

DECEMBER 2020

# PRECARITY OR PROSPERITY:

*African perspectives on the future of the International Criminal Court*

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**The International Criminal Court (ICC) is at a crossroads. Galvanised by the experiences of African states and communities, the thirst for reform and change is palpable.**

The **Wayamo Foundation** and the Rule of Law Program for Sub-Saharan Africa of the **Konrad Adenauer Stiftung** are proud to present “*Precarity or Prosperity? African Perspectives on the Future of the International Criminal Court*”, a video gallery featuring a prestigious group of justice experts reflecting on what the future holds for the ICC in South Africa, the African continent, and beyond.

# THEME I



## *South Africa and the International Criminal Court*

South Africa represents a microcosm of the dynamic relationship between the ICC and Africa, having variously played the roles of supporter, detractor, withdrawer and constructive critic of the Court. Below, experts discuss how they perceive the relationship between South Africa and the ICC today. They propose practical steps for both country and court to better satisfy their mutual interests.



Apartheid Museum, Johannesburg, South Africa  
Photo courtesy of Joao Vicente, Flickr

### Question 1

***How can South Africa's stature, as well as its wealth of experience in matters of international and transitional justice, help lead discussions and efforts to reform and improve the Court?***



### **John Jeffery**

**Deputy Minister of Justice and Constitutional Development, South Africa**

It firstly needs to be noted that South Africa played a significant role in international negotiations on the establishment of the ICC, and was one of the first signatories of the Rome Statute. The Rome Statute was domesticated in South Africa with the adoption of the Implementation of the Rome Statute of the International Criminal Court Act of 2002, thus reaffirming South Africa's commitment to a system of international justice. Currently 123 countries are States Parties to the Rome Statute of the ICC, and out of that 33 are from the continent of Africa.

We are aware that a withdrawal of South Africa from the ICC would undoubtedly dent the credibility of the ICC. We were a founding member of the ICC, based on the ICC's ambitions to be an important player and contributor to a rules-based approach to international criminal law. Our participation in the negotiations towards the Rome Statute was concerned with the establishment of a treaty-based approach to holding those most responsible for grave crimes accountable.

By remaining as a State Party to the ICC, South Africa can influence some important changes to the functioning of the Court, e.g., one of the most important aspects being the powers of referral or deferral, which are currently vested in the United Nations (UN) Security Council. The Security Council can refer ICC matters involving non-States Parties, such as was the case with President Al-Bashir of Sudan. But the significant problem with this is that three permanent members of

the Security Council are not States Parties to the ICC, that's Russia, China and the United States. The power to refer third-party cases to the ICC should really rest with the General Assembly or be delegated to the Bureau of the ICC.

Similarly, powers to defer matters before the ICC in the interests of peace is vested in the Security Council under Article 16 of the ICC. South Africa, through our own experience knows the fine line that countries sometimes have to tread between peace and justice. We believe that there are circumstances where legal proceedings should be deferred if there is any chance of it scuppering peace and stability in particular situations. However again, the nature of the UN Security Council in its current form, makes it the wrong institution to decide on deferrals. We believe this power should be vested in the General Assembly or the Bureau of the ICC, and this is perhaps one of the most important issues for us to lobby in the interests of a more effective international criminal justice regime that strikes a fair balance between justice in courts, and peace through political negotiations where appropriate.

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**John Jeffery**



***Kaajal Ramjathan-Keogh***

Director of Africa Programme at the International Commission of Jurists

It has been 26 years since the official end of apartheid in South Africa. It is important to note, however, that the crime of apartheid has never been prosecuted. The Ahmed Timol case, which is proceeding before South African courts currently and for the last several years, seeks to re-characterise the charges which are being brought against an apartheid police officer from one of murder, and to include the crime against humanity of apartheid. This is a hugely significant development, and if South Africa does not lead the way in following through with the laying of charges and the prosecution of the crime of apartheid, we cannot hope to see this in other countries. This has huge significance in both the South African context, as well as within the context of transitional justice across the world.

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***If South Africa does not lead the way in following through with the laying of charges and the prosecution of the crime of apartheid, we cannot hope to see this in other countries.***

**Kaajal Ramjathan-Keogh**



John Jeffery  
Photo courtesy of Government ZA. Flickr

## Question 2

### **Where does South Africa's relationship with the ICC stand today?**



#### **John Jeffery**

**Deputy Minister of Justice and Constitutional Development, South Africa**

I think it's common cause that we are both a staunch supporter as well as a frank critic of the ICC. The issues relating to South Africa's withdrawal and the stated intention to withdraw are centred around the Al-Bashir case of 2015, where the then President of Sudan visited South Africa, not as a guest of South Africa, but a guest of the African Union (AU), which was holding its Heads-of-State Summit in South Africa. Our concern was that the Court was being used by powerful non-member States, and that was not what we were expecting in the Court. We expected a Court that was going to hold human beings accountable for their war crimes, regardless of where they were from. There were also concerns that all the ICC prosecutions stem from the African continent, and that no investigations into other parts of the world have yet yielded a prosecution.

The decision to withdraw wasn't taken in haste. It was also informed by a resolution of the ruling party –the African National Congress (ANC)– which at its 54th National Conference in 2017 resolved that 'the conference reaffirmed the resolution of the 2015 ANC National General Council to withdraw from the ICC', and stated that 'South Africa must ratify the Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, and encourage the speedy operationalisation of the African Court of Human and Peoples' Rights.'

The position of the AU also plays a key role, but the AU's position with regard to withdrawal has shifted. The latest decision is for AU member states to engage with the ICC around the issues that concern the AU.

The events surrounding the Al-Bashir case led to the ANC resolution, and as I've mentioned, it was also linked to a ratification of the Malabo Protocol. There are though problems with the immunity clause in the Malabo Protocol. This provision sparked intense debate during the negotiations and the drafting of the Protocol. The South African delegation objected to the inclusion of this article, arguing that the Court will be deviating from established practice of international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court of Sierra Leone, and the ICC that does not recognise immunity for sitting heads of state and government, including senior officials. The delegation also argued that the recognition of immunity will undermine the legitimacy, integrity and credibility of the Court in the fight against immunity on the continent.

There have been problems with the adoption of the Malabo Protocol. No country on the continent has as yet ratified it, although a number have signed it. Recognising this, we have embarked on a process of engagement with the AU Commission, with the aim of

amending or reviewing the Malabo Protocol. There are also other factors making it difficult for South Africa and other countries to sign and ratify the Malabo Agreement: this includes the fact that some of the crimes' subject matter jurisdictions are not well defined.

In short, the Malabo Protocol is a long way from being operationalised. As I have stated, 15 member states out of 55 states have signed the Protocol, but none has

ratified it. The Malabo Protocol is therefore not going to be a regional apex court for some years. In view of the above, there is a view that South Africa should remain in the ICC, based on the reasons that it provides the most effective means to deal with accountability for international crimes when national jurisdictions are either unable or unwilling to do so. The principle of complementarity guides the ICC as a court of last resort, and safeguards national legal sovereignty.



### **Kaajal Ramjathan-Keogh**

**Director of Africa Programme at the International Commission of Jurists**

South Africa has had a long history with the ICC, the Rome Statute, and the promotion and support of international justice in South Africa. The Parliament of South Africa adopted the Rome Statute Implementation Act in 2002. This act is modelled on the Rome Statute, which establishes the ICC. South Africa's position changed in 2015, following the case brought by the Southern Africa Litigation Centre, which sought the arrest of former President of Sudan, Omar al-Bashir. The case deeply polarised both South African and African views on the ICC, as well as on the issue of immunity from prosecution for heads of state. The domestic legal processes within the South African court system were followed by a non-cooperation hearing in April 2017 before the Pre-Trial Chamber of the ICC. The Pre-Trial Chamber found that South Africa failed to cooperate with the request from the ICC to arrest Omar Al-Bashir. The Pre-Trial Chamber did not, however, impose any sanctions on South Africa for this failure to cooperate.

South Africa thereafter made two attempts to withdraw from the ICC. The first was declared unlawful and the second attempt has not yet been completed. These attempts were in 2016 and then again in 2019. It is uncertain whether the state continues to have the appetite for withdrawal from the ICC. The second withdrawal attempt remains alive and is not yet completed. The Department of Justice has drafted a new bill to replace the Implementation of the Rome Statute Act. This new bill will become effective if withdrawal does indeed proceed to finality.

The African National Congress, which is the ruling party in South Africa, has taken a party decision to withdraw from the ICC. The government of South Africa, however, may change its position. In June 2020 (so this is earlier in the year), South Africa joined 67 ICC member states in endorsing a statement in support of the ICC, following a United States (US) executive order, which ordered travel restriction and economic sanctions against ICC staff members. This seemed to signal a clear shift in position with regard to the ICC as far as South Africa was concerned.

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**It is uncertain whether South Africa continues to have the appetite for withdrawal from the ICC.**

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**Kaajal Ramjathan-Keogh**



## Max du Plessis

Senior Counsel and Advocate, South Africa, and Adjunct Professor, International Law, Nelson Mandela University

As many of you will know, South Africa has now tried twice to withdraw from the ICC. The first effort was in December 2016. That was undone by a successful court challenge by civil society, with a full bench of South Africa's High Court ruling in February 2017 that Zuma's government had unconstitutionally bypassed parliament in its rush to leave the ICC. The government was then forced to reverse itself, and it deposited, on the 7 March 2017 with the UN Secretary General in New York, a document headed 'South Africa: withdrawal of notification of withdrawal'. Truly, as far as diplomatic moments go, it makes you wince just saying it. A particularly embarrassing moment for any South African committed to the rule of law.

Then South Africa, unbelievably, tried again, in December of 2017. It announced that South Africa was withdrawing, and that this time Parliament would be engaged. And just before President Ramaphosa won the African National Congress (ANC) leadership, the Minister of Justice introduced a bill in Parliament to finalise South Africa's exit from the Court, after depositing a new notice of withdrawal from the Court at the UN.

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**While it seems clear that some within Ramaphosa's party have been keen to withdraw, or may still be keen to withdraw, it doesn't appear as though our President has any real intention of doing so.**

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Max du Plessis

But where is that bill today? It has been limping along, to be frank. President Ramaphosa seems to have kicked the can down the road for now. While it seems clear that some within his party may have been keen to withdraw, or may still be keen to withdraw, it doesn't appear as though our President has any real intention of doing so; which is just as well because the government's arguments in support of its withdrawal have been subjected to withering criticism by many, including a number of retired Justices of South Africa's Constitutional Court, amongst them, Justice O'Reagan, now Director of the Bonavero Institute of Human Rights at Oxford, as well as Justice Navi Pillay, the former UN Human Rights Commissioner, and herself a previous judge at the ICC.

So, at the level of international reputation, the implications of a withdrawal by South Africa would have sent shock waves, as it did, and it induced fears that its move would threaten the existence of the Court itself in Africa. Of course, that would be a tremendously bad consequence for African victims of the world's worst crimes.

The argument in favour of a credible substitute, which is another argument advanced by South Africa, was that there would be an international chamber at the African Court on Human and Peoples' Rights, that might stand as some form of credible alternative to the ICC. But that argument, frankly, is risibly weak. It is perhaps enough to say that the Protocol for that African Court and its Chamber has been open for ratification but less than a handful of states have done so. And tellingly, given how South Africa has punted the African Court as a viable alternative to the ICC, not even South Africa has ratified it.

What we have seen is that under President Zuma's administration, South Africa attempted to withdraw

from the Court. And it was withdrawing because it said, ultimately, as its primary reason, that South Africa had been very upset with the fact that the ICC had ruled against South Africa for its failure to arrest President Al-Bashir, and hence the Court had shown disrespect to South Africa by failing to accept our arguments about head of state immunity. But of course, this is diplomacy by pique –we will be part of the ICC, is the argument, but only insofar as its judges accept our arguments. South Africa itself failed to appeal the ICC decision, even though it was open for it to do so. Of course, there is

no question that the issue of immunities for heads of state is a very thorny one, and currently it is potentially headed for the International Court of Justice (ICJ). But that's the point! It is the details of those debates, and their importance for the future of the ICC which is precisely where South Africa's strength lies. So instead of withdrawing from the Court on the basis that it didn't find in South Africa's favour, the opportunity remains now for South Africa to stay within the Court, and to pursue change through its leadership.



### **Richard Goldstone**

**Former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia, former Chair of the Independent Expert Review of the ICC, and Member of the Africa Group for Justice and Accountability**

During the now disgraced presidency of Jacob Zuma, the ruling party in South Africa, the African National Congress, decided that South Africa should respond positively to the 2016 call from the AU for all 34 African member States Parties to withdraw from the Rome Statute of the ICC. At the end of 2017, the government made public draft legislation to withdraw from the Rome Statute. It has now been languishing since then. Of course, only one African country did withdraw from the Rome Statute, and that was Burundi. The attitude of the AU has changed to become more positive towards

the ICC and there is no talk today of other African States Parties withdrawing from the Rome Statute.

