ADVISORY COMMITTEE ON NOMINATIONS OF JUDGES

QUESTIONNAIRE ANSWERS

ANDRÉS BARRETO

(COLOMBIA - B LIST)

A. Nomination process

1. I am currently Colombia's Superintendent of Industry and Commerce, a position which requires me to serve as the Colombian Competition Authority. In that capacity, I not only lead investigations, but I am also responsible for administering the consequences in the form of sanctions for any administrative or criminal malpractice that we uncover. Within my jurisdiction, I am able to investigate and sanction a number of different crimes, namely cartels, collusions, bid-rigging, economic, consumer and intellectual property offences, as well as contraband.

   Additionally, whilst working as a lawyer in private practice, I managed the firm's International Practice, where the scope of work was predominantly focused on helping individuals and companies avoid committing any (generally speaking economic) criminal offences through the implementation of Compliance Programmes.

   Between 2017-2018, I was lead advisor for the investigation and subsequent presentation on the situation in Venezuela (referencing Nicolás Maduro Moros among others) to the Office of the Prosecutor at the International Criminal Court, which was supported by several members of the Colombian and Chilean Senate, led by former Senator Iván Duque, currently Colombia´s President.

   I have also served as an attorney for three of Bogotá's local Mayors, where I handled administrative, police and criminal offenses in different districts of Colombia's capital city (2018).

   During the government handover following the 2018 General Election in Colombia, I was a programming consultant on all aspects related to law, justice, administrative reform and international affairs, as well as the commission's Technical Secretary. (2018).

   In 2016-2017, whilst serving as Bogotá´s Delegate District Attorney for Security and Cohabitation, I was in charge of guaranteeing the protection of human rights in all activities as the official representative of the district's Public Ministry.

   Whilst working as a consultant lawyer, I focused my practice on international and public law. I was the legal advisor on the "*Convenio Andrés Bello*", an international organization with a presence throughout

Latin America, supporting them on matters related to litigation, as well as on issues regarding their international position, privileges and immunities, among others. I also advised the NGO "*Fundación Carulla*", which receives international funding from the Interamerican Development Bank (IDB) for specific projects focused on education. I also advised international companies (telecoms and infrastructure) on international law, both in terms of litigation and for dispute settlement boards in Colombia and Honduras. I also represented political asylum seekers in Colombia persecuted by Evo Morales' regime in Bolivia (2012 – 2014).

I served as Bogotá´s Director of International Relations, representing the Colombian capital in all their international activity, including partnerships and alliances with foreign governments, and presenting different programmes and strategies related to international affairs to the National Government. I represented Bogotá before different cooperation organisations and in various social and humanitarian programmes involving migrants, victims of international crime and people trafficking (2011 – 2012).

At Colombia´s Ministry of Foreign Affairs, I was responsible for preparing and issuing legal concepts on Public and International Law on behalf of the office of the Minister and Vice Ministers. I also led on international judicial cooperation and international criminal law, including assuming responsibility for extradition channels and serving as the main negotiator for different instruments for cooperation and control created with different foreign governments. At times, I was Acting Head of the International Judicial Affairs Directorate, deputising in the absence of the Director. (2010 – 2011).

I was also responsible for providing legal counsel on behalf of the Protocol Directorate, as well as designing legal concepts around privileges, immunities and their relationship with Public and International Law. I managed diplomatic channels with different missions, including embassies/high commissions, international organisations, special missions and consular/commercially accredited in Colombia, liaising with the national authorities, particularly focused on judicial and administrative procedures. I negotiated relevant chapters on privileges and jurisdictional immunities in international treaties. And, again, I deputised as Head of Department in the absence of the General Director of Protocol. (2009 – 2010).

During my first period at the Ministry of Foreign Affairs, I was the lawyer charged with overseeing the processing of approved laws for treaties, treaty negotiations and providing legal and administrative representation of the organisation. As such, I was responsible for treaties on International Criminal Law, double taxation agreements, memoranda of understanding, as well as treaties and agreements on promotion and investment protection and the wider creation of legal concepts on Public and International Law (2005 – 2006).

It is also worth mentioning that I carried out my legal internship at the Presidency of Colombia, in what was known as their Humanitarian Affairs Office at the time, where I was responsible for responding to petitions, verifying terms and conditions for the provision of emergency humanitarian aid, responding to lawsuits, verifying the delivery of international cooperation support and of other subsidies and services provided by the State to support displaced populations victims of the armed conflict. (2003 – 2004).

Last but not least, I have been a longstanding scholar of international law, predominately focusing on human rights and international humanitarian law for ten years. Furthermore, my research and publications have always revolved around international criminal law, universal jurisdiction and the ICC. (2008 – 2018).

