



International Criminal Court
Bar Association

Association du Barreau près
la Cour Pénale Internationale

ICCBA NEWSLETTER

MARCH 2018 - ISSUE 1



Brought to you by the ICCBA Newsletter Committee:

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MESSAGE FROM THE PRESIDENT

I am delighted to present this first edition of the ICCBA Newsletter. The Newsletter includes updates from the ICCBA Committees, updates on proceedings at the ICC and two insightful interviews with Judge Sanji Monageng and Judge Cuno Tarfusser.

Although the ICCBA is only in its second year of existence, the Association is going from strength to strength. I would like to take this opportunity to thank all elected officials of the ICCBA and the entire membership of the ICCBA for your fabulous work and dedication. Your continued involvement and support is essential to our continued success.

Among the ICCBA's many activities and initiatives in its second year, was our engagement with the process for the selection of the next ICC Registrar. The ICCBA invited all shortlisted candidates to answer a questionnaire and attend a meeting with an ICCBA panel. Nine of the fourteen shortlisted candidates responded to the questionnaire, and seven of these individuals additionally met with the ICCBA panel. A Report on the ICCBA process was presented to the ICC judges on 12 March 2018,

and is now available on the [website](#). I wish to thank panel members, Chief Charles Taku, Dr. Caroline Buisman and our Executive Director, Mr. Dominic Kennedy for their sterling work in organising this process.

In early February 2018, the ICCBA Vice Presidents, the Executive Director and I met with the then President of the ICC, Sylvia Fernandez de Gurmendi. A number of issues were discussed including victims' representation before the ICC, office space for the ICCBA and the ICC's outreach programme. At the conclusion of the meeting the ICC President stated that she was very happy that the ICCBA had been created during her term as President and that she fully supported the objectives of the Association. We look forward to meeting the newly elected President, President Chile Eboe-Osuji and the two new Vice Presidents soon in order to take forward the important work of the ICCBA. Their support of the ICCBA and its objectives will be crucial if the potential of the organization is to be fulfilled.

The ICCBA has also issued a Declaration on Obligations under the ICC Code of Conduct. This Declaration gives guidance on the ethical standards which should be upheld by counsel and legal team members practising before the ICC. The Declaration is available [here](#). I urge all members to read the declaration without delay – and for Lead Counsel to ensure all team members read it as well. Last year, the ICCBA Executive Council also established a Working Group on workplace harassment, which is in the process of creating a confidential hotline for use by legal team members in relation to allegations of work-related harassment.

In November 2017, the ICCBA submitted a report on its activities to the Assembly of States Parties (ASP), a copy of which is available [here](#). Further, in December 2017, the ICCBA was represented at the ASP in New York by members of the Executive Council. I was invited to address the full ASP as ICCBA President, which marked a milestone for the Association. The ICCBA also held a side event which was well attended and the presence of ICCBA representatives was very beneficial to explain the work and role of the ICCBA.

In January 2018, the ICCBA Working Group on Tax published a detailed Report on the tax situation for legal team members practicing before the ICC, which is available [here](#). This is a matter of great importance to many members and we hope to take forward the discussions with the new Registrar when he or she is elected.

The ICCBA signed an Affiliation Agreement with the African Bar Association in October 2017. The signing took place at the ICC in the presence of ICC judges and officials, the Registrar of the MICT and the Registrar of the Residual Special Court for Sierra Leone. This agreement lays the foundations for closer ties between the two associations and collaboration on training and dissemination of information on the ICC. Photographs of this event, and many others, are available on our website.

The ICCBA also signed the GQUAL Action Plan for gender parity during the plenary session of the GQUAL conference in The Hague.

The ICCBA and Oxford University have also entered into an agreement for a common project on Victims' Participation before the ICC. This partnership provides funding for specific training on victims' representation issues at the ICC. For further information, please see the Victims' Committee update.

The ICCBA continues with its partnership agreement with the Siracusa International Institute and in June 2018 a course on Defence Counsel before the ICC will be held. This year I am delighted to announce that the course will be conducted in French.

On 5 March 2018, I attended the swearing in ceremony of the newly elected judges of the ICC, along with Vice President (Victims) Mr. Jens Dieckman and Vice President (Defence) Chief Charles Taku. We were invited to be in the Court room along with Prosecutor and President and Vice President of the ASP, and had the opportunity of congratulating the new judges in person on their election. We wish them, and all the judges of the ICC, every success in the discharge of their important responsibilities.

There is a lot happening in the ICCBA, please stay involved and feel free to keep up to date with postings on our website for news and events at: www.iccba-abcpi.org.

I hope you enjoy this first issue of the newsletter and if you have comments or suggestions, please do not hesitate to contact us.

Best wishes,

Karim A. A. Khan QC
President





DEFENCE COMMITTEE

Since their election, members of the Defence Committee have met regularly to discuss issues concerning the rights and interests of suspects and accused. The Defence Committee is currently setting up an Email Group (Defense Watch Group) which will allow teams to exchange directly, by email, on any difficulties they face. This email group will also allow the Committee to be in permanent contact with the teams, and to serve as a focal point between them and the ICCBA. The Defence Committee also advised the Executive Council on certain issues affecting the interests of the Defence, such as Defence involvement in the Court's outreach activities.

VICTIMS COMMITTEE

The Victims Committee has held monthly meetings in The Hague from July 2017. The Victims Committee is preparing training videos and e-learning material on Victims Representation at the ICC. The first video entitled "Introduction to Victims Participation at the ICC" is available on the ICCBA website.

The ICCBA Victims Committee is very much delighted to also announce a common project on victims' participation before the ICC with the Centre of Criminology, Oxford University. Professor Carolyn Hoyle and current Economic and Social Research Council GCRF Postdoctoral Fellow, Dr. Rudina Jasini. The project is entitled "Advancing the Impact of Victim Participation at the International Criminal Court: Developing Avenues for Collaboration". The project foresees cooperation with the ICC independent Office of Public Counsel for Victims (OPCV) and the ICCBA in designing resources for the education and training of practitioners interested in international criminal

law, with a specific focus on practitioners who may wish to represent victims in proceedings before the ICC.

On 1 December 2017, the ICCBA invited all ICC Victims' Counsel and assigned team members to an open meeting at the ICC premises. This meeting was convened at the initiative of the ICCBA Victims Committee to discuss the situation of victims' teams at the ICC and gather information on the issues faced in carrying out their mandate of representing victims in proceedings. The meeting also aimed to find out the different teams currently engaged in ongoing proceedings and establish a relationship between them and the ICCBA Victims' Committee. Representatives of many victims' teams attended the meeting. Participants were invited by Jens Dieckmann, ICCBA Vice President for Victims and Chair of the Victims Committee, to raise and discuss issues that were of interest and concern to them, which included: communication with the counsel support section, salary, reimbursement and timesheets and work space at the ICC for victims' teams. A report was prepared for ICCBA Executive Council and adopted. The report was circulated among the participants of the meeting and will serve as basis for future meetings and negotiations between ICCBA and other Registry and ICC organs.

On 5 February 2018, Jens Dieckmann joined a meeting between the ICC President and the ICCBA President and Vice Presidents where several issues were discussed including victims' representation before the ICC and potentially organising a roundtable discussion later in 2018 and the improvement of office space for victims' teams. Further information is available [here](#).

On 6 February 2018, Jens Dieckmann gave a presentation at an event organised by the British Embassy on Victims' Representation at the ICC. The event was attended by over 100 participants from the diplomatic community and NGO's in The Hague. Further information is available [here](#).



LEGAL ADVISORY COMMITTEE

The July 2017 work plan of the ICCBA Legal Advisory Committee ("LAC") endorsed by the Executive Council identifies five issues on which the LAC intended to work over its 2017-2018 tenure. The present update provides a snapshot of its achievements so far and reports on the difficulties it has met.

