollar budgets annually. One noted that there seems to be a presumption that those who are elected as judges would not need to have any additional training because of the experience that they should have been required to have through the selection process. However, that presumption has proved to be more hopeful than realistic.

The tribunals have attempted to create a career path for staff as they want to be able to keep those who have strong skills and abilities. However, as several respondents pointed out, individuals who are moved from an administrative role into a management role are given no management training. Nor is there any management training for the individuals who become heads of divisions or sections, or leaders of the various organs. The need for this type of training was seen as paramount by almost all of the respondents who were interviewed.

Estelle Cros, who is a member of the French judiciary and coordinator for the French National School for the Judiciary quotes an article posted on the website for Institut des Hautes Études sur la Justice entitled *Training of Judges and Prosecutors Serving at International Criminal Courts: A Necessity*,³⁴ argues, “the legitimacy of judges who serve at these courts is also necessarily linked to their skills and training. . . . [J]udicial training guarantees a high level of skills and is essential to ensure independent justice in compliance with the rule of law and ensuring protection of rights.”³⁵ The respondent strongly agreed with that position. Judge Cros goes on to explain that there is considerable resistance to the requirement for judicial training however she believes that this viewpoint is slowly changing.

34. Estelle Cros, *Training of Judges and Prosecutors Serving at International Criminal Courts: A Necessity*, INSTITUT DES HAUTES ÉTUDES SUR LA JUSTICE (2018), <https://ihej.org/wp-content/uploads/2018/06/training-of-judges-and-prosecutors-serving-at-international-criminal-court-1.pdf> [<https://perma.cc/SX2Z-4VLB>].

35. *Id.*

L. Judicial Accountability

The final theme for which there was a very broad consensus is concerning the accountability of judges within the system. The majority of those interviewed indicated that there is no remedy for misconduct. They point particularly to judges' inappropriate interactions with staff, the lack of protection for whistleblowers, and the retaliation against staff who complain. The respondents believed that judicial standards are basically ignored.

The respondents point to the lack of enforcement as one of the main reasons that there is no accountability. The way the rules are set up it is the judges, usually as a group, that are supposed to enforce the code of conduct against other judges. But when complaints are filed there is no response or explanation as to what has occurred. Since these matters are completely confidential it may be that an investigation has ensued, evidence of wrongdoing was examined by a group of judges, but they found insufficient evidence of misconduct; however, this is never explained or put forth. The individual is merely informed that the complaint has been dismissed.

Several respondents argued that the solution to this problem is to have a mechanism for enforcement that is outside of the judicial chamber. One respondent noted that an independent board is required, not the judges reviewing and excusing their own behavior.

Several of the respondents observed that judges tend to take all the authority that is available to take but take little of the responsibility for performance. The drafting of judgments takes far too long. It is clear that there are really no performance measures for the judges, no appraisal of their job performance, and no meaningful oversight. Judges could not even be compelled to appear for the issuance of a judgment or be persuaded to remain on location in The Hague to draft judgments and collaborate with their peers. Job performance must be reviewed. While the quality of their judgments and opinions cannot realistically be reviewed, judicial panels should have clear timelines for their work and should be held accountable for the overall performance of the court.

V. JUDICIAL SELECTION, TRAINING, AND ACCOUNTABILITY

A. *The Rome Statute of the International Criminal Court*

How have these same issues of judicial selection, accountability, and training been addressed in other areas beyond this study? First, let us look at the Rome Statute which is the constitutional document for the ICC. The statute provides in Article 36 Section 3A, “The judges shall be chosen from among persons of high moral character, impartiality, and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices.”³⁶ It is therefore curious how a person with only international diplomatic experience would qualify for such a role. Subsection b requires the candidates to have established competence in criminal law and procedure or in international humanitarian law and the law of human rights.³⁷ Subsection c also requires that they have excellent knowledge and be fluent in at least one of the working languages of the court.³⁸ The Statute itself does not encompass a way for these standards to be determined. While a person who does not meet these criteria would be deemed disqualified from service, they are not treated as such in practice.

Article 40 concerns the independence of the judges.³⁹ It requires that the judges be “independent in the performance of their functions.”⁴⁰ The Article directs in paragraph 2 that they not engage in activities that would interfere with their judicial functions or “affect confidence in their independence.”⁴¹ Paragraph 3 states that the judges are to serve on a full-time basis and not have any other occupation.⁴² Subsection 4 of Article 40 clearly states, “Any questions regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges.”⁴³ The originating document establishes the concept that the judges and only judges vote on the conduct of other judges. The statute does not provide for any other type of review or accountability.

