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SYMPOSIUM ON THE ROME STATUTE AT TWENTY

JUDGES: SELECTION, COMPETENCE, COLLEGIALITY

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On March 9, 2018, the highest officials of the International Criminal Court (ICC) and representatives of the international community assembled at the seat of the Court to welcome six newly elected judges and to bid farewell to the six who had concluded their term of office, including myself. In my then-capacity as President, I presided over their swearing-in ceremony, which, in accordance with the Rome Statute, must take place in open court. In my opening remarks, I emphasized that this ceremony, which takes place every three years, was an important moment for the institution. Six new judges were solemnly undertaking to exercise their respective functions impartially and conscientiously, something that embodies both individual and collective responsibilities. "Through renewal," I said, "the institution ensures its continuity."

During my years at the Court, I experienced directly the changes brought about by the regular replacement of a third of the Court's eighteen judges. While the injection of new people and ideas was always welcomed, the replacement of a third of the bench also posed a formidable challenge to efforts to increase efficiency and judicial cohesion at the Court. While both efficiency and judicial cohesion are essential for any jurisdiction, they are particularly difficult to achieve in a multicultural environment like the one prevailing at the Court, which, in addition to representing all regions, seeks to combine the different legal systems and traditions of the world. In order to achieve the necessary balance between diversity and unity, it is a crucial precondition to select the best possible individual for the job, both in terms of professional competence and personal attitude. One can only wonder whether the current selection practices are sufficient to that end.

Selection and Competence

The judiciary of the ICC is composed of eighteen judges elected to serve for a nonrenewable term of nine years. Judges are elected by secret ballot at a meeting of the Assembly of States Parties of the Rome Statute (ASP). The persons elected are those obtaining the highest number of votes and a two-thirds majority of states parties present and voting.

Once elected, judges of the Court are international officers expected to act in total independence from states or any other external influence. Still, the process of nomination and election of judges is entirely conducted and controlled by states parties to the Rome Statute.

What the judges' qualifications should be and how to select them are not easy questions. The drafters of the Rome Statute sought to answer those questions in Article 36, which contains provisions on the qualification, nominations, and election of the judges of the Court. Pursuant to this article, the judges shall be chosen from among persons of high moral character, impartiality, and integrity; they must possess the qualifications required in their

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respective states for appointment to the highest judicial offices; and they must have excellent knowledge of and be fluent in at least one of the working languages of the Court, which are English and French. The selection needs to reflect equitable geographic representation and a fair representation of male and female judges.

The technical competences that are required to become a judge at the Court constitute the most controversial aspect of the provision, which allows candidates to have either established competence in criminal law and procedure ("List A") or established competence in relevant areas of international law ("List B").

The possibility of nominating candidates under "List B" was contentious during the negotiations of the Rome Statute, and it continues to be criticized today as it allows individuals with no practical experience in criminal proceedings to be judges at the Court. This may indeed be problematic, as recognized by the Statute itself, which indicates in Article 39 that the Trial and Pre-Trial Divisions must be predominantly composed of judges with criminal trial experience. It must be stressed that practical knowledge and experience in criminal law and procedure is in fact needed at all phases of the process, including the appeals proceedings. As the practice of the Court shows, the appeals judges have to deal not only with substantive international law, but also and far more frequently with intricate substantive and procedural criminal matters. For the latter, it is unquestionable that possessing the type of competences encompassed by "List A" is badly needed.

However, as fifteen years of operations at the Court have also shown, possessing such competences may not be sufficient. A judge with extensive national criminal experience but little or no international exposure may not be able to adapt to an international context and to deal effectively with a complex hybrid procedural system that hardly resembles his or her own. In addition, it must be noted that the "List A" category includes not only individuals with experience as judges but also any "practitioner," such as a prosecutor or defense counsel. Again the practice of the Court demonstrates that experience in those capacities does not necessarily ensure the skills and temperament required to manage the overall case, conduct the proceedings, or, most importantly, arbitrate between the conflicting views and interests of all parties and participants.

In light of the above, it is of paramount importance that states nominate and select individuals possessing an appropriate combination of relevant criminal *and* international experiences, as well as the appropriate personal skills. Unfortunately, neither the nomination nor the election process guarantees such an outcome.

Nominations for judges can only be made by states parties and only with respect of nationals of states parties, something that limits the available pool of potential nominees. A state party may put forward one candidate that is not its own national provided that the person is a national of another state party. This useful provision, which allows states to expand this pool to some extent, has been applied already once at the Court.[1]

The nomination must be made in accordance with one of the procedures identified by the Statute, namely (i) by the procedure for the nomination of candidates for appointment to the highest judicial offices in the state in question or (ii) by the procedure provided for the nomination of candidates for the ICJ in the Statute of that Court. The requirement that states follow a particular procedure for nominations is a welcome filter intended to mitigate the risk of arbitrary selection of individuals who lack any of the required qualifications. However, one may wonder whether either of these two procedures is per se appropriate for selecting qualified judges. The ICJ procedure entails a selection by the members of the so-called "national groups" of the Permanent Court of Arbitration or equivalent.[2] These groups are typically composed of international law experts and are thus generally more apt to evaluate the knowledge and experience of internationalists under "List B" of the Statute, rather than those criminal

[1] Panama initially nominated former judge Elizabeth Odio Benito, national of Costa Rica, for the term 2003-2012.

