



International Criminal Court
Bar Association

Association du Barreau près
la Cour Pénale Internationale

ICCBA NEWSLETTER

SEPTEMBER 2018 – ISSUE 3



Brought to you by the following contributors:

- Shalini Jarayaj
- Dominic Kennedy
- Doreen Kiggundu
- Jad Khalil
- Nadim Mansour
- Audrey Mateo
- Sara Pedroso

Design by Nadim Mansour

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OUDE WAALSORPERWEG
10, 2597 AK, THE HAGUE



INFO@ICCBA-ABCPi.ORG



WWW.ICCBA-ABCPi.ORG



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MESSAGE FROM THE PRESIDENT

Dear Members,

I am delighted to present the third edition of the ICCBA Newsletter which includes updates from the ICCBA committees, updates on the cases currently ongoing at the ICC and also a very insightful interview with former ICC Judge Christine Van Den Wyngaert.

In July 2018, I was honored to be elected as the President of the ICCBA and I look forward to working with the Executive Council and all committees for the benefit of the Association and its members over the coming year.

At the ICCBA General Assembly Meeting at the end of June 2018, much was discussed, and updates were given by each of the committees on the work done during their tenure. A special President's award was also presented to the Victims Committee for the best overall committee. The ICC First Vice-President, the Registrar and the ICC Prosecutor also came to speak with members at the General Assembly which shows the importance which is given to the ICCBA by the organs of the ICC. The minutes and video of the General Assembly, and the speeches of the ICC Principals, are available in the Members' Area of the ICCBA website as well as photos which are on the [gallery page](#) of the website.

On 29 June 2018, prior to the start of the General Assembly, the President of the Federation of European Bars, Mr. Michele Lucherini, along with former President of the ICCBA, Mr. Karim Khan QC, signed an Affiliation Agreement between the two organizations. This is the second such agreement which the ICCBA has signed, the first being with the African Bar Association. These agreements are beneficial for the ICCBA to enhance the working relationship between the organizations.

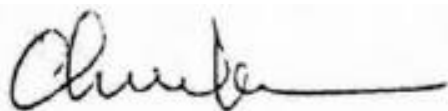
In July 2018, the ICCBA Presidency and the Executive Director held meetings with the Principals of the ICC (President, Prosecutor and Registrar) and discussed several issues. I was extremely pleased by the warm welcome which we were given by each of the Principals and the meetings were very fruitful. There are a number of areas in which the ICC and ICCBA can work together to the benefit of the ICC and also to all members of the ICCBA.

Representatives of the ICCBA are regularly invited to attend events on behalf of the Association and such events are important to expand the reach of the ICCBA and its work. In July 2018, the Presidency was invited to the 20th Anniversary of the Rome Statute event at the ICC which included a number of high level dignitaries, including the President of Nigeria. I was invited to speak on behalf of the ICCBA, the full speech is available [here](#).

Please keep a check on the ICCBA website for updates and news from the ICCBA: www.iccba-abcpi.org

I look forward to working with all members of the ICCBA during the coming year and should you have any issues which we may be of assistance with, please do not hesitate to contact our Executive Director, Dominic Kennedy at: executivedirector@iccba-abcpi.org

Best wishes,



Chief Charles Taku
President
ICCBA





VICTIMS COMMITTEE

On 7 September 2018, the VC met for the first time after GA 2018 and end of Summer Recess at the ICC. The Work Plan for 2018-2019 and the upcoming

Training Event at Oxford University on 4 October 2018 (see separate announcement) were discussed.

COUNSEL SUPPORT STAFF COMMITTEE

The new Committee warmly welcomes all counsel support staff at the ICC to the new ICCBA working year. Following the elections, five members of last year's Committee have been re-elected, and we are delighted to be joined by two new Committee members: Dr Bande Gulbert Mbah Tarh and Fabian Krougman.

The newly-constituted Committee met for the first time on 30 July 2018 and appointed Michael Herz as its Chair. We are looking forward to a productive year, focusing on three key issues of advocacy to improve support staff welfare:

1. Securing clear and favourable terms on the status of support staff vis-à-vis income tax;

2. Promoting a work-place environment free from all forms of harassment and discrimination, and ensuring accountability if they do occur;

3. Improving working conditions, including finding ways to contractually incorporate maternity/paternity leave, sick leave, annual leave, notice periods, and reasonable working hours.

The Committee is scheduled to meet in the first week of each month to ensure that we can frequently coordinate and discuss the advocacy efforts.

As always, as your representatives, we welcome all views and thoughts by support staff, and invite you to send any to our email address on: cssc@iccba-abcpi.org. Messages will be treated in strict confidence.

AMICUS COMMITTEE

The Amicus Committee held its first meeting of the new ICCBA term on 16 July 2018, attended by all five members. The Committee discussed the previous work of the Committee as well as proposals for the Committee's work during the current term. The Committee members reached a consensus on the contents of its proposed Work Plan, and a finalised

Work Plan has now been submitted to the Executive Council for the Council's consideration and approval. The Committee will hold its second meeting in early September and proceed with its Work Plan subject to any requested amendments received from the Executive Council.





