

The judges in the Rome Statute of the International Criminal Court. An analytical overview.

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Abstract.

The evolution of the International Criminal Law is being very quick. It is widely believed that this happens because there is a staggering increase in atrocities, and, therefore, a sophistication of the legal system, accompanied by a gradual shift in its philosophical underpinning. In this context, the creation of the International Criminal Court (ICC) through the Rome Statute should involve a development in the role of the judges. The scope of this paper is presenting the institution of the judges in the Statute mentioned, analysing in a critical way the organs of the Court, the role of the Presidency and the Chambers, the service, term and election of the judges as well as the rights and duties they have; all of these in relation with the most recent developments on International Criminal Law.

Key words: International Criminal Law, Judges, ICC, Rome Statute.

Resumen.

La evolución del Derecho Penal Internacional está siendo muy rápida. Se suele creer que sucede porque hay un aumento asombroso en la cantidad de atrocidades que ocurren y, por lo tanto, una sofisticación del sistema legal acompañada de un cambio gradual en su base filosófica. En este contexto, la creación de la Corte Penal Internacional (CPI) a través del Estatuto de Roma debería implicar un desarrollo en el papel de los jueces. El alcance de este trabajo es presentar la institución de los jueces en el mencionado Estatuto, analizando de manera crítica los órganos de la Corte, el papel de la Presidencia y las Salas, el servicio, las condiciones y la elección de los jueces, así como los derechos y deberes que tienen; todo ello en relación con los desarrollos más recientes en el Derecho Penal Internacional.

Palabras clave: Derecho Penal Internacional, Jueces, CPI, Estatuto de Roma.

Abbreviations.

ACLT Advisory Committee on Legal Texts.

ICC International Criminal Court.

ICTY International Criminal Tribunal for the former Yugoslavia.

ICTR International Criminal Tribunal for Rwanda.

ILC International Law Commission.

SCSL Special Court for Sierra Leone.

UN United Nations.

I. Introduction.

If the judges' function on international courts is not anymore being merely *bouches de la loi* (in accordance to the classic Montesquieu's lesson, in which the role of the judge was limited to apply mechanically the norm), all questions related to who our judges are and what do we wish on that issue in an international context such as the ICC assume greater relevance.

Following this premise, the scope of this paper is presenting the institution of the judges on the Rome Statute, analysing the organs of the Court, the role of the Presidency and Chambers, the service, term and election of judges and the rights and duties they have; all of these in relation with the most recent developments on International Criminal Law.

On the first part of this study, it will be objectively analysed the composition of the Court and its different organs. This paper will emphasise on the role of the Presidency and its members, as well as in the Chambers and the performance of judges in this organ. Secondly, the service, term and election of judges will be analysed. After some essential notes on judges' position, the qualification, nomination and election of judges will be showed, apart from the judicial vacancies and its regulation. In the third place, this essay considers the duties and responsibilities of judges: independence, excusing and disqualification of judges, focusing on how important these facts are to the correct development of their work.

In sum, the study has the intention to bring up a complete overview of the judges performance according to the Statute of the ICC, their purposes, and their role on the persecution of a brand new concept of International Criminal Law on a contemporary globalized and transnational society where as it was said, atrocities, whether or not linked to armed conflicts, are more and more the order of the day. A final conclusion and a critical analysis will add a subjective and trenchant point to the essay.

II. Organs of the Court.

For the elaboration of the Rome Statute, it is important to point out that there was a Preparatory Commission regarding the Rules of Procedure and Evidence, which are a necessary instrument for the application of the Statute of the ICC, avoiding the reiteration of those rules in the Statute. According to the Secretary-General (1993, para. 69), the components of the permanent Court were dictated by functional necessity and the basic requirements of justice.

In respect of the article 34 of the Statute, the Court is composed by the Presidency, three chambers: a Pre-Trial Division, a Trial Division and an Appeals Division; the Office of the Prosecutor and the Registry. The organizational structure of the Court was considerably advanced by the experience of the ICTY and ICTR, which had worked under a similar organizational composition; but there are two important differences respect to the ICTY and ICTR Statutes: the ICC has a Presidency [according to Abtahi and Young¹, while those previous tribunals do contain a section entitled "The Presidency", they do not establish a "Presidency" as body, but they merely contained the provisions relating to the election and functions] and a new chamber: the Pre-Trial Division. Article 34 also follows the example of the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda in not catering for a standing office of Defence Counsel.²

¹ Abtahi, H. & Young, R. (2010). "Article 38. The Presidency". In Schabas, W. (ed.). The International Criminal Court. A Commentary on the Rome Statute. Oxford: Oxford University Press, p. 123 y ss.