1/ Contribution to consultation on ICC legal texts before the Advisory Committee on Legal Texts ("ACLT"):

Based on the unfortunate experience of its predecessor, the current LAC initiated a new approach in its interaction with the elected Counsel Representative before the ACLT, our learned colleague Yaré Fall. Instead of submitting its contributions directly to the ACLT, the LAC provided its timely comments and analysis to Yaré Fall, who expressed its deepest appreciation for the support he received and conveyed the ICCBA's views to the ACLT. Since July 2017, the LAC in particular provided comments and advice on (i) the appointment of amicus curiae in certain Article 70 proceedings; (ii) the inclusion of a "no case to answer" application in the proceedings; (iii) the inclusion of summary grounds of appeal in applications for leave to appeal; (iv) the reference to "indictment" in ICC legal texts; and (v) the implementation of *Article 15bis* of the Rome Statute. The LAC looks forward to continue its fruitful cooperation with the elected Counsel Representative.

2/ Legal Aid:

The LAC successfully served as the core drafting team for the submission of ICCBA's [proposals](#) on legal aid to the Committee on Budget and Finance ("CBF") in July-August 2017. The LAC Chairperson accompanied the ICCBA President in his presentation before the CBF on this issue in September 2017. The CBF Submission was followed by a second submission to the 16th session of the Assembly of States Parties on the same topic, which was annexed to the ICCBA's [Report](#) on its constitution and activities to the ASP. The LAC Chair also joined the ICCBA Working Group on Tax and provided advice on the finalization of its [report and proposals](#) which are also relevant in the ongoing discussion on legal aid.

3/ ICC Policies:

The LAC endeavored to provide tools and analysis adapted for Counsel's and Support staff's consumption in relation to the administrative framework of the Court relevant for their activities. Three documents have already been finalized and published on the ICCBA website: an [Index](#) of ICC Administrative Issuances relevant for the daily work of Counsel's legal teams, which provides a mapping of the ICC administrative framework on a variety of topics running from the protection of information to the ICC internal disciplinary framework, financial administration, privileges and immunities and security; a Legal [Analysis](#) on the applicable ICC Information Protection Policy; and a Legal Analysis on ICC internal [accountability mechanisms](#) including the ICC whistleblower policy. These analysis were formally transmitted to ICC Officials, CBF and ASP with the aim of triggering a constructive dialogue and the fruitful resolution of identified current gaps in ICC policy framework. A first follow-up meeting is scheduled with the ICC Office of Internal Audit. By these analysis, the ICCBA aims at contributing to enhance the quality of justice at the ICC pursuant to Article 2(5) of its Constitution.

4/ ICCBA Policies and Constitution:

The LAC and its Chairperson drafted a number of ICCBA policy documents over the year, such as the ICCBA [Procedure](#) on Affiliations, the Affiliation [Agreement](#) between ICCBA and the African Bar Association, or the ICCBA's [Report](#) on its constitution and activities to the ASP. The LAC is also currently drafting proposals of amendments to the ICCBA Constitution in view of their adoption by its General Assembly.

5/ Cooperation and Witness Protection:

Out of the five topics, this is the one for which the LAC was the least successful in making progress as a result of the ICC Registry's uncooperativeness and refusal to provide access to information. The LAC Chairperson wrote to the Immediate Office of the Registrar on 28 August 2017 and had several contacts thereafter. The ICCBA President addressed letters to the Registrar on 23 August 2017 and 29 November 2017. The ICC Registrar denied disclosure of the relevant information requested on the ground of its alleged confidentiality. In the absence of the required material, the LAC could not make progress on these important topics.



PROFESSIONAL STANDARDS ADVISORY COMMITTEE

The main role of the Professional Standards Advisory Committee is to provide advice and guidance to members on the Code of Conduct for Counsel and to offer advisory opinions when requested.

Professional Counsel and staff may request advisory opinions from the Professional Standards Advisory Committee on the ICC's Code of Professional Conduct for Counsel, the ethical and conduct code of the ICCBA, and all related directives and regulations and the interpretation of the rules, regulations and codes governing the conduct of Counsel at the ICC or of this Constitution.

Any advisory opinions, if not confidential, shall be distributed to the Members.

The Committee will create a database of in abstracto advisory opinions as well as a database page section on the ICCBA website with all publicly available advisory opinions and publicly available decisions of the disciplinary bodies of the ICC and other international criminal tribunals.

The Professional Standards Advisory Committee may perform any other duties which may be requested by the ICC or the Assembly of States Parties.

TRAINING COMMITTEE

The ICCBA Training Committee has been working on a number of projects which aim at providing training opportunities for members.

It was decided by the Executive Council that in light of the wide distribution of members in many countries that online training would be the most ideal way to reach as many members as possible. Therefore the Training Committee is currently working with a number of people to record a library of online training videos on a variety of topics such as substantive international criminal law, procedural issues at the ICC and also

advocacy skills. These videos will be uploaded to the ICCBA website in the near future.

The ICCBA will also continue its agreement with the Siracusa International Institute which will hold a course in June on Defence Counsel before the ICC. This course was offered last year in English and this year it will be conducted in French. ICCBA members receive a 10% discount on the price of this course as well as a number of other courses which are offered by the Siracusa Institute throughout the year.

At the end of April, the ICCBA in partnership with Penn State Dickinson Law School, will once again offer a week long intensive training at the ICC. The training is open to approximately 20 participants and will teach advocacy skills which are required before the ICC. A nominal fee will be charged for the five day course to cover the expenses of the trainers. Registration is now open on the ICCBA website.

The ICCBA Training Committee remains open to any suggestions for training, please feel free to contact:
training@iccba-abcpi.org

AMICUS COMMITTEE

The composition of the Amicus Committee was changed on 23 December 2017. Mrs. Rosette Bar Haim, resigned from her post and was replaced by Ms. Karlijn Van der Voort.

The Committee is mainly working on the submission of the Amici Curiae briefs before the ICC and examining developments the interventions in terms of fundamental law and litigation. The Committee aims to create a database and a body of decisions dating back to the date of entry into force of the Rome Statute (2002) The Committee will identify the various intervening parties (universities, research laboratories, magistrates, lawyers, NGOs, etc.), their requests and propose an analysis of the observed trends to draw the guidelines from these interventions. The Committee will also makes suggestions for improving the procedure to strengthen the links between the different actors in the proceedings.

The Committee is also studying the impact of the Court's decisions in which Amici Curiae have intervened



This will allow for better analysis of their influence in the process and also highlight the areas in which interventions are expected as well as their important consequences for society as a whole and for the State to rebuild following the judgment. To illustrate its purpose, the Committee will consider a few special situations of Amici Curiae that have come before the Court. Finally, it will try to put in historical perspective in which the Amici Curiae could intervene to improve the quality and the legitimacy of the trials.

In addition, members of the Committee have participated individually or collectively in work (publications, conferences, continuing education) on the ICC. Professor Philippe Gréciano, President of the Amicus Committee, organised a major symposium on international criminal justice on 23 and 24 November 2017, at the University of Grenoble. There were many participants from the academic and judicial world, as well as several members of the ICCBA. The two-day event was inaugurated by the President of the ICC, Silvia Fernandez de Gurmendi, and introduced by the President of the ICCBA, Mr. Karim Khan. The presentation by the ICC President is available [here](#) and the presentation from the ICCBA President is available [here](#).



Colloquium on International Criminal Justice on the occasion of the 30th anniversary of the Klaus Barbie trial, on 23 and 24 November 2017, University Grenoble Alpes.



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CASE UPDATES



PROSECUTOR V. GBAGBO & BLE GOUDE (ICC-02/11-01/15)

Overview

The case of *Prosecutor v Laurent Gbagbo and Charles Blé Goudé* commenced on 28 January 2016. Mr Gbagbo and Mr Blé Goudé are charged with four counts of crimes against humanity, allegedly committed in Abidjan, Côte d'Ivoire, during the post-electoral crisis, between December 2010 and April 2011. The trial proceedings are currently underway.

