Cour
Pénale
Internationale

International
Criminal
Court

Judge Silvia Fernández de Gurmendi

President of the International Criminal Court

"Fair trial in a confluence of legal traditions"

Keynote presentation on the occasion of the commemoration of the Day of International Criminal Justice

CHECK AGAINST DELIVERY

12 July 2017, The Hague

Mr. Vice-President of the Assembly of States Parties,

Your Excellency, Ambassador Wilke,

Excellencies,

Dear Judges,

Madame Prosecutor, Mr Deputy Prosecutor,

Mr Registrar,

Ladies and gentlemen,

Let me start with a few words in French before switching to English.

Je suis très heureuse de commémorer avec vous la Journée de la justice pénale internationale, qui marque l'adoption du Statut de Rome le 17 Juillet 1998. Je vous remercie, monsieur l'Ambassadeur, pour vos bons mots d'introduction. Je suis très heureuse de prendre la parole devant vous ce matin.

La commémoration de la journée de la justice pénale internationale revêt une importance particulière cette année. Il y a deux semaines, le premier juillet, nous avons souligné le quinzième anniversaire de l'entrée en vigueur du Statut de Rome. Cela signifie quinze années d'activités de la première cour pénale internationale à vocation permanente.

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The choice of today's theme, "Fair trial in a confluence of legal traditions", allows us to reflect on how, in light of our experience, judicial proceedings at a global level meet the requirement of fairness.

I look forward to the presentations of the distinguished panellists of today's event. And I would like to use this opportunity to congratulate Mr. Karim Khan on his election as President of the ICC Bar Association. Let me recall that the Court has warmly welcomed the creation of this independent association, which was established to represent the interests of counsel for the defence as well as victims. As I have said on many occasions, there cannot be a successful ICC without a strong legal profession and the strong role of counsel, and the ICCBA plays an important role in this regard.

Fairness is the cornerstone of any criminal proceedings. It gives a tribunal its legitimacy and credibility. All legal systems in the world encapsulate fairness, but in different ways. What does fairness mean for an international court that combines different legal systems, values and traditions? And how is it expected to embody legal pluralism into its practice?

I was personally confronted with this question time and again during five years in which I presided over the negotiations of the procedural aspects of the Rome Statute and, later, of the Rules of Procedure of Evidence.

Negotiators agreed at the time, in principle, that a universal court could not be perceived as favouring one legal system over the other and that it was therefore essential to find suitable compromises between the main criminal justice systems. It was also clear to all that it was essential to ensure the highest standards of justice, impartiality and due process for the credibility of the institution. In other words, it was essential to ensure fairness. But what does this mean in practice?

Judge James Crawford, who chaired the discussions on the draft statute for the ICC at the International Law Commission, has described how the Commission – and I

quote – "had also to contend with the tendency of each duly socialized lawyer to prefer his own criminal justice system's values and institutions".

I experienced this myself during the negotiations of the Rome Statute and Rules of Procedure of Evidence, which were opened to representatives of all States of the world. For years, I could witness how duly socialized lawyers of half of the world considered the ideas of the lawyers of the other half as unfair. And vice versa.

Some provisions were more problematic than others, of course. As you can imagine, it was not easy to agree on the establishment of a pre-trial chamber, proceedings for admission of guilt, admission and disclosure of evidence, rights of suspects and accused persons or conduct of the trial proceedings, just to name a few of the issues that raised particular concerns in relation to fairness. By the time of the Rome Conference, more than a thousand points of disagreement persisted in the Rome Statute, most of them relating to procedural matters.

Eventually, progress was made in reconciling legal traditions and creative compromises were found that did not reflect a particular legal system. There were cases where the divide of legal traditions was such that it proved impossible to provide for clear-cut solutions and compromises based on constructive ambiguity were made. Margins for manoeuver had to be left to allow for approaches to flourish at a later stage depending on how practice evolves.