² Khan, K.A.A. (2010). "Organs of the Court". In Schabas, W. (ed.). The International Criminal Court. A Commentary on the Rome Statute. Oxford: Oxford University Press, p. 1200.

However, due to the limited extension of this paper, the Office of the Prosecutor and the Registry will only be mentioned.

II.A. The Presidency.

As it was said, the inclusion of the Presidency as one of the organs of the Court, in accordance with article 34, represents a departure from the precedents of the *ad hoc* and hybrid supranational criminal jurisdictions.³ It is important to point out that the Presidency of the ICC, in sum, is a governmental organ that does not have any jurisdictional power.⁴ Nevertheless, it is an important pillar in the structure of the Court, which safeguards the interests of the protection of humanity and its rights.

This new organ is regulated in article 38 of the Rome Statute, and according to the third paragraph, the President, together with the First and Second Vice-Presidents, constitute the Presidency, which shall be responsible for two questions: First of all “the proper administration of the Court, with the exception of the Office of the Prosecutor”.⁵ Secondly, a general rule: “the other functions conferred upon it in accordance with this Statute”.

Sections 1 and 2 of article 38 specify that the Presidency of the ICC is composed by a President, a First Vice-President, who shall act in place of the President in the event that the President is unavailable or disqualified; and likewise, a Second Vice-President, who will act when the President and the First Vice-President, both, are unavailable or disqualified. All of them shall be elected by an absolute majority of the judges, and they shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once. Apart from that, judges composing the Presidency shall serve on a full-time basis as soon as they are elected (art. 35.2); moreover, the Presidency may, according to paragraph 3 of the referred article and on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis⁶. Although it is not said in the article 38, the election of the President and the Vice-Presidents will be made by the judges present in the First Plenary Session, which will take place before two months have elapsed since the designation of the judges.

In another vein, the Court operates in the form of an intergovernmental organisation; therefore, the President and the Presidency play an active role in developing and maintaining cooperative

³ *Ibid.*

⁴ Cabezudo Rodríguez, N. (2002). Colección de Estudios Penales. Madrid: Dykinson, v. IV.

⁵ In discharging this responsibility, according to article 38.4 of the Rome Statute, the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

The original paragraph 4 of article 38 proposed by the ILC foresaw the exercise by the Presidency of “*pre-trial and other procedural functions*”, but it has been deleted because of the doubts expressed as to the appropriateness of the Presidency exercising such functions (Abtahi, H. & Young, R., *Article 38. The Presidency*, p. 1238).

⁶ In September 2003, the then-President of the Court, Philippe Kirsch, informed the Assembly of State Parties that it was expected that the judges of the Pre-Trial and Appeals Chambers would be required to sit on a full-time basis from 2004 (Wen-qi, Z. and Chana, S. (2008). "Article 35", in Otto Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article*, Second Edition, C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2008, pp. 937-939). By 2006, all three judicial divisions had become fully operational and only two trial judges were serving on a non-full time basis (Proposed Programme Budget for 2007 of the International Criminal Court).

relationships between the Court and various external entities. This makes the President the public face of the Court.⁷

According to Schabas⁸, it is possible to consider three different functions of the Presidency. Firstly, the general cooperation and external relations (with the United Nations, according to article 2 of Rome Statute, and with States, intergovernmental organisations and other applicable entities). Secondly, in performing its judicial functions, the Presidency acts to a very large extent as an administrative tribunal (judicial review of certain decisions of the Registrar) and, to a lesser extent, as a criminal court⁹, firmly grounded in administrative and human rights law. Thirdly, the administrative function of the Presidency may be divided into the oversight of judicial proceeding (facilitating the organisation and work of Chambers and addressing matters relating to ethics and professional conduct) and management, oversight and coordination, with the registry in a specific way (detention related matters, cell monitoring, inspections...) and with the Court in general, through Directives (financial aspects, internal control, risk management...). Apart from these three essential functions, the Presidency also acts in the public information area¹⁰ and it is the pivot of the Court's judicial-generated normative activities¹¹. From a personal perspective, one of the most questionable aspects is that, in some contexts (urgent cases), the Presidency may *proprio motu* submit proposals directly to the plenary of the judges, thus bypassing the Advisory Committee on Legal Texts (ACLT)¹². In this vein, there is a well-known legal gap in relation with what "urgent cases" mean, because the only definition given to these situations is "where the Rules do not provide for a specific situation before the Court"¹³. Furthermore, it is important to consider the binding effect that these proposals have, given the importance of the Presidency for judges. Although a great diligence of the Presidency it is presumed, it would be necessary to study case by case the sobriquet of "urgent" the trials could have in a more consensual way, so that this prerogative of the president is reduced.