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

As the trial of the accused Dominic Ongwen continues to be heard at the ICC, his defence lawyers have filed a motion on 5 July 2018 to Trial Chamber IX requesting leave to file a no case to answer and judgement of acquittal motion. In its request, the Defence argued that the court should dismiss the 10 counts of war crimes and crimes against humanity that Ongwen has been charged with for his alleged attack on Pajule IDP camp in October 2003. On 12 July 2018, the Prosecution and the Legal Representatives of Victims filed responses opposing the Defence request. (See: *ICC-02/04-01/15-1305*; *ICC-02/04-01/15-1304* & *ICC-02/04-01/15-1306*).

On 18 July 2018, Trial Chamber IX unanimously rejected the Defence request to file a motion for the court to consider acquitting Dominic Ongwen of some of the charges against him. According to the Chamber, the issues (i.e., the repeated reference to the burdens caused by the voluminous number of charges and modes of liability in the case, pillage charges and charges relating to Ongwen's alleged planning of the LRA attack on Pajule camp in October 2003) raised by the Defence did not justify for allowing such a motion. On the same day, the single judge Bertram Schmitt of Trial Chamber IX granted the defence request to order the Registry to disclose and transmit certain items that were in the possession of Ongwen at the time of his transfer to the court.

The Trial Chamber confirmed for the case record that it conducted a judicial site visit to the four charged crime scenes in Northern Uganda in June 2018. Consequently, all documents that were filed on the case record confidential in relation to the judicial site visit were reclassified as public.

In a decision of 16 August 2018, the Trial Chamber partially granted the Prosecution request to introduce into evidence prior recorded testimony of witness D-132 pursuant to Rule 68(2) (b) of the Rules and rejected the remainder of its request with regard to prior recorded testimonies of 6 Defence witnesses.

Currently, Ongwen's trial is on judicial recess until 18 September 2018 when the hearings will resume with the Defence Opening Statement. In accordance with Order *ICC-02/04-01/15-1275*, the Defence will have up to 5 hours to present its opening statement on 18 September 2018 at 9:30 am. The Defence will present its evidence for the first block from 27 September 2018 to 10 October 2018.

Significantly relevant to the conduct of the Ongwen trial proceedings is a previous direction *issued* by Trial Chamber IX on 13 April 2018 where the parties were ordered to file their closing briefs, if any, six weeks after the declaration of the closure of the submission of evidence, and that the closing statements be held two weeks after the filing of the closing briefs. The Defence request for reconsideration of or leave to appeal the Directions on Closing briefs and Closing Statements was rejected by the Single Judge of Trial Chamber IX in a decision that was rendered on 11 May.



PROSECUTOR V. AL HASSAN (ICC-01/12-01/18)

Mr Al Hassan, a Malian national was a member of Ansar Eddine and *de facto* chief of Islamic police. Mr Al Hassan is alleged to have been involved in the work of the Islamic court in Timbuktu and to have participated in executing its decisions. He is also alleged to have taken part in the destruction of the mausoleums of Muslim saints in Timbuktu using Islamic police forces in the field, and to have participated in the policy of forced marriages which victimized the female inhabitants of Timbuktu and led to repeated rapes and the sexual enslavement of women and girls.

On 31 March 2018, Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud was surrendered to the ICC on charges of crimes against humanity (torture, rape and sexual slavery; persecution of the inhabitants of Timbuktu on religious and gender grounds; and other inhumane acts) and war crimes (rape and sexual slavery; violence to person and outrages upon personal dignity; attacks intentionally directed against buildings dedicated to religion and historic monuments; and the passing of sentences without previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are generally recognised as indispensable) allegedly committed in Timbuktu, Mali, between 2012 and 2013.

The surrender follows an arrest warrant issued by Pre-Trial Chamber I ("Chamber") of 27 March 2018. On 4 April 2018, Mr Al Hassan appeared before the Single Judge of the Chamber for an initial appearance hearing held in the presence of the Prosecutor and Mr Al Hassan's defence counsel. The Single Judge provisionally set the date for the beginning of the confirmation of charges hearing in the Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud case ("Al Hassan case") for 24 September 2018. On 20 July 2018, Pre-Trial Chamber I issued a decision postponing the commencement of the confirmation hearing to 6 May 2019.

The key filings and decisions in this case are highlighted below:

- **On victim participation and reparations:** On 24 May 2018, the Chamber issued a decision on the principles applicable to victims'



Al Hassan @ ICC

participation in the case by which, inter alia, it

approved a joint form for participation and reparations to be used for the purpose of applying for participation and/or reparations in the Al Hassan case. The Victims Participation and Reparations Section ("VPRS") of the Registry has now commenced the process of collecting victims' application forms for participation in the proceedings and/or reparations.