36. Rome Statute of the International Criminal Court, *supra* note 25, art. 36.

37. *Id.*

38. *Id.*

39. *Id.* art. 40.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

Article 41 provides for the disqualification of judges.⁴⁴ A judge may not participate in any case in which their impartiality could come into question and specifically provides that they may not preside over any cases they have been involved in, in a prior capacity.⁴⁵ Judges may ask the President to be excused, or if they do not wish to do so, the prosecutor or party may ask that they be disqualified. The question of disqualification is decided by an absolute majority of the judges.⁴⁶ The statute does not provide any language with regard to performance, performance measures or other member methods of accountability.

B. The Code of Judicial Ethics

The current Code of Judicial Ethics for the International Criminal Court was adopted on January 19, 2021, as a revision of the prior codes.⁴⁷ Article 5 addresses the issues of integrity and it provides that the judges have to “conduct themselves with probity, restraint, and integrity in accordance with their office.”⁴⁸ It also provides in Subsection 2, “Judges shall treat fellow judges, parties and participants, staff members, and others with dignity and respect. Judges shall not engage in any form of discrimination, harassment, including sexual harassment, and abuse of authority.”⁴⁹ This provision clearly provides that judges conduct and misbehavior towards staff is indeed a violation of the Code of Judicial Ethics. Section 3 provides that the judges will act “towards one another in the spirit of collegiality and professionalism.”⁵⁰ Section 4 dissuades them from accepting gifts, advantages, or privileges.⁵¹ Section 5 requires that the “[j]udges’ obligation to act with probity and integrity extends to all aspects of their office.”⁵²

It should be noted that the Code of Judicial Ethics is silent with regard to the enforcement of its provisions. It does not grant any authority for the enforcement, disciplinary action, or punishment of any kind that is permissible to be imposed. Most importantly Article 12 concerning observance of

44. *Id.* at art. 41.

45. *Id.*

46. *Id.*

47. CODE OF JUD. ETHICS, pmbl. (INT’L CRIM. COURT 2022).

48. *Id.* art. 5, ¶ 1.

49. *Id.* ¶ 2.

50. *Id.* ¶ 3.

51. *Id.* ¶ 4.

52. *Id.* ¶ 5.

the code states that, “the principles embodied in this code shall serve as guidelines on the essential ethical standards required of judges in the performance of their duties.”⁵³ As guidelines, the specific prohibitions are not therefore mandatory. The code does not seem to actually prohibit any conduct and cannot be directly enforced.

C. *Independent Expert Review*

In December 2019, the Assembly of States Parties to the Rome Statute that created the International Criminal Court appointed a group of experts to review the ICC and its systems and to make recommendations to improve its performance, efficiency, and effectiveness.⁵⁴ The purpose was to attempt to improve the stature of the court in the international community and to enhance its mission to fight impunity and the violation of human rights. The panel was empowered to review all aspects of the court and its operations. The panel consisted of nine experts from nine different countries with expertise in the three separate clusters, governance, the judiciary, and prosecution and investigation.⁵⁵ It should be noted that since the United States is not a state party, no American experts were included.⁵⁶

The experts embraced this task and disseminated their report on September 30, 2020.⁵⁷ The experts made 384 recommendations in twenty-one separate areas.⁵⁸ In this paper, I will look to those sections of the report that consider judicial selection, training, and accountability. Section IX addresses the working methods of the court, including judicial training and the Code of Judicial Ethics.

The experts were aware that some judges lack experience in criminal law. They noted too that the ICC has its own substantive law, rules, and jurisprudence and that even a judge with significant experience in their national system may be unfamiliar with these subjects.⁵⁹ They therefore argue that the ICC needs more training. They recommend a more in-depth

53. *Id.* art. 12, ¶ 1.

54. INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM, FINAL REPORT ¶ 1 (Sept. 30, 2020), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf [https://perma.cc/L8BV-6V9D].

55. *Id.* ¶ 3.

56. *Id.* (indicating which countries participated in the investigation).

57. *Id.*

58. *Id.* ¶ 23.