⁷ Abtahi, H. & Young, R., *Article 38. The Presidency*, p. 1239.

⁸ Schabas, W. (2010). *The International Criminal Court. A Commentary on the Rome Statute*. Oxford: Oxford University Press.

⁹ The Presidency may extend the sentence of imprisonment of a convicted person who has continuously and wilfully refuse to pay the fine imposed on him/her (Rule 146 para. 5 and 6 of the Rules and regulation 118 of the Regulations of the Court ICC-BD/01-01-04)

¹⁰ The Presidency decides, in consultation with the Prosecutor and/or the Registrar, which documents should be published in the Official Journal of the Court (Regulation 7 para. 1(n) of the Regulations of the Court ICC-BD/01-01-04), and it can also decide to publish on the website of the Court material additional to those enumerated in the Regulations of the Court (Regulation 8 para. (d) of the Regulations of the Court ICC-BD/01-01-04). It also establish the calendar of proceedings (Regulation 36 para. 1 of the Regulations of the Registry ICC-BD/03-01-06-Rev.1).

¹¹ Pursuant to the Roadmap to Expedite the Criminal Process that was endorsed by the ASP in 2012, the Working Group on Lessons Learnt of the judges, as chaired by a member of the Presidency, identifies amendment clusters within the Rules which may enhance the efficiency of court proceedings (ICC-ASP/11/Res.8). The "*Revised Roadmap*" was endorsed by the ASP on 27/11/2013, ICC-ASP/12/Res.8.

¹² Regulations 5.2 and 6.2 of the Regulations of the Court ICC-BD/01-01-04.

¹³ Another difficult situation was produced during the preparatory works, when one of the proposed functions of the Presidency was to determine whether the Prosecutor or Deputy Prosecutor should be disqualified on the basis of their prior involvement with a case or any other ground relating to their independence. It finally was as rejected by delegates at the Rome Conference because it was felt that such a power might risk the Presidency wielding excessive influence over the Office of the Prosecutor (Rwelamira, M. R. (1999). "Composition and Administration of the Court". In Lee R. S. (ed.), *The Making of the Rome Statute*, The Hague: Kluwer Law International).

II.B. Chambers.

Article 39.1 of the Rome Statute establishes that, as soon as possible after the election of the judges, the Court “shall organize itself into the divisions specified in article 34, paragraph (b)”, that is, a Pre-Trial Division (composed of not less than six judges), a Trial Division (of not less than six judges), and an Appeals Division (of the President and four other judges). Being more specific, the Rome Statute affirms in the second paragraph of the same article that the Appeals Chamber shall be composed of all the judges of the Appeals Division, while the functions of the Trial Chamber shall be carried out by three judges of the Trial Division and the functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence. In any case, anything shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires (art. 39.2.c)).

According to the Rome Statute (art. 39.1), the assignment of judges to divisions is based “on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law”. It is recalled that, as it will be analysed in the next section of this essay, under Article 36, judges are elected on “lists” in line with their expertise.

The Rome Statute does not state who is to conduct the assignment of judge to divisions, therefore, it is necessary to analyse the Rules of Procedure and Evidence to resolve the issue¹⁴. Rule 4*bis* provides that the Presidency shall, after consultation with the judges, decide on the assignment of judges to divisions in accordance with the mentioned article 39.1. Considering that “the Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience” (art. 39.1 Rome Statute) it is logical to assume that the Appeals Chamber should be composed mostly of lawyers specialised in humanitarian law and human rights^{15 16}.

Regarding the judicial functions of the Court, art. 39.2.a) confirm that they shall be carried out in each division by Chambers, and in order to give additional flexibility to the Court and to avoid difficulties in administration, that rule may be amended by the Assembly of States Parties at any time¹⁷.