- **On disclosure:** On 16 May 2018, the Chamber issued the "Decision on the System of Disclosure" in which the Single Judge instructed parties to submit observations on a potential analysis of the disclosed evidence and in which he made reference to an approach whereby - to streamline the evidence disclosure process - when disclosing any evidence and communicating it to the Chamber the Prosecution may be required to attach an in-depth analysis chart (IDAC). Taking into account the Prosecution's argument, *inter alia*, that the production of an IDAC based on the model proposed by the Chamber would not only place an undue burden on the Prosecution but considerably delay the proceedings, by potentially up to a year, the Single Judge on 29 June 2018 in the "Decision on the In-Depth Analysis Chart of Disclosed Evidence" held that the parties should not be required to produce an IDAC of evidence at the time of disclosure as the burdens of requiring the same would be disproportionate to the potential benefits it might bring. The Single Judge also instructed the Prosecution to



immediately begin the process of disclosing evidence and communicating it to the Chamber, in accordance with the instructions provided in the "Decision on the System of Disclosure".

- **On confirmation hearing date:** On 2 July, with a view to possibly setting a new date for the commencement of the hearing, the Single Judge issued the "Decision Instructing Parties to File Observations on a Possible Postponement of the Confirmation of Charges Hearing" to receive the parties' observations on the need to postpone the confirmation of charges hearing and the date on which they consider it could be held.
- **On the redaction protocol:** On 4 July, the Single Judge decided in the "Decision on the Prosecutors' Request for Clarification on the Non-Disclosure of Witnesses' Identities" that when disclosing to the Defence any notes it had taken during contact or interviews with individuals who had not provided formal statements, the Prosecution is not required to first seek authorization from the Single Judge to redact their identities.

PROSECUTOR V. GBAGBO & BLÉ GOUDÉ (ICC-02/11-01/15)

Overview

The case of *Laurent Gbagbo and Charles Blé Goudé* commenced on 28 January 2016 and trial proceedings are currently underway. 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. On 4 June, the Trial Chamber declared the presentation of the Prosecution's evidence as closed (ICC-02/11-01/15-1174).

"No case to answer" proceedings

On 4 June 2018, the Trial Chamber ordered, in its "Second Order on the further conduct of the proceedings", the Defence for Laurent Gbagbo and for Charles Blé Goudé to file submissions addressing the 'issues for which, in their view, the evidence presented by the Prosecutor is not sufficient to sustain a conviction' (ICC-02/11-01/15-1174).



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Blé Goudé© ICC

On 8 June, the Prosecution submitted the “Urgent Prosecution’s motion seeking clarification on the standard of a “no case to answer” motion” (ICC-02/11-01/15-1179), arguing, among others, that at this stage, and contrary to the views expressed by the Defence, the Chamber should not engage in a qualitative assessment of the evidence. In a 13 June decision (ICC-02/11-01/15-1182), the Single Judge rejected the Prosecution’s request, holding that ‘it is not necessary to take a position either as to the standards adopted by Trial Chamber V(a) or to the application of those principles in the final decision in that case’.

On 23 July 2018, the Defence teams submitted “no case to answer” motions (ICC-02/11-01/15-1198-Conf and ICC-02/11-01/15-1199), requesting the full acquittal of Laurent Gbagbo and Charles Blé Goudé respectively.

The Prosecution and the Legal representative for victims filed their responses to the Defence motions on 10 September and hearings are scheduled for the first week of October for oral submissions (ICC-02/11-01/15-1189).

Decision on Laurent Gbagbo’s Request for revised and corrected translation of the Trial Brief and related orders

On 7 June 2018, the Single Judge ordered (ICC-02/11-01/15-1177) the Registry to file a revised French translation of the Prosecution’s Trial Brief and ordered the Prosecution to file a final and corrected version of its Trial Brief. The Single Judge indicated that the lack of a revised French version of the Trial Brief did not adversely impact the rights of the Defence. On 13 June

2018, the Defence of Laurent Gbagbo sought leave to appeal, challenging among others the finding that ‘the Trial Brief is not one of those documents which have to be made available to the accused in a language he perfectly understands and speak’ on the basis of the principles of fairness and the equal footing of the two working languages of the Court. On 26 June, the Single Judge rejected (ICC-02/11-01/15-1190) the request, finding that the grounds raised by the Defence of Laurent Gbagbo did not meet the threshold for interlocutory review.

Decision on Legal Representative’s Application for the introduction of documentary evidence

On 19 June, the Chamber authorized (ICC-02/11-01/15-1188) the submission by the Common Legal Representative for victims (ICC-02/11-01/15-1088) of one item of documentary *via* the bar table – a list of the names of 48 Nigerien nationals who were allegedly killed in Abidjan and other locations in Côte d’Ivoire during the relevant timeframe of the case – and recognized the document as formally submitted. Judge Henderson dissented, raising several issues with respect to the relevance and probative value of the document.