South Africa, it should be recalled, was one of the strongest supporters of the ICC when it was founded in 1998 in Rome and when it became operative in the middle of 2002. Indeed, I was involved in a number of meetings that were called by the government of Nelson Mandela, to persuade other southern African countries to sign and ratify the Rome Treaty. Almost all of them did so.



### **Navi Pillay**

**Former United Nations High Commissioner for Human Rights and Member of the Africa Group for Justice and Accountability**

South Africa has historically played a key role in the adoption of the Rome Statute. Its post-apartheid constitution eschewed retribution and promotes democratic values, social justice and fundamental human rights. South Africa's threatened withdrawal

from the ICC does not appear to be a priority, but South Africa's bill to repeal the Implementation Statute and allow for immunity for heads of state and senior state officials is unfortunately still enrolled before the Parliament.

This indicates the concern of states over the seeming incompatibility between compliance with the Rome Statute and the sovereign national and inter-state obligations under international law. Therefore, solutions must be found to resolve the dilemma, and this is something that can be done within the Rome Statute system. A number of jurists, including myself, signed a brief prepared by the International Commission of Jurists, requesting that the Repeal Bill before the South African parliament should not be passed, and we made several recommendations:

- (1) the ICC works within an imperfect framework. We all know that: however, leading nations like South Africa, should spearhead initiatives to improve the Court. This is something that can only be done within the system;
- (2) States Parties should actively engage in pursuing appropriate reforms within the Assembly of States Parties (ASP), with the view to making the ICC more effective in advancing the objectives of international justice;
- (3) States Parties should be encouraged to put in place legislation required to empower domestic courts



President Cyril Ramaphosa, South Africa  
Photo courtesy of GovernmentZA, Flickr

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**The ICC works within an imperfect framework. We all know that: however, leading nations like South Africa, should spearhead initiatives to improve the Court. This is something that can only be done within the system.**

**Navi Pillay**

- with the ability to try genocide, crimes against humanity and war crimes; and finally,
- (4) States Parties should continue to work constructively with civil society on the advancement of international criminal justice.

### Question 3

**How can South Africa, the AU and the ICC work together more effectively in order to satisfy their mutual interests?**



### **Max du Plessis**

**Senior Counsel and Advocate, South Africa, and Adjunct Professor, International Law, Nelson Mandela University**

Let me make three points. First, I think that South Africa stands poised to make a significant contribution to international affairs at a time when our Trumpian

world is sorely in need of leadership that's inclusive and mature: leadership which confirms, rather than rejects the values of multilateralism and accountability;

leadership that stands up to the bullying seen by the United States (US) in its targeted use of sanctions against the ICC in this past year. So while Trump and his cronies continue to cling to the power that they have lost, President-Elect Biden has spoken to reaffirming the US' commitment to the international rule of law. So, now is the time for President Ramaphosa to be an African partner on the global stage. Not just being open to business and trade, but as a trusted partner to countries who want to build a more sustainable, fair and tolerant future, to tackle together issues like climate change, migration, trade, terrorism and transnational crimes. These are obvious examples. And such multilateral challenges require strong states with principled commitment to the values of the rule of law, accountability and human security.

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***As partners, rather than divorcees, the ICC and South Africa stand a chance of achieving accountability for the world's worst crimes.***

Max du Plessis

My second point -and it is related to the first- is that one of the most important issues that requires immediate attention, is South Africa's continued involvement in an international institution that it was instrumental in building ... the ICC. By re-engaging constructively with the ICC, South Africa will show a recommitment to principles that have been lost or threatened over the past decade under Zuma's administration, including of course, the importance of accountability. South Africa now has the opportunity to show how a country under a bullying leadership of President Zuma, can change its ways. And the US again is a case presently in point. Under the bullying leadership of Trump, it is now an important opportunity to show that the US too can change its ways.

It is easy for a new government like Ramaphosa's or Biden's, to say that it is committed to accountability domestically. But the obvious parallel, and a resounding

confirmation of this commitment globally, would be to show a deep commitment to the rule of law at an international level. And there really can be no easier or more profound way of doing so than by recommitting to the work of the ICC. So instead of its strategy of rejection and withdrawal thus far, the US of course could withdraw its meritless sanctions that have exemplified Trump's crassness at the international level. And for South Africa: well, South Africa could set the tone by working to improve the ICC from within, and to help set the agenda of that institution.

That could be done in at least two ways. Firstly, South Africa could help solve the issue of immunities, and in particular, constructively debate the problem of heads of state being accused of ICC crimes. And here a course of action for South Africa would see it and others directing efforts at the UN Security Council, by insisting that where that Council intends to remove immunities from state officials when sending cases to the Court, that has to be done unambiguously. That hasn't been done thus far, which has greatly contributed to the lack of clarity around the issue before the ICC. And then secondly, when dealing with Africa, the Council could be encouraged to improve its consultation process with African states and the AU in relation to ICC matters. South Africa is ideally suited to contribute to that process of reform and to serve as a bridgehead.

So let me close this short response by saying the following: South Africa's efforts to remove itself from the ICC are easily reversible. The gains are likely to be immediate and globally impactful. And together, rather than apart, South Africa and the ICC stand a chance to learn from their individual and collective mistakes. As partners, rather than divorcees, the ICC and South Africa stand a chance of achieving accountability for the world's worst crimes. South Africa is a special place, and the ICC is a special institution. Both have had their values and their processes stress-tested over the past decade. And I'd like to say that the US similarly seems to have had its values, its processes, stress-tested over the last 4 years under President Trump. But it's time for renewal. And the timing is good all round. We have a new president coming into the White House, and President Biden, together with President Ramaphosa and other like-minded leaders, will have an opportunity to fix what Trump tried to destroy, which includes multilateralism and the ICC with it.

## THEME II



### *The Election of the next Prosecutor and Judges: Process and Outcome*

States and civil society are occupied by this December's election of a new Prosecutor and cohort of judges. There is a lot at stake. With the Court under unprecedented attack from countries such as the United States, and calls for reform resonating among States Parties, the ICC is in dire need of strong leadership. Below, experts discuss concrete measures which they feel the next Prosecutor and judges should take to overcome the hurdles facing the ICC.



The judges of the ICC at the seat of the Court in The Hague  
Photo courtesy of the International Criminal Court



Black Lives Matter protest  
Photo courtesy of Socialist Appeal, Flickr

### Question 1

***In your recent piece, you argue that in international criminal law, structural racism and white supremacy dictate which crimes count, what jurisdiction applies, who is rendered culpable, who chooses, who has the power, and who matters. Is it possible for the ICC to overcome this? If so, what concrete measures would you like to see the next ICC Prosecutor to take to achieve this goal?***



## Kamari Clarke

Professor, University of Toronto & University of California, Los Angeles

Justice and achieving justice is difficult. It takes a lot of work: it takes engagement, it takes strategy, it takes time to think through and to listen to what people want, especially those who have been victimised by violence. So yes, there are possibilities, there are limits to what courts can do. Courts have to work alongside political actors, political players, to deal with the political nature of violence. If I were to come up with some suggestions, there would be three levels of suggestions that I would propose.

One is concerned with collaborative structural reform. And certainly, in my piece I talk about this. The nature of structural reform is critical. It is critical for the perception of justice by others of the Court, but it is also critical in actually achieving the things that the Court claims that it does. Universal jurisdiction is critical: taking seriously the Court's triggers in relation to the political and the UN Security Council, and the uneven relations of power and self-interest that exist there; questions of the selectivity of cases, not just in Africa, but elsewhere; and not just a performative act of engagement with these other regions but actually

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***At a time when we are hearing loud and clear that Black Lives Matter, it is important that international justice institutions engage collaboratively to produce the type of reform that is necessary.***

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Kamari Clarke

attempts to address political violence in these contexts; ensuring that the defence is structurally recognised at the ICC; things like delinking victim status from case proceedings; taking seriously the kinds of crimes that the Court can adjudicate. These are structural issues for long-term rethinking, for making the Court better, but also for addressing violence in our world.

The second level has to do with regional cooperation. It has to do with ensuring that when we talk about complementarity it is not simply supporting the ICC and its aims, but also thinking about justice in these localities, what these regions need, what those who have been victimised by violence need. It's a negotiation. This is where the Court can listen actually, and think about how they can also serve the interests of regions that are, on an everyday level, struggling and dealing with these conditions of violence.

Now the third level, I would say is concerned with the development of policy papers. This is achievable in the short-term, and the next Prosecutor certainly can engage and make a mark in clarifying certain positions of the Court by way of policy papers. So, there was a missed opportunity in the first administration around the meaning of the interest of justice. I think the next Prosecutor could revisit that question and further clarify the nature of the political and what justice actually means for those who have been victimised by violence. There could be position papers on sequencing, and especially in relation to working with regions on sequencing. So when arrest warrants are released, when parties are in the midst of peace talks –these are questions that need to be dealt with full-on. Other questions that could be clarified have to do with the right to victim participation, and delinking case-victims from the prosecution and the extent to which perpetrators are found guilty or innocent. That's a structural issue that needs to be addressed.

There are possibilities for change: some of them will take much longer, others can be dealt with in the

immediate short-term period with the new Prosecutor. But I'll end by just saying that at a time when we are hearing loud and clear that Black Lives Matter, it is important that international justice institutions engage collaboratively to produce the type of reform that is necessary, so that regions and localities can also engage effectively, rebuild judiciaries, put in place the mechanisms so that violence doesn't happen. And this has to happen, but it means that political mechanisms have to be refigured and Courts have to recognise

the nature of the political. It is also important that we reckon with the limitations of legality in some of these contexts, and I think that it's important that the Court should reckon with the nature of the political that also produces these conditions of violence. Having a dual commitment to regional cooperation as well as the nature of the political is important. It's critical. It is only through really taking on many of the earlier points, as well as this point, that we can see the eradication of global violence writ large.



Lady Justice  
Photo courtesy of Tingey Injury Law Firm, Unsplash

## Question 2

***What qualities will be most important for the next ICC Prosecutor, and how does the election process reflect or not reflect the need to get the best candidate possible?***



### **Mausi Segun**

**Executive Director, Africa Division at Human Rights Watch**

In terms of the election of the next Prosecutor, there are fewer more important decisions for States Parties to make. The Prosecutor serves for nine years and drives the work of the court, through decisions about what cases to bring, and how those cases are brought. This year, States Parties have put in place some new and, I think, important elements that guide the decision-making. This included tasking a panel of independent experts to assist the Election Committee in drawing up a shortlist of candidates from all of those who applied. In addition to that, it has instituted a public hearing, where every member of the public can see all of the shortlisted candidates side by side. While no doubt the process can continue to be strengthened, this new element represents important innovations that hopefully would help to keep merit and the qualifications of the candidates front and centre. It should hopefully also minimise campaigning and deal-making, which are out

of step with the nature of the court as an independent judicial institution. The election for this position is too important for anything but merit to guide the decision.

However, what we have seen this year is that the process has proven to be contentious. It is unclear, at least from where we sit, how States Parties intend to proceed from here. They could consider whether to add additional candidates to those already in consideration in the shortlist. But whatever comes next, we at Human Rights Watch and many other NGOs are urging States Parties to ensure that the process remains fair, that it is transparent, and that it provides for vigorous and rigorous scrutiny of all candidates.

When it comes to the next steps that States Parties should be looking at, especially the qualities of the next Prosecutor, we believe that for that person to deliver

on the ICC mandate, they need to be a person of high moral character, clear dedication to justice, and with extensive practical experience in the adjudication of criminal cases. And while this is always so, it is even more so now that the Court is faced with these types of unprecedented threats for doing exactly its job. Merit should also mean for the Prosecutor a determination to act with full independence, to hold even the most powerful to account.

Although it may sound counter-intuitive, given all of the internal and external challenges that the Court is facing, but it is exactly because of this difficult landscape, that



Fatou Bensouda · Photo courtesy of the International Criminal Court



### **Max du Plessis**

Senior Counsel and Advocate, South Africa, and Adjunct Professor, International Law, Nelson Mandela University

I have to use my South African hat and put that on to explain that I think South Africa could play a critical role. It could help, firstly, dispel a sense that the ICC Prosecutor has been overly selective in the cases that it was willing to entertain, and avoiding cases where powerful proxy states like the US would prefer the ICC to look the other way. Again, South Africa could lead the pack of states, secondly, that genuinely wanted a Court liberated of its political shackles and which put its resources where its mouth is, namely towards prosecuting suspected war criminals, regardless of their nationality and their political friendships.

the Court and its Prosecutor need to remain true to the ambitions and visions that drove its founding 22 years ago. To do that, the Prosecutor of the Court needs to be a person who is relentless in defending justice, and defending its office and the court against the pressure to compromise its mandate.