2. Yes, I have significant experience in this area, having served as lead counsel, deputy counsel, legal representative, legal advisor, and public servant in charge of legal and judiciary representation. I have experience both as an authority, investigator, counsel, and attorney in matters related to international law, both as plaintiff and defendant.

   In this capacity I have been able to practice law, specially international law, in the fields of international treaties, privileges and immunities and international criminal law, as my main speciality in the public sector.

   In my private practice I have been able to advise and represent in conflicts of jurisdiction, international treaties (integration and regional mechanisms), dispute settlement, human rights (asylum and refugee seekers), as well as international criminal law.

3. Never.

B. **Perception of the Court**

1. Whilst the Court has a strong reputation internationally, I would say that the delay in various cases and on a practical level, the relatively small number of cases that are properly prosecuted in order to be judged are areas that tend to be highlighted when discussing its operation. Elsewhere, the geographical bias that seems to occur whereby the majority of cases are from Africa, and to a lesser extent the Middle East, is another criticism that is frequently made, alongside the lack of cooperation within certain jurisdictions to facilitate the capture of those people who abuse their privileges, immunities or who bypass the Court's jurisdiction to avoid being brought to justice.

2. Looking at the Court from an outsider's perspective, I would suggest broader representation among the judges, with a view to hopefully incorporating younger, more enthusiastic people from around the world who can bring fresh perspectives and to encourage more diverse experience that includes the likes of litigation, academia and legal

consultancy, among others. I would also suggest that the Court pursues more judgments and convictions, particularly in the case of ongoing situations that risk breaking international law, and that it expands its focus beyond African states and post-conflict cases to also pursue international criminals whilst they are still in office.

In the same way, the ICC (both the Office of the Prosecutor and the Honourable Judges) should have to comply with a strict code of conduct and the most transparent and independent oversight mechanisms, in order to protect their mandate and uphold their decisions with no element of doubt about their integrity.

3. The ICC has presided over so many important decisions, but for me, the arrest warrant issued against President Omar Al-Bashir as an Acting Head of State and the prosecution of Kenya´s President Uhuru Kenyatta, with his subsequent promise to comply with the ICC, are both good examples of the 'spirit' of the Court, always striving to ensure that the privileges, immunities or position of the defendants don´t lead to impunity. However, as popular as these decisions might be, I still believe that there is more that could be done to increase prosecutions and ensure more effective sentencing.

   Without a doubt, the Court has made a number of important decisions. In particular, there is one case that I have been able to study in some detail because of the precedent it might create in my own country: the "Bemba Case". In this particular case, the systemic attacks against civilians stand out, but also I found that the issues around command and control were interesting because they proved to be a key factor not only for the eventual conviction, but also for the interpretation of the extension of responsibility in terms of who knew about the acts, participated in some of them and/or failed to take any steps to stop or prevent them.

   When it comes to unpopular situations, the lack of compromise of certain States with the Court and the Office of the Prosecutor diminishes its capacity to conduct independent and in-depth investigations and effectively sanction international crime. Other unpopular matters are the denounce of member States of the Rome Statute in order to leave the ICC. The absolute need to strengthen and achieve a more fluid and concrete cooperation between States, international organizations and NGOs, in order to gain resources, donations, technical resources, i.a., is a most for a 21st Century ICC.

   However, unless the ICC takes proper action in many of the situations, the ongoing violations taking place in Latin America, the Middle East, Africa and Asia, will continue to place enormous pressure not only on the Court, but also more generally on the protection of human rights and the international humanitarian legal system.

Another unpopular, but seemingly fair, occurrence is when charges are dropped. Clearly judges and prosecutors face enormous pressure in the 'courts' of public and media opinion for their initial work to lead to trials and, ultimately, convictions. However, when the facts and available evidence are insufficient or fail to support the case, then the only right and fair thing to do is to stop the prosecution. By way of an example, I believe that the case against Kenya's Francis Kirimi Muthaura, where all charges were eventually dropped by the Prosecutor, highlights this situation.

C. **Judge's independence**

1. The relationship between a Judge and the authorities of their country should be one of mutual respect and cooperation, but ultimately it is imperative that there is a clear distancing when it comes to cases and decisions. The Judge needs to operate with neutrality and an open mind, discussing their decisions and abandoning any prejudices and preconceptions at the door to their Court. At no point should a Judge be advancing their home country's national political or judicial agenda, nor should it play any part in the undertaking of their work or affect their rulings.

   In the same way, any relationship between an ICC judge and other stakeholders in a case (from academia, NGO´s or other international organizations and jurisdictions, among others) should be of mutual respect, fruitful cooperation and mutual understanding, but always with a clear distance between their substantive and judicial duties and wider academic or cooperation agendas.