The Prosecution’s submissions of documentary evidence via the bar table

On 12 July, The Trial Chamber issued its “Decision on the “Demande d’autorisation d’interjeter appel de la « Decision concerning the Prosecutor’s submission of documentary evidence on 28 April, 31 July and 22 December 2017, and 23 March and 21 May 2018 » (ICC-02/11-01/15-1172)” (ICC-02/11-01/15-1197), rejecting the Defence of Laurent Gbagbo’s request for appeal of the Chamber’s decision of 1 June recognizing as formally submitted hundreds of items of evidence submitted by the Prosecution in five separate requests *via* the bar table. Judge Henderson dissented and found that while ‘this appeal is not the appropriate place to challenge the majority’s approach on the submission and admission of evidence as such, I disagree that no new issues arise from the Impugned Decision, which the Defence may challenge on appeal’, especially in light of the impending “no case to answer” proceedings.



Redactions and reclassification

On 5 July, the Chamber issued the “Decision on Mr Gbagbo’s Request for lifting of redactions and reclassification of documents in the record (confidential filing no. 1173) and related orders” (ICC-02/11-01/15-1194), ordering, *inter alia*, the Prosecution to continue with its ongoing review of ‘all the documents submitted in the record of the case and/or disclosed to the Defence currently classified as confidential or redacted, with a view to indicating which of those documents can be reclassified as public and to providing public redacted version where appropriate’. On 9 July, the Chamber rejected (ICC-02/11-01/15-1195) Laurent Gbagbo Defence’s request for leave to appeal an email decision relating to Rule 68(2).

Prosecution’s notice of the death of Witness P-0011

On 8 August the Prosecution notified the Chamber that on the evening of 13 July 2018, Witness P-0011 died of cardiovascular complications.

PROSECUTOR V. NTAGANDA (ICC-01/04-02/06)

Bosco Ntaganda is accused of 13 counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy’s property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and 5 counts of crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population), allegedly committed in the Ituri Province, the DRC, in 2002/2003.

Bosco Ntaganda is the alleged Deputy Chief of Staff and commander of operations of the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (UPC/FPLC), an organized armed group involved in two conflicts in Ituri in 2002/2003:

1. a widespread and systematic attack against the civilian population pursuant to an organisational policy adopted by the UPC/FPLC



Ntaganda © ICC

to attack civilians perceived to be non-Hema, such as those belonging to Lendu, Bira and Nande ethnic groups.

2. a non-international armed conflict between the UPC/FPLC and other organized armed groups.

Bosco Ntaganda is charged with crimes in both conflicts, including in two specific attacks: one in the Banyali-Kilo collectivité in late 2002 and another in Walendu-Djatsi collectivité in early 2003.

On 10 July 2018, the Prosecution sought an extension of the page limit to 115 pages for the Prosecution Response Brief (‘Prosecution Request’). In support of its Request, the Prosecution argued that: (i) the requested extension of 15 pages corresponds to 25 percent of the additional 63 pages of the Defence Closing Brief, thus ‘mirroring the percentage’ the Prosecution was granted in the Directions;⁹ (ii) had the Defence Closing Brief been filed in compliance with the Chamber’s direction that an average page shall not exceed 300 words (‘Direction’), it would have amounted to 496 pages;¹⁰ (iii) the Prosecution must address ‘a significant number of inaccurate references to evidence and law’ arising from the Defence Closing Brief;¹¹ (iv) the Prosecution’s ‘often extensive’ footnote references increase the overall number of pages in order to comply with the Direction;¹² and (v) the requested extension will ensure that the 5 Request on behalf of Ntaganda seeking an extension of the page limit for the submission of the Defence Closing Brief, ICC-01/04-02/06-2280. The Defence requested that the Chamber increase the page limit for its closing brief to a maximum of 550 pages.



On the 13 July 2018 the Trial Chamber granted the Prosecution Request and the Defence Request; and directed that the Prosecution Response Brief and the Defence Reply Brief shall not exceed 115 pages each.

On 2, 6, and 13 August, the Defence, the Legal Representative of the Former Child Soldiers, jointly with the Legal Representative of the Victims of the Attacks, and the Office of the Prosecutor provided their respective submissions on closing statements.

The Defence submitted that the Prosecution and the Defence should be given five and a half hours each, and the Legal Representatives one hour each, to present their closing statements. It further informed the Chamber that the accused intends to make an unsworn statement in the context of the closing statements.

The Legal Representatives of Victims requested one hour each for the presentation of their closing statements. The Prosecution requested that the parties be granted five hours each for their oral submissions, as well as half an hour each for a reply and sur-reply.

On the 15 August 2018 the Trial Chamber agreed with the order of presentation suggested by the parties, and decided that the Prosecution should present its closing statements first, to be followed by the Legal Representatives, the Defence, the unsworn statement by the accused, and then any submissions by the parties in response or reply, as appropriate, with the Defence being given the opportunity to present last.

The Trial Chamber recalled that it may intervene at any time during the parties' or participants' closing statements in order to obtain any clarification that it may consider necessary, and that it may communicate questions that it intends to ask to the parties and participants in advance of the hearing.