The job of an ICC Prosecutor is not easy. But by undertaking a process that looks for a candidate who will resolutely pursue tough cases with full independence, States Parties will be making it clear that they stand ready to do all they can on behalf of justice

### **Question 3**

**What qualities would you want to see in the next ICC Prosecutor?**



### **Kaajal Ramjathan-Keogh**

Director of Africa Programme at the International Commission of Jurists

The ICC-prosecutor-selection process presents a crucial opportunity to strengthen and promote gender justice. There are 11 crimes against humanity, and these include rape, forced abortion and other sexual violence. Even where the statutory definitions of war crimes or crimes against humanity do not explicitly specify rape or other sexual assaults, they are typically understood to be acts of torture and inhuman treatment. As such, they can be charged as grave breaches of the laws of war, war crimes, or crimes against humanity. Gender-based violence (GBV) and rape may be prosecuted as a crime against humanity, sexual violence can function as a tool of genocide, and it is hugely important for prosecutions to be able to promote accountability. We have recently seen protests in Namibia on GBV, as well as in Nigeria;

although not specifically related to GBV, they related to unlawful police action. In South Africa, the statistics of GBV and crimes against women are extremely high. It is hugely important in the gender sector for accountability and access to justice; and not just as it relates to women, but also to gender-diverse, and non-binary and LGBTIQ individuals.

In December 2020, which is just next month, 123 States Parties to the Rome Statute will elect the next ICC prosecutor, following a nearly 18-month selection process. This will be the ICC's third prosecutor, following Luis Moreno Ocampo of Argentina and Fatou Bensouda of Gambia. What we would like to see in the next ICC Prosecutor is somebody who is independent and fair; we would like to see a person of high moral character, as well as someone who has the competence and experience in criminal prosecutions and trials. The new

prosecutor must command respect and have some international stature. Fairness and independence are huge priorities in this selection process.

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**The ICC-prosecutor-selection process presents a crucial opportunity to strengthen and promote gender justice.**

**Kaajal Ramjathan-Keogh**



**Chidi Odinkalu**

Senior Manager for Africa, Open Society Justice Initiative

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**We should be looking to recruit, not just one person who is extraordinary, because that person does not exist, but one person who brings strength that can be complemented by strong people on the team.**

**Chidi Odinkalu**

The first Prosecutor of the Court left his successors with a very poisoned chalice, with unfinished projects, and in many ways toxified the Court by the time that he had left, by the time he had finished his term. The current Prosecutor has managed those challenges as best she can. The next Prosecutor has got to rebuild the credibility of the Court with constituencies that need the Court. That person has to be passionate about some things that matter -about justice, about people, about communities, about victims, about ensuring that the Court becomes an instrument that can be leveraged for positive change amongst the states that are before it. And that also means, therefore, that some of these forced impacts that the Court has been used to in the past -bargains with regimes that are manifestly committed to using it for their narrow purposes- must come to an end. That's not somebody who is going to tolerate these kinds of things.

I do recognise that no one human being is going to bring the entire package of skills and attributes that any prosecutor will need. That person will need help

from senior staff of the prosecutor's office. Therefore, we should be looking to recruit, not just one person who is extraordinary, because that person does not exist, but one person who brings strength that can be complemented by also strong people on the team. If

we have that, we can look to 9 more years of a Court working its way to what the original vision was: an effective instrument that brings fear to those who seek to perpetrate mass atrocities around the world.



Owiso Owiso  
Photo by Kris Kotarski, Wayamo Foundation

#### Question 4

***What concerns from African states and communities do you believe can be addressed through the election of the next Prosecutor and judges?***



#### Owiso Owiso

Doctoral Researcher in Public International Law and International Criminal Justice at the University of Luxembourg

#### What does this election mean for the relationship between the ICC and African states?

First, we need to recall why this relationship is as frosty as it is. And, to my mind, there are at least two factors for that. First is how does the Prosecutor perceive their role?; and secondly, how does the Prosecutor go about situation and case-selection?

So how does the Prosecutor perceive the role? For almost two decades now, the ICC has sought to convince anyone who's listening that it is above the political frame, that it is above the politics of states. I believe that this is a very counter-productive narrative because it effectively shuts the door on any potential meaningful conversation between the ICC and States Parties, particularly States Parties from the African continent.

We need to recall at this point that the ICC is first and foremost an inter-governmental organisation (IGO)

“***The ICC operates against a backdrop of political processes that established it and the political process still influences the environment in which the ICC operates.***”

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Owiso Owiso

established by states through a political process. And then secondly, it is a judicial mechanism –the first and only permanent international criminal court. So the fact that the ICC is an IGO established by states through a political process and the fact that the ICC is a judicial mechanism are so fundamentally intertwined that they cannot be divorced.

### **So what would I expect of the next Prosecutor?**

I would expect the next Prosecutor to depart from the path taken by her predecessors, and adopt an approach of self-awareness, an approach that acknowledges the position that they find themselves in: the position being that the ICC operates against a backdrop of political processes that established it and that the political process still influences the environment in which the ICC operates, and that influence will continue for at least the foreseeable future.

### **Why is this acknowledgement important?**

This acknowledgement is important because, once the Prosecutor acknowledges this fact, he or she will be in a better position to navigate the politics surrounding her work, and in that regard, open a channel for meaningful dialogue between states that are sceptical of the ICC's work.

There has been quite a considerable debate over whether or not the ICC is biased against Africa. Regardless of which side of the debate you are on with regard to this particular issue, you would realise that they are valid reasons and concerns on both sides of this debate. However, what's more important to me is what has been the result of this debate. The result of this debate, in my estimation, is that it has created a perception of bias, so that the ICC now operates in an environment where it is perceived to be biased.

### **What do I expect the next Prosecutor to do about this?**

Simple! Get on with the business of being the prosecutor of an international criminal court, and stop acting like the prosecutor of a regional court. The ICC is an international criminal court, and indeed the Rome Statute gives very wide powers to the Office of the Prosecutor (OTP) to investigate situations across the world (of course, depending on whether or not he or she has jurisdiction in that particular area). Stop focusing on one particular part of the world, and make

full use of your powers and go everywhere that you can go to, depending on whether or not you have jurisdiction. This is not to say that the ICC should stop investigating situations and cases in Africa. That should continue because the ICC performs a very important role against impunity on the African continent. But what I am saying is expand your reach. In doing so, we may see a reduction in the argument that the ICC is biased against African states.

### **What does this election mean for communities in African states?**

Well I am but just one African, so I cannot speak on behalf of all Africans. I will say this for myself though. The ICC has a serious diversity problem, and this is particularly very unfortunate if we consider the fact that the ICC has been in existence for almost two decades now, and also if you consider the fact of the diversity of the Court's membership. If you are a prosecutor and you are investigating situations and running cases in African states, and your team does not have African prosecutors, your team does not have African investigators, your team does not have African case analysts, your team does not have African legal officers, your team does not have African interns, your team probably has only one or two African translators ... then you start losing the plot. You start losing the plot because the communities impacted by your work will look at you, they will look at your team, and they will fail to identify with you, they will fail to identify with the work that your team does, and they will fail to identify with the work that the institution that you purportedly work for, does.

### **How should the Prosecutor go about changing this unfortunate situation?**

Most of the people who work at the OTP at the moment are from North America and Europe. What I would expect of the next Prosecutor is to go beyond this slogan because for the past several years we have heard all these slogans of the ICC aspiring to diversity and inclusion. But there has been, however, very little if any action following these slogans. I would expect that the next Prosecutor goes beyond these slogans and revamps their office to reflect the diversity of the human family, and to reflect the diversity of the Court's membership.

### How about the new crop of judges?

Well there was a rather unfortunate comment in the Independent Expert Review Report to the effect that judges at the ICC consider themselves to be aristocrats while everyone else is a commoner. This is pretty unfortunate because it reveals a particular attitude on the bench, an attitude that affects the relationship that the bench has with everyone else who works at the ICC, and an attitude that affects the way the bench perceives its own role in the whole grand scheme of things. So, what would I expect the new crop of judges to do? Go to the Hague, go to the ICC with a different mentality from your peers: go to the Hague with a mentality that is more receptive to building a relationship between the work you do at the ICC and the communities that are impacted by your work.

### How can you do this?

Start by being more receptive to holding in situ trials. I do not understand why two decades later, the ICC is still very insistent upon holding entire trials, entire hearing at The Hague in the Netherlands, very far away from situation countries. At the very least, be more receptive to holding trials, at least part of those trials, in situation countries. Thereby, you will start the long process of building meaningful connections between the Court and the communities that are affected by the Court's work.



Mohamed Chande Othman  
Photo by Wayamo Foundation

### Question 5

***What is the greatest challenge facing the next ICC Prosecutor and, as a former prosecutor of an international tribunal yourself, what advice would you give them?***



### **Mohamed Chande Othman**

**Former Chief Justice of Tanzania, former Member of the Independent Expert Review of the ICC, and Member of the Africa Group for Justice and Accountability**

In my view, the next Prosecutor faces a number of challenges: and both these challenges are in multiple areas and various levels or various degrees. But there are definite challenges, and I think it should be expected really in any organisation that is now almost 18-19 years old and has a lot of experience. There is a lot of positive things that the Prosecutors have done in terms of really building up the institution of the Office of the Prosecutor (OTP) and what it does. But I think that, for me, the greatest challenge that the next Prosecutor faces, is twofold. One is the quality of investigations.

I think this is really fundamental to any successful accountability for atrocious crimes, that is the quality of investigations. The fact that this needs to be improved really should not be a discovery because it is reflected in the decisions of the Court –in the Bemba Appeals Judgement and in other decisions. When you say the quality of investigations, I take it overall because there are many components of this “quality” of investigations: you have the capacity, the competence of investigators, the evidential analysis, the analytical analysis, you have a need for increased understanding of the context

in which these crimes have been committed, and so on. So the quality of investigations is number one I think, because it is evident that there are a number of instances where charges have not been confirmed at the preliminary hearing stage, which is really a lower threshold of evidence. That is something that I think the next Prosecutor has to attend to.

Linked to that, the next Prosecutor has to attend to another fundamental challenge, which is really the trial readiness of cases. It is significant that the Prosecutor in 2012, in her own policy, commits to trial readiness of cases but we know that the reality has been different, i.e., you know that requests have been made to continue investigation beyond the confirmation stage of hearings. I think that improving the quality of investigation, but at the same time really ensuring that cases are tried within a reasonable time after the confirmation hearing, will do a great deal because a fundamental -and I think unacceptable- deficiency of the ICC is this incredible delay in the whole judicial process. Much as it is agreed everywhere that

international justice is inherently slow, when it is too slow, then victims despair. This is the crisis now, i.e., that, in a number of aspects, the ICC has not delivered in terms of, for example, reparative justice. In a number of cases that have been there for 12-14 years before the ICC, the Court has not delivered reparative justice. I think acceleration of the whole process -the quality of investigations and the trial readiness of cases at the early stages- will help this delivery of justice and render it more effective.

These are I think key challenges. There are many other challenges, both in relation to preliminary investigation, in relation to investigation, and so on. But I think that some of these, if they are attended to (and I think they can be attended to, can be improved), the next Prosecutor and his or her colleagues will be able to advance the cause of justice because the Prosecutor, in my view, is the engine room of the ICC, [providing] the evidence needed in a criminal court, in an international criminal justice system that has to operate.



### **Richard Goldstone**

Former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia, former Chair of the Independent Expert Review of the ICC, and Member of the Africa Group for Justice and Accountability

**“The greatest challenge for the next Prosecutor, is managing the present political turmoil against international organisations, and especially opposition coming from the very powerful United States.**

The greatest challenge in my view, is managing the present political turmoil in many parts of the world against international organisations, and especially opposition coming from the very powerful United States of America. That the Office of the Prosecutor is not involved and is not driven by politics, is important not only for the prosecutor to say and to repeat, but also to demonstrate. That is made particularly difficult today in the background of the present dislocation of the Security Council (SC). The fact that the SC, by the use of the veto of one of the Permanent 5 (P5) Members, protects war criminals in countries like Syria and Somalia, makes the whole system of international justice appear to be unfair -and of course it is! The worst war criminals should be prosecuted -and if they're not prosecuted at home, should be prosecuted by the ICC.

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**Richard Goldstone**

However, on the other hand, denying justice for some victims is no reason for denying justice for all victims. Many people, and too many journalists, think that it is a decision of the Prosecutor of the ICC that keeps that Court from investigating the terrible war crimes to which I have referred in Syria, Somalia and elsewhere. They do not understand that it is the veto power executed in the Security Council that protects those war criminals from the Court.

Perhaps the biggest challenge for the next Prosecutor is to make the ICC more efficient in the face of a stagnant budget. And of course, a stagnant budget means a diminishing budget, taking into account inflation. The financial prospects of the ICC are worsened by the economic implications of the COVID-19 pandemic. But

the world will not be the same after this pandemic, and it has already changed.