59. *Id.*

introductory or induction program to cover the legal and administrative issues that judges need to be aware of. They also see the need for continuing professional development.⁶⁰ This is nearly a universal requirement in the United States, state judges are required to take a minimum number of hours of continuing judicial education.⁶¹ The French system also requires this type of professional development through their judicial college.⁶²

The experts noted that the Code of Judicial Ethics was approved by the judges themselves.⁶³ The judges should undertake as the code provides to “take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.”⁶⁴ This in and of itself would seem to create an obligation for professional development. However, it does not provide how to fulfill the obligation, and there are no mechanisms for enforcement or consequences for failure to do so. The experts recommend that the president of the ICC create mandatory training for new judges coming to the court and create a continuing professional development program.⁶⁵ They fail, however, to recommend how such mandatory training would be enforced and the consequences for judges who do not avail themselves of the training.

The experts point out something even more troubling. There are judges who not only lack knowledge of international criminal law and procedure, but who also lack interest in this subject.⁶⁶ In such a situation there would be no self-motivation to pursue further professional development or better understanding of substantive and procedural law that the judge would have to be applying. The impact on the procedure, decisions and institutional integrity of the court cannot be understated.

60. *Id.* ¶ 112.

61. *See* Attendance at Independent Educational Seminars, 2B Op. Guide to Judiciary Pol’y 2, at 97 (2006) (“The education of judges in various academic and law-related disciplines serves the public interest.”).

62. Xavier Ronsin, *The Principles of Judicial Training: Towards International Recognition?*, in JUDICIAL EDUCATION AND TRAINING 17 (Ernest Schmatt & Rainer Hornung eds., 2016) (“[T]he French National School for the Judiciary is the institution that has trained all of the judges and prosecutors serving today . . .”).

63. INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM, FINAL REPORT, *supra* note 54, ¶ 452.

64. CODE OF JUD. ETHICS, art. 7, ¶ 2.

65. INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM, FINAL REPORT, *supra* note 54, ¶ R175.

66. *Id.* ¶ 417.

In Section XX improvement of the system of nominations of judges, the experts find that:

[I]t has been impossible to ignore the comments made that suggest that the Court's problems may be in part the result of the standard of some of the Judges, in particular that the ability and experience of some Judges who have been elected has not marked them out as Judges or jurists of the highest calibre sought by the Court. The belief persists that some Judges have owed their success in the ballot more to electoral horse-trading than competence.⁶⁷

They note that the assembly of states parties has passed resolutions that “[e]ncourage[] State Parties to refrain from trading the votes.”⁶⁸ However, it only provides this aspirational phrase with no other commitment or enforcement mechanism that might prevent the practice. These findings of the experts are similar to those reflected in the interviews conducted in that there are candidates who do not meet the minimum qualifications be it in language, law, or experience, and yet are somehow elected as leaders of the court.

In order to improve the selection process, the states parties developed an advisory committee on nominations in 2012. The committee reviews the qualifications of each candidate and interviews them in order to make recommendations to the state parties. The report of the committee is only informational. The experts recommended that the advisory committee on nominations specifically report to the states parties each candidate's knowledge and experience in international law so that there is a basis for the selection or rather election of individuals as judges.⁶⁹ This would be helpful except for the fact that not all candidates care to be interviewed and do not make themselves available to the committee. States only have to try to get their candidates to appear and the failure to be interviewed does not disqualify the individual.

The working group recommends that candidates be required to both appear before the advisory committee and attend the round table of candidates where state parties and the candidates have an open discussion of issues and concerns that states might have. This would be a move towards better informing the state parties of the qualifications of the

67. *Id.* ¶ 961.

68. *Id.* ¶ 963.

69. *Id.* ¶ 971.

candidates and their personal character. The experts recommend that the failure to appear before the committee and the roundtable should disqualify the candidate.⁷⁰ However, even under the recommendation, nothing would prevent an individual who appears before the committee and roundtable but is found not to be qualified to still be a viable candidate for election. The group also strongly recommends that the answers to both the questionnaires provided by judicial candidates should be certified by a senior member of that nation's judiciary so as to offer some independent corroboration of the qualifications of the candidate.