   On a personal note, the organisations with which I am affiliated are heavily focused on International Law and the ICC. I am a member of the Colombian Academy of International Law, the Colombian Jurists Association and the International Bar Association, which I believe complement any potential role as an ICC Judge, for their global reach and commitment to uphold international law, however they are not the kind of associations that interfere or create conflicts of interest.

2. When it comes to participating in a trial related to a Judge's home nation, I don´t see that there would be any obstacles from a legal perspective. Furthermore, the ICC Statute includes the possibility for a Judge to disclose any conflicts of interest and for the Chamber or Court to analyse this and then either accept or reject it. In many international courts, this is a golden rule; however, there have been many other cases where *ad hoc* judges help to present the different points of view and legal perspectives required to solve the case without representing their national or appointing State.

   As far as I'm concerned, the only legal limitation to preventing a Judge from participating in cases related to nationals from their own country shout be with regard to any action previously taken that is related to a specific individual or case, or being biased about it through opinions,

prior decisions or situations (among other things) that involved the prosecuted.

3. I believe that the decisions taken by national courts, as well as those taken by international tribunals, are key when it comes to defining relevant legal criteria in order to decide cases, even if they are considered 'secondary resources', according to international law.

   Jurisprudence is a key tool for any prosecutor or judge. It helps them to understand similar cases, or to obtain a different perspective from previous rulings. This is particularly valuable in International Law due to the fact that crimes, rights and rules are universal, especially in International Criminal Law.

   Soft law recommendations, opinions or rulings from administrative bodies, even if they are international, might help inform opinion, but they are in no way legally binding and as a result are less powerful. Therefore, in criminal justice (local or international), soft law recommendations are not a reliable source, nor a substantive tool to shape a ruling. However, human rights organisations and the findings, reports and documents from NGOs have a very different relevance. These organisations are important stakeholders for the Court, and have long and ongoing collaborations with tribunals and international bodies that can certainly help when it comes to reaching decisions. On many occasions, their findings are informative and can be very helpful and useful – indeed, they might be the *Amicus Curiae* one might use to understand key issues.

4. The appeals process is the instance for revising a ruling on the grounds of error, procedural and/or legal, and can be solicited by the prosecutor or by either party. However, these decisions are a legal mechanism to ensure due process and proper judgements and as such, it is important that mistakes are not made in the procedure of charges levied. However, in my opinion appeals do not themselves possess the precedents that might create a new category of jurisprudence, particularly due to the complementary nature of the ICC in terms of their relationship with other criminal courts in national jurisdictions and the finality of its rulings in a substantive view. With this in mind, an Independent Judge needs to take all of the above into account, remembering that this is not its precedent or the likely doctrine upon which they should base their decision.

5. I believe that innovation – particularly to improve efficiency – should be deployed as and when required. One of the most common criticisms of the Court's operation is its lengthy procedures. In order to tackle this issue, it is imperative that Judges be permitted to address certain situations, such as the need to effectively implement the 10 month period to decide certain cases (Art. 74 of the Rome Statute), as well as to ensure maximum use of the Court's resources in order to allow as

many hearings and procedures as possible so as not to overwhelm the offices of both the Prosecutor and Chambers with additional work.

Elsewhere and reflecting on a previous question, perhaps some innovation around precedents could also improve the Court's efficiency. That is to say, precedents may not be the only criteria on which to base a decision or ruling, but they are important indicators to predict the Court's eventual ruling, particularly when it comes to appeals. Incorporating them could improve efficiency and guarantee against decisions being overturned.

6. I have worked as part of a team throughout my career and I value teamwork. In my current role as Colombia's Superintendent of Industry and Commerce, I lead a team of 1,600 people based predominantly in Bogotá, but also with a strong regional presence across the country. I have always felt comfortable working as part of a team, as well as adopting a managerial or leadership role as required.

   For me, working with different judges from different backgrounds, countries and legal systems, represents a tremendous opportunity to continue honing my skills in International Law, working together to collectively ensure rulings are in the best interests of International Law and to always uphold the rule of law by consulting different legal opinions and perspectives.

   Any disagreements should be brought to the Chamber for internal discussion prior to the final ruling as this is the means through which a Judge or a Court communicates. I don't believe that any of the internal debates or dissent should be made public. The Court has a hugely important public facing role and to rule upon and sentence some of the most important cases in international criminal law and this needs to be the focus of their external positioning.

   Dissenting opinions are allowed in various jurisdictions, however they are exceptional and should not constitute a separate or parallel ruling, and the need for them should only be permitted to express a dissenting view, or to alert with regard to a major issue that might not have been taken into account by the other members of the Chamber or the Court.

