



International Criminal Court
Bar Association | Association du Barreau près
la Cour Pénale Internationale

ICCBA NEWSLETTER

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MESSAGE FROM THE PRESIDENT

Dear Members,

I am delighted to present this edition of the ICCBA Newsletter which includes news from the ICCBA committees and updates on the cases currently on-going at the ICC.

As the term of my mandate, and that of the Executive Council, is drawing to a close, I would firstly like to thank all members of the committees for their work and dedication to the ICCBA over the course of the last year. I would also like to thank all members of the ICCBA for their continued support and engagement with the Association.

An issue which is of concern to many members is that of taxation of defence and victims' team members in the Netherlands. This is an issue which the

ICCBA has engaged with the ICC Registrar on and is striving to find an outcome which will resolve this issue. In April the ICCBA sent a [Submission on the Taxation of Legal Aid Fees](#) to the Committee on Budget and Finance expressing its concern at the *Note Verbale* which was issued by the Ministry of Foreign Affairs of the Netherlands. I have also had several meetings with the Registrar, along with members of the ICCBA Tax and Legal Aid Working Group, regarding taxation but unfortunately, like many issues which involve political aspects, the process will take time. I would like to emphasise to members that this has been, and will continue to be, a high priority issue for the ICCBA.

Another important on-going issue is that of the ICC Legal Aid reform. After the issuance of a draft legal aid policy in late 2018, the ICCBA has been engaging with the Registry on the content of the policy and members of the ICCBA Legal Aid Working Group attended several meetings regarding the content of the policy. At the current time, the policy is still in the process of being promulgated but members will be kept updated of any developments.

In early May, the ICCBA conducted an advocacy training course for 18 participants who came to the ICC from all over the world. The three day course included lectures from highly experienced defence counsel and prosecutors from the ICC, as well as judges. The participants were given high level training on opening and closing statements, direct examination and cross examination and were given the opportunity to practice their skills and receive feedback. Photos from the training are available on the [gallery page](#) of the website.

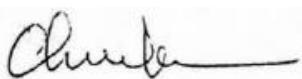
The ICCBA has also signed two affiliation agreements this year, one with the [International Association of Lawyers](#) (UIA) and one with the "[Ordre de Barreaux Francophones et Germanophone de Belgique](#)". This brings the total number of affiliation agreements signed to four including the affiliation with the [African Bar Association](#) and the [Federation of European Bars](#). These agreements serve as an excellent means for the ICCBA to work closely with other organisations and strengthen coordination on important issues for members.

In February, the ICCBA sent a letter to all lead counsel of defence teams and legal representative of victims' teams at the ICC on Workplace Harassment. The [letter](#) outlines the ICCBA's position on Workplace Harassment and the measures which the ICCBA will be implementing to address this issue. The ICCBA takes staff well-being seriously and has engaged on a number of initiatives and taken various steps to help ensure that legal team members are aware of their obligations and behave collegiately, and fairly with each other.

The ICCBA General Assembly meeting will take place on Friday 14 June at the premises of the ICC and I invite you to join us, all the information about the General Assembly, registration and the elections can be found on our website at: <https://www.iccba-abcpi.org/ga2019>

If you have any questions or comments, or we can assist in any way, do not hesitate to contact the ICCBA Executive Director, Dominic Kennedy at: dkennedy@iccba-abcpi.org

Best wishes,



Chief Charles Taku
President





DEFENCE COMMITTEE

On 9 April 2019, the Defense Committee: Franky Tagne, Emmanuel Altit, Xavier-Jean Keita, and Jad Khalil met at the headquarters of the International Criminal Court and discussed the taxation imposed by the Dutch authorities who contacted the Registrar on March 12 2019. These taxes are imposed on the practicing counsels.

A suggestion was made to inform the Executive Council of this dangerous move because if the counsel paid these taxes, the legal aid would be heavily affected. The committee set a deadline of 22 May 2019 to make it clear that there is fairness of

procedure and equality of arms between the Office of the Prosecutor and Defense Counsel. The clarity of this topic assumes that the OTP and the Defense should be tax exempt. In case there is an inequality of representation, international justice would be affected. The imposition of tax on counsel who reside with their families in the Netherlands would be heavily affected. One of the solutions would be to increase the legal aid remuneration by the amount of the tax. The Defense Committee left its meetings open on this subject and got in touch with the members of the Executive Council.

VICTIMS COMMITTEE

1. The ICCBA Victims Committee met on 10.02.2019, 01.03.2019, 12.04.2019 and 17.05.2019 at the ICC.

2. The Centre for Criminology at Oxford University and the ICCBA VC are currently working on developing a platform for an in-house publication based on the contributions made by all the panelists and papers presented at both events held in The Hague and Oxford 2018. Once finalized, the publication will be made available and accessible online on both the Centre for Criminology and the ICCBA websites.

3. On 12.04.2019, the ICCBA invited again all ICC Victims' Counsels and members of their teams engaged in ongoing proceedings to an open meeting at the ICC premises. This meeting was again convened at the initiative of the ICCBA Victims Committee to discuss the situation of victims' teams at the ICC and

gather information on the issues faced in carrying out their mandate of representing victims in proceedings. The meeting also aimed to gather the different teams currently engaged in ongoing proceedings and establish a relationship between them and the ICCBA Victims' Committee. Participants were invited to raise and discuss issues that were of interest and concern to them. A Report was prepared for ICCBA Executive Council and to circulate among the participants of the meeting and will serve as additional basis for future meetings and negotiations between ICCBA and other Registry and ICC organs with a view to improving working conditions, practices and cooperation. The report will be accessible in a redacted version within the ICCBA Members area.