[2] Proposals for candidates for the ICJ are made by a group consisting of the members of the Permanent Court of Arbitration designated by that state, i.e., by the four jurists who can be called upon to serve as members of an arbitral tribunal under the Hague Conventions of 1899 and 1907. In the case of countries not participating in the Permanent Court of Arbitration, nominations are made by a group constituted in the same way.

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law practitioners under "List A." The alternative option—following the procedure for appointment to the highest judicial offices in the state in question—leaves very broad discretion to states. This procedure, when it exists, varies from state to state. Also, depending on the legal system and the national interpretation, the notion of the "highest judicial offices" may include positions in various types of courts and jurisdictions that may not necessarily encompass competences relevant for the ICC. In any event, the legal framework does not provide any mechanism to ensure that any of these procedures is indeed followed by a nominating state.

As noted, in addition to the competences required for nomination, states must take into account appropriate regional and gender balance in the selection of judges. The ASP seeks to achieve such balance through the implementation of a complex system of minimum voting requirements, which states need to observe in the election process. The importance of this balance is unquestionable as the Court, having global aspirations, needs to reflect the diversity of its membership, as mandated by the Rome Statute. However, this should not be achieved at the expense of merit and competence, which are essential for the Court to be able to deliver high quality justice. In order to meet all three important goals—competence, regional representation, and gender balance—*all* candidates who are proposed must be highly qualified for the job.

The Advisory Committee on Nominations

While Article 36 of the Statute foresees the possibility for the ASP to establish an Advisory Committee on Nominations "if appropriate," the Assembly did not do so until 2012, twelve years after the Statute's entry into force. Before that, the civil society Coalition for the ICC introduced initiatives to ensure some measure of quality control and transparency in the selection process, such as asking nominees to fill out questionnaires, seeking to interview them, and hosting public debates between them. Most importantly, in 2010, the Coalition established the Independent Panel on ICC Judicial Elections in order to provide independent expert assessment of the qualifications of the candidates nominated for the 2011 elections. The creation of this body of experts pushed the ASP to establish the following year the Advisory Committee on Nominations, as foreseen in the Statute. Following the creation of this Committee, the Independent Panel discontinued its work.

The establishment of the Advisory Committee filled an important gap in the selection process. It is the only mechanism that allows scrutiny into the competency of candidates in order to ascertain whether they possess the qualifications required by the Statute and whether their command of at least one of the working languages is sufficient for them to exercise their functions effectively. For this purpose, the Advisory Committee conducts personal interviews of the candidates and issues a report with their views and recommendations before the election.

The work of the Advisory Committee is certainly a positive step forward in placing merit at the center of the process. While recommendations are not binding on states parties, they have already had a positive influence, demonstrating the importance of strengthening the Committee's role. Indeed, the Committee has gradually become more assertive in its assessment and recommendations to states. While avoiding a "ranking" of candidates, the Committee not only has provided views on individual competences of candidates but, in its latest report, also sought to provide some guidance to enable a comparison between candidates.[3]

It is hoped that this trend will continue in the future. Taking into account the sensitivities of assessing candidates presented by states, it would be useful for the Committee to develop in advance of the next nomination process, and in consultation with other experts and relevant bodies, some general and objective criteria against which the competences of individual candidates may be later assessed and measured (such as the number of years of practice in any of the categories; experience in the conducting of proceedings as a presiding judge; experience with certain

[3] See the Report of the Advisory Committee on Nominations of Judges on the work of its sixth meeting of October 10, 2017 (ICCASP/16/7), in which the Committee distinguished between "particularly well qualified " and "formally qualified" candidates.

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types of proceedings or crimes; and understanding of the Court's system). Defining indicators of competence in advance may discourage the nomination of unqualified candidates by states and help to strengthen the work of the Committee without prejudicing the states' prerogative to nominate and elect the judges.

Collegiality

While possessing the appropriate technical competences and skills is an essential precondition of a good judge, it is also of paramount importance that such skills are accompanied by the right attitude towards the institution and colleagues. Indeed, high quality justice at the international level cannot be ensured by the efforts of individual judges acting on their own, but requires that judges are able to work collegially with others, within each chamber and across chambers and divisions. Judges must be able to work together in order to deal effectively with their cases and improve collectively the quality of the proceedings and ultimately of the justice that they deliver.