I can give one example in respect of the Independent Expert Review Group that I recently chaired at the request of the ASP. There were nine members of the group and we came from all corners of the world. We began our meetings in February and in March in The Hague, and had to abruptly end them in the middle of March when we had to hasten home in the background of the pandemic. We were nonetheless able, through modern technology, to continue and complete our work within the short time period given to us. As is well known, the final report of the group was made public on 30 September, which was the date given to us in our original mandate.



Fatou Bensouda takes oath as second ICC prosecutor  
Photo courtesy of the Coalition for the International Criminal Court, Flickr



### **Fatou Bensouda**

Prosecutor of the International Criminal Court

The job of the ICC Prosecutor is an incredibly complex and demanding one. All I can do as Prosecutor, is to put my successor –whoever that may be– in the best possible position to carry forward the work and to build on what we have in place. I can only hope my successor will equally seek to dutifully implement the significant mandate, with independence and impartiality, and always work with the same honour and integrity, in the service of the Rome Statute.

### **Question 6**

**What are the lessons learnt that you would like to share with the next Prosecutor?**

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***I hope my successor will equally seek to dutifully implement the significant mandate, with independence and impartiality, and always work with the same honour and integrity, in the service of the Rome Statute.***

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**Fatou Bensouda**

## THEME III



### *African States, the African Union and the International Criminal Court*

African nations and communities have been important players in the global struggle for the rule of law and the fight against impunity for international crimes. In recent years, however, the relationship between African states, the AU and the ICC has become strained. Even though threats of a mass withdrawal have faded and opposition to the Court at the AU has been muted, many concerns raised by African states and communities remain unaddressed. Below, experts discuss some of these issues, and propose practical steps for African states, the AU and the ICC to work together more effectively in order to satisfy their mutual interests.



17th Ordinary African Union Summit in Malabo, Equatorial Guinea  
Photo courtesy of Embassy of Equatorial Guinea, Flickr

#### Question 1

***How can South Africa, the AU and the ICC work together more effectively in order to satisfy their mutual interests?***



#### ***Kaajal Ramjathan-Keogh***

**Director of Africa Programme at the International Commission of Jurists**

The ICC operates on the basis of cooperation and complementarity. The ICC should promote and support increased operation of complementarity in domestic jurisdictions, e.g., over many years we have seen the commission of international crimes in Zimbabwe. South African courts would be well placed to hear these cases. There is also South African jurisprudence which supports the bringing of cases focused on Zimbabwe before South African courts. The Zimbabwean courts have shown scant regard for the rule of law, and this should not mean that it is impossible for victims of

international crimes to be able to seek access to justice. We have also seen the operation of a hybrid court in Senegal, which was used to prosecute former Chadian dictator Hissène Habré.

It is difficult to bring cases before the ICC, and it should be easier and more practical to be able to bring these cases before national judicial systems. In order to do this, there needs to be greater fostering of cooperation between the ICC and member states.



## John Jeffery

Deputy Minister of Justice and Constitutional Development, South Africa

African states have been some of the biggest supporters of the Rome Statute and as a region were among the first to sign and ratify the Rome Statute establishing the ICC. This level of support was not driven by levels of naïvety, but guided by considerations of a just and fair international legal regime dealing with universal jurisdiction. African states supported a treaty-based approach to the exercise of accountability in international criminal law, and takes place within a certain set of known and agreed rules which are applied uniformly and fairly.

The African states' relationship with the ICC soured as a result of what appeared to be a disproportionate focus on African situations. It is worth noting that most of the situations in Africa that were investigated by the ICC, were as a result of referrals from within the countries involved, mostly to settle political scores stemming from internal political conflicts.

The most significant challenge was the arrest warrant for the former Head of State of Sudan, Al-Bashir; and the indictment of President Al-Bashir prompted the government of Sudan to argue that the international community, including the ICC, was being used for political purposes. At this stage, the government of Sudan was still engaged with the US government on normalising relations through the Comprehensive Peace Agreement signed with the Sudanese Peoples Liberation Movement Army (SPLM). The actors involved in the peace process argued that the ICC indictment imperilled the peace process through targeting the person with sole authority to sign a peace agreement with other parties.

Largely based on these tensions, the AU resolved in 2009 that African states should not cooperate with arrest warrants relating to President Al-Bashir. This strategy was followed by the ICC withdrawal strategy in January 2017, largely influenced by South Africa's legal problems and the decision to withdraw from the ICC in relation to the Al-Bashir arrest warrant. However, only

three African states submitted withdrawal notices to the ICC, namely South Africa, Burundi and the Gambia. The Gambia and South Africa have since revoked their withdrawal notices, and Burundi's withdrawal took effect on 27 October 2017.

The less than enthusiastic compliance with the AU's withdrawal decision underscores the tensions and differences between AU member states and this decision, which some saw some states placing reservations on the decision, while others used subsequent international platforms, including UN forums to reassert their support for the ICC. The AU has subsequently, at the January 2018 Heads-of-State Summit, decided that member states of the AU who are also States Parties to the Rome Statute should seek an advisory opinion from the International Court of Justice (ICJ) on the question of immunities for heads of state. This issue is one of the key issues proffered by many countries, including South Africa, for its dissatisfaction with the ICC; hence, the importance of the request to the ICJ through the UN General Assembly. As mentioned, the predominant view of the AU states seems to have changed to one which prefers engagement and reform of the ICC, rather than withdrawing from it.

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***The predominant view of the AU states seems to have changed to one which prefers engagement and reform of the ICC, rather than withdrawing from it.***

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John Jeffery



Africa in focus  
Photo courtesy of Kyle Glenn, Unsplash

## Question 2

**Do you see more hope, or reasons to worry about the relationship between African states and the ICC today? Why?**



### **Mohamed Chande Othman**

Former Chief Justice of Tanzania, former Member of the Independent Expert Review of the ICC, and Member of the Africa Group for Justice and Accountability

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***I do not foresee a threat of accelerated withdrawal from the ICC from African states. But on the other hand, I don't think one can be very optimistic about an accelerated ratification to the Rome Statute by the 21 African states that are not yet members of the ICC.***

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**Mohamed Chande Othman**

The relationship between African states and the ICC is one that is governed by both politics and dynamic relationships, and also legal parameters. So it has a number of features but I think that African states are an essential component of the Rome Statute system, not only because there are 33 states that are parties to the Rome Statute, but also you have an African regional organisation, which is the AU, which has also peace, justice, reconciliation and dispute settlement responsibilities within an international system. Therefore, there are certain dynamics between the AU in its role in peace-making and peace-building, and the UN Security Council.

But what I want to say really in terms of how I see this relationship, is that there are three things.

- One, I do not foresee a threat of accelerated withdrawal from the ICC in the forthcoming seasons from African states. But on the other hand also, I don't think one can be very optimistic about an accelerated ratification to the Rome Statute by the 21 African states that are not yet members of the ICC. You have neither pessimism nor optimism but there is prospect, I think, for increased engagement between the African states and between the ICC.
- The second point is that there is room in my view for increased cooperation, both by individual African

states and by the African regional institutions that can cooperate with the ICC -the African Court for Human and Peoples' Rights, and other regional instances. The AU is not only composed of the Summit, which is the annual meeting of the heads of state and government, but also you have its regional institutions. So these regional institutions can also cooperate with the ICC. There is room for effective cooperation, and therefore this thing needs to be developed.

- The third aspect is that both the African states and the ICC, if they explore common interests, I think it is possible to find or to have a breakthrough really in a more cordial, more respectful relationship between these two instances, i.e., regional and international. Because there can be cooperation in terms of investigations, cooperation in terms of positive complementarity, and so on. I foresee that there is room for effective cooperation.



### **Navi Pillay**

**Former United Nations High Commissioner for Human Rights and Member of the Africa Group for Justice and Accountability**

The record of Africa for combating impunity for serious crimes underscores the importance of the membership in the ICC of African countries, including South Africa. So what is this record?

Well the successful trial of the former Dictator of Chad, Hissène Habré, for war crimes, sets a new bench mark to end impunity in Africa. And that was set up by the AU. It marks a significant step forward in holding high-profile perpetrators of crimes to account in Africa, and could be an important model of new hybrid courts that can reconcile the often-conflicting demands of international law and national sovereignty. The case is the first exercise of universal jurisdiction on the continent, and the first time a former African Head of State has been prosecuted and punished for crimes under international law before a national court, and that is Senegal.

I myself, while serving as Judge and President of the Rwanda tribunal, appreciated that the success of that tribunal was largely due to the cooperation from African countries in terms of arrest, transfer and protection of witnesses. The Special Court for Sierra Leone convicted and sentenced to 50 years imprisonment Head of State Charles Taylor of Liberia, for war crimes committed in a neighbouring state. And of course, more recently, Sudan tried and convicted the former President Omar Al-Bashir for corruption, and it is hoped that he would

be transferred to the ICC to face more serious charges.

Africa's support for the rule of law, justice and human rights is also very steadfast. African states have been in the forefront of important international and regional endeavours to ensure respect for human rights. The African Charter on Human and Peoples' Rights in its Preamble stresses that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African Peoples. Article 4 of the AU's Constitutive Act firmly states that impunity should not be tolerated across the continent, and that victims must have access to justice. Under the auspices of the AU, African countries have also demonstrated their commitment to ensure accountability by establishing the African Human Rights and Peoples' Rights Commission and the African Court of Justice and Human Rights. Let us also not forget that African countries were leaders in establishing the ICC. They played a key role in negotiating and adopting the Rome Statute in 1998. They were also actively involved in transforming the idea of a court to reality. Senegal was the first state to ratify the Rome Statute. When the court was finally established in 2002, 17 of its initial States Parties were African, and 5 of the first 18 judges were from Africa, including me. The continent of Africa boasted the largest number of ratifications to the Rome Statute, thereby throwing their collective weight behind ending impunity for serious crimes.

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***If there are any concerns of precarity or threats to international justice, then one should not look at Africa, but to the north, from where these threats against the ICC Prosecutor emanate.***

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**Navi Pillay**

However, Africa has concerns that are shared in common with many other states that have withheld ratification of the Rome Statute. The AU complained of politicisation and misuse of indictments against African leaders by the ICC, and that prosecutions could undermine sovereignty, stability and peace. The focus for some time, as we know, by the ICC prosecutor, was on African countries alone, and that gave rise to many concerns and criticisms of selective justice, particularly in the light of the failure to pursue accountability for serious crimes committed by actors in Western states in Iraq and in Libya. Criticism is also raised over the participation in referrals and deferrals to the ICC by three veto-holding members of the UN Security Council who are not members of the ICC. So the perception of politicisation, injustice and illegitimacy is inherent, when three major countries can escape scrutiny by the ICC of alleged violations within their own countries and that of their allies.

We should recall that 5 of the 8 countries where the ICC is investigating, have themselves referred the relevant allegations to the ICC. These self-referrals show that states that were unable or unwilling to prosecute the serious crimes in their countries sought the benefit of accessing justice through the system of international criminal justice. They also show that the ICC, far from undermining national sovereignty, works with its States Parties to assist them in their efforts to render

justice to victims and to comply with their international legal obligations. In this way, they reflect a welcome development in international law and relations, namely a conception of sovereignty that embraces the protection and promotion of people's fundamental human rights.

It is evident that the resolution on immunity and threats of withdrawal from the ICC arose because of the profile of the individuals indicted, and not because of the seriousness of the alleged crimes or the number of victims, nor was it an abandonment of the principle of no impunity. The notion, however, that political power can be a safe-haven for impunity would create a dangerous double standard for accountability. It is also incompatible with international law. However, significantly no Africa country heeded the AU call for resignation from the ICC.

African countries have been steadfast in their support for the ICC, and if there are any concerns of precarity or threats to international justice, then in my view, one should not look at Africa, but to the north, from where these threats against the ICC Prosecutor emanate.

So, to answer the key question, "Precarity or Prosperity?" I would say African countries are well on the way towards prosperity in the future.



Navi Pillay  
Photo by Kris Kotarski, Wayamo Foundation



## **Mausi Segun**

Executive Director, Africa Division at Human Rights Watch

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**Fortunately, the backlash against the ICC in Africa, which was actually only driven by a handful of states, has begun to ebb.**

**Mausi Segun**

Fortunately, the backlash against the ICC in Africa, which was actually only driven by a handful of states, has begun to ebb. The prospect of mass withdrawal was widely discussed but it never really gained momentum. In fact, at the end of that process, only one country in Africa –Burundi– ultimately decided to withdraw from the Court, as abuses in its own court came under the ICC investigation. Instead, what happened was that when Burundi, Gambia and South Africa announced in October and November 2016, their intention to become the first states to ever withdraw from the Court. Sixteen other African governments spoke out in support of the Court and against withdrawal from the Rome Statute. In February 2017, the new government in Gambia decided to reverse the plans to withdraw from the Court. In South Africa, the courts in that country concluded that the government had not obtained the necessary parliamentary permissions before deciding to withdraw from the Court. Since then, a new draft legislation is in progress but it has not yet received legislative attention. So beyond Burundi, no other country in Africa has withdrawn from the Court. In fact, I think that the support for the Court has only gained more traction. But on the part of the ICC itself, there remains a lot that it can do in terms of meeting the demands for

justice, and meeting the needs of victims, especially in a global landscape where there is an increasing number of situations where international crimes are being committed across the world.