Prosecution insider and expert witnesses

Among others, key witnesses took the stand in the Fall, including Prosecution insider witness Philippe Mangou, former chief of the Defence Staff of the armed forces of Côte d'Ivoire (Chef d'État Major des Armées) during the post-electoral crisis. Mr Mangou testified between 25 September and 5 October 2017 on several central aspects of the post-electoral crisis, including the role of the UN Operation in Côte d'Ivoire (ONUCI) during this time. From 7 to 10 November 2017, insider witness Mr Detoh Letho testified remotely via video link, from Abidjan. At the time of the post-electoral violence, Mr Detoh Letho was commander of the land forces of the Defence and Security Forces (FDS), and as of January 2011, was designated Commander of the Abidjan operations.

Expert witnesses also appeared before the Trial Chamber in the last months. On 6 and 7 December, Professor Frédéric Bonbled, an expert in forensic science, appeared before the Court. Professor Bonbled testified about a mission he undertook in Côte d'Ivoire at the request of the Prosecution in October 2013. He was the last witness to testify before the judicial break. Trial proceedings resumed on 17 January 2018, with the expert testimony of Professor Héléne Yapo Etté, a forensic pathologist,

who had been commissioned by the Government of Côte d'Ivoire to conduct examinations of bodies of alleged victims during the post-electoral crisis. Professor Yapo Etté completed her testimony on 19 January, marking the end of the presentation of the Prosecution's case.

Legal Representative for Victims

On 15 December 2017, the Legal Representative for Victims sought the introduction and submission of documentary evidence without producing it by or through a witness ('bar table motion'). The evidence consists of a list of names of Nigerian nationals who were killed during the post-electoral crisis.

Request for intervention

On 13 January 2018, the Registry transmitted a request to intervene as *amicus curiae* submitted by the organization African Lawyers and Democrats Without Borders (ADASF), pursuant to Rule 103 of the ICC Rules of Procedure and Evidence. The ADASF sought authorisation to submit a request for 'annulment' of the proceedings against Gbagbo and Blé Goudé. The Prosecution, Defence, and Legal Representative for Victims opposed the request. On 26 January 2018, Trial Chamber I rejected the request.

Further conduct of proceedings

Trial Chamber I rendered the Order on the further conduct of the proceedings, on 9 February 2018. In its decision, the Trial Chamber enjoins the Prosecutor to file, within 30 days, and with a view to ensure the fairness and expeditiousness of the trial, a trial brief 'containing a detailed narrative of her case in light of the testimonies heard and the documentary evidence submitted at trial' to serve as an 'auxiliary tool to the benefit of both the Chamber and the parties and participants' (para. 10). The Order also directs the Defence teams to make submissions on 'a no case to answer', if any, and as to whether they intend to present any evidence (para. 14).



PROSECUTOR V. ONGWEN (ICC-02/04-01/15)

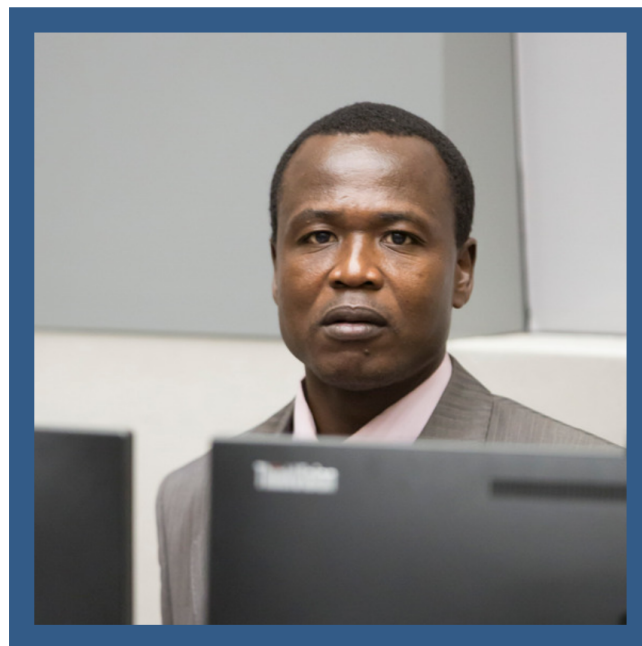
Dominic Ongwen, a former Lord's Resistance Army (LRA) Brigade Commander is on trial at the ICC and has been charged with 70 counts of war crimes and crimes against humanity related to attacks against the civilian population in the former IDP camps of Lukodi, Pajule, Odek and Abok between October 2003 and June 2004. He has pleaded not guilty to all counts. It is further alleged that from at least 1 July 2002 until 31 December 2005, Dominic Ongwen, Joseph Kony, and the other Sinia Brigade commanders were part of a common plan to abduct women and girls in northern Uganda that were then used as forced wives and sex slaves, tortured, raped and made to serve as domestic help; and to conscript and use children under the age of 15 to participate actively in hostilities in the LRA.

Ongwen is represented by counsels Krispus A. Odongo, Chief Charles Achaleke Taku, and Beth S. Lyons.

The Ongwen trial began on 6 December 2016 with the Prosecution and the Legal Representatives for Victims (LRV) making their opening statements. The Prosecution started presenting its case and witnesses on 16 January 2017.

On 6 October 2017, Trial Chamber IX informed the participants and the Registry of the initial hearing schedule from January to April 2018. The Defence requested for the modification of this schedule, citing Mr Ongwen's personal circumstances and health challenges as impediments to his ability to prepare his defence within the prescribed timeline. The Prosecution opposed the Defence request for want of evidence. In the [Decision](#) of 16 November 2017, the Trial Chamber revised the hearing schedule.

In accordance with the revised hearing schedule, the Prosecution resumed presenting its evidence on 15 January 2018. It is anticipated that the Prosecution case is likely to close by the end of March 2018. From January to end of March 2018 about 10 witnesses, including three mental health experts [will testify](#) before the Trial Chamber.



Dominic Ongwen © ICC

In the Decision on Prosecution Requests related to Mental Health Expert Evidence, the Trial Chamber granted the Prosecution requests for leave to add the three mental health experts to its List of Witnesses and to add their corresponding expert reports and associated items to its List of Evidence. The Chamber rejected their request relating to the sequencing of the testimony of the mental health experts, and ordered that the Prosecution call their expert witnesses at the end of its evidence presentation.

Following the close of the Prosecution case, the LRV will request to call six participating victims from their preliminary list of witnesses to present their views and concerns (some of whom will provide evidence viva voce and others through Rule 68 of the Rules of Evidence & Procedure), including two [expert witnesses](#).

The Defence case is likely to commence soon after the LRV case. At its request, the Defence will make its opening statements at the beginning of the presentation of its evidence. On 14 December 2017 the Defence submitted a confidential ex parte list of [provisional witnesses](#) and indicated that an additional 20 witnesses would be added to the final list.

There have been 62 witnesses who have testified so far for the Prosecution in its case. Some of the witness testimonies that emerged in Court from November 2017 to present include:



"THE CONTROVERSY AROUND WAR CRIMES ALLEGEDLY COMMITTED BY THE UPDF WILL NOT CEASE".

- Witness P-138 who was with the LRA for about eight years, during which time he served under Vincent Otti, who was Kony's deputy. He testified on LRA commanders;
- Witness P-339 told the Court about his work with the Uganda People's Defense Force (UPDF) in intercepting LRA radio communications from intercepting LRA radio communications from 1995 to 2011. The information obtained would be recorded in logbooks. When asked by the Prosecution about the codes that the LRA used, the witness said the LRA sometimes used proverbs as a form of code. He said that they also used a code sheet they called TONFAS. Using one of the code sheets he managed to crack, P-339 demonstrated how he would spell Black with it. TONFAS is the acronym for Time, Operator, Nicknames, Frequencies, Address, Security.
- Witness P-231 who testified that he was a former fighter with LRA who served under Ongwen;
- Witness P-396 described the sexual violence she suffered after she was abducted by the LRA about 13 years ago. P-396 told the court that Ongwen, forced her to become a "wife" to an LRA commander. She said that the commander raped her that same night. The Defence cast doubt on the accuracy of P-396's testimony and claimed that she could not have met Ongwen because during the time she was in the LRA, Ongwen was not in the Lango area as the witness claimed. The Defence alleged that Ongwen was near the border with Sudan;
- A former long-serving member of the LRA witness P-145 insisted Ongwen participated in the attack on Lukodi camp for IDPs, despite the Defence suggesting that Ongwen was not at Lukodi when the attack happened in May 2004.