On 21 August 2018, Ntaganda submitted a request that the Trial Chamber modify its Second Order on Closing Statements by ensuring that the unsworn statement of Ntaganda is the last word uttered in the case prior to adjournment. This has been the consistent practice of previous ICC and ICTY trials. Furthermore, and again consistent with the unswerving practice of previous cases before the ICC and the ICTY, the Prosecution should not be accorded any right to respond to Ntaganda's statement.

The closing arguments were held on 28-30 August 2018. On 28 August during her closing remarks, Fatou Bensouda, ICC Chief Prosecutor, summarized the testimony from witnesses to crimes allegedly committed by troops under Ntaganda's command. Bensouda told the judges that the case would prove a landmark in that it recognized the sexual enslavement of soldiers as a separate crime within the court's jurisdiction. Ntaganda's lawyers made their closing statements on Wednesday 29 August 2018.

During the trial Ntaganda testified in his own defense, arguing he was a peacemaker who had tried to keep order amid a power vacuum in the mineral-rich Ituri region of northeast Congo in the early 2000s. He said he had been unfairly tagged with the nickname "Terminator," that witnesses against him had given false testimony, and that he had never harmed civilians.

Over the course of 248 hearings, the Trial Chamber heard 80 witnesses and experts called by the Office of the ICC Prosecutor, 19 witnesses called by the Defence and three witnesses called by the legal representatives of the victims, as well as five victims who presented their views and concerns.



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INTERVIEW

Interview with Judge Christine Van Den Wyngaert

Interview conducted by Sara Pedroso and Dominic Kennedy on 29 June 2018

- 1. During the last nine years, you have been a judge in Pre-Trial, Trial and Appeals, what were the most memorable moments of your mandate?**

Actually, all of my time at the ICC has been memorable, ever since my arrival in 2009, until my very last day in June 2018 when we delivered the judgment in Bemba. When I arrived, the first trial had just begun (the Lubanga case) and the second trial was about to start in Katanga, the case on which I was to serve as a trial judge. After my time in the Trial Division, I served in the Pre-Trial Division and finally in the Appeals Division. As such, I have, in different judicial capacities, served in almost all of the cases that have been before the court.

It was a real privilege to serve in these cases and to help shape the first jurisprudence of the ICC. Even with the benefit of the jurisprudence of the ad hoc tribunals, we are still creating new jurisprudence at the ICC, especially when it came to interpreting the famous “constructive ambiguities” in the Statute, the issues that were hotly debated in Rome and that were left to the judges to interpret and apply. A prominent example is the victim’s participation regime, which was a complete novelty for the Court. Some issues were totally unforeseen and unprecedented, for example when three defence witnesses in the Katanga case suddenly confronted us with a request to apply for asylum in The Netherlands. They also requested the Chamber to liberate them on Dutch territory after their



Judge Christine Van Den Wyngaert

testimony. These witnesses were “detained witnesses” who had been transmitted to the Court by the DRC to allow them to testify, meaning that they should return to the DRC after their testimony. How were we to resolve the conflict between the Court’s duty to return the witnesses to the DRC under art.93(7) of the Statute with a potential violation of their human rights under art.21(3)?



As a judge, I often felt what Patricia Wald, a former judge at the ICTY, has called “the incredible loneliness of the international judge”. Being an international judge is indeed a huge responsibility. What is paramount is that you uphold the oath of office in all decisions you make. From that perspective, the difference with national judges is perhaps not so great. However, at the ICC we deal with new law, new jurisprudence and colleagues with very different professional backgrounds. At times, judges have a different judicial philosophy and overall approach to the law and how it should be interpreted and applied, unlike national judges who share a single, common legal tradition. For me, with my background as an academic, the feeling of loneliness was even greater: as an academic, I was used to sharing and debating thoughts with colleagues from all over the world, as a judge, I was restrained by the secrecy of deliberations and the fact that any discussion you can have on a concrete case remains within the boundaries of the deliberation process.

However, working at the Court was a great experience: it was a sheer privilege to interact with judges who, in their respective countries, had reached the highest professional levels, and to be assisted by highly qualified and committed senior and junior staff members. More generally speaking, it was wonderful to be part of an international environment with dedicated professionals from all over the world. It was great to work with people who are driven by the common idealism of building an effective international criminal justice system to face the “abominable atrocities” of our times to which the Preamble of the Statute refers.

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 creation of the Court back in 1998 was a giant leap in the history of international criminal justice. In retrospect, the mere creation of the Court was even more spectacular than we realized at the time, and it is highly questionable whether the same political willingness would still exist among States today. Indeed, in an era of diminishing support for multilateralism, it is quite unlikely that a global

institution such as the ICC would see the light.

The ICC Statute did more than creating a Court, it created a “system”, in which both States and the Court share the responsibility to fight the “abominable atrocities” to which the Preamble refers. As Prosecutor Bensouda has said, the Court is part of a global governance system without there being a global government. This has bestowed responsibilities on the ICC, which the *ad hoc* tribunals did not have. Much of the jurisprudence that the Court has delivered deals with matters that the *ad hoc* tribunals did not need to address, including admissibility challenges, Article 15 decisions, decisions about immunities, decisions about jurisdiction, such as the upcoming decision of the Pre-Trial Chamber concerning the crimes committed against the Rohingya, etc.