The other issue that the ICC needs to deal with, is the ability of some individuals in some of the most powerful states in the world and their allies, to evade the reach of the ICC. It is a cause for deep concern, and it is a criticism that African governments have levied against the Court. The Court needs to continue to improve its investigations and prosecutions. The efforts to make its work more meaningful to local populations cannot be overemphasised.

The important fact is that the ICC remains the only permanent court of last resort, which at least offers a potential check against impunity around the world, especially when national courts fail to hold perpetrators to account. In Africa, the AU expanded the jurisdiction of the African Court of Justice and Human Rights in 2014. But there are two problems with that. The African Court of Justice is yet to become operational, and secondly, and I think for us most importantly, the immunity for sitting heads of state or government and other senior government officials under the African Court’s new authority, runs counter to at least two core principles of international law: the irrelevance of official capacity before the court, and the principle of equality for everyone before the law. We believe that the most effective route to enhancing the work of the ICC is through strong support and meaningful engagement with States Parties, with NGOs, and with victims, especially people on the ground.

Ratification of the Rome Statute of the court is not yet universal. It is something that needs to happen. Bringing the Statute provision into domestic law in different countries, including here in Nigeria where I live, would foster a sense of justice for serious crimes, not just at international level, but also at the local level.

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**The existence of the ICC preliminary examination in Nigeria was critical to the decision to bring domestic cases in the first place.**

**Mausi Segun**

The one thing that the ICC has also done, is to encourage states to initiate local prosecutions. In Nigeria for example, the Federal Ministry of Justice, perhaps to stave off criticisms and the impending investigation by the Prosecutor of the ICC, decided to bring cases against suspected members of Boko Haram. Those trials have been stalled now, but at least there was a beginning. I think the fact of the existence of the ICC was critical to that decision to bring cases in the first place.



African Union Headquarters in Addis Ababa, Ethiopia  
Photo courtesy of Solen Feyissa, Unsplash



**Kaajal Ramjathan-Keogh**  
Director of Africa Programme at the International  
Commission of Jurists

The Court's record of prosecutions and investigations are what gives rise to the controversies surrounding the ICC in Africa. There have been concerns raised over the years by South Africans and other African states, and these relate to the ICC's focus on the prosecution of Africans above other states.

If we look at the ICC statistics, there have been four convictions. All four of these individuals are African, and these cases are primarily from the Democratic Republic of Congo (DRC). Looking at persons in custody, these are also all Africans, including 10 individuals in 8 cases. Persons who are at large and who are wanted by the ICC -there are 11 such cases- are all African. There are currently 13 situations under investigation by the ICC: 10 out of 13 of these cases focus on African countries. In addition, countries like the US, Russia, and China are not ICC member countries and do not submit themselves to the jurisdiction of the ICC. All of these issues contribute to the opinion that the ICC is focused on Africa and not on other jurisdictions.



17th African Union Summit, Malabo, Equatorial Guinea  
Photo courtesy of Embassy of Equatorial Guinea, Flickr

### Question 3

**Let's try and imagine a utopian system of international justice on the African continent. What would it look like? What practical steps can we take to get there?**



### **Mohamed Chande Othman**

**Former Chief Justice of Tanzania, former Member of the Independent Expert Review of the ICC, and Member of the Africa Group for Justice and Accountability**

To be effective in terms of delivering justice to victims of crimes, there must be an interplay between three components. I do not believe that one single component is capable of delivering effective justice to victims of crimes, especially atrocity crimes. So there must be an interplay between national systems, regional systems and the international system: no single system can do it alone, and there are various examples that we can give and we can see. Fundamentally, I think the model of the ICC is a workable model, because the primary responsibility for accountability for these crimes rests with States Parties, which is the domestic system. That is where the crimes are committed, where the majority

of victims are, and definitely most of the perpetrators of crimes are. But the reality is that the domestic system in many African states is weak. There are few African states that you can say really at this present have the capacity, have the technical competence, have the financial resources, have the legal systems in place, the laws and so on, to be able to effectively prosecute some of these major crimes within the jurisdiction of the ICC.

So domestic systems, I foresee, are the anchor really in terms of dispensing international justice. There is a lot of reform that is needed: States Parties need to invest in their law enforcement system, they need to invest in the justice system, in the prison system, penitentiary system, in law enforcement, in investigation techniques, in reform of laws, and so on and so forth. So, there is a lot of work that still remains to be done. In my view, it is not a question of genuine unwillingness but more genuine inability for most domestic systems to deal with atrocity crimes effectively. Therefore, I think this aspect of positive complementarity which is now an ingrained principle and policy of the ICC provides a solution in terms of ICC cooperating with national authorities

I think the second aspect that I want to comment on regarding this scenario is the regional level. There are, at the regional level, regional justice instances under the auspices of the AU, and you have also sub-regional judicial instances under the auspices of sub-regional

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**The three levels – domestic, regional, and international – must work as a web. No single system can do it alone.**

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**Mohamed Chande Othman**

organisations. In East Africa, you have the East African Court of Justice, which addresses some aspects of human rights issues. But the African Court of Human and Peoples' Rights is an instance at the pan-African level. I think that the decision to create an African court with criminal jurisdiction, much as that is the wish of African states, has not yet materialised because the Malabo Protocol has not yet been signed by the majority of states. It's just been signed by a handful of states, so it will take considerable time. But I think there must be some room for dispensation of accountability for international crimes by a regional system, and I say regional instances, regional legal and judicial instances.

The third level -again this is not hierarchical, I think these are things that must work as a web- is the international system which is really represented by

the ICC which is the court of last resort. The ICC is committed to positive complementarity because at the end of the day, when it comes to atrocity crimes -given their widespread nature, systematic nature, level of perpetration, possibility to apprehend those with greatest responsibility- the ICC will be able to bring to account only a handful of perpetrators, whether mid-level or those with the greatest responsibility. These three levels -domestic, regional and international- must work as a web. I don't think that there is any room for competition because I think their mandates are clear, they are different mandates, but there is -and there should be really- an interaction between these three systems, and I think this is important for the victims of crimes within the jurisdiction of the Court and for the African people.



### **Richard Goldstone**

**Former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia, former Chair of the Independent Expert Review of the ICC, and Member of the Africa Group for Justice and Accountability**

Prosecutions, in my view, should always be brought as close to the crime scene as possible. That enables the victims and survivors to witness at first-hand that those responsible for their misfortune are being brought to

justice. I am therefore strongly in favour of prosecutions before international domestic courts, in preference to international or transnational courts.

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***The idea of an African criminal court is fully in line with the philosophy of the Rome Statute of the ICC. The problems, however, are both political and financial.***

That is the basis of course of the complementarity system on which the jurisdiction of the ICC is founded and built. The ICC has jurisdiction only in situations where the relevant domestic prosecution authorities are unable or unwilling to prosecute the crimes in question at home. It follows that I am in favour of regional courts with similar complementarity powers to prosecute criminals closer to home.

The idea of an African criminal court is fully in line with the philosophy of the Rome Statute for the ICC. The problems, however, are both political and financial. There are few if any African countries really committed to the proposed African Court of Human and Peoples' Rights having criminal jurisdiction given to it. There is

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**Richard Goldstone**

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***It is in the interest of Africa that the ICC should be as efficient and effective as possible. There is now and in the foreseeable future, no alternative to the ICC.***

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**Richard Goldstone**

talk in some African capitals of doing so but little action follows. And there is the cost of such a court. Justice is an expensive commodity, and there are other agenda items that are and will continue to be given priority in Africa. That is why the Malabo Protocol extending criminal jurisdiction to the African Court of Human and Peoples' Rights has received 11 signatures but not one single ratification. It is not surprising, therefore, that 33 African nations are members of the ICC, the largest number from any region.

It is in the interest of Africa that the ICC should be as an efficient and effective court as possible. There is now and in the foreseeable future, no alternative to the ICC.



Navi Pillay and Richard Goldstone  
Photo by the Wayamo Foundation.

#### Question 4

***As the former United Nations Commissioner for Human Rights, why does our human rights framework necessitate a strong International Criminal Court?***



#### **Navi Pillay**

**Former United Nations High Commissioner for Human Rights and Member of the Africa Group for Justice and Accountability**

As a former High Commissioner for Human Rights, I have repeatedly said in the course of my six-year mandate that human rights violations are alerts to serious crimes such as genocide, crimes against humanity, and so on. Over half a century since protection of individual human rights and prohibitions against atrocity crimes acquired the status of binding international norms, the world continues to witness horrendous human suffering, and widespread and systematic violence against civilians from rebel and terrorist groups, as well as at the hands of state actors.

We have a well-developed human rights framework and numerous mechanisms to highlight human rights violations, such as the Human Rights Council, the Office of the High Commissioner for Human Rights, the Treaty Bodies, and the Special Procedures. And the UN Security Council regularly addresses serious human rights violations in conflict situations that endanger peace, as well as gender-based violence (GBV).

Regrettably, the international community remains unable to react consistently, strongly and speedily

to crises, including situations of grave human rights violations with high potential for regional overspill. And why is this so?

One of the reasons, as was explained to me by members of the UN Security Council when I made my reports as High Commissioner for Human Rights to the Security Council, is that they lack enforcement power. They do have certain tools but not enforcement power. And the same would apply to human rights bodies, as well as the treaty bodies, and so on. They have

persuasive authority only, and can only appeal to states to act in compliance with their international obligations to which they have committed themselves.

So it is the ICC alone that has the power of arrest and punishment, and therefore we need a strong and preferably universally supported ICC to act against violators of human rights that amount to serious crimes, and to deliver justice to victims, and to serve as a deterrent to future atrocity crimes.



Permanent Premises of the ICC, The Hague, Netherlands  
Photo courtesy of UN Photo\_Rick Bajornas

### Question 5

***At the end of your nine-year term as ICC Prosecutor, how would you describe the current ICC-Africa relationship?***



### ***Fatou Bensouda***

**Prosecutor of the International Criminal Court**

The ICC-Africa relationship has always been multi-faceted and cannot be generalised.

Let us firstly recall that African states were at the forefront of the push from over 120 states across the world to create the ICC. Without Africa's support in the period leading up to and during the 1998 Rome Conference, the ICC would not have been conceived.

In February 1999, it was no other than an African country –Senegal– that became the first State Party to ratify the Rome Statute. This was an historically important step and a hugely important one symbolically, soon followed by other States around the world. Senegal and countless other African States Parties, as well as African civil society groups continue to be staunch supporters of international criminal justice and the ICC.

African States have since provided significant support to the Court and the Office of the Prosecutor, including by referring situations for investigation, and by providing critical assistance to enable our operations.

As the Court implements its mandate with full independence and impartiality, it benefits in no small measure from the judicial and operational assistance of its States Parties, including many African States, who provide cooperation in the context of investigations and prosecutions, such as to grant investigators access to sites or to military or other records, to assist the Court with the protection of witnesses, or to ensure the arrest and surrender of persons sought by the Court.

This is not to say that the Court has never been a major bone of contention.

Much of it is part of the public record, and there are several examples where tension was clearly visible. I will refer to the situation in Darfur (Sudan) to demonstrate my point. Not long after the Office of the Prosecutor opened investigations into that situation, in 2005, the then President Omar Al Bashir's regime ceased providing any form of cooperation. This despite the situation having been referred to the ICC by the UN Security Council. ICC investigators were not allowed to set foot in Sudan. Despite these challenges, over the years, my Office continued to exert every effort to collect evidence and strengthen our cases, even while warrants of arrest issued by the Court remained outstanding for a considerable time.

The arrest warrants issued against Mr Al Bashir were a particular cause of criticism against the Court -notwithstanding the irrelevance of official capacity under the Rome Statute- and Sudan managed to rally significant political support for its propaganda to falsely depict the Court as an instrument of the West.

This false narrative has caused difficulty. You will recall in this context also how a few years back, some African states were contemplating a possible mass withdrawal by African States Parties from the Rome Statute, which fortunately did not materialise because many African States questioned the proposition.

Throughout, we never lost focus and our dedication to our mandate and victims of atrocity crimes in Africa remained unwavering.

With the passage of time, in part thanks also to the robust engagement by the Court, including myself and my Office, through travels to African capitals, seminars at the AU, and other engagements at the highest levels, things have slowly been turned around.

Sudan has undergone an extraordinary political transition since 2019.