P-145 also told the court, Ongwen addressed LRA fighters before they went to attack Lukodi.

The UPDF has also been accused of directly committing crimes. Two Prosecution witnesses, P-280 and P-024, have accused the UPDF for acts of omission, which for some people in Northern Uganda could amount to war crimes. In November 2017, a survivor of a LRA attack on the Pajule camp for IDPs in Uganda described to the Court how Ugandan government soldiers allegedly tortured him for up to three weeks.

The issue of accountability for alleged UPDF crimes is still lingering in the minds of many Ugandans. The Defence has also highlighted how the UPDF military bases were frequently placed in close proximity to civilian settlements. More recently, an article in Uganda's New Vision newspaper headline purported that 'the ICC had cleared the Uganda People's Defense Forces (UPDF) of war crimes in Northern Uganda'. The ICC contacted the newspaper and clarified the remarks made by Dahirou Sant-Anna, the International Cooperation Advisor in the OTP, while addressing journalists and civil society organisations in the Lira district during a break in the trial. Civil society practitioners and community members in Uganda reacted in anger to the article. This reaction indicates that the controversy around war crimes allegedly committed by the UPDF in Northern Uganda, regardless of the outcome of the trial will not cease.

PROSECUTOR V. NTAGANDA (ICC-01/05-01/13)

Bosco Ntaganda, former Deputy Chief of Staff - Operations and Organization, with the Patriotic Forces for the Liberation of Congo ("FPLC"), an armed wing of the Union of Congolese Patriots ("UPC"), was charged with 18 counts of war crimes and crimes against humanity before the International Criminal Court.

Since the opening of his trial on 2 September 2015, nearly 69,000 pages of evidence have been exchanged between the parties and sent to the Chamber for review. The Prosecution's case began on 15 September 2015 and ended on 29 March 2017, during which time 74 witnesses were called to testify viva voce and the testimony of 8 witnesses was admitted in writing under Rule 68.





Bosco Ntaganda © ICC

There were 2149 victims divided into two groups who were allowed to participate in the proceedings. There were 1859 in the first group and are the so-called victims of the attacks, three of whom appeared as witnesses and five for the purpose of presenting their views and concerns. This occurred between the end of the Prosecution case and the beginning of the Defence case. The remaining 297 victims belong to the group of former child soldiers, none of whom were called to testify or to present views and / or concerns.

The Defence commenced the presentation of its Defence case on 29 May 2017. The Defence called 12 *viva voce* witnesses, including the Accused himself, whose testimony began on 14 June 2017 and ended on 13 September 2017. A significant fact of the trial, the Accused testified for 123 hours, which is the longest testimony by an accused before an international court or tribunal.

The Defence has admitted the testimony of seven witnesses in writing under Rule 68.

The last *viva voce* witness of the Defence appeared before the Trial Chamber on 29 January 2018 and the last written testimony was admitted on 22 February 2018.

Importantly, on 19 February 2018, the Trial Chamber ordered the lifting of all restrictions imposed on the Accused regarding his unprivileged communications with the outside world - telephone and visits - which had been in place since March 2015.

Similarly, at the request of the Defence, the Trial Chamber recently issued two decisions admitting 20 documents into evidence without them having to be brought in through witnesses.

Following these decisions, on 23 February 2018, the Defence confirmed to the Trial Chamber that the presentation of the Accused's defence was completed.

On 30 January 2018, pursuant to an order of the Trial Chamber, the Prosecutor filed an application to be allowed to introduce further charges in rebuttal.

This request by the Prosecutor was preceded by two *ex parte* applications to the Trial Chamber and Prosecutor only, which were the subject of a major dispute between the Parties.

The Trial Chamber refused the Prosecutor's request on 26 February 2018, and the Prosecutor now has until 2 March 2018, to submit a final request to the Trial Chamber to be allowed to present further evidence in rebuttal.

If the Prosecutor fails to file such a request or to seek leave to appeal the decision of 26 February 2018, the Parties and Participants shall file their closing statements, the duration of which has already been set by the Trial Chamber. If the procedure for filing the submissions of the Parties and Participants is as planned, all entries will be submitted during the month of June 2018.

The closing arguments are scheduled to be held in July 2018, prior to the Court's summer recess.



PROSECUTOR V. BEMBA (ICC-01/05-01/08)

On 21 March 2016, Jean-Pierre Combo Bemba Combo was found guilty by the ICC Trial Chamber III pursuant to Article 74 of the ICC Statute of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging) for crimes committed by a contingent “Mouvement de liberation du Congo” (MLC) under the effective commandment of Bemba. On 21 June 2016, the Trial Chamber III sentenced Bemba to 18 years of imprisonment. The conviction and the sentence were appealed.

In January 2018, the Appeals Chamber held an Appeals Hearing and, consecutively the parties and participants filed their final written submissions. Several issues were debated, such as the meaning of a “fact” under Article 74(2) of the ICC Statute; the nature of Article 28 “command responsibility” as a mode of liability under the ICC Statute, the applicable criteria of crimes against humanity and the sentencing. With regard to the interpretation of Article 28, the judges, the parties and the participants debated on the question of the requirement or not of a “causation element” under Article 28(a); the *means rea* within the definition of knowledge “should have known” under Article 28(a) (i). The question of the applicability or not of the mental element under Article 7 of the Statute for crimes against humanity of the accused under Article 28 of the Statute was also argued. Precisely, does the requirement of the mental element of Article 7 apply to the direct perpetrator of the crime, or the accused person, or both?

Another issue debated amongst the parties and participants was the element of “organisational policy” in relation to “attacks against a civilian population” as a requirement element of crimes against humanity under Article 7 and, if a trial Chamber can rely on its findings on the war crime of pillaging to qualify this policy requirement?

The Appeals Chamber will answer these issues in its final Judgement which has not yet been scheduled.

PROSECUTOR V. KATANGA (ICC-01/04-01/07)



Germain Katanga © ICC

On 7 March 2014, Mr Germain Katanga was found guilty as an accessory to crime against humanity and war crimes committed on 24 February 2003 during the attack on Bogoro, Ituri in the Democratic Republic of Congo. On 23 May 2014, he was sentenced to 12 years of imprisonment. On 24 March 2017, Trial Chamber II issued Reparations Order. Katanga, the OPCV, and the Legal Representative of Victims appealed Reparations Order. The Appeals Chamber confirmed in part the Reparations Order, reversed the Order regarding five applicants and instructed the Trial Chamber to perform a new assessment of these applications.

Katanga raised the issue of the Trial Chamber’s use of presumption as opposed to direct evidence, to make findings of harm and to allocate a monetary value to each harm.

The approach taken by the Trial Chamber was to identify and value the harm in terms of money for each applicant. In its judgement, the Appeals Chamber recalled that a Trial Chamber enjoys discretion in finding the best approach to reparations



proceedings on a case by case basis and in the most appropriate and expeditious way.

However, the Appeals Chamber declared that it does not support the approach adopted by the Trial Chamber in the present case. According to the Appeals Chamber, allocating an amount of money to each applicant after having evaluated their harm for each of them, was a very long process, contrary to the need for fair and expeditious proceedings. The Appeals Chamber considered that the appropriate procedure was rather to focus on the cost to repair the harm and not to determine the “sum-total” of the monetary value of the harm caused and, in doing so, with the assistance of an expertise, such as the Trust Fund for Victims.

However, the Appeals Chamber did not consider that this issue was an error of law or an abuse of power.

Regarding the use of presumption, the Appeals Chamber considered that in the reparation proceedings, in the absence of direct evidence, a Trial Chamber may rely on factual presumptions in its identification of the harm. It is a Trial Chamber’s discretion to determine “what is ‘sufficient’ for purposes of an applicant meeting the burden of proof”.