**“THE COURT, BY ITS
MERE EXISTENCE, HAS
GREATLY CONTRIBUTED
TO THE CULTURE OF
ACCOUNTABILITY”**

The Court, by its mere existence, has greatly contributed to the culture of accountability including the general acceptance of the idea that major crimes should not go unpunished. The relatively low number of convictions entered by the Court so far should not be regarded as a failure. Yes, there were some decisions not to confirm the charges, yes, there were some acquittals. However, as Judge Goldstone has said, the quality of a court will not be measured by the number of its convictions but by the fairness of its proceedings.

There is therefore much to be proud of and to celebrate on the occasion of the 20th anniversary of the Court in the year 2018. At the same time, I believe that it is time to do a reality check, to make an assessment of what the court can achieve in practice and to re-calibrate where necessary. Only then will the Court be able to manage expectations.



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

The victims' participation regime was the biggest innovation in the Rome Statute, and it was loaded with immense expectations. However, the Statute remained quite vague on its practical meaning, and much was left to the judges to decide. It was one of those "constructive ambiguities" where states could not agree (the devil being in the details) and judges were expected to sort things out in their decisions. It took a long time before the Court really did: the first trials with victims effectively participating only started in 2009, and it took until 2017 before the first decision on reparations came out at first instance. Meanwhile, the Registry and NGO's tried to inform potential victims as best as they could. However, in the process expectations were created upon which it could not deliver. This is where, I believe, much went wrong and hopes of victims were inflated much beyond what the Court would ultimately be able to do in practice.

"WE SHOULD STOP USING SLOGANS WHICH MAY BE APPROPRIATE FOR A HUMAN RIGHTS COURT OR A TRUTH COMMISSION [...] BUT NOT FOR A CRIMINAL COURT."

I remember my surprise, arriving at the ICC in 2009, just weeks before the start of the Katanga trial to which I had been assigned, about the fact that there were no general rules on reparations set out by the Plenary. I had expected that the Judges, under article 75 of the Statute, would have laid down these principles long before the start of the first trials. However, the then Plenary of judges decided that this should be done on a case by case basis. This meant that, in the upcoming

Katanga case to which I had been assigned, we had to start organizing the participation regime from scratch, without a clue about how to connect this to an eventual reparations regime, in case of a conviction. I find it highly regrettable that the first judges left this topic, which concerned such a crucial innovation in the Statute, to be dealt with casuistically rather than as a matter of principle. Meanwhile, different stakeholders of the court had formed different expectations about how to go about the victims' participation/reparations regime and many feel disappointed by the work of the court, often for different reasons.

I understand the disappointment of many, but this is in part because of the inflated expectations that were created. The ICC is first and foremost a criminal court, not a human rights court, or a truth commission. The basic function of a criminal court is to decide about guilt or innocence of persons who have been accused of atrocity crimes and this on the basis of a standard of proof test, which is much higher than the test used at Human Rights Courts. This means that, in case of an acquittal, there shall be no reparations, however many individuals may have suffered from the crimes that were committed. As Anthony Carmona, President of the Republic of Trinidad and Tobago, stated in his address at the Inaugural Ceremony for the Opening of the Judicial Year in 2018, "there is no such thing as an endemic right to a guilty verdict. The endemic right lies in a just verdict". It is important that the ICC achieves the basic task it was entrusted with in the first place, to deliver trials by bringing good evidence; reparations are intrinsically linked to this.

The ICC must manage expectations of victims. "Doing justice to victims" varies with the institutional framework in which justice is delivered. We should stop using slogans which may be appropriate for a human rights court or a truth commission (for example "the right to justice" and the "right to truth"), but not for a criminal court. Chambers have at times put the cart before the horse, by allowing many more victims to participate than could be sustained by the charges against the individual standing trial. It is therefore not surprising that victims become disenchanted with the Court.

Maybe the time has come to do some soul searching about the immense resources that, before any victim has seen a penny, are actually spent on the victim-



related proceedings at the Court. Immense resources are spent on the individual treatment of applications for participation and/or reparations which can go into the thousands, and are therefore much more resource-intensive than in any of the national systems on which the ICC regime was inspired. Maybe there are ways to spend these resources in a manner that is more directly beneficial to the victims. From that perspective, it may be worthwhile to consider reinforcing the assistance mandate of the Trust Fund for Victims.

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?

I would tend to answer this question in the negative. Complementarity does not mean that national courts have to follow ICC law as a model. The procedural law of the ICC is very complex, with a Pre-Trial Chamber deciding about confirmation and a Trial Chamber about the merits. This not only means that you need six judges for each case, but also that the same issues can potentially be re-litigated several times, at pre-trial, trial and then again at appellate level, as was shown in a number of trials. Although these issues are now addressed in the Judges' Manual, I would not recommend the general procedural architecture as a model for national courts, also because of the side effect of this complicated structure: the entire pretrial/trial process at the Court has been extremely lengthy, which does not only raise problems of fairness to the accused and the victims, but also in terms of the enormous cost of protracted proceedings.