7. I believe that recusal should only take place when a Judge has a conflict of interest, when they have made or stated an opinion that could jeopardize the case, when their previous actions regarding an investigation or case, whether in a national or international court, or their ties to a specific individual or situation might harm the final ruling or taint the impartiality of the process or decision.

D. **Workload of the Court**

1. Yes, I am.

2. Yes, I am.

3. Yes, I am.

4. Initially, I envisage writing up decisions on my own. However, depending on the workload or when the situation calls for it, I would also look to share some of this responsibility and trust the exceptional work of clerks and other officials whose work would comply with the high standards required around procedure, rulings and documents.

5. I believe that a Single Judge could issue decisions that expedite process in certain matters, according to Art. 74 of the Rome Statute. For example, formal or procedural filings, not final rulings but decisions that need to be taken during the process.

6. Yes, I am very accustomed to working under pressure. In previous positions, as well as in my current role as Colombia's sole competition authority (amongst other responsibilities), I have to address the public on various occasions, hold press conferences and interviews, attend congressional hearings, appear before the Courts, and make other appearances due to my public role. I investigate and sanction a wide range of misdemeanours and I am the primary spokesperson for my Authority. I am also frequently called upon to represent the Superintendence of Industry and Commerce, and Colombia, before major international organisations such as the OECD, UNCTAD, WIPO, International Competition Network (ICN) and the International Consumer Protection and Enforcement Network (ICPEN), among others.

7. Yes, I am, and no I have never been required to leave a job for any of those matters.

E. **Deontology**

1. For me, an independent Judge is one whose only obligation is to administer justice, someone who speaks through their decisions, upholds the law and complies with the rule of law. An independent Judge is someone who behaves professionally, ethically, respects the law and due process, contributes to the work and wellbeing of their court and colleagues.

2. As previously stated, it is important to alert the Court should any potential conflict of interest arise, and anything relevant that might affect the decision, or the Court should be raised prior to any judgement. These conflicts of interest might be familial or professional ties, or wider affiliations, to cases, suspects, or individuals being prosecuted by the Court. This should include any cases or situations previously known or

referred to, whether as an advisor or official, in any other country or organisation (public and private), or indeed other situations that if not disclosed to the Court in a timely manner might taint the process and final ruling.

3. I believe that whilst it is important not to exercise any form of discrimination in determining the eligibility of Judges to serve the Court, one also needs to ensure diversity and representation. When it comes to the appointed Judge ruling on cases, then these factors should not bias their decisions and any potential conflicts of interest related to these areas should be declared to the Court. It is important to remember that a Judge must comply with the requisites stated within the Rome Statute and the requisites of their own jurisdiction to administer justice.

4. No, never.

5. No, never.

6. I believe that it is imperative for victims, both individuals and organisations, to appear before the Court during all hearings and for the final ruling. If elected, I would look to ensure plural participation of victims and for them to play an active role in cases. Furthermore, I believe that it is very important for victims to have the opportunity to effectively challenge appeals and appear before the Chamber, and for them to be granted reparations if determined in a ruling. Reflecting on a previous question, another obstacle in the operation of the Court and the effectiveness of its rulings, is ensuring adequate reparations for the victims, which is why assets from the accused and other suspects have to be seized in due time, preventatively, prior to the final ruling, to ensure that assets aren't dispensed with during the trial and that there are sufficient funds to compensate victims as required.

   My own country, Colombia, has taught me this: there is no point in a great ruling without any effective symbolic or economic reparation for the victims. There are no first- or second-class victims or cases, they all have the same right to justice, and in my mind, justice includes effective reparations and the guarantee of no repetition.

7. Balance is key when administering justice or imposing a sanction in any area of the law. Victims play an integral part during the process and it is essential to guarantee their rights, sanction the offenders and prevent repetition, as well as ensuring adequate compensation (reparation).

   However, defendants, suspects and the accused also have rights, which is why rulings need to be made by Judges and Courts that respect due process and attendant prior rules and procedures. A fair trial ensures a fair ruling. Suspects are suspects until they are formally charged, the accused are then part of the judicial process and trial, where they also have the right to exercise their guarantees. They have to have the right to be trialled and found guilty beyond reasonable doubt (*in dubio pro reo*); they can´t be

charged twice or even revictimized (*Non bis in idem*). Ensuring a fair trial is a delicate balance, but it is the Judge's duty not to assume every accused is guilty, nor that every case is a victory, nor to decide with bias, and to analyse all available facts and evidence in order to establish complete responsibility and guilt.

The best decision is one that delivers justice, including the truth, reparation and no repetition; and one that ensures due process and is fair, both to the victims and the accused.

F. Additional information

1. Yes, English.

2. No.

3. Yes.

4. Yes.

5. None that I am aware of.

G. Disclosure to the public

1. To make them public.

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