Despite the volatile situation on the ground, and the restrictions posed by the COVID-19 pandemic, the ICC was able to successfully achieve the surrender and transfer to the Court of one of the suspects in the Darfur situation. On 9 June 2020, Ali Muhammad Ali Abd-Al-Rahman was brought into the custody of the ICC. He has meanwhile made his initial appearance

before the ICC judges, and a hearing to confirm to charges brought against him is scheduled for February 2021. On the foundation of this successful operation, and other developments such as the peace deal signed in August between the Sudanese transitional Government and most rebel groups, I was able last month to conduct an historic visit to Khartoum -the first mission by the Prosecution to Sudan since 2007.

The meetings I had there, including with representatives from all parts of government, were critically important to enhance understanding of the functioning of the Court, and to chart a course for effective cooperation with relevant authorities, including in preparation for proceedings related to Mr. Abd-Al-Rahman, as well as in relation to the outstanding warrants against other suspects. My Office will build on the success of this visit in the coming period, to solidify arrangements for cooperation, with the ultimate goal of contributing to bringing long-awaited justice to the victims in Darfur.

This example shows that patience and perseverance, and reliance on legal facts over political ad hoc decision-making, are necessary elements to ensure that the ICC can continue to deliver on its crucial mandate.

By its very nature, the Court frequently operates in fragile post-conflict situations, during ongoing hostilities, through politically charged election periods, or against the backdrop of ongoing peace negotiations. Political stakes are usually high, and the prospect of an investigation and prosecution by the ICC is also viewed through such prisms.

It comes therefore as no surprise that at times when we become involved in a given situation following our strict legal mandate, we are erroneously accused of being political in our actions. Yet, nothing could be further from the truth, as the track record of my Office in particular demonstrates. I have and will continue to fulfil, honourably and professionally, my prosecutorial duties, as mandated by the Rome Statute, without fear or favour.

This is the nature of the beast. The Court does not do popularity contests. It does crucial work to fight impunity for the world's gravest crimes, and hopefully, through this work, deter the commission of future crimes.

To maintain the current helpful path, we must continuously acknowledge that fighting impunity for atrocity crimes and cultivating the rule of law are fundamental preconditions for a more peaceful and prosperous African continent. In fact, for any continent.

International criminal justice is necessary if we are to have a less conflict-prone world, or at least, to ensure that the law does not remain silent during otherwise lawless wars. That the victims of atrocity crimes are not forgotten. That they too have a voice. That they too count, and have access to justice for the atrocities that have devastated their lives and livelihoods.

The participation of states –including African states– in the Rome Statute and their continued support for the ICC in the discharge of its mandate is essential to global efforts to ensure accountability and strengthen the international rule of law. Support should extend to international and regional organisations, including the AU.

The Court continues to engage with African States Parties, both in the context of its operations, and beyond.

We work daily with judicial authorities in our States Parties, including situation countries, to ensure we give life to the principle of complementarity and help each other. In the course of our common efforts, we see first-hand how much they are struggling as well to achieve results and we can only extend our call for support to all judicial mechanisms genuinely engaged in fighting impunity.

We are working hard, within the limited means at our disposal, and respecting our legal mandate, to also address persistent misconceptions, including on the continent, about the Court's functioning. Raising awareness through outreach to ensure better understanding among local societies is also critically important to ensure that victims and affected communities can see justice being done.



African Court on Human and Peoples' Rights  
Photo courtesy of the African Court

### Question 6

***How can Nigeria, the AU and the ICC work together more effectively in order to satisfy their mutual interests? Would an African Court with international criminal jurisdiction be the solution?***



***Chidi Odinkalu***

**Senior Manager for Africa, Open Society Justice Initiative**

At the moment, and for quite a while, I'd like to think that Nigeria and the Court have needed one another for different purposes. Nigeria is using the Court to advertise itself as a law-abiding international citizen. The

Court seeks to use Nigeria for the purpose of sorting out its relationship with the AU, because the AU and the Court have been at odds for quite a while, and Nigeria is one of the more influential members of the AU.

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**Nigeria is using the Court to advertise itself as a law-abiding international citizen. The Court seeks to use Nigeria for the purpose of sorting out its relationship with the AU.**

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**Chidi Odinkalu**

In this relationship of mutual exploitation, Nigeria is deploying the fact that the President of the Court is Nigerian, the prosecutor is a product of Nigerian legal education, and so there are sentimental relationships that Nigeria believes it can use, and the Court can also use.

That runs the risk of derailing the project of the Court in Nigeria, and in fact in much of Africa, because the mutual exploitation detracts from the primary objective of the Court, which is bringing to account people who have committed the most atrocious crimes known to humanity. That is not something you sacrifice on the altar of banal relationships, which really is what I believe is taking place.

That leads me to think, therefore, that you cannot really, at the moment and for a long time, have a mutuality of objectives as such between the Court on the one hand and Nigeria on the other. You see this in how the Court, in my view, fell into the error of inviting Nigeria's President to address the 20th anniversary of the entry into force of the Rome Statute as the keynote speaker: because Nigeria, at that point, had been under preliminary examination by the Court for at least 8 years, and part of the crimes for which the Court is examining Nigeria for the possibility of prosecution or investigation in any case, are crimes committed,

not just by Boko Haram -the insurgency movement in Nigeria- but in fact by the Nigerian Armed Forces, who's commander-in-chief is the Nigerian President. The optics are not good when you have that. Nor, in fact, is the messaging about what the court exists for, being promoted.

Now, do I think this is going to change with the creation of an African criminal instance, giving criminal jurisdiction for grave crimes to the African Court of Justice and Human Rights? Not necessarily; but that does not mean that we do not need an African Court of Justice and Human Rights. The ICC cannot sort out every problem, quite clearly. It is quite distant, and most Africans cannot get visas to The Hague. And the crimes for which we are seeking accountability, are crimes against real people in real communities that have had real traumas visited on them.

So, if we can get an African instance able to take some of those burdens of accountability off the Court, I think it is a positive thing. Is it going to come fully formed? No! Is it going to have problems? I think it is going to have a lot of challenges. But that's why we are a community of human beings able to figure out answers to these challenges, and over time, hopefully, try to perfect the imperfections of these institutions. But do we need such an institution in Africa? I think we do; and I think the time is right for it. We cannot continue to outsource responsibility for crimes Africans have committed against Africans, to the rest of the world. Africans have got to take responsibility for that.

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**Do we need an African Court with international criminal jurisdiction? I think we do; and I think the time is right for it.**

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**Chidi Odinkalu**

## THEME IV



### *The Independent Expert Review of the International Criminal Court*

Heeding longstanding calls from the ICC's diverse constituencies, an Independent Expert Group has studied the Court and submitted recommendations for its reform and better functioning. Experts discuss the extent to which these recommendations have the potential to improve the ICC-Africa relationship, and what still remains to be done.



ICC Assembly of States Parties  
Photo courtesy of the International Criminal Court

#### Question 1

***Which concerns raised by African communities and states were addressed by the Expert Review process? Do you believe states and communities will be satisfied or is there still more to be done?***



#### **Kamari Clarke**

Professor, University of Toronto & University of California, Los Angeles

The ICC Expert Review Panel, of course represents a lot of formidable and interesting things. It ranges from interests in strengthening the Court to strengthening the overall international system, and certainly promoting the fight against impunity. At first glance, it might seem as if it's proposing something that could be deemed comprehensive, or comprehensive reform that might transform some of the structural problems that are part of the ICC infrastructure. We know that a tremendous amount of work certainly went into this process, a tremendous amount of collaborative work for sure, and the report takes on a range of internal

considerations, operational aspects, looks at hiring issues, codes of conduct, social climate, and makes a whole host of recommendations. And so yes, I can appreciate the amount of work that went into this project.

However, while this report reflects these sets of internal processes and dynamics, upon closer examination, the report still falls short of some of the long-standing calls for reform and engagement. And this is an important point because there is a whole pre-history to this report. There were many sets of state-level dialogues that

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***There is a pre-history that needs to be addressed and I don't necessarily see where the calls by African states to reform are actually on the table in the report.***

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**Kamari Clarke**

pre-figured this type of review, that involved ongoing calls for reform and rethinking. There have also been scholarly and civil society engagements, practitioner-based engagements, all highlighting the need for addressing structural limitations that are relevant to the ICC.

For example, in 2010, African states called for ICC reform, and laid out a range of concerns and three major amendments. One of them had to do with the political act of giving the UN Security Council exclusive powers to make referrals and deferrals: so, Article 13, the referral power of cases to the ICC; also the deferral of prosecution, that was Article 16 of the Rome Statute. And basically, what we saw was that African states called for a rethinking of the systemic imbalance within which the Court was situated. These were very real concerns and very real problems about the fiction of democracy, the unequal and political nature, and double standards of course, as well as questionable selectivity results.

So that was one set of concerns that we saw in the amendments that aren't adequately addressed in the review. Another has to do with the call for the ASP to put in place prosecutorial discretion guidelines, i.e., the development of guidelines for the Prosecutor, for the Court, and for taking seriously the range of concerns that African states had around ensuring that there was a balance and limits to prosecutorial action.

Another had to do with the fraught problem of prosecutorial selection and investigating two sides

of a conflict. Over the past 8 years we have seen tremendous issues around this problem in Cote d'Ivoire and a number of other places. Uganda maybe is also another place where addressing two sides of a conflict is critical, and doing so simultaneously, or at least in a context in which one side of a conflict doesn't feel as if they're being singled out. Or that we think that it is fine for the Prosecutor to pursue one case and then 10 years later pursue another case. That might be okay in legal time, but in terms of the politics of everyday, it is not. That was certainly part of the call for rethinking and reform that we saw coming from African states.

A final point that I will make in responding to your question is this point about the ICC's complementarity to regional courts, and the call for reform that African states have made around Article 17: this is the principle of complementarity, where currently the language in the Rome Statute is one where the ICC recognises the complementarity of national states but not regional courts. This is language that needs to be reformed. It is not simply a matter, as we see in the report or the review, that African states have to understand the working of the Court, and that they are an appendage as part of a regional system to the Court's work, but instead what African states have been asking for is not just an amendment to the language where there is a recognition of the regional, but also that they are forms of burden-sharing or there are ways of dealing with conflict and addressing questions of violence is also a collaborative effort where these African bodies are engaged in that regard. That's not necessarily the case. Instead, what we see in the review, is the need to engage with international, inter-regional, and regional organisations. We see an identification of the AU, the Organisation of American States, the European Union (EU), etc. But the problem here, is that the goal of this collaboration is with the aim of helping relevant states to better understand the purpose and value of the Court, and thereby building support for its activities. Now if that is not a problem, I don't know what is! This says something about the nature of collaborative engagement with regions: that it is one-sided, that it is about the ways regions can support the Court, as opposed to the Court also engaging dialogically with the needs of regions, that are concerned with justice and approaches to justice -in the case of Africa on African terms, using African justice forms on African terms. This could involve legality, and it might also involve being

aware of peace-justice sequencing, a range of strategies that could be used in the context of violence.

So this is an important negotiation that needs to happen. Making the amendment is one thing, and another involves ensuring that any kind of reform actually takes into consideration the dual nature of these relationships: regions with courts and how burden-sharing might happen.

Overall, I guess I end with disappointment with the reform in this document, and think that there's a lot of work to do. There's a pre-history that needs to be addressed and I don't necessarily see where the calls by African states to reform are actually on the table in the report. Many of those questions still have to be addressed, as far as I am concerned at this stage.



## **Mausi Segun**

**Executive Director, Africa Division at Human Rights Watch**

In December 2019, the ASP decided to commission the Independent Expert Review, following a request by the leadership of the Court to review its performance. Civil society strongly supported the Commission's Review, and several organisations, including Human Rights Watch (HRW), made submissions to the Experts. While the ICC remains a crucial court of last resort across the world, its performance shortcomings have hampered its progress in realising this very crucial mission. These shortcomings have left some of the most serious crimes unaddressed, while also disappointing the legitimate expectations of victims and affected communities.

At a time when the rules-based global order and the Court itself are under an unprecedented attack, a strengthened Court robustly supported by its members would be more resilient to politicised efforts to obstruct its mandate. Now that the report of the Expert Review is out, we would ask that the Court and the States Parties put in place processes to assess the Experts' recommendations, and then ensure appropriate follow-up on those recommendations. Those two points are critical. In order to make the most of this unique opportunity that the Court has, we believe that the next steps by the Court and the ASP should be guided by three principles.

One, the principle of genuine dialogue; dialogue between court officials, between the Court itself and States Parties and NGOs, on those recommendations that have been put forward in the report. The

second is respect for the Court's judicial and prosecutorial independence. Some of the topics in the recommendations go to the essence of the Court's work as an independent judicial institution. States Parties need to tread, I think, very carefully, in ensuring respect for these boundaries. The third principle that we hope should guide the next steps by the Court, include ensuring transparency and inclusion. All stakeholders -including court staff, civil society organisations- who contributed to this process from its inception, and have made valuable inputs and continue to have valuable insights, should continue to be involved in these discussions around the next steps.