My hesitations on the victims' participation regime before the Court also mean that I would not recommend it as a model for national jurisdictions. Compared to the many national systems that provide well functioning systems of victims participation, such as Belgium, France, Italy and Germany, I consider the ICC system as a procedural overreach that, until the Court has had the opportunity to mend the many issues that still remain to be resolved, should not stand as a model.

5. How does being a judge at the ICC compare with your experience of being a judge at the ICTY? What were the main differences?

Working at the ICTY was much easier. The procedures

were less complex: the confirmation process was much simpler because it was done in a non-adversarial manner by a trial judge who often would join the panel of judges that would hear the case and hence be better prepared than a trial judge who sees the case on the day of the start of the trial. There was no Pre-trial Chamber, only Trial Chambers composed of three judges, meaning that we would need only three, not six judges for each trial. Proceedings were slow, but faster than at the ICC. To give you an idea: in my nearly six years at the ICTY, I took part in five complete trials, two sentencing judgments and two contempt cases. At the ICC, my trial (Katanga) lasted more than four years (not including the time that my fellow judges of the Pre-Trial Chamber had already worked on the same case). All my colleagues at the ICC regret the slowness of the proceedings, and Judge Tarfusser in his interview with ICCBA has said, this potentially casts some doubt about the overall fairness of the proceedings. There is much that the judges can do, and that they have been doing in the more recent trial, but the problem remains with the complicated procedural structure of the Court, which is laid down in the Statute and which cannot be changed without going through a cumbersome amendment tunnel.

“WORKING AT THE ICTY WAS MUCH EASIER. THE PROCEDURES WERE LESS COMPLEX...”

There were no complementarity-related proceedings, as the ICTY took precedence over national proceedings. The ICTY had only one “situation”, the former Yugoslavia, in contrast to the wide geographical reach of the ICC. This made things easier for the prosecutor. When comparing the “performance” of the ICC to that of the *ad hocs*, it is often forgotten that the *ad hocs* had only one situation to manage, whereas the Court has many. The work of the Court is therefore immensely more labour-intensive than at the *ad hocs*, especially for the prosecution who have to bring evidence in a great variety of situations.



As the ICTY was not “many courts in one”, expectations were not as high as at the ICC. Victims were called as witnesses, but were not participants in the proceedings. I never had the feeling, expressed by some, that victims at the ICTY were “instrumentalised witnesses”. On the contrary, comparing my trials at the ICTY with those at the ICC, I have the feeling that the ICTY did a better job at “empowering” the victims than the ICC.

“ULTIMATELY, THE COURT IS ONLY A PIECE IN THE PUZZLE OF INTERNATIONAL CRIMINAL JUSTICE, AN IMPORTANT PIECE BUT ONLY A PIECE”.

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

As said before, the Court should, while celebrating its 20th anniversary, look at itself in the mirror, perform a reality check and re-calibrate expectations of its many stakeholders accordingly.

As said, the work of the ICC Prosecutor is immensely more difficult than that of prosecutors at the *ad hoc* tribunals because she has the potential to investigate an almost indeterminate number of situations. However, the potential for growth and the resources of the Court are not unlimited and the Court can only take on as many situations as it can manage. And within each situation, it is important that investigations/prosecutions are not one-sided, focusing on one of the parties to the conflict only, which means that additional investigations and potentially prosecutions may be required in situations that are already before the Court (e.g. in the Ivory Coast situation). Maybe we have reached a point

where “less can be more” in terms of the situations we can handle.

The Court, despite being “many courts in one” (with different stakeholders having different, oftentimes conflicting expectations of the Court), is first and foremost a *criminal* court, which means that the Prosecutor must provide evidence that suffices both in quality and quantity to sustain convictions beyond a reasonable doubt. Only then can convictions be entered and reparations awarded to the victims.

The ICC needs to remain focused on the general culture of accountability. However, this is not the sole responsibility of the court, but also, and perhaps even more importantly, of the international community, in the first place the member states and to some extent also the Security Council. States need to take their responsibilities seriously and do their part. States Parties should embrace complementarity and extra-territorial jurisdiction. They should share the burden with the ICC. Ultimately, the Court is only a piece in the puzzle of international criminal justice, an important piece but only a piece. As the late Antonio Cassese stated about the ICTY, which is also relevant to the ICC, it remains a “giant without arms and legs” – it needs artificial limbs to walk and work. These artificial limbs are the state authorities.

I agree with prof. Ernst Hirsh Balin who writes in the latest issue of the ICL Review that any further loss of momentum in international criminal justice would represent a dramatic setback in the development of the international rule of law, but also that meanwhile, we should not lose sight of our idealism: “it is only when idealism sharpens our view on reality that progress can be achieved”.