A collegial attitude towards other judges is obviously welcomed in all jurisdictions. For an international tribunal, the ability to work with others is essential in light of the huge internal and external challenges confronting the investigation and prosecution of international crimes, which typically occur in violent and sometimes highly politicized environments. There is no way that individual judges can effectively deal in isolation with many of the legal, operational, and logistical issues that arise during the criminal proceedings. The ICC, being of a permanent and general character, faces the additional challenge of constantly having to shift focus in order to understand and adapt to new situations in the world. Many of the difficulties can only be overcome through concerted efforts at the Court and with the cooperation of the international community. Without prejudice to the different responsibilities and mandates of various organs of the Court, sufficient unity within the institution and, in particular, among judges is crucial for its credibility and for securing enhanced cooperation from the international community.

In the initial years of the Court's existence, single judges and various chambers have provided different answers to the same procedural problems, something that has slowed proceedings, generated uncertainty among parties and participants, and impacted negatively on the overall efficiency and effectiveness of the Court. For the enhancement of the judicial work of the Court, it is essential to develop a more cohesive judicial culture. Without prejudice to the judicial independence of each individual judge and chamber dealing with a particular case, it is vital for both expeditiousness and fairness to increase predictability of the proceedings by a gradual but steady harmonization of the practices of different chambers.

The legal framework of the Court is a challenge in itself as it combines elements of various legal systems and traditions of the world, most notably of the civil and common law systems. The entitlement of victims to participate in the ICC proceedings and seek reparations—something that is unknown to certain jurisdictions—is also a game-changer. Regardless of their professional background and experience, all judges joining the Court need to adapt to this entirely new hybrid scheme, resisting a natural tendency to interpret its provisions in accordance with their own legal systems. This requires an open mind and a disposition to consult and work with others in order to find together the best responses to shared problems.

Some individuals are naturally inclined to consult with others and work collegially. However, collegiality cannot depend on individual temperaments and personalities. Collegiality is vital for the success of the Court and must therefore be promoted institutionally through proactive efforts. As President for the period 2015-18, I made it my priority to enhance efficiency and effectiveness of the Court through, inter alia, promoting the collective revision of proceedings by judges at retreats and other gatherings.[4] The first judicial retreat was held within three months of the election of the new judges in order to integrate them immediately to the work of the Court. Other retreats and

[4] On initiatives taken during the period, see End of Mandate Report by President Silvia Fernández de Gurmendi (Mar. 9, 2018).

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discussions followed in subsequent years in order to revise procedural provisions relevant to the various phases of the process, namely pre-trial, trial, and appeals. These gatherings proved to be an extremely useful tool for enhancing the judges' understanding of the system and for finding ways to improve it through identification and harmonization of best practices[5] and proposed amendments to the rules of procedure and evidence and regulations of the Court. These discussions were an unprecedented step towards increasing judicial cohesion as all judges accepted, for the first time, that judicial independence was in no way incompatible with exchanging views on matters of law and procedure with colleagues of other chambers and divisions with a view to identifying the best responses to some common challenges.

Conclusion

The Court can only be as good as its members can make it, starting with its judges.

Practice has demonstrated that each individual judge, notwithstanding his or her predominant competences under one of the categories contemplated in the Statute, should also have sufficient knowledge and experience under the other. Fortunately, after three decades of developments in the area of international criminal justice, the growing involvement of professionals in the field is gradually expanding the pool of potential candidates possessing the required combination of skills for an international jurisdiction. However, under the current selection process, there is no guarantee that the best individual amongst them will be nominated and selected. Despite the creation of the Advisory Committee on Nominations, elections continue to be dominated by the "trading" of votes among states. It is thus essential to further define the required competences and skills for future judges, strengthen the role of the Advisory Committee on Nominations, and encourage other initiatives that will enhance the transparency of the selection process.

For their part, judges of the Court have persistently invoked their judicial independence as a barrier to collegial discussions. However, as demonstrated by collective efforts in recent years, judicial independence is fully compatible with judicial cohesion, which is in turn crucial for the improvement of their judicial work and, more broadly, for the efficiency and effectiveness of the institution. It is to be hoped that additional initiatives will be taken in the future to continue fostering collective discussions among the judges on judicial matters and to enhance their integration in the Court's system. In this regard, among other initiatives, it would be useful to review the code of ethics of judges, which was adopted in the early days of the institution, in order to ascertain whether, in light of fifteen years of practice, it remains sufficient to guide judges in their work at the Court, their internal interactions with colleagues, their interactions with parties and participants in the proceedings, and their external interactions with states and organizations.

The twentieth anniversary of the Rome Statute is a good occasion to hold an in-depth discussion among states, civil society, and the Court on the required competencies for judges, the appropriate mechanisms to evaluate them, and other initiatives to enhance collegiality in the work of the Court. This reflection is badly needed. Highly competent judges working collegially are essential for the Court to succeed and thrive.

[5] The agreed recommendations were included in various editions of a Chambers Practice Manual made public through the website of the Court.

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