Like the information gathered in the interviews by the author, the experts learned of instances where judges would treat staff improperly.⁷¹ The experts, however, believe that this is merely a training issue and is evidence of the need for better introductory and continuous judicial education.⁷² They did point out that other ethical codes of other institutions "requir[ed] judges to treat other judges and staff with dignity and respect" among other prohibitions but that the ICC code was silent.⁷³ They did not specifically recommend the addition of such an article but did encourage an updating of the code. The Update did follow and lead to a modification on this issue. In the revised code Article 5 on integrity was revised to add a provision covering the internal conduct. Article 5 Section 2 now provides:

Judges shall treat fellow judges, Parties and participants, staff members and others with dignity and respect. Judges shall not engage in any form of discrimination, harassment, including sexual harassment, and abuse of authority.⁷⁴

Here again, the pattern of attempting to set standards yet failing to create an enforcement mechanism continues.

VI. THE INTEGRITY PROJECT

Finally, it is important to turn to the literature and research of other scholars. The International Nuremberg Principles Academy and the

70. *Id.* ¶ 969.

71. *Id.* ¶ 74.

72. *Id.* ¶ 41.

73. *Id.* ¶ 456.

74. CODE OF JUD. ETHICS, art. 5, ¶ 2.

Center for International Law Research and Policy together organized the Integrity Project.⁷⁵ They invited a number of scholars and practitioners to a conference in The Hague in December of 2018.⁷⁶ The conference, the papers presented, the ideas and concerns raised, and the discussion that ensued resulted in the decision to create the first comprehensive volume on *Integrity in International Justice*, edited by Morten Bergsmo and Viviane E., Dittrich.⁷⁷ This project coincided in time with the expert’s review of the International Criminal Court. The expert’s report was issued only a few weeks before the publication of the volume. The editors note that one purpose of focusing this volume on integrity and ethical issues was the scarcity of sources on this subject within the context of international criminal tribunals. The 1139-page volume is comprehensive with thirty-two chapters divided in six parts. Part I reviews the “Meaning of Integrity.”⁷⁸ Integrity is not developing a list of what you cannot do but rather defining what you should do. However, the volume takes the position that codes of ethics should be legally binding. Part II concerns the “Awareness and Culture of Integrity” and explores the necessary elements to establish a culture of integrity within international institutions.⁷⁹ Part III is the “Role of International Organizations and States” and explores what they can do to strengthen integrity.⁸⁰ It argues that accountability for all types of behavior by any individual within an institution is a necessary element. Part IV is the “Role of International Courts” and explores how courts lay the groundwork to establish integrity within their organizations.⁸¹ Part V covers “Integrity

75. Morton Bergsmo & Vivian E. Dittrich, *Preface*, in *INTEGRITY IN INTERNATIONAL JUSTICE* vi (Morton Bergsmo & Vivian E. Dittrich eds., 2020).

76. Vivian E. Dittrich, *Forward*, in *INTEGRITY IN INTERNATIONAL JUSTICE* ii (Morton Bergsmo & Vivian E. Dittrich eds., 2020).

77. Bergsmo & Dittrich, *Integrity as Safeguard Against the Vicissitudes of International Justice Institutions*, in *INTEGRITY IN INTERNATIONAL JUSTICE* 1 (Morton Bergsmo & Vivian E. Dittrich eds., 2020).

78. Morton Bergsmo & Vivian E. Dittrich, *Meaning of Integrity*, in *INTEGRITY IN INTERNATIONAL JUSTICE* 47–304 (Morton Bergsmo & Vivian E. Dittrich eds., 2020) (providing sources that introduce integrity and justice).

79. Morton Bergsmo & Vivian E. Dittrich, *Awareness and Culture of Integrity*, in *INTEGRITY IN INTERNATIONAL JUSTICE* 309–511 (Morton Bergsmo & Vivian E. Dittrich eds., 2020) (reviewing qualities like leadership, appearance, and management).

80. Morton Bergsmo & Vivian E. Dittrich, *Role of International Organizations and States*, in *INTEGRITY IN INTERNATIONAL JUSTICE* 515–737 (Morton Bergsmo & Vivian E. Dittrich eds., 2020) (addressing harassment, whistleblowing, and investigation).