Applying the standard of review on appeal, the Appeals Chamber found that the presumption of harm drawn by the Trial Chamber in its decision was based on the findings in the Judgement on Conviction. However, the Appeals Chamber considered that the Trial Chamber should have notified the parties and the participants of this approach and invited their submissions. However, the Appeals Chamber found that Katanga did not demonstrate an error.

Another issue was the assessment made by the Trial Chamber regarding five applicants suffering from a psychological transgenerational harm. According to the Appeals Chamber, the Trial Chamber failed to give a reasoned opinion on this issue. The Trial Chamber failed to establish a causal nexus between the attack on Bogoro and the harm suffered by the five applicants. Therefore, the Appeals Chamber reversed the Trial Chamber’s findings and decided to remand the matter to the Trial Chamber.

PROSECUTOR V. AL-MAHDI (ICC-01/12-01/15)



Al Mahdi © ICC

On 27 September 2016, Mr Al Mahdi was convicted, through a guilty plea agreement, as a co-perpetrator for having intentionally attacked ten protected religious and historic buildings in Timbuktu, Mali between 30 June 2012 and 11 July 2012. He was sentenced to 9 years of imprisonment.

On 17 August 2017, Trial Chamber VIII decided on reparations to the victims. The Legal Representative of Victims appealed against the Reparations Order. The Appeals Chamber confirmed in part the Reparations Order. The Appeals Chamber declared that individual applicants requesting the anonymity shall nevertheless participate in the administrative screening process and their identities have to be disclosed to the Trust Fund for Victims, but not to Al Mahdi. The applicants declared ineligible for individual reparations by the Trust Fund for Victims are entitled to request a review by the Trial Chamber, which can also proceed *proprio motu*.

PROSECUTOR V. BEMBA ET AL (ICC-01/05-01/13)

On 8 March 2018, the ICC Appeals Chamber rendered its judgements on the appeals of Mr. Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu, and Mr Narcisse Arido against verdicts and sentence in the Article 70 contempt case.



On 19 October 2016, Trial Chamber VII convicted Bemba, Kilolo, Mangenda, Babala and Arido for offences against the administration of justice pursuant to Article 70 of the Rome Statute and acquitted Mangenda, Babala and Arido on some counts. Trial Chamber VII convicted the accused of having jointly agreed to illicitly interfere with at least 14 witnesses and being compensated in order to provide evidence in favor of Bemba during the Bemba trial (main case).

The Appeals Chamber reversed the convictions of “presenting false evidence” under Article 70(1)(b) in relation to the oral testimony of 14 witnesses, holding that this Article covers only documentary evidence, while confirming the remaining convictions entered by the Trial Chamber on false testimony for Bemba, Kilolo, Mangenda; and the offence of corruptly influencing witnesses for Babala and Arido.

The Appeals Chamber ruled that there is no immunity for Defence Counsel from legal proceedings before the ICC. Defence Counsel’s immunities under the Rome apply solely to the exercise of jurisdiction by national courts and cannot constitute a bar to the operation of the ICC’s own process.

Furthermore, on the issue of the admission of evidence and the right of privacy, the Appeals Chamber decided on whether Western Union Records (money transfer records through Western Union, received by Austrian authorities and obtained by the ICC) were obtained in violation of Article 69 (7) (evidence obtained by means of violation) of the Rome Statute. The Appeals Chamber ruled that the right to privacy is an internationally recognized right but it is not absolute. The possibility of a legitimate interference exists and is recognized by the Statute. Such interference cannot be disproportionate with the internationally recognised human right to privacy. The Appeals Chamber held that a request to a State for cooperation from the Court allows collecting evidence from States, even if such collection could constitute a breach of a State’s national law. The scope of inquiry of the Trial Chamber under Article 69 (7) on the admissibility of evidence on the collection of Western Union Records, cannot be an assessment of a violation of Austrian law. The ICC is bound by its own law and international human rights standards.

The Appeals Chamber also assessed whether the Pre-Trial Single Judge’s decision authorizing the transmission of Detention Centre materials (intercepted telephone communications)

to the Prosecutor violated the right of privacy. The Appeals Chamber found that collection and transfer of telephone communications was an interference to the right to privacy. However, in this case such interference was not illegal. The Appeals Chamber found that this was “of essence for the Prosecutor to be able to shed further light on the relevant facts”, and therefore justified under Article 57 (3) (a) of the Rome Statute (investigations).

Regarding the qualification as “privileged communications” between a counsel and his/her client as provided under Rule 73 (1) of the ICC Rules of Procedure and Evidence and the use of “Dutch intercept materials” relating to Kilolo’s telephone communications, the Appeals Chamber held that the rule excludes communications made in furtherance of criminal activities even if they occur between a client and his/her counsel. Communications made in the context of the implementation of a criminal activity are *ab initio* non-privileged.

At last, the appellants challenged the Trial Chamber’s decision not to make admissibility rulings on evidence submitted at trial and to rely further on such evidence on its findings. The Appeals Chamber stated that evidence “submitted” in accordance with the procedure as adopted by the Trial Chamber and discussed at trial cannot be excluded or presumed to be considered by a Trial Chamber as non-admissible. The Appeals Chamber considered that there was no undue prejudice to the rights of the accused persons in deciding not to rule on the relevance and/or admissibility of evidence “submitted” and in relying on it in its conviction decision.

Sentencing

The Appeals Chamber confirmed partly the sentences given by the Trial Chamber, reversed Kilolo’s and Mangenda’s sentences, remanding the matter to the original Trial Chamber for a new determination. The Appeals Chamber stressed several errors of law made by the Trial Chamber. Some of these errors concerned the time spent in detention and the nature of the penalty. The Appeals Chamber considered that Article 78 (2) of the Rome Statute obliges a Chamber to take into account the time previously spent in detention but it can only be taken into account once. Also, the Appeals Chamber found that the Trial Chamber erred in law and acted *ultra vires* in imposing suspended sentences on Kilolo and Mangenda. The Appeals Chamber held that under the principle of legality, such penalty does not exist under the Rome Statute.



INTERVIEWS

JUDGE CUNO TARFUSSER

1. During the last nine years, you have been a judge at the ICC. What were the most memorable moments of your mandate?

I have felt privileged every day as being one of only 18 people who are judges at the International Criminal Court and this awareness makes every of every moment a memorable moment and of everyday a memorable day. When you have to deal with issues which are part of the contemporary history you feel both heavy responsibility and great honour. This said it is difficult to state what has been the most memorable experience as there is a difference between the institutional experiences, on the one hand and the personal feelings and memories, on the other.

From an institutional perspective, there was a big gap for me between what I expected and the reality I witnessed. My experience as an investigating Public Prosecutor in Italy was a very broad and good one and prepared me for the enormous issues which you have to deal with on a daily basis at the ICC. Nevertheless when I came here I felt humbled and hoped that I would be able to meet the high standard I expected and to have sufficient skills as required by a judge at the ICC. I learnt very soon that, although I needed to learn very much, the gap wasn't that big. In other words, the average level of professionalism, especially at the higher positions, is not what I had expected it to be.

From a personal point of view and professionally speaking, many moments were memorable. One of the most exciting ones was when I had to decide on the issue relating to the travel of Omar Al-Bashir to South Africa in order to attend the African Union summit. Through a note verbale by the Court South Africa was "reminded", well ahead of the day of travel, of its



obligation under the Statute to arrest Al Bashir while entering their territory. Only at 11.02 on the day prior to Al-Bashir travelling to South Africa I received a filing from the Registry saying that the South African authorities had requested "consultations with the ICC". Immediately it seemed clear to me that this was a tactic manoeuvre by South Africa to gain time regarding their duty to cooperate with the Court and reacted by calling a meeting with my staff in order to discuss the relevant legal issues. In particular, the meaning of 'the Court' under Article 97 of the Rome Statute was a problem. I interpreted it as including representatives of all organs of the Court and scheduled a meeting with them at 17.00 hours, inviting for the requested consultations also the Ambassador of South Africa for him to be able to express the concerns of the South African authorities in relation to the arrest of Al Bashir. Having been a Prosecutor, I am used to dealing and deciding issues on an urgent basis and to taking strong decisions. Clearly South Africa was expecting a decision scheduling the requested "consultations" to take much longer, days if not weeks if not months.