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**The Court needs to continue to improve its investigations and prosecutions. The efforts to make its work more meaningful to local populations cannot be overemphasized.**

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**Mausi Segun**



## Oumar Ba

Assistant Professor of International Relations at Morehouse College, Author of *States of Justice: The Politics of the International Criminal Court*

I think the Expert Review of the ICC is a positive development. It needs to be welcomed, because at the very least it shows that there is a recognition that there are some issues that ought to be addressed at the institutional level.

After two decades of operation it is no longer tenable to just use the excuse of the ICC being a newer institution and that these may be teething issues. That excuse no longer works. There is a sense that something is amiss in how the ICC has operated over the past two decades. There is a recognition that this must be addressed. So this is a welcoming development that the ASP has put together this Panel of Experts, who have done due diligence and have issued a report.

One of the issues though that this report has not addressed, to my satisfaction at least, is that it focuses a lot on the ICC and its institutional culture. This is an attempt to look at what hasn't worked in The Hague and how to fix it. It looks at issues such as management of personnel, selection of cases, specific offices, women, the ICC - so the institutional culture, which is all good and a serious issue that must be addressed. However, what I think is also missing is the broader questions, the role the ICC plays in the international system. It seems to me that two decades later, there is still no attempt to rethink what the ICC can be, rather than what the ICC would be in a world where international justice would be the main concern for all parties involved, including states, which I am not necessarily sure is the case.

So these broader questions are still unaddressed. For instance, the lofty goals that emerged out of the Rome Conference, this optimism that we are entering a new world wherein justice would be delivered to victims. I think there is a need to go back to the drawing table and ask ourselves what can the ICC achieve? What kind of justice can the ICC deliver? Which also means what kind of justice the ICC is not able to deliver, and be

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the ICC operates in a political world made of states which will go after their own security and political interests, and they will use the Court if they have to.”

Oumar Ba

upfront and be honest about the limitations that the ICC has. There is a need I think to step back from this reification of the ICC, this idea of the ICC as the solution, the ICC as an institution that can and will end impunity. I don't think that is going to happen. Be upfront about it, be honest about it, and let victims know that we as the ICC could be a solution, but oftentimes, we will let you down.

The ICC operates in an international system made primarily of states who have interests and who will go after those interests. This is something that I tried to highlight in my book: that the ICC operates in a political world made of states which will go after their own security and political interests, and they will use the Court if they have to, and that is still the case. Otherwise, how could we explain that the ICC has been unable so far to investigate and prosecute agents of the state? It is much easier for the ICC to go after rebels or 'enemies of state', rather than successfully prosecuting state officials. I am not even talking about heads of state, just state officials. That has been one of the main challenges. Why? Because again, the ICC operates within

a political world, the ICC is an International Organisation (IO), although people at the ICC tend to think of the ICC as something special -it is a Court and therefore not a political organisation or not an IO'- and I disagree. The sooner the ICC sees itself as an IO, the more effective it will be at fulfilling its mission because it would lead to a recognition that the justice that the ICC can deliver will

always be selective, it will always be partial, it will always be political. The sooner we all come to that realisation and accept it, the better it would be for the ICC as an institution, but also for the victims who would know that the ICC could be a solution for redress and for accountability, but there may be other possibilities to pursue.



### **Fatou Bensouda**

**Prosecutor of the International Criminal Court**

Along with my senior management, I fully supported the mandate for the group of independent experts commissioned by the States Parties at the ASP of 2019, to review and enhance the functioning of the Court and my Office, culminating into a report published this autumn. We are currently studying the report's recommendations and are pleased to note that many of them confirm our own processes, thinking and improvement projects.

Indeed, from my Office's perspective, many of the recommendations that the experts have made can help us chart a way forward in the interests of strengthening the Court and the Rome Statute system of international criminal justice. That said, as the experts themselves have anticipated, we may have difficulty with certain other findings or recommendations.

My Office's divisions and sections are currently providing observations and making an inventory of priority recommendations that can be implemented in the short and long term, and identify those that we believe, should they be implemented, would not result in greater efficiency and effectiveness but the opposite. A full report is envisaged.

We are engaging with the other organs of the Court in discussions of States Parties on the modalities on how to take the process forward, recognising that some of the recommendations by necessity involve further consultation. We are fully committed to dialogue with States Parties on the matter.

I hope that the next steps in this review process will also incite a productive discussion amongst States Parties on how they can, in their own right, more effectively and efficiently support the work of my Office and the Court more broadly through enhanced cooperation and provision of adequate resources, as we work on our side to enhance and increase our own efficiencies and improvements.

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**Many of the recommendations that the experts have made can help us chart a way forward in the interests of strengthening the Court and the Rome Statute system of international criminal justice.**

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**Fatou Bensouda**



## **Chidi Odinkalu**

**Senior Manager for Africa, Open Society Justice Initiative**

Now we've ended up in many ways with a situation in which victims who need the ICC, on the one hand, and the Court, which is established to bring justice to those who have violated them, on the other, are now at odds. Certainly, in Africa, there is vast dissonance between the two constituencies and there is good reason for that. A lot of victims believe the Court has failed them. The Court has not been present for them and has not been supportive of them, and in many countries victims have paid a heavy price for their belief in and initial support of the Court.

You see this in a place like Kenya, where many victims disappeared, several were killed, mysteriously died, and several had to be exiled as a result. You also see that in Sudan, in Darfur, where many of them have indeed been exiled. Across vast parts of Africa, victims have paid a huge price for the Court and for their support for the Court.

Now, this dissonance has been deepened, rather than alleviated, by the tendency to outsource responsibility for fixing it to some technicians, committees of experts,

reports, and all of that. That is not the way, in my view, to fix it. I think the way to fix it is from within the Court, from the management of the Court, from its leadership, from the Office of the Prosecutor, the Registrar, the presidency, showing that they understand the issues, rather than running away from taking responsibility for the issues, from recalibrating the way the Court handles victims' issues, from avoiding a situation in which the Court operates as if these are other peoples' issues rather than issues for it to manage. Unless and until that begins to happen, I don't think we are going to begin to see any solutions to the mutual dissonance, the vast dissonance, the chasms that have grown between the Court and victim constituencies.

At that level of the emotional connection and shared enterprise between victims and the Court, it is missing; at the political level of diplomatic and sovereign support for the Court, it is missing. And that is why, increasingly, the Court is looking like an orphaned institution, without any moorings, without any support, with no one it can actually hew to for the kind of support that it needs to do its work.



## **John Jeffery**

**Deputy Minister of Justice and Constitutional Development, South Africa**

The Group of Experts, chaired by South Africa's judge Richard Goldstone, was established in December last year by the ICC's ASP to make concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute as a whole. My personal view is that it is an excellent report which will go a long way in enhancing the effectiveness, legitimacy and functioning of the ICC, and will strengthen the Court in a meaningful

way. The Report contains 384 recommendations, both short- and long-term, with varying degrees of complexity and urgency of implementation. In their report, the experts take a frank and critical look at the ICC and the Rome Statute, and discuss aspects which have drawn criticism over the years. The report looks at important aspects, for example the Prosecutor's discretion in the selection and prioritisation of cases and situations, and the feasibility of cases. It looks

at the criteria for case-selection and -prioritisation, as well as charging practices, and makes important recommendations in this regard. It also looks at the issue of the lack of transparency in preliminary examinations, and also makes recommendations. One of the most important recommendations the report

makes is to say that the Office of the Prosecutor (OTP) should continue to develop partnerships and enter into memoranda of understanding with States Parties, international and inter-governmental organisations, and private companies.



ICC President addresses United Nations General Assembly, calls for universal ratification of the Rome Statute  
Photo courtesy of the International Criminal Court



United Nations Security Council, New York City, United States  
Photo courtesy of MusikAnimal, Wikimedia Commons

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**All criminal justice agencies can improve. The Court, notwithstanding the unique challenges it faces, is no exception.**

**Fatou Bensouda**

## Question 2

**As the Prosecutor of the ICC, you have witnessed a growing call from the international criminal law community for reform. What have you done to address these concerns?**



**Fatou Bensouda**

Prosecutor of the International Criminal Court

My Office, under my direction, is committed to a culture of continuous learning and improvement. We recognise that setbacks can serve as a learning experience for the improvement of our future practices.

In order to improve the quality and efficiency of the Office, upon my taking office as Prosecutor in 2012, we adopted a prosecutorial strategy with a major shift in how we investigate and build our cases among other things, by focusing on in-depth investigations and being as trial-ready as possible when presenting our cases before the Judges. We have since also streamlined and strengthened our administrative procedures in line with the goal of being a professional and transparent office. We further made significant efforts to improve and build an office culture, including the functioning of the integrated teams responsible for our investigations, and through adopting policies, and the core values of Dedication, Integrity, and Respect. We are also continually seeking to optimise our work processes,

including in relation to preliminary examinations, to ensure their efficiency, integration and value for any future investigations.

These are just some examples of our embrace of change management and continuous learning as reflected in the three consecutive strategic plans issued during my term.

As a confirmation of the changes made to prosecutorial strategy, we have secured important convictions in the Katanga, Ntaganda, Bemba (overturned on appeal) and Al Mahdi cases and in contempt proceedings against another five individuals. We also await the Trial Chamber's verdict in the Ongwen case, which has been scheduled for delivery on 12 January 2021.

Limitations in the fate of other cases are the consequence of several factors that may confront any prosecutor, such as an initial prosecutorial strategy that was subsequently transformed as I noted above; cooperation challenges; security conditions; resource limitations; and lack of consistent judicial judgments, practice or clarity, in addition to the need for the Office to improve its own performance. All criminal justice agencies can improve. The Court, notwithstanding the unique challenges it faces, is no exception.

**“**  
***My Office, under my direction, is committed to a culture of continuous learning and improvement. We recognise that setbacks can serve as a learning experience for the improvement of our future practices.***  
**”**

**Fatou Bensouda**



Picture the Rome Conference in July 1998

Photo courtesy of the Coalition for the International Criminal Court, Flickr

## BIOGRAPHIES



### **Chidi Odinkalu**

Senior Manager for Africa, Open Society Justice Initiative

Nigerian lawyer and advocate, Chidi Odinkalu (Ph.D. Law, London School of Economics and Political Science), is the former Chair of the Governing Council of Nigeria's National Human Rights Commission.

Prior to taking up his current position as senior team manager for the Africa Programme of the Open Society Justice Initiative, Odinkalu was senior legal officer responsible for Africa and Middle East at the International Centre for the Legal Protection of Human Rights in London, Human Rights Advisor to the United Nations Observer Mission in Sierra Leone, and Brandeis International Fellow at the Centre for Ethics, Justice and Public Life of the Brandeis University (Massachusetts). In addition to being widely published on diverse subjects of international law, international economic and human rights law, public policy, and political economy affecting African countries, Chidi Odinkalu is frequently called upon to advise multilateral and bilateral institutions on Africa-related policy, including the United Nations Economic Commission for Africa, the African Union, the Economic Community of West African States, and the World Economic Forum.

Odinkalu is associated with several non-governmental and academic institutions within and outside Africa. He is a member of the Human Rights Advisory Council of the Carnegie Council on Ethics and International Affairs, has a seat on the Boards of both the Fund for Global Human Rights and the International Refugee Rights Initiative, is the founder of the Section on Public Interest and Development Law at the Nigerian Bar, and is a member of the Executive Committee of the Nigerian Bar Association.



### **Kaajal Ramjathan-Keogh**

Director of Africa Programme at the International Commission of Jurists

Kaajal Ramjathan-Keogh is a South African lawyer (B.Proc., LLB., University of Natal), who joined the International Commission of Jurists in October 2020.

After a stint with the International Organisation for Migration from 2001-2002, she worked at Lawyers for Human Rights (South Africa) from 2002- 2014 where she initially headed the Immigration Detention Monitoring Unit from 2002-2007 and thereafter acted as Manager of the Refugee and Migrants Rights Programme from 2007- 2014. As Executive Director of the Southern Africa Litigation Centre from 2015 to 2020, she led many strategic litigation cases focusing on various human rights issues, and in particular, on judicial independence, rule of law, international criminal justice, freedom of expression and association. Aside from significant experience and expertise gained in the fields of asylum and refugee protection, migration, citizenship, and statelessness, she also has experience in international criminal justice and freedom of expression.

Kaajal sits pro bono on several boards of non-profit organisations. In addition to acting as Board Chair of the Consortium for Refugees and Migrants in South Africa from 2007-2011, she was a board member of the Southern African Human Rights Defenders Network from 2017-2020, and currently sits on the boards of the Centre for Child Law, South African History Archive and Sonke Gender Justice, and is the Board Chair of Freedom House's Advancing Rights in Southern Africa Programme.