81. Morton Bergsmo & Vivian E. Dittrich, *Role of International Courts*, in *INTEGRITY IN INTERNATIONAL JUSTICE* 515–737 (Morton Bergsmo & Vivian E. Dittrich eds., 2020) (compiling resources on judicial ethics, policy framework, accountability, and reflections on integrity).

and the Lens of Cases.”⁸² It explores how courts address or were challenged by integrity issues in particular cases. Part VI independence and integrity looks at the relationship of these two concepts and how they can strengthen each other.⁸³

Individual integrity cannot be artificially disconnected from the operation of international organizations. The success of international justice institutions depends on the individual integrity of their high officials and staff members.⁸⁴

For the purpose of this Paper, I will look at those chapters that focus on accountability of judicial officers and that are concerned with the relationship between accountability and judicial independence. Judges have long been concerned that disciplinary procedures could be used to limit their independence and to keep them in line, however, accountability tends to enhance independence rather than limit it and these concepts are discussed further in this volume. In closing, I look at the remarks of Judge Re in the final chapter whose remarks practically constitute a sixteenth interview.

A. *Codes of Judicial Ethics*

Bettina Julia Spilker in her chapter entitled, *Codes of Judicial Ethics: An Emerging Culture of Accountability for the Judiciary?*,⁸⁵ argues that there is a growing culture of accountability in the international tribunals. A factor in this is the adoption of codes of judicial conduct. It should be noted that all of the international tribunals *ad hoc* and permanent have adopted codes of conduct. Typically, the code was adopted after the establishment of the court and the appointment of the judges.⁸⁶ Some delay in the creation of such codes after the appointment of judges is to be expected as it is the judges who are the authors of their own standards of conduct and vote on their

⁸² Morton Bergsmo & Vivian E. Dittrich, *Integrity and the Lends of Cases*, in INTEGRITY IN INTERNATIONAL JUSTICE 905–1021 (Morton Bergsmo & Vivian E. Dittrich eds., 2020) (reflecting on integrity in prosecution, integrity of an individual, and independence of judges).

⁸³ Morton Bergsmo & Vivian E. Dittrich, *Independence and Integrity*, in INTEGRITY IN INTERNATIONAL JUSTICE 1027–1161 (Morton Bergsmo & Vivian E. Dittrich eds., 2020) (finishing the collective work with sources on international integrity).

⁸⁴ Bergsmo & Dittrich, *supra* note 75, at xi.

⁸⁵ Bettina Julia Spilker, *Codes of Judicial Ethics and Emerging Culture of Accountability for the Judiciary*, in INTEGRITY IN INTERNATIONAL JUSTICE 741 (Morton Bergsmo & Vivian E. Dittrich eds., 2020).

⁸⁶ *Id.* at 742 (observing the codes of judicial ethics that were adopted, were adopted “several years after [the court’s] establishment”).

acceptance. For the International Criminal Court, the code was adopted two years after its establishment and the appointment of judges. The Special Tribunal for Lebanon waited seven years after judges were appointed and years into the trial of the main case before approving a judicial code. Progress, however, can be seen in the establishment of the Kosovo Specialist Chambers which adopted the code of judicial conduct immediately after the appointment of judges.⁸⁷

Without a code of ethics as a yardstick, the only avenue open to the parties for ethical lapses was the removal of the judge from a particular case on the basis of bias or lack of impartiality. Staff of course would not have any such avenue to create accountability for abusive behavior or other misconduct.

The author points out that the code within the ICC is viewed by the judges as a guideline and not a regulatory requirement to abide by.⁸⁸ The purpose of the code is to be advisory. It would appear that there is no intention to enforce the code itself. In fact, the codes from three of the tribunals, the CCC the ICTY, and the STL do not propose any mechanism for enforcement which would lead to the same conclusion.

The ICC by contrast has procedures for the enforcement of misconduct within its rules of procedure and evidence.⁸⁹ Complaints about judges are received by the president—who is also a judge—and then passed to a three-judge panel who would either dismiss it where it manifestly unfounded. If not, it would investigate and make recommendations to the president. The assembly of states parties reacted to complaints of judges and not being held accountable. The lack of enforcement was seen as the judges protecting their own. Prior to the recent changes in the rules, complaints could not be submitted anonymously and required the president to inform the judge against whom the complaint was made. Staff who did file complaints felt they were risking their careers. Complaints were also required to be confidential. Once a person had filed a complaint there was no way to know how it was handled and if it was considered or investigated at all. The complainant would be told if was dismissed, but not the reason for doing so.

The assembly of states parties created an independent oversight mechanism (IOM) to receive and investigate complaints about judges, presumably

87. *Id.* at 743.

88. *Id.* at 754.

