



CICJ Statement No. 5

Lady Justice Blindfolded, Not ICC States Parties

Berlin, Buenos Aires, Florence, London, Oslo, and Queenstown, 28 February 2024

Lady Justice is blindfolded because courts must be impartial, blind to outside influence. States Parties to the International Criminal Court (‘ICC’), on the other hand, must be true-eyed, vigilant and forward-looking in their governance of the Court. Last December’s election of Ambassador Päivi Kaukoranta as President of the ICC Assembly of States Parties for three years represents an opportunity for the Court and the States Parties.

They, the ICC’s main stakeholders, gave the Independent Expert Review (‘IER’) a mandate to critically assess the functioning of the Court itself. The IER decided, however, to add critical remarks on how the States Parties govern the Court.¹ How have the States Parties performed since the IER report was submitted more than three years ago?

The CICJ agrees with the recent policy brief “ICC State-Party Governance in Times of Disunity” that there are several reasons to suspect that States Parties are not asking the Court the right questions, about important issues, at the right time:²

- CICJ Statement 2 already highlighted the risk of perceptions of double standards due to the increase in voluntary contributions, secondments and other support to the ICC by Western States Parties related to Ukraine, in ways not seen in other investigations.³
- There are also concerns about the observance of the principle of ‘complementarity’.⁴ As Ukraine is genuinely investigating and prosecuting, the ICC’s investigation may be perceived as a “bias towards the political priorities of Western States that may harm the Court’s reputation elsewhere in the world”.⁵

¹ The IER recommended structural changes to improve the Assembly’s interaction with the Court (see “Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report”, 30 September 2020, paras. 955–957 (recommendations R364– R368) and 958–960 (recommendations R369 and R370) (‘IER Report’) (<https://www.legal-tools.org/doc/cv19d5/>)).

² See Morten Bergsmo, Emiliano J. Buis, Gregory S. Gordon, Brigid Inder, Wolfgang Kaleck, Gunnar M. Ekeløve-Slydal and Song Tianying, “ICC State-Party Governance in Times of Disunity”, Policy Brief Series No. 146 (2023), Torkel Opsahl Academic EPublisher (‘TOAEP’), Brussels, 2023 (<http://www.toaep.org/pbs-pdf/146-governance/>). For similar views on the need to involve “a greater range of practical expertise and experience in criminal justice matters”, see Dominic Raab and Hans Bevers, “The International Criminal Court and the Separation of Powers”, in *International Organizations Law Review*, 2006, vol. 3, no. 1, pp. 93–135.

³ CICJ, “Beyond Ukraine: International Justice Without Double Standards”, 11 November 2022, with further reference (<https://cicj.eu/steering-group-statement-2/>).

⁴ ICC Statute, Article 17, whereby the Court shall only intervene if national authorities are “unwilling or unable genuinely to carry out the investigation or prosecution” (<https://www.legal-tools.org/doc/7b9af9/>).

⁵ See William A. Schabas, “La Cour pénale internationale à vingt ans: Un bilan géopolitique”, in *Annuaire français de relations internationales*, vol. XXIV, Éditions Panthéon-Assas, Centre Thucydide, 2023, pp. 911–925.

- States Parties also do not seem to ask questions concerning the Court’s role under ‘positive complementarity’.⁶ Indeed, in future decades, when the ICC has successfully prosecuted dozens of cases, national criminal justice actors may wish to learn from select, affordable Court practices. But as the ICC has a statutory obligation to assess whether domestic jurisdictions are willing and able to genuinely investigate and prosecute, the Court is systematically precluded from undertaking the needs assessments required by proper capacity-strengthening.
- States Parties may also have failed to engage as they should on relevant information-technology policies of the Court. Moving the Court’s case-related information and evidence to a cloud of proprietary IT companies will necessarily generate questions about back-door access for the main host country of these companies.⁷
- States Parties have a legacy of past missteps in terms of election of the Court’s high officials, still affecting Court performance, global interests of the ICC Statute and the Court,⁸ and wider support for international justice.

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States Parties need to do better. “While respecting the Court’s independence without compromise, States Parties should govern the ICC more incisively – and not only through a dense governance structure”,⁹ said the CICJ Steering Group. It suggested that “the Court needs to benefit from more relevant expertise and continuity in the oversight by States Parties. They should now include experts from professional domestic judicial or prosecutorial administrations in their delegations to the ICC Assembly of States Parties, and not subject them to the diplomatic-rotation practice. Such experts may become ‘insightful and constructive sparring partners’ for the Court on technical issues and policy”.¹⁰ The nature and complexity of international courts have evolved considerably since the mid-1990s – the way States govern such courts should evolve commensurately.

“Including professional justice administrators can facilitate better integration and co-operation with the ICC among independent justice sectors in States Parties. It can counter perceptions of politicization of international criminal justice, anchoring the Court more firmly in a broader ecosystem of independent justice institutions. President Kaukoranta should encourage States Parties to move in this direction”, said Gunnar M. Ekeløve-Slydal, CICJ Director.



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⁶ A practice whereby the Court contributes towards the development of domestic capacity to investigate and prosecute core international crimes. See Sarah M.H. Nouwen, “A CILRAP Conversation on World Order, focusing on ‘positive complementarity’”, CILRAP Film, 3 October 2022 (<https://www.cilrap.org/cilrap-film/221003-nouwen/>), and International Law Association, “Lisbon Conference: Complementarity in International Criminal Law”, 2022 (<https://www.legal-tools.org/doc/vqvrwy/>).

⁷ The cyberattack in September 2023 further increased the need to scrutinize the policy. See Norwegian Helsinki Committee, *Letter to the Prosecutor of the International Criminal Court concerning cyber attacks, steps taken to diagnose the attacks and ensure IT security*, 11 October 2023 (<https://www.legal-tools.org/doc/0oqm11/>), and ICC, “Measures Taken Following the Unprecedented Cyber-Attack on the ICC”, Press Release, 20 October 2023.

⁸ IER Report, see *supra* note 1, para. 963. See also Morten Bergsmo, “Unmasking Power in International Criminal Justice: Invisible College v. Visible Colleagues”, in Morten Bergsmo, Mark Klamburg, Kjersti Lohne and Christopher B. Mahony (eds.), *Power in International Criminal Justice*, TOAEP, Brussels, 2020, pp. 14–19 (<https://www.toaep.org/ps-pdf/28-power>).

⁹ Including the Office of Internal Audit, Independent Oversight Mechanism, Committee on Budget and Finance, Audit Committee and External Auditor, Study Group on Governance and The Hague and New York Working Groups.

¹⁰ See *supra* note 2 for elaboration.