The Pre-Trial Chamber should supervise the Prosecutor and collaborate with him/her during the investigation of crimes under the jurisdiction of the ICC¹⁸. This is an important difference

¹⁴ Abtahi, H. & Young, R., *Article 38. The Presidency*, p. 12. Until December 2011 this issue was an important problem. At various stages of the drafting process, a number of different options were expressed in that regard (assignment by the Presidency: ICL Draft of 1994; election by the Court: Preparatory Committee of 1996; choice by lot: French idea).

¹⁵ McDermott, Y. (2016). ICC Commentary. *ICC Case Matrix Network*.

¹⁶ Analysing the biography and the curriculum of each of the judges (ICC, 2018), it is very feasible to affirm that, with very few exceptions, in practice, the composition of the chambers is in accordance with the above; notwithstanding, the members of the Appeals Chamber have a training in criminal law as extensive as in humanitarian law and human rights.

¹⁷ McDermott, Y. (2016). ICC Commentary. *ICC Case Matrix Network*.

¹⁸ When the case is initiated at the *ex officio* request of the Prosecutor, a confirmation by the Pre-Trial Chamber will always have to be made. Moreover, if the Prosecutor, after investigating, decides that the accusation should proceed, she/he will request the Pre-Trial Chamber to issue an arrest warrant.

with the ICTY and the ICTR, in which on receipt of an indictment for review from the Prosecutor, the Registrar consults with the President and the President refers the matter to the Bureau, which makes a review of indictment¹⁹. The judges of the Trial Chamber are competent for the prosecution of the criminal acts typified in the Statute, as well as to confirm the charges in the Pre-trial stage. The Trial stage must end with a conviction or an acquittal in the sentence and with reparation proceedings if it is necessary²⁰. The so-called Appeals Chamber has functionally attributed the knowledge of the appeals against decisions issued by the Trial and Preliminary Chambers, as well as the review trial. Judges that are assigned to the Appeals Division serve only in that division, but it is possible the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa (art. 39.4)²¹. According to art. 106 of the Statute, the enforcement of a sentence of imprisonment shall also be an issue to the supervision of the Court.

Finally, it is important to underline that judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned. Given that judges are elected for nine-year terms, the provision suggests that judges might possibly be “promoted” from one division to the other during their term of office.²² On the other hand, judges assigned to the Appeals Division shall serve in that division for their entire term of office (art. 39.3), that is, nine years, and their term may not be extended.

III. Service, term and election of judges.

After the analysis of the organs of the Court, this essay will focus on how the judges are elected and how they perform their functions. Articles 35, 36 and 37 are essential to understand these ideas.

Firstly, according to article 35 of Rome Statute, all judges are elected as full-time members of the Court and are available to serve on that basis from the commencement of their terms of office. Regarding the preparatory works, article 35 reflects the drafters’ perception of the ICC as a type of standby ad hoc tribunal, which could be called into action when the need arose.²³ As it was said, the judges composing the Presidency serve on a full-time basis, and the Presidency may decide to what extent the remaining judges shall be required to serve on a full-time basis. In relation with the availability of judges, it is possible to affirm that judges are free to take on other work, but their key priority is to the Court as full-time judges. Therefore, they must make themselves available as soon as the need arises.²⁴

¹⁹ Rule 28, Rules of procedure and evidence of the ICTY, IT/32/Rev.50.

²⁰ Salmón Garate and García Saavedra (2000). “Los tribunales internacionales que juzgan individuos: el caso de los tribunales ad-hoc para la ex-Yugoslavia y Ruanda y el Tribunal Penal Internacional como las manifestaciones institucionales de la subjetividad del ser humano”, *Revista Derecho y Sociedad*, Perú, No. 15.

²¹ This is only possible if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case. However, following Jones (2002, *Composition of the Court*), the provisions formally precluding Appeals Chamber judges from mobility were probably unnecessary.

²² Jones, J. (2002). "Composition of the Court". In Cassese, A. (ed.). *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press.

²³ Schabas, W. (2010). *The International Criminal Court...*

²⁴ Wen-qi, Z. and Chana, S. (2008), *Article 35*, pp. 937-939.