89. *Id.* at 784–85.

taking that authority away from the presidency, but in fact, the practice has been that the president still receives the complaints and passes them on to the IOM who would undertake investigation and the findings would be turned over to a three-judge panel.⁹⁰ The author points out the discrepancy between the rules of procedure that say the findings shall be transmitted to the assembly of states parties. The Rules of Evidence and Procedure were amended by the assembly of states parties to accommodate the use of the IOM according to their scheme.⁹¹ The Rules of Court, which are the administrative rules that apply to the staff and parties, are established by the judges, they were not modified to reflect the change. The author speculated that it may have merely been an issue of timing that the Rules of Court were amended just prior to the change in the Rules of Evidence and Procedure and there had not yet been an opportunity to harmonize them. However, it is now 2024 and no amendment to allow the Rules of Court to be modified to align with the Rules of Evidence and Procedure has yet been passed. This may have led to the comment by one interviewee that the court does not even follow its own rules.

Ms. Silker argues that the creation of the IOM is a significant step forward so that at least the investigation of the complaint is independent.⁹² However, the imposition of sanctions remains with the presidency and the removal of a judge requires a vote of the plenary of judges. Therefore, the judges retain the ultimate say on what happens. The IOM is also supposed to report to the ASP on its findings.

The fact that these matters always remain confidential means that there is no body of jurisprudence that could offer greater clarity on the code or more importantly in the case of the ICC of the rules. Confidentiality also makes opaque what should be transparent.

90. Cyril Laucci, *Wider Policy Framework of Ethical Behavior: Outspoken Observations From a True Friend of the International Criminal Court*, in INTEGRITY IN INTERNATIONAL JUSTICE 863–68 (Morton Bergsmo & Vivian E. Dittrich eds., 2020).

91. *Id.*

92. *Id.*

B. *Judicial Independence and Accountability*

Ivana Hrdlickova and Adrian Plevin's chapter is *Judicial Independence and Accountability In International Tribunals*.⁹³ "We affirm the view that judicial accountability should not be considered a threat to legitimate judicial independence but rather promoted as a means of strengthening and protecting it."⁹⁴ They argue that mechanisms that enforce accountability sustain judicial independence. This is an echo of what Stephen Burbank *et al.* wrote in *Judicial Independence at The Crossroads*, that independence and accountability are two sides of the same coin.⁹⁵ However, I have argued that the establishment of judicial independence requires a broader set of elements but certainly accountability is one key. The authors go on to argue that the mechanisms to handle and investigate complaints "ensure that complaints can be raised against judges and that judges are answerable for their actions to an appropriate authority in order to ensure that they comply with the core ethical principles and standards of conduct."⁹⁶ Contrary to the view of the code within the ICC, the authors seem to insist that codes of judicial ethics should be enforceable rather than aspirational. The STL itself was slow to adopt a code of ethics and it never had in place a procedure to enforce those ethics that passed. Perhaps the president was using this forum as a push to her colleagues to create such a procedure.

The authors take the view that what is required is an outside mechanism that would be able to investigate and enforce codes of ethics and conduct.⁹⁷ They argue that the recommendation of the Paris Declaration should be followed. The Paris Conference was hosted by the French National School of the Judiciary and included delegates from international tribunals active in 2017.⁹⁸ The conference adopted thirty-one recommendations but the most significant suggestion for the purpose of this paper is the call for the establishment of suitable disciplinary mechanisms.⁹⁹ The Paris Declaration on the Effectiveness of International Criminal Justice states:

93. Ivana Hrdlickova & Adrian M. Plevin, *Judicial Independence and Accountability at International Criminal Courts and Tribunals*, in INTEGRITY IN INTERNATIONAL JUSTICE 1027 (Morton Bergsmo & Vivian E. Dittrich eds., 2020).

94. *Id.* at 1029.

95. Stephen B. Burbank *et al.*, *Introduction*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 11, 14, 15 (Stephen Burbank and Barry Friedman eds., 2002).

⁹⁶ Hrdlickova & Plevin, *supra* note 93, at 1040–41.

97. *Id.* at 1060.

98. *Id.* at 1059.

99. *Id.*

27. Establish suitable disciplinary mechanisms in order to ensure that adopted codes of conduct are respected and to guarantee impartiality, the appearance of impartiality and the dignity of the disciplinary process. As far as possible use investigative bodies which are external to the relevant court or tribunal and entrust decision-making to a separate panel of the Assembly of the Judges of the court or tribunal. Consideration could be given to establishing an investigative and decision-making body common to all international criminal courts and tribunals.¹⁰⁰

A decision-making body independent of the courts and the tribunal that would enforce ethical standards in all international tribunals would address the concern raised through this paper.