## **Fatou Bensouda**

### **Prosecutor of the International Criminal Court**

Mrs. Fatou Bensouda is the Prosecutor of the International Criminal Court (ICC), having assumed office in 2012 after being elected by the Assembly of States Parties and nominated as the sole African candidate for election to the post by the African Union. She is the first woman to serve as ICC Prosecutor. Under her leadership, she has greatly reinforced her Office's capacity and its activities to cover 13 investigations and ten active preliminary examinations in conflicts around the world. She has striven to advance accountability for atrocity crimes, highlighting in particular the importance of addressing traditionally underreported crimes, such as sexual and gender-based crimes, mass atrocities against and affecting children, as well as the deliberate destruction of cultural heritage.

Between 1987 and 2000, Mrs. Bensouda successively occupied the posts of Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General and Legal Secretary of the Republic, and Attorney General and Minister of Justice, in which latter capacity she served as Chief Legal Advisor to the President and Cabinet of The Republic of The Gambia. Her international career as a non-government civil servant formally began at the UN International Criminal Tribunal for Rwanda, where she worked as a legal adviser and trial attorney before rising to the position of Senior Legal Advisor and Head of the Legal Advisory Unit (2002 to 2004), after which she joined the ICC as the Court's first Deputy Prosecutor. Mrs. Bensouda also served as delegate of The Gambia to, inter alia, the meetings of the Preparatory Commission for the ICC. She is the recipient of numerous awards, including the distinguished ICJ International Jurists Award (2009), the 2011 World Peace Through Law Award from the Whitney Harris World Law Institute, the American Society of International Law's Honorary Membership Award (2014), and the United Nations Association of Spain's XXXV Peace Prize (2015). In addition to receiving several honorary doctorates, Mrs. Bensouda has

been listed by: Time magazine as one of the 100 most influential people in the world (2012); the New African magazine as one of the "Most Influential Africans;" Foreign Policy as one of the "Leading Global Thinkers" (2013); and Jeune Afrique as one of 50 African women who, by their actions and initiatives in their respective roles, advance the African continent (2014 & 2015). In 2018, she joined the eminent roster of International Gender Champions.



## **John Jeffery**

### **Deputy Minister of Justice and Constitutional Development, South Africa**

John Jeffery, MP is a member of South Africa's ruling party, the African National Congress, and is currently serving as the country's Deputy Minister of Justice and Constitutional Development.

An Attorney of the High Court of South Africa, Mr. Jeffery originally studied law at the University of Natal, from which he received his BA and LLB degrees, as well as a postgraduate diploma in environmental law.

After South Africa's transition to a constitutional democracy in 1994, John Jeffery became a member of the KwaZulu-Natal Provincial Legislature where he chaired the Environment and Conservation Portfolio Committee. He has been a member of the National Assembly of Parliament since 1999. As a former member of the Portfolio Committee on Justice and Constitutional Development, he was instrumental in shaping a number of pieces of legislation, including the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 and Child Justice Act, 2008.

After holding the position of Parliamentary Counsellor to the President and Deputy President from 1999 to July 2013, serving under Presidents Mbeki, Motlanthe and Zuma, Mr. Jeffery was appointed to his present post in July 2013 and subsequently re-appointed in 2019 by President Cyril Ramaphosa for a second term of office.



### **Kamari Clarke**

**Professor, University of Toronto & University of California, Los Angeles**

On leave from her post as Professor at the University of California Los Angeles, Kamari Clarke is currently a Professor at the University of Toronto's Centre for Criminology and Sociolegal Studies.

She holds a BA in Political Science-International Relations from Concordia University, a Master in the Study of Law from Yale University, and a Ph.D. in Anthropology from the University of California-Santa-Cruz. Her research explores issues addressing transnational legal meaning as well as the increasing judicialisation of justice, where she explores the implications for rethinking how we study contemporary global and transnational formations in the contemporary period. She is the author of over fifty articles and eight books, ranging from *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009) and *Affective Justice* (Duke University Press, 2019) to edited volumes such as *Mirrors of Justice: Law and Power in the Post-cold War Era* (Cambridge, 2009) and *Africa and the ICC: Perceptions of Justice* (Cambridge, 2016).

Over the course of her academic career, Professor Clarke has received numerous prestigious fellowships, grants and awards, such as a two-year President's Postdoctoral Fellowship at the University of California, Berkeley, a Social Sciences and the Humanities Research Council of Canada (SSHRC) fellowship, and research funds from the Ford Foundation, Wenner-Gren Foundation, the National Science Foundation, the Rockefeller Foundation and the Open Society Foundations.

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### **Mausi Segun**

**Executive Director, Africa Division at Human Rights Watch**

Mausi Segun is the Executive Director, Africa division at Human Rights Watch, having previously worked at Nigeria's Federal Ministry of Justice and at the Nigerian National Human Rights Commission.

Armed with a law degree from Obafemi Awolowo University, Nigeria, and an LLM in human rights law from the School of Oriental and African Studies, University of London as a British Chevening scholar, Mausi has over 25 years of experience in legal and human rights practice.

Under her leadership, a team of 33 currently covers 25 countries in Sub-Saharan Africa, monitoring human rights issues that arise from terrorism and counterterrorism, conflicts, cycles of communal violence, humanitarian and refugee crises, sexual violence against women and girls, repression of journalists, activists and political opposition, as well as natural resource exploitation and environmental rights.

She has written pieces and opinions for the New York Times, the Guardian and the Independent UK, Sunday Independent SA, Huffington Post, Washington Post, MSNBC, and Salon. She is often featured and quoted on CNN, the BBC, Al Jazeera, Sky News, SABC, France 24 and other major news media.

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### **Max du Plessis**

**Senior Counsel and Advocate, South Africa, and Adjunct Professor, International Law, Nelson Mandela University**

Max du Plessis SC (B. JURIS SA, LL.B Natal, LL.M Cambridge, PHD UKZN) has been an advocate since 2000, an adjunct professor at the Nelson Mandela University, honorary research fellow at the University of KwaZulu-Natal (Durban), and a senior research associate at the Institute for Security Studies (Pretoria). He is an associate tenant in Thulamela Chambers, Sandton, associate tenant in Doughty Street Chambers, London, and associate fellow in international law at Chatham House, Royal Institute for International Affairs, London.

In South Africa, Max practises in public law, human rights, international law and competition law, appearing before the Constitutional Court, Supreme Court of Appeal, High Courts, and the Competition Tribunal and Competition Appeal Court. As an international lawyer, he advises governments, international organisations and NGOs, and has appeared in or advised on cases before inter alia the International Criminal Court, the African Commission on Human and Peoples' Rights, the SADC Tribunal, and the East African Court of Justice. On international law, he has been briefed to submit amicus curiae briefs before the US Supreme Court, the US Court of Appeals, and the Israeli Supreme Court. Max is the lead or co-author of various textbooks, including *Class Action Litigation in South Africa* (2017), *Constitutional Litigation in South Africa* (2015), *Civil Procedure* (3rd edition, 2017), and *International Law: A South African Perspective* (5th edition, 2019). As an academic, he has taught for many years as an associate professor at the University of KwaZulu-Natal, and has been a visiting professor or scholar at inter alia Oxford University, Cambridge University, Harvard Kennedy School of Government, London School of Economics, University of Sydney, and New York Law School.



### **Mohamed Chande Othman**

**Former Chief Justice of Tanzania, former Member of the Independent Expert Review of the ICC, and Member of the Africa Group for Justice and Accountability**

Mohamed Chande Othman is the former Chief Justice of Tanzania, a position he held from 28 December 2010 to 18 January 2017 after stints as both a High Court and Appeal Court Judge.

Justice Othman's previous experience includes that of Prosecutor General of East Timor, Chief of Prosecutions of the International Criminal Tribunal for Rwanda (ICTR), and Senior Legal Adviser to the Prosecutor of the ICTR. In addition, he has also worked with the International Federation of the Red Cross and Red Crescent Societies. Under the flag of the United Nations, Mohamed Chande Othman has served as:

- Eminent Person (since 2017) and Head of the UN Independent Panel of Experts appointed by the UN Secretary General to review the conditions and circumstance resulting in the tragic death of Dag Hammarskjöld, former 2nd UN Secretary General and of members of the party accompanying him;
- member of the UN Human Rights Council's High-Level Commission of Inquiry into the situation in Lebanon following the Israel-Lebanon Armed Conflict in 2006; and,
- UN Human Rights Council's Independent Expert on the human rights situation in the Sudan (2009-2010).
- His most recent appointment was as member of the Independent Expert Review Group established in December 2019 by the Assembly of States Parties to review the International Criminal Court and Rome Statute system. In addition, he is also the Chairperson of the Administrative Council of the African Association of International Law.

Justice Othman's publications include books and peer-reviewed papers on international humanitarian law, refugee law, criminal law and evidence, and peacekeeping.



## ***Navi Pillay***

**Former United Nations High Commissioner for Human Rights and Member of the Africa Group for Justice and Accountability**

Navanethem “Navi” Pillay holds a B.A. LL.B. from Natal University South Africa, as well as a Master of Law and Doctorate of Juridical Science from Harvard University.

In 1967, she became the first woman to start a law practice in her home province of Natal, where she acted as a defence attorney for anti-apartheid activists, exposing torture and helping establish key rights for prisoners on Robben Island. She also worked as a lecturer at the University of KwaZulu-Natal. In 1995, after the end of apartheid, Ms. Pillay was appointed as acting judge of the South African High Court, and in the

same year was elected by the UN General Assembly to sit as a judge on the International Criminal Tribunal for Rwanda (ICTR), where she served a total of eight years, the last four (1999-2003) as President. She played a critical role in the ICTR’s groundbreaking jurisprudence on rape as genocide, as well as on issues of freedom of speech and hate propaganda.

In 2003, Navi Pillay was appointed as a judge of the International Criminal Court in The Hague, where she served in the Appeals Chamber until August 2008. Her appointment as UN High Commissioner for Human Rights followed in 2008, a post she was to hold until 31 August 2014. In April 2015, Ms. Pillay became the 16th Commissioner of the International Commission against the Death Penalty. She was also named chair of the Special Reference Group on Migration and Community Integration in KwaZulu-Natal, a group formed to investigate the immediate and underlying causes of attacks on migrants.

In South Africa, as a member of the Women’s National Coalition, she contributed to the inclusion of the



**Navi Pillay**  
Photo by the Wayamo Foundation

equality clause in the country's Constitution that prohibits discrimination on grounds of race, gender, religion and sexual orientation. She co-founded Equality Now, an international women's rights organisation, and has been involved with other organisations working on issues relating to children, detainees, victims of torture and domestic violence, and a range of economic, social and cultural rights.

Her current posts include Judge ad hoc of the International Court of Justice in the Application under the Genocide Convention by The Gambia against Myanmar, President of the International Commission against the Death Penalty, President of the Advisory Council of the Nuremberg Principles Academy and Trustee of the University of Kwa-Zulu Natal Foundation Board of Trustees.'



### **Richard Goldstone**

**Former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia, former Chair of the Independent Expert Review of the ICC, and Member of the Africa Group for Justice and Accountability**

Richard J. Goldstone served as a judge in South Africa for 23 years, the last nine as a Justice of the Constitutional Court. From August 1994 to September 1996, he was the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. He is the former Chair of the Independent Expert Review Group established in December 2019 by the Assembly of States Parties to review the International Criminal Court and Rome Statute system.

Since retiring from the bench, he has taught as a visiting professor at a number of United States and European Law Schools.

In addition to being an Honorary Bencher of the Inner Temple, London and an Honorary Fellow of St. John's College, Cambridge, Richard J. Goldstone is also an

Honorary Member of the Association of the Bar of the City of New York, a foreign member of the American Academy of Arts and Sciences, an Honorary Life Member of the International Bar Association and the Honorary President of its Human Rights Institute. '



### **Oumar Ba**

**Assistant Professor of International Relations at Morehouse College, Author of *States of Justice: The Politics of the International Criminal Court***

Oumar Ba holds the post of Assistant Professor of International Relations at Morehouse College, in Atlanta. His primary research agenda focuses on international criminal justice and the global governance of atrocity crimes. He also studies worldmaking and visions for and alternatives to the current international order, from Global South perspectives.

He is the author of *States of Justice: The Politics of the International Criminal Court* (Cambridge University Press, 2020).



### **Owiso Owiso**

**Doctoral Researcher in Public International Law and International Criminal Justice at the University of Luxembourg**

Owiso Owiso is an international lawyer and an independent consultant and researcher on international criminal justice, transitional justice and human rights. He is currently a Doctoral Researcher in Public International Law and International Criminal Justice at the University of Luxembourg.

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From top right to bottom left  
1. Mohamed Chande Othman  
2. Kaajal Ramjathan-Keogh  
3. Kamari Clarke  
4. Fatou Bensouda

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