There are 18 judges²⁵ in the Court (art. 36), but the Presidency, acting on behalf of the Court, may propose an increase in the number of judges²⁶. These eighteen judges, according to art. 36.3, are 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”. One of the most criticized questions by scholars and also by this author regarding the regulation of the judges is the imprecision of the Statutes of ICTY (art. 13), ICTY (art. 12) and SCSL (art. 13) on the qualifications required.²⁷ To solve this problem, the Rome Statute requires established competence in either relevant fields of international law, such as international humanitarian law and human rights law, or criminal law and procedure, as well as relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; apart from an excellent knowledge of and be fluent in at least one of the working languages of the Court (art. 39.3 b) and c)).

Nominations of candidates for election to the Court may be made by any State Party²⁸. Each State Party may put forward one candidate for any given election who must be a national of a State Party. For elections, candidates are divided into two lists: List A for those candidates with experience and competence in criminal law and procedure, and List B for those candidates nominated on the basis of their expertise in international law²⁹. At least nine candidates from List A will be elected, and at least five candidates will be elected from List B, and future elections are to maintain that proportion of expertise in criminal and international law (art. 39.5). Moreover, States Parties shall also take into account the need to include judges with legal expertise on specific issues such as violence against women or children (art. 39.8.b)). The judges are elected by secret ballot at a meeting of the Assembly of States Parties, and successful candidates are those who have received the highest number of votes, provided that two-thirds majority of the States Parties present and voting (art. 39.6), but no two judges may be nationals of the same State. Furthermore, States Parties shall take into account the need for the representation of the principal legal systems of the world, an equitable geographical representation and a fair representation of female and male judges (art. 39.8 a)). Due to this last issue, the ICC has been described as a “gender-sensitive court”.³⁰ This is a necessary advance if we compare the situation with the ICTY and ICTR, where never more than 3 women together

²⁵ During the negotiations there was apparently some debate as to whether 17 or 19 judges would be most appropriate (Schabas, W. (2010). *The International Criminal Court...*). The agreed figure of 18 judges represents a compromise in this regard (McDermott, Y. (2016). *ICC Commentary*).

²⁶ In order to increase the number of judges, the Presidency should indicate the reasons why this is considered necessary and appropriate, and the Registrar shall circulate the proposal to all States Parties, which will consider it in a meeting of the Assembly of States Parties. The proposal shall be considered adopted if approved by a vote of two thirds of the members of the Assembly of States Parties. The election of the additional judges shall take place at the next session of the Assembly of States Parties. On the other hand, if the workload of the Court justifies it, the Presidency can propose a reduction in the number of judges, but respecting the minimal number of eighteen. In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached (art. 36.2).

²⁷ Safferling, C. (2012). *International Criminal Procedure*, Oxford University Press.

²⁸ It shall be made either by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question or by the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court (art. 39.4).

²⁹ If candidates are potentially eligible for inclusion on both lists, it will be for the candidates themselves to decide which list they wish to be included on.

³⁰ Oosterveld, V. (2005). "Prosecution of Gender-Based Crimes in International Law", in Mazurana, D. (ed.), *Gender, Conflict and Peacekeeping*, Lanham: Rowman & Littlefield Publishers Inc.

have served between the 14 permanent judges in the *ad hoc* tribunals. Apart from that, only one woman has served as judge at the International Court of Justice since its establishment.³¹

According to article 39.3 of Rome Statute and as it was advanced before, judges hold office for a term of nine years³² and shall not be eligible for re-election³³. Notwithstanding, a judge assigned to a Trial or Appeals Chamber shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber³⁴.

In the event of a vacancy, an election shall be held with the same procedure to fill the vacancy. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term (art. 37). The main controversies in drafting this provision were whether the replacement judge's qualifications should match those of his/her predecessor, and the question of eligibility for re-election³⁵.

IV. Duties and responsibilities of the judges.

The most important issue in relation with the functions of the judges is that they shall be independent in their performances (art. 40.1). Judicial independence requires the judges to be free when exercising their functions from third parties. This obligation is incumbent particularly on States, whether their nationals be accused, victims, witnesses or judges³⁶.

One issue that has emerged in opinion of some authors is that judges, particularly those who sit on the Presidency, have a role in the external relations of the Court and are frequently asked to give speeches on the work of the Court.³⁷ This might affect the confidence in their independence and impartiality, and as art. 40.2 explains: "Judges shall not engage in any activity

³¹ Lawyers Committee for Human Rights (2002). *Nominación de Magistrados para la CPI*, p. 4.

³² At the first election, one third of the judges elected was selected by lot to serve for a term of three years; one third of the judges elected was selected by lot to serve for a term of six years; and the remainder served for a term of nine years (art. 36.9.b).