The memorability from my perspective was that, although I was perfectly aware of the political interests and positions involved, I decided as a judge, in total independence and exclusively on the basis of the law. And it was this that the South African authorities didn't like; in withdrawing from the ICC, they *de facto* admitted it when they wrote in the letter sent to the UN Secretary-General to withdraw from the ICC that "There are no procedures to guide Article 97 consultations, and South Africa is disappointed that the process, that in our view should clearly have been a diplomatic process was turned into a judicial process." They are right in saying that there are no procedures to guide Article 97 consultations, but in such cases it is for the judges to interpret the law and this is exactly what I did. Diplomatic processes are not for a judge to deal or be involved with and I was very proud of this moment for showing my full independence as a judge.

Other memorable judicial moments were when the Pre-Trial Chambers I was part of didn't confirm the charges brought against four individuals in two cases as the evidence presented by the Prosecutor was considered to be insufficient. The clear message was that the ICC is a criminal court and needs to work as a criminal court: evidence must be assessed to the highest level and people should not be tried – or, worse, be put in prison – simply because they are charged with heinous crimes.

2. In July this year, the Rome Statute will celebrate its 20th anniversary. What do you consider to be the major achievements of the ICC and what is your vision for the future of international justice?

Well, for me the main achievement is that the International Criminal Court exists. The Court can be compared with an open building site where many things have already been done and many others more are still to be build and to be improved. This would not be possible if the Court had not been created in the first place. At present I am not in a position to elaborate in detail on the ICC's achievements but I am confident that, despite the many problems of credibility the Court is facing, caused primarily by its management in the last triennium, thanks to the daily work of the numerous committed staff members the construction of a credible and strong Court, although slowly, goes in the right direction. For my part I can only say that I am proud of having been for nine years one of those who were given the possibility to work on the building and assure that I have tried to do my very best.

"THE STATES SHOULD NOT ALWAYS EAT AND DRINK WHATEVER THEY ARE FED BY THE MANAGEMENT"

As for my visions for the future of international justice and thus for the ICC which I consider to be a fantastic instrument for international justice with an enormous potential which has not yet been properly developed, very much depends on the choices which will be made in the next days and weeks in terms of management at the head of the Judiciary and the Registry. For sure the Court cannot continue on the same path because, as said, it's credibility is very low, internally vis-à-vis the staff whose morale is depressed and externally vis-à-vis the informed observers. But the future of the ICC depends also very much on the States themselves. I think they need to have a more influential say on the workings of the Court. Obviously I do not mean this with regard to the judicial proceedings as these must remain totally independent; what I mean is that the States should be more involved in the institution on issues such as a more in-depth control and oversight over the management of the Court and I say this because I have no doubts about the fact that the ICC's management is not very transparent vis-à-vis the States and this has created mistrust by the States in the Court. With admittedly some degree of provocation and exaggeration, a few years ago I said that the Court would operate much more efficiently and effectively with less the staff and half the budget. I still believe that this is the case in the sense that no serious attempt (for sure the ReVision project cannot be regarded as such, either in its inspiration or in its outcome) to optimise the human and material resources has ever been made. Instead for nine years I have heard the ICC management constantly ask for more funding from the States without credibly and transparently demonstrating how the funds are used. I think that States should not always eat and drink whatever they are fed by the management.



3. In your view, what has the participation of victims brought to proceedings before the ICC?

I come from a jurisdiction where the victims' participation in the criminal trial is something absolutely normal and therefore to me victims' participation in the ICC is something I am absolutely familiar with and I find it of huge value, be it in a national system, be it to the ICC as for victims feeling the institution on their side is part of a self-healing process. This said, as a matter of principle it is clear that the victims' participation in the ICC proceedings is slightly different from the one in national jurisdictions, especially considering the figures.

While in the national system the victims of a crime are normally only a few, in the ICC proceedings there are thousands of victims, which obviously impacts on the overall balance of the proceedings. The Court therefore needs to find a system which, while strongly upholding the principle of victims participation, guarantees the balance vis-à-vis the accused.

On the other hand, not only does the Rome Statute fail to define what a victim is, it also is very confused about its definition. Article 15 of the Rome Statute stipulates that "victims may make representations to the Pre-Trial Chamber". To my understanding as a criminal lawyer, at the stage of a request by the Prosecutor to initiate an investigation the very fact of mentioning "victims" is, to say the least, improper. Victims who? Of what? Of a conduct which has not yet even been investigated and identified as a crime?

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Nevertheless the term "victim" is in the law without a precise definition and it is left for each chamber to define and to decide on it.

More generally speaking, I think that the ICC and the NGOs supporting the interests of victims are creating far too high expectations in them, expectations the ICC can never meet. I fear that sooner or later this will backfire on the ICC.

4. Do you consider that proceedings before the ICC can serve as model for national courts in terms of the protection of fair trial rights and the rights of an accused to an expeditious trial?

Well, before serving as a model for other, national courts, I think that the ICC should ask itself if its own proceedings are fair. Or, expressed in the words I was raised with, before teaching others, we should make sure that we have done our homework.

Have we? Are our proceedings truly fair?

Yes, of course, generally speaking and from a formal point of view they are. We do follow the law, the rules and the principles established by the legislator, interpreting and applying them in the context of the cases we are called to judge upon.

From a substantive point of view I have however some doubts, in particular as far as an important element of overall fairness is concerned. I am referring to the expeditiousness of the proceedings which, although being part of the overall concept of "fairness", is often expressly mentioned in our legal texts in one breath (three times in the Statute alone, eight times in the Rules of Procedure and Evidence; in most of these instances, the legislator speaks about a "fair and expeditious trial"). I interpret this as the intent of the legislator to put a particular focus on the expeditiousness as a critical aspect of the overall fairness; as such, it is the responsibility of the judiciary to ensure that the legislative will is truly implemented. If we now look at our proceedings lasting years and years, in the absence of any statutory deadlines which could streamline the proceedings, if we take into account that not even maximum deadlines related to the different phases of the proceedings are set for the detention, I have some doubts in defining our proceedings as holistically fair.



I find it also disappointing that the discussion among judges on the issue of expeditiousness, a discussion which started some time ago, was not further promoted by the judicial management. The absence of statutory deadlines makes it possible for some to argue that it would be the exclusive prerogative and right of the accused to determine whether the requirement of the expeditiousness is met; an argument which has been and is being made and which cannot be dismissed by way of a simple reference to a clear statutory timeframe. Therefore I think that as long as the Assembly of States Parties and the ICC do not impose deadlines, the right to an expeditious, and therefore fair in the specific meaning chosen by the statutory texts, trial will always be at risk.

Bearing this in mind, my answer to your question would be that yes, the ICC can certainly serve a model for some national courts or legal systems but, at the same time, there is a lot that the ICC can and should learn from legal systems based on the same principles, without assuming that the mere fact of dealing with the worst atrocities on an international scale makes it a model.

Coming back to the issue of expeditiousness as central and critical part of the overall principle of fairness, I was always taken aback by the widely held view that the ICC cannot be bound by deadlines because of the “complexity” of our proceedings. I wonder what kind of idea or experience of national proceedings can sustain this kind of statement. I, for one, having served my jurisdiction for several years, am in a position to say that proceedings of a similar complexity as those of the ICC can and are regularly being held before national courts. It is time to debunk the myth that the complexity of what is done by the ICC is unprecedented, and to stop this being brought as an excuse to justify practices which would not stand scrutiny at the national level.

5. How does being a judge at the ICC compare with your experience of being a Prosecutor in your national legal system? What are the main differences?