C. *Some Reflections on Integrity in International Justice*

The volume closes with insight from Judge David Re and it brings this article full circle.¹⁰¹ It began with the interviews of those who have worked throughout these international institutions. However, the interviewees, their identities, and their statements are being held in confidence. Judge Re is an individual similarly situated to those who were interviewed, but his comments are published and can therefore be quoted. His remarks do not deviate far from those provided by the other interviewees.

Judge David Re was the Presiding Judge of the Trial Chamber of the STL.¹⁰² He had a long and distinguished career involving international tribunals and organizations in multiple roles as both judge and prosecutor.¹⁰³ In his experience almost all the judges that he has worked with have been confident and had integrity. However, this was not always the case. The judge wrote:

Shockingly I have been on the receiving end of judges attempting to interfere in witness testimony in a trial, and I have seen attempts to make judicial decisions for political reasons. I have also encountered judges routinely

100. Paris Declaration on the Effectiveness of International Criminal Justice, Oct. 16, 2017, <https://iiej.org/wp-content/uploads/2018/03/Paris-Declaration-on-the-efficiency-of-the-international-criminal-justic....pdf> [<https://perma.cc/3RKV-8FTV>].

101. David Re., *Some Reflections on Integrity and International Justice*, in INTEGRITY IN INTERNATIONAL JUSTICE 1125 (Morton Bergsmo & Vivian E. Dittrich eds., 2020).

102. *Id.*

103. *Id.*

submitting false leave returns I have also seen a judge continue to sit in a case in which the judge had an obvious conflict that should have disqualified them from further involvement.¹⁰⁴

In most national systems this type of behavior would have been subject to disciplinary procedures that may have even resulted in the removal from office but in international institutions ethical lapses and misbehavior may be ignored or swept under the rug which does nothing to enhance the integrity of the institution.

With regard to judicial selection, he argues:

The appointment and election of senior officials including prosecutors and judges is an intensely political process and the winners are not necessarily appointed on merit although of course, many excellent candidates managed to get through the process.¹⁰⁵

He argues the politics of judicial elections and appointments hamstring the institutions from creating real disciplinary consequences.¹⁰⁶ He argues that an independent mechanism that can investigate complaints and handle disciplinary issues is required and the lack of this and other types of external mechanisms that would have oversight and enforce the rules and law are a “key impediment to achieving institutional integrity.”¹⁰⁷

VII. CONCLUSION

There are concerns over four key components of independence and empowerment particularly the accountability of the judiciary, the efficiency of the courts, the effectiveness of staff put in place without training, the quality of the judges selected, and the lack of training to improve and maintain the quality of the judiciary. The insight of those who have worked within these institutions, the experts who have reviewed them and made recommendations, and the scholars who have investigated and researched the problems and solutions come to the same conclusion. These institutions are in place to avoid the impunity of state actors and therefore they cannot and should not allow their judiciary and other key leaders to act with impunity toward

104. *Id.* at 1131.

105. *Id.* at 1133.

106. *Id.* at 1134.

107. *Id.* at 1137.

their institution, their peers, or other staff. Having the judges be the ultimate authority of discipline upon themselves has led to a system where rules are not enforced, staff is intimidated and prevented from being forth complaints and whistleblower protections are a mere paper tiger. Integrity must start with the judges and the leaders of the court. Without integrity, these institutions will never be able to develop the trust and confidence that is required to make them successful within the international community and to fulfill their mission.

The courts are slow and inefficient. Although there are unique institutional limitations such as the need for multiple languages and the conflict between civil and common law practice the efficiency can be improved. The effectiveness of the court could be improved by improving the management and supervisory skills of the staff. The total lack of training in these areas merely guarantees that these problems will continue.

The occasional yet consistent disregard for the qualifications for the bench by the appointing authority impacts the entire tribunal and its performance. The lack of training, especially on the unique jurisprudence and practices of international tribunals almost purposefully invites error and should be addressed.

The need for the establishment of the rule of law is felt keenly when dealing with atrocities war crimes and gross violations of human rights to make certain we have such rule of law the tribunals must take steps to improve those key problem areas that will allow the courts to remain become and remain independent and empowered to fulfill their mission.