³³ The only exception to this rule is where a judge was elected for a three-year term under the transitional arrangements for the first set of elected judges of the Court, and where a judge has been elected to fill a judicial vacancy and the remainder of the predecessor's term is less than three years (McDermott, Y. (2016). *ICC Commentary*).

³⁴ This was the situation of Judge Blattmann, for example, who was elected in 2003 for a period of six years, but he was permitted to remain sitting as a judge until 2012, when the *Lubanga* case ended.

³⁵ Schabas, W. (2010). *The International Criminal Court...* The International Law Commission had initially proposed that where the predecessor's term was five years or less, the replacement judge should be eligible for re-election, but this was reduced to three years.

³⁶ *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Appeals Chamber of SCSL. 13/03/2004. See also *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, para. 35, Appeals Chamber of ICTR. 03/06/1999.

To see the difference between "independence" and "impartiality" (which is generally regarded as the judicial characteristic of disinterest towards parties and their causes), see *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, para. 34, Appeals Chamber of ICTR, 31-03-2000. In all cases, these two concepts remain closely inter-related, according to *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06/2138-AnxIII, pp. 6-7. 14/07/2009.

³⁷ Cryer, R. (2009). "The International Criminal Court and its Relationship to Non-Party States" in Stahn, C. and Göran, S. (eds.). *The Emerging Practice of the International Criminal Court*, Leiden: Nijhoff Publishers.

which is likely to interfere with their judicial functions or to affect confidence in their independence". However, from my perspective, this alleged problem is not given in practice, because judges cannot talk about the content of the issues they are dealing with in these conferences.

An original proposal that a judge could not sit on a case where the accused bears the same nationality as her/him was dropped during the drafting of the Rome Statute³⁸. Another proposal that the Presidency would be responsible for deciding questions of judicial independence was also replaced with the current arrangements under Article 40.4³⁹. In order to maintain the independence and impartiality, a judge can even be disqualified from a case in some circumstances⁴⁰ (art. 41.2), but it shall be decided by an absolute majority of the judges. In that case, the challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision (art. 41.2 c)).

The second main duty of judges, according to art. 40.3, as it was anticipated, is that judges required to serve on a full-time basis shall not engage in any other occupation of a professional nature (part-time teaching and writing were considered acceptable activities for that purpose in the Prep Com discussions)⁴¹. Originally, the ILC suggested that any question about these activities must be decided by the Presidency (Draft Statute, p. 13), but nowadays it just shall be approved by an absolute majority of the judges, and if such question concerns an individual judge, that judge cannot take part in the decision. (art. 40.4).

V. Conclusion and final remarks.

The purpose pursued by the ICC with its organization, regarding the judges, is to fight against impunity through the investigation and condemnation of serious international crimes committed around the world. Through this essay, we have overviewed the main issues in relation with the organs of the ICC, as well as the election and functions of judges, their obligations and responsibilities and how all this regulation affect to their work.

Although we have analysed several contradictions and improvable aspects regarding the regime and organization of organs and judges, the necessary function of the ICC must be highlighted. In any case, advances are required in areas such as the elimination of male chauvinism in the access to the position of judge, the avoidance of conflicts of judges' interests and the protection against corruption, which, despite what is stated in article 40, is still an important legal gap, as well as improvements in aspects as important as the volume and judges' speed of work or the election of judges in an objective manner and not depending on the interests of States. Likewise, an equitable representation of territories when choosing is needed. Finally, from my personal perspective, more support (institutional and citizen) to the ICC is needed, as well as hope (derived from the successes that the ICC has to reap) in that no crime will go unpunished.

³⁸ See *Prosecutor v. Banda and Jerbo*, ICC-01/05-03/09. 05/06/2012.

³⁹ Jones, J. (2002). *Composition of the Court*.

⁴⁰ If, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. According to the rule 34 of Rules of Procedure and Evidence, the Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge.

⁴¹ On the other hand, see *Prosecutor v. Kony*, ICC-02/04-01/05-124. 31/10/2006. Decision on the Prosecutor's request to separate the Senior Legal Adviser to the Pre-Trial Division from rendering legal advice regarding the case.

Honouring David Luban⁴², some *clichés* run through my mind analysing the future of the ICC: “*Rumours of my demise are greatly exaggerated*”. “*Stay the course!*”

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