In the end, when you go back to the basics, the ICC is no different to any other criminal court: the prosecution charges an individual and brings its evidence in support, a defence lawyer represents the accused and the judges are there to determine guilt

"IT IS TIME TO DEBUNK THE MYTH THAT THE COMPLEXITY OF WHAT IS DONE AT THE ICC IS UNPRECEDENTED"

or innocence, the well-known paradigm thesis – antithesis – synthesis.

Therefore the main differences are cultural, and I refer in particular to the always present dualism common law – civil law; they are linguistic, and I am referring to the fact that English and French are the working languages but many other languages, sometimes completely unknown, are used in the courtroom; I would also mention geographic challenges, the crime scenes being far away from the Court with all problems this implies such as difficulties for the judges to understand the real context and the perceived distance of the Court from the persons and the population involved.

This said, I think that the ICC overestimates its role. Focus should not be lost that its primary purpose is to serve justice through criminal proceedings, not to create a historical record, or to save the world, it is to decide the guilt or innocence of an accused charged with precise and determined facts considered as crimes. Period.

6. What do you consider are the future challenges for the ICC?

There are so many challenges facing the ICC. The basic and most important is to do what it was established for: to investigate, prosecute and hold trials and to do so in a timely and acceptable manner and, believe me, this is already challenging enough. The need to ensure that the Court can rely on competent staff for this specific judicial job is critical



(and I refer here also to what I said previously as to the need for the Court to embark on a serious assessment of the resources available to it, in terms of both quantity and quality). If one does not do as good a job as possible then the Court cannot achieve its bigger goals such as universality; only by being seen as a Court who holds proper trials will the ICC gain the support of States and the international community. The ICC doing things the right way will naturally lead to States getting on board. States do not like to give up their sovereignty and will only do so when they will feel they can trust the ICC.

7. What is next for you after the end of your mandate at the ICC?

I do not know what is next as I do not know yet when the Gbagbo and Blé Goudé trial I am presiding over will finish. With such uncertainty it is very difficult to make precise plans for my future. The only thing I know for sure is that I will not retire. An option which is always open is to go back to the Italian judiciary as judge or as prosecutor. But I have started to look around for other opportunities and I am leaving my options open because I would also like to remain in the international sphere. Ultimately for me, if there was a choice between a more prestigious position and a more interesting one, taking the more interesting one is of greater importance.

JUDGE SANJI MONAGENG

1. This year your mandate as a judge at the ICC will end and you will be leaving the Court. During the last nine years, you have been a judge in Pre-Trial and Appeals and also held the position of Vice-President. What were the most memorable moments of your mandate?

I will start with Pre-Trial. This is where I cut my professional teeth; this is where my professional eyes and ears opened to issues such as conflict of laws and systems at the ICC. It was initially very difficult to work and reason when each one of us Judges were still pre-occupied with our own national systems, procedures and processes. At that time I was interpreting the application of civil and common law regimes literally, and as a result I spent a lot of time arguing over this with my colleagues.

I was to realize much later that actually the best approach is for the Court to apply a system which is more efficient and which does not prejudice the accused person. One memorable experience from my work in the Pre-Trial Chamber was dealing with a potential conflict of interest. I knew about conflict of interests from my position as a former judge in domestic jurisdictions. In 2010, I was assigned to preside of the issuance of the second arrest warrant for Al-Bashir. I asked the Presidency to be recused from this case. This was because I had previously participated as a Commissioner in the Report on Darfur for the African Commission on Human and People's Rights.



At the national level this would have been a reason to recuse myself, however at the ICC the Presidency decided that as the Commissioners who compiled a Report on Darfur, did not provide an opinion on the issue of genocide, it was not a sufficient reason for me to be recused. This was a surprise but looking back it made sense.

Another situation where I felt the need to recuse myself was in the Ruto case. I had previously been Chair of the Working Group on Lessons Learned and the Vice-President of the ASP asked me



to speak with lawyers and officers from Kenya regarding the discussion on the modification of Rule 68 of the Rules on the admission of evidence. When there was an appeal in the Ruto case on this specific issue on the applicability of amendments of Rule 68 of the Rules I asked to recused myself and on this occasion in order to avoid any appearance of impartiality. The President of the Appeals Chamber agreed. In both situations I made sure that the decisions on my recusal were made public so there were no misunderstandings.

I spent six years in the Appeals Division and literally participated in almost all cases that have been handled by the ICC. The most memorable case for me is the ground breaking decision in the Ntaganda jurisdiction case over whether child soldiers that belong to the same armed forces can be raped or sexually abused by members of the same armed forces. I presided on this case and my fellow judges and I concluded that indeed Mr Ntaganda could be held responsible for these crimes.. We affirmed that the ICC has jurisdiction in these cases. This was an unprecedented issue which had not been covered by academics and others. When the final decision came, I received a lot of feedback from all over the world congratulating us on the decision, and this confirmed that my colleagues and I had made the right decision. The Trial Chamber initiated the decision and it was confirmed by the Appeals Chamber and all involved deserve congratulations.

I was also President of the Appeals Division for two years and this made me very close to staff – both legal officers and administrative staff and we have developed what I think is a lifelong bond. Needless to say, I carry very fond memories of my A Team, the best in the world – the Appeals Division legal officers and administrative staff. Being a judge in the Appeals Division has been a wonderful and enriching experience.

When I was Vice-President it was one of the most difficult times, due to relations between the Court and the African Union not being the best. I would wake up each morning as an African and have a huge problem about the way some African States were handling this matter. This made me think about all the African staff at the ICC and also the African victims of crimes. This was a painful experience for me when I heard allegations that the ICC is targeting Africa and yet this was not true and as if women, men and children were not dying, were not being raped and displaced.

Although I had no direct contact with my government it was comforting that they were in support of the ICC.

2. In July this year, the Rome Statute will celebrate its 20th anniversary. What do you consider to be the major achievements of the ICC and what is your vision for the future of international justice?

The very fact of the establishment of the ICC is a major achievement. There have been convictions; there have been reparation orders, although some are on appeal. There is somewhere where victims of these atrocities can look up to for redress. The ICC is embraced internationally although not by everybody. I also think that it is a deterrent of sorts. After 20 years, the ICC remains the centrepiece of the field in terms of ending impunity and upholding the rule of law, and this puts a lot of pressure on it to deliver, but we should not make ending impunity the preserve of the ICC, national and regional institutions should also play their part.

International justice, especially international criminal justice has a great future, but having said this, there are major challenges. There has to be a radical change of mind-set regarding the recognition of crimes against humanity as serious crimes, that should be punished accordingly. There are still political games being played. This area also suffers from lack of or limited resources and jurisdiction like in the case of the ICC and many other things.

My vision is to see the above addressed, to see all states coming to the table, to see the United Nations Security Council rising to the challenge and embracing its responsibilities. I would like to see a situation where deserving cases are referred to the ICC without political hindrances as we are presently witnessing.

The ICC has come a long way and it is going in the right direction and it has personally been a wonderful journey for me. For example, since I first arrived in 2009, the standard of submissions by the parties, participants and legal representatives for victims has improved significantly, and it has reached the stage where I look forward to receiving submissions and participating in appeals. Generally I think the Court is where it should be.



My vision is that African states improve their human rights record, there are so many human rights instruments and mechanisms for human rights in Africa and Africa needs a better record in upholding these rights.

3. In your view, what has the participation of victims brought to proceedings before the ICC?

Victims participation in my view has brought dignity to the victims, it has brought a voice to these largely faceless people, it has brought the Court's and the world's attention to the scale, intensity and ruthlessness of these offences, and in some way, I strongly believe a bit of closure. But the big question remains; why these atrocities? What can be done to stop these senseless conflicts and who should do it?

Victims participation was something new to me and I first encountered it as a Pre-Trial judge. I dealt with authorising the participation of victims, and in those days application forms were scrutinized one-by-one. There were many issues that we had to deal with, including the role of intermediaries, but the involvement of victims at the ICC is a very welcome development.