7. How did you enter the world of international criminal justice?

By pure accident! When I was an adolescent, I had no interest whatsoever to become a lawyer. My main and only interest was music. I was one of those “girls with the guitar” in the seventies singing songs of Bob Dylan and Joan Baez in the folk clubs of the time, making my first record in 1967 and another one in 1971. It was the days of the “protest songs” against racial discrimination in the US and the war in Vietnam, which for me was the first time in my life when I got



passionate about human rights. My parents pushed me to go to University, and I chose law because I was told that this was the easiest study to combine with my musical career ambitions.

But then, as they do, things changed. As a student, I got curious about the Nuremberg trials, after writing a paper on the subject, which sparked my interest in international criminal law, a legal field that was just emerging. I decided to write a PhD alongside my

This makes me think of a quote of one of my favorite judges, judge Aharon Barak of the Israeli Supreme Court. Judging, he says, is like writing part of an immense book, the previous chapters have been written by your previous colleagues on the Bench, you yourself write some of the chapters, until the work is taken over and continued by your younger colleagues. This is how I feel about my mandate at the ICC and about passing the torch to my new colleagues whom I wish the greatest of luck with their new mandates.

**“I WAS ONE OF THOSE
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studies at the Royal Conservatory of Music in Brussels. At the time, the idea of an international criminal court was just a dream and I was not taken very seriously when telling colleagues about my passion for this subject. I never thought that I would ever see such an institution in my lifetime. But then the ICTY happened, and to make things even more exciting I found myself in The Hague as a judge of that Court, together with a number of academic colleagues with whom I had brainstormed at the Bassiouni Institute in Siracusa. And so it happened that, together with Alphons Orie, Bert Swart, Wolfgang Schomburg, Stephan Trechsel, Albin Eser, Frank Hopfl, Sharon Williams, I was called to serve on the institution that had only existed in our dreams and took part in the writing of the jurisprudence.

8. What is next for you personally?

I have been appointed as a judge at the Kosovo Specialist Chambers, a body of 18 judges who were not elected, but appointed by an appointing authority. It is not an international court strictly speaking, but a court that has been integrated in the Kosovar judicial system, comprising a Pre-Trial Chamber, a Trial Chamber, an Appeal Chamber, a Supreme Court Chamber and a chamber of the Constitutional Court. The Court will apply both Kosovar law and international law, including customary international law. The challenges are great, both politically and judicially.

I have high hopes for this new Court. Having sat in one of the Kosovo-cases at the ICTY, I have some acquaintance with the region, which I hope will contribute to my work in the KSC. I look forward to sharing the experience of my years at the ICTY and the ICC with my new colleagues and to learn from their experience in national and international courts. The judges have already convened several times. We have drafted the Rules of Procedure and Evidence, trying to learn some lessons from the ad hoc courts and the ICC and also from the experience of those judges who have already served as judges in Kosovo, with EULEX.

In addition, I am now an Emeritus Professor at the University of Antwerp, and I will be very happy to reconnect with the students whom I missed so dearly during my years as a full-time judge. I also plan to spend more time in Stellenbosch, in my capacity of an Honorary Professor at the Law Faculty.



EVENTS

ICCBA -UNIVERSITY OF OXFORD VICTIM PARTICIPATION WORKSHOP

The University of Oxford and the ICCBA are delighted to invite you to a workshop on victim participation, on 4 October 2018 entitled "**Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice**".

Further information and registration is available [here](#).

Is International Law International?

Date: 21 September 2018

Location: Leiden University, The Hague Campus

For more information, click [here](#).

20th Anniversary of the Rome Statute: Law, Justice and Politics

Date: 19-20 October 2018

Location: Courtroom 600, Nuremberg, Germany

For more information, click [here](#).

Religion and Ethnicity on the International Bench

Date: 4-5 October 2018

Location: Leiden University, The Hague Campus

For more information, click [here](#).

'East-West Street and the Making of Modern Human Rights' (Philippe Sands QC)

Date: 24 October 2018

Location: Edinburgh Law School, UK

For more information, click [here](#).

IBA Annual Conference 2018

Date: 7 October 2018

Location: Rome, Italy

For more information, click [here](#).

Repatriation and Restorative Justice: From Native American Remains and Sacred Objects to Nazi Art Theft

Date: 25 October 2018

Location: Kupferberg Holocaust Center, Queens, NY

For more information, click [here](#).

Report Launch Event: 'The Use of Force in Relation to Sovereignty Disputes over Land Territory'

Date: 9 October 2018

Location: British Institute of International and Comparative Law, London, UK

For more information, click [here](#).

International Expert Conference "Integrity in International Justice"

Date: 1-2 December 2018

Location: Peace Palace, The Hague

For more information, click [here](#).

Armed Conflict and Starvation: What Does the Law Say?

Date: 12 October 2018

Location: Chatham House, London, UK

For more information, click [here](#).

Global Legal Skills Conference

Date: 10-12 December 2018

Location: Melbourne Law School, Australia

For more information, click [here](#).





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