Once the Court became operational, judges had the arduous task of testing and applying for the first time this hybrid, innovative, and sometimes ambiguous procedural system. As a judge, I have also had the opportunity of interpreting and applying myself a system in the drafting of which I had the chance to participate. It was – it is – a fascinating experience, as many of the issues that arose during the creation of the Court are brought back by those engaged in its operations today. Sometimes, I wish we had been clearer. Sometimes, I regret we were too clear. And

sometimes, I am surprised to see how provisions that I consider to be crystal clear raise so much confusion and division.

Hence, over the last fifteen years, reconciling legal traditions has remained an ongoing task for ICC judges and practitioners. Every day in our courtrooms, questions do arise which require taking into account solutions from both the inquisitorial and adversarial systems.

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As said, well trained practitioners tend to interpret and perceive their own system as best favouring fairness. This preference often translates into suspicion for the other systems. I believe that this is an untenable stance in the context of international criminal justice. As a matter of principle, a global court needs to sufficiently embrace legal diversity. In addition, no legal system alone can adequately meet the needs of an international court facing mass crimes committed in contexts of violence. The sheer scale of the crimes within the ICC's jurisdiction requires evidence to be adduced in different ways than in domestic jurisdictions. The entitlement of victims to participate in our proceedings – something that is completely unknown to certain jurisdictions – is also a game-changer. Like going to Rome, we must acknowledge that there are different roads that lead to fairness.

Judges and participants share equally the responsibility to resolve tensions between main legal traditions and set in motion a system that protects and preserves fairness.

In light of these considerations, it is not surprising that in the initial years of the Court's existence, different chambers have provided different responses to the same procedural problems and that proceedings have sometimes been lengthy. With sufficient experience, it is now time to identify best practices, harmonize where possible and accelerate our pace, without negatively affecting fairness. I consider

this to be a top priority and also something that can only be done collectively by all judges working together. Among other efforts to this end we have held three judges retreats since 2015 in order to revise all phases of our proceedings, namely pre-trial, trial and – at the latest retreat some weeks ago – the appeals proceedings.

The agreements reached in discussions among judges have resulted in the publication of a Chambers Practice Manual aimed at outlining best practices at all stages of our proceedings, with fairness being a core preoccupation. Where problems could not be solved through best practices, we have also proposed some amendments to the legal framework, rules and regulations. Our discussions have been enriched by the diversity of inputs provided by the judges, who represent a wide spectrum of legal traditions. This is how legal pluralism may work in practice.

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As said, we are trying to expedite proceedings without negatively impacting on fairness. In fact, experience shows that both concepts are not mutually exclusive but rather intrinsically linked to each other. As the saying goes, "justice delayed is justice denied". It is in the interests of all that proceedings be expeditious – the accused, the victims and the public alike.

But one cannot assess the length of proceedings through the sole lens of time spent in the courtroom. A wide range of factors impact on the duration of the ICC's proceedings, including in particular the cooperation received or not received from States and organisations. At the request of the Assembly of State Parties, the Court has embarked on a measurement exercise of its judicial activities. Through performance indicators, we strive to illustrate the complexity of our cases and identify those factors which affect our proceedings. Collection of data is ongoing. In the long-run, we aim to set benchmarks against which the fairness and expeditiousness of our proceedings will be assessed together.

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Excellencies, ladies and gentlemen,

In sum, ensuring fairness and expeditiousness at the ICC is a constant challenge. A challenge that is further compounded by the fact that the ICC sits at the confluence of legal traditions.

But the challenges we face in this regard must not lead us to favour one system over the other. The fact that ICC proceedings are complex and lengthy does not result from the hybrid nature of our system. Our cases are complex by the nature of the crimes within our jurisdiction and the context of violence in which they take place. To ensure fairness and expeditiousness, we must continue to find innovative and relevant solutions without affecting the balance between different systems.

As well understood by the drafters, a hybrid, plural system is of the essence at a global court like ours. Legal pluralism is also essential for the further success of the Rome Statute system as a whole. Further efforts toward universal ratification rely to a significant extent on the fact that the Rome Statute is truly international in nature.

The ICC is the result of a successful multilateral effort to combine divergent approaches to law and fairness. The fifteen years of activities of the Court testify to challenges, but also significant successes in this regard. .

I wish you all a very fruitful discussion. Thank you very much for your attention.

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