Not every victim wants money or compensation, some want to be heard, some want to tell their story. For example, in the Katanga case some victims asked for \$1 as a token compensation, this says a lot about something which others take for granted. It is important for the victims to be able to send someone to the ICC to be heard and this is something which the ICC should be very proud of. Victims participation has brought dignity to the victims and in some way it has brought them closure.

4. Do you consider that proceedings before the ICC can serve as model for national courts in terms of the protection of fair trial rights?

They can, but the ICC has to work hard to harmonise some of its processes and procedures so that there is certainty for the parties and the participants, for example in the issue of victim participation and reparations. I think the Court has reached a stage where it should reach a landing, which it has largely done, but there are still some pockets to be filled.

"VICTIMS PARTICIPATION HAS BROUGHT DIGNITY TO THE VICTIMS AND [...] IT HAS BROUGHT THEM CLOSURE"

5. How does being a judge at the ICC compare with your experience of being judge in national legal systems? What are the main differences?

In my national system, as a high court Judge, I tried cases alone, I took decisions alone and therefore the whole responsibility was on my shoulders. At the ICC, I share the responsibility with other Judges, which might be said to be advantageous for the litigants. At the national level it is not always possible to have multiple judges in first instance proceedings, due to lack of resources, but usually at the higher levels there are multiple judges to ensure oversight. Proceedings at national level are also fairer due to many factors for example, witnesses are easy to find and bring to court, cases are less complicated, the law is established and so forth. This makes it easier. At the ICC at times the Prosecutor investigates in ongoing conflict areas and this does not make her task any easier. At the moment witnesses are far off in Africa. Cultures and languages are different, and there are many other issues. What is common is the goal. We all work towards attaining justice for the victims and ending impunity.

6. What do you consider are the future challenges for the ICC?

Resources are a big challenge and will remain so. The other issue is managing expectations for the whole world and in particular for victims. When the victims hear of a conviction they expect meaningful reparations.



"STATES NEED TO STOP CONFLATING POLITICS WITH THE ICC"

As long as member states do not contribute to the Trust Fund for Victims, this will remain a challenge. As for the international community, the ICC being a permanent Court, it is expected to deliver on its mandate of delivering true justice, but it faces many challenges after so many years. The fact of non-universality of the Rome Statute is also a challenge. Cooperation is a major stumbling block. I also think that the ASP should invest more in complementarity, and therefore it is important for more resources to be put into capacity building for regional and national institutions to be able to investigate and prosecute the Rome Statute crimes. This will also relieve the ICC which should not be viewed as the sole entity to end impunity. The role that the United Nations Security Council plays in the future is also crucial

- States need to stop conflating politics with the ICC.

7. What is next for you after the end of your mandate at the ICC?

I will go back to Botswana, my motherland, bond with my grandchildren and rest a bit, before taking up some activity. I have since qualified as an International Commercial Arbitrator and will probably venture into that. I would rather not find a formal job with a boss watching over me. I could do arbitration at my own pace, as and when I want to.

There is also so much to do for the community in Botswana including for women's and children's rights and this is another way I could help. Prior to joining the ICC, I participated in the establishment of the Southern African Litigation Centre, in my capacity as a member of the Board of the Open Society Initiative of Southern Africa, together with the Executive Director of the International Bar Association. The Centre works on human rights and public interest cases. Initially when it was established we thought that it would be a small organization, however, it is now one of the most powerful organizations in Southern Africa. This is an organization I would like to reconnect with given the importance of its work..



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OPINION PAPER

By Sara Pedroso



BUILDING A RELATIONSHIP: INTERMEDIARIES AT THE INTERNATIONAL CRIMINAL COURT

Introduction

A new type of actor, the intermediary, has emerged as a vital player in the Court's activities. Until recently, there were no formal rules regulating the relationship between intermediaries and the Court. In March 2014, the Guidelines Governing the Relations between the Court and Intermediaries ('Guidelines'), the Code of Conduct for Intermediaries and Model Contract, were created to govern this relationship. The Guidelines define an intermediary as: 'someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other'. This broad definition reflects the wide range of functions performed by intermediaries.

The Guidelines aim to codify Court practices and standardize the relationship between the Court and intermediaries by defining their reciprocal rights and obligations. They set out extensive screening and selection criteria for the recruitment of intermediaries (section 2) and define the contours of the relationship between them and the Court (section 3). A significant part of the Guidelines is devoted to the support and training of intermediaries (section 4).

They stipulate measures to ensure their safety (section 5). The final section envisages the monitoring and implementation of the Guidelines (section 6). While the Guidelines represent a commendable advance in defining the relationship between intermediaries and the Court, they raise concerns as to their practical implementation, which remains uncertain to this day. Three broad concerns are raised below:

1- Scope of application

Intermediary status determines which duties, and importantly, which protections are afforded to intermediaries assisting the Court. The Guidelines distinguish between three types of intermediaries: those who are 'contracted', those who are 'approved by the Court by way of affidavit', and those who are 'unapproved', such as self-appointed intermediaries. The 'unapproved' category is covered by the Guidelines on a case-by-case basis; however, all intermediaries are subject to the Code of Conduct. Although the Guidelines are deliberately vague and acknowledge that 'Court-wide standardization of all aspects concerning intermediaries may not be possible', ambiguities as to their scope of application risk undermining their effectiveness. For instance, the 'affidavit' and 'unapproved' categories of intermediaries are based on an *ex post facto* determination of their status and circumstances in which a



person becomes an ‘affidavit’ intermediary, or in which an ‘unapproved’ intermediary may fall within the ambit of the Guidelines are unclear.

Further, the Guidelines are silent on potential recourses available to intermediaries seeking to challenge their status (keeping in mind that many intermediaries do not have a contract with the Court). Lack of clarity of the applicability of the Guidelines may put those assisting the different organs of the Court at risk.

2- Practicability

The screening, selection and supervisory requirements for intermediaries contrast with the practical realities of investigations. The responsibilities imposed on intermediaries through the Guidelines are akin to those of Court staff. On the one hand, intermediaries ‘must uphold the highest standard of confidentiality and respect the impartiality and independence of the Court while carrying out their activities in the same way as Court staff do’.

On the other hand, intermediaries should not be called upon to undertake ‘core functions’. Intermediaries are also expected to adhere to the Code of Conduct, and uphold strict confidentiality standards. Such obligations seem at odds with their potential lack of insight and access to information regarding the strategic aims of the organs of the Court with whom they work.

This lack of knowledge may deprive them of the ability to fully assess, for instance, whether information is ‘sensitive’ or classified, whether there may be a conflict of interest, or whether they are breaching a policy or practice ‘in accordance with Court decisions’. The Guidelines also provide for extensive screening and selection criteria, which may not always be commensurate with the realities on the ground, such as financial and other practical restraints.

In sum, the high standards to which intermediaries are held under the Guidelines may not be reflective of their relative position to the Court.

3- Oversight and Monitoring

The final section of the Guidelines envisages a predominantly self-regulatory monitoring scheme, where ‘each organ and unit of the Court and Counsel shall be responsible for the proper application of the provisions of the Guidelines in relation to intermediaries that cooperate with their organ or unit or Counsel’.

The Guidelines provide for the creation of a Working Group on Intermediaries, as well as ‘a permanent observation mechanism’ for receiving recommendations and the exchange of experience and information. In a progress report, the Working Group noted, in 2015, that ‘the review of the Guidelines is foreseen to take place towards the end of 2016’; however, no such review appears to have taken place.

Suggestions were made for attributing an oversight role for the implementation of the Guidelines to the Independent Oversight Mechanism but this idea was later abandoned. It is also unclear whether the Court’s Chambers will play a role in ensuring the implementation of the Guidelines, reinforcing the prospect of an enforcement gap.

Conclusion

The status and role of intermediaries is an ongoing concern. The formalization of the relationship between the Court and intermediaries through the Guidelines is a welcome advance; however, a lack of clarity of the rules and lack of oversight in their implementation may render that framework illusory, which could be ultimately detrimental to the Court.





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