A LEGAL POINT CONCERNING THE INDEPENDENT PANEL'S ASSESSMENTS ON ICC JUDICIAL NOMINATIONS 2011[1]

(On the interpretation of the term "necessary relevant experience" in Article 36.3(b)(i) of the Rome Statute)

The Independent Panel in its Report of 26/10/2011 has construed Article 36.3(b)(i) of the Rome Statute so as to exclude an ICC candidate from being eligible for election, if his or her experience in criminal proceedings has been less than 10 years. As it appears from its Report (at pages 13-14), the legal basis of the Panel's argument is Regulation 67 of the ICC Regulations, which requires 10 years of experience as a counsel for the defence, for the purposes of Rule 22 of the ICC Rules of Procedure and Evidence. Rule 22, similarly to Article 36.3(b)(i), employs the phrase "necessary relevant experience", though for a different purpose and in relation to different persons and matters.

According to Article 32.1 of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

Article 36.3(b)(i) of the Rome Statute requires "necessary relevant experience" "in criminal proceedings" without, however, confining the required experience to a minimum time period of practice. The ordinary meaning of Article 36.3(b)(i) is clear in that it makes the experience dependant on the circumstances of each candidate, leaving the matter completely unconnected with a minimum length of practice. One cannot therefore employ an argument by analogy based on Regulation 67, dealing with a different matter, so as to add words or modify the wording of a clear provision of the Statute, i.e. Article 36.3(b)(i).

According to Article 21 of the Rome Statute, the law applicable "in the first place" by the ICC is the Statute itself, which was enacted by the State Parties. On the other hand, the ICC Regulations are not made by the States Parties. According to Article 52 of the Rome Statute, the necessary Regulations of the ICC are made, in accordance with the Statute and the Rules, by the Judges themselves, and they are adopted simply for the "routine functioning" of the Court. So a Regulation cannot modify the meaning of a provision in the Rome Statute, nor even can it be employed to interpret or to clarify a Statute provision, such as Article 36.3(b)(i).

Here the maxim *ubi lex non distinguit, nec nos distinguere debemus* (7 Coke's Reports 5) should be employed. According to this maxim "where the law does not distinguish, we ought not to distinguish". Since Article 36.3(b)(i) does not make distinctions as to the length of experience in criminal proceedings, one ought not

[1] *Vide* also Prof. William A. Schabas' article entitled "Report on Candidates for Judge at the International Criminal Court" and the extremely interesting comments contained therein (in: http://humanirghtsdoctorate.blogspot.com).

to make such distinctions. Equally, the maxim *expressum facit cessare tatitum*, applies here. According to this maxim, "to state a thing expressly ends the possibility that something inconsistent with it is implied". (F. A. R. Bennion, Bennion on Statutory interpretation A code, 5th edn., Surrey 2008, section 389, p. 1249 ff.).

One should also employ *argumentum a contrario*, which in the present case may take the following form: "Whenever the legislator intended to employ a minimum time limit to experience, this was made clear, as it was made clear in Regulation 67 in conjunction with Rule 22. So it can be argued that it was not the intention of the States Parties to place a time restriction to experience in Article 36.3(b)(i), since they clearly avoided to say so".

Furthermore, it is important to clarify, that while "the appointment and qualifications of Counsel for the defence" for which Rule 22 and Regulation 67 make provision, is a matter within the competence of the ICC Registrar under Regulation 21.2, the election of the ICC Judges is a matter within the exclusive competence of the States Parties, to be decided by the procedure provided by Articles 36.6 and 112.7 of the Rome Statute.

The Rome Statute in Article 22.2 clearly provides that the definition of crime shall not be extended by analogy. On the same reasoning, one can argue that there is no room for the argument of analogy in regard to all clear provisions of the Rome Statute, including Article 36.3(b)(i).

The above view is strengthened also by this observation: Unlike para. (b)(ii) of Article 36.3 which uses the term "extensive experience", para. (b)(i) of the same article employs the term "necessary relevant experience". I believe that unlike "extensive experience" in para. (b)(ii), "necessary relevant experience" in para. (b)(i) refers more to the quality and the substance of experience and less to the length of the period of experience. It is to be noted that another difference between para. (b)(i) and para. b(ii), is that the required experience in para.(b)(i) should be in relation to "criminal proceedings" without the Statute specifying further this experience, while in para.(b)(ii) the "experience in a professional capacity" should be "of relevance to the judicial work of the Court". This distinction is logical, since different candidates have different experiences in criminal law and procedure, coming from different legal systems of the world, i.e. the continental inquisitorial system or the common law adversarial legal system. Besides, there is no system of law in the world, which is similar to that of the ICC, the latter being an amalgamation of many various national legal systems.

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