4. On 13 June 2019, Paolina Massidda and Luc Walleyne will give presentations on Victims Counsel issues at the ICC List Counsel Seminar.



COUNSEL SUPPORT STAFF COMMITTEE

We are very much aware that the last couple of months have been troubling for support staff. The note verbale on income tax has brought on great anxiety, and CSSC has been committed to doing what we can to improve the situation. Resolving the income tax issue has for several years been a key CSSC objective but, unfortunately, much of it is outside of our control.

We have been liaising closely with the Executive Council (EC) on how to proceed. The ICCBA leadership has had serious meetings with the ICC Registry on this issue and will continue to do so. Although it is frustrating, we cannot share much of the contents of these discussions for now, but we encourage you to speak to a CSSC or EC member if you have any questions.

The income tax issue also renewed long-standing concerns about the employment status and conditions of support staff. CSSC has focused this year on improving working conditions through the legal aid consultation, and in March we submitted a detailed proposal to include maternity/paternity/adoption leave pay and a minimum fee level (equivalent to a P1, step 1 staff member) for support staff in the proposed new legal aid policy. We are waiting to hear if they have been included by the ICC.

You may have also heard that a group of support staff chose to go directly to the Registry with certain concerns. We are in touch with this group and would like to thank them for the important points they raised regarding employment status. In response, we are in the process of obtaining independent legal advice of our own on the issue. For obvious reasons we cannot share more, but also encourage you to speak to a CSSC member if you have questions.

But also, the group raised important concerns regarding how well the ICCBA can represent support staff interests when they are in conflict with those of counsel. They raise valid points, particularly as the EC is only composed of counsel. We nevertheless believe that counsel and support staff are stronger represented together than apart. We have therefore proposed two detailed amendments to the ICCBA Constitution for consideration by the General Assembly on 14 June to include support staff representatives on the EC. Please read them as they are important, and encourage full members to vote for them (only full members can).

As always, if you have any questions or comments, please speak to one of us, or email us in confidence on: cssc@iccba-abcpi.org. We hope to see you at the General Assembly on 14 June.

AMICUS COMMITTEE

In March 2019, the ICCBA Amicus Committee transmitted an email to ICC Lead Counsel and legal team members reminding them of the Committee's mandate and advising that the Amicus Committee may be consulted on a preliminary basis regarding the possibility of the ICCBA seeking leave to submit amicus briefs in ICC proceedings. The Committee also revised its page on the ICCBA website to provide a clearer and more comprehensive explanation of its mandate and the role of amicus curiae more generally in legal proceedings. The Committee's webpage additionally now includes a database of amicus interventions in ICC proceedings dating to 2006.

Members of the Committee also consulted with an individual involved in ICC proceedings regarding the possibility of the ICCBA seeking leave to file an amicus brief in an ICC case.



CASE UPDATES



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

No case to answer

On 15 January 2019, Trial Chamber I, by majority, Judge Herrera Carbuccion dissenting, acquitted Laurent Gbagbo and Charles Blé Goudé of all charges, namely, crimes against humanity allegedly committed in Abidjan, Côte d'Ivoire, during the post-electoral crisis between December 2010 and April 2011. The Majority found that "the Prosecutor has failed to satisfy the burden of proof to the requisite standard as foreseen in Article 66 of the Rome Statute" and granted the Defence motions for acquittal from all charges against Mr Laurent Gbagbo and Mr Charles Blé Goudé. The Majority indicated that it would issue its reasons at an ulterior date and that the deadline for appealing the decision would start running at the moment the parties are notified of the full reasons for it.



Gbagbo © ICC

Release with conditions

Upon acquitting Laurent Gbagbo and Charles Blé Goudé, Trial Chamber I, by Majority, ordered the accused' immediate release. The Prosecution seized the Chamber pursuant to Article 81(3)(c)(i) of the Rome Statute, arguing the presence of exceptional circumstances which would warrant an exception to the rule of immediate release upon acquittal. The Prosecution's request was rejected. The Prosecution lodged an appeal and requested suspensive effect of the Trial Chamber's decision, which was granted. A hearing before the Appeals Chamber was held on 1 February 2019. The parties and participants presented their views, inter alia, relating to the proper interpretation of Article 81(3)(c)(i) of the Statute and whether conditions could be imposed on the acquitted persons once released. On the same day, the Appeals Chamber rendered its "Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute" (ICC-02/11-01/15-1251-Red2). The Appeals Chamber found that there was "a sufficient factual indication that Mr Gbagbo and Mr Blé Goudé might abscond if released unconditionally" and imposed a series of conditions on Mr Gbagbo's and Mr Blé Goudé's release.

The conditions include that Mr Gbagbo and Mr Blé Goudé must: "sign an undertaking that they will abide by all instructions and orders from the Court"; "not to travel beyond the territorial limits of the municipality of the receiving State without the explicit and prior authorisation of the Court; "surrender all identity documents, particularly their passports, to the Registry"; "report weekly to the law enforcement



authorities of the receiving State or the Registry”; not to contact, either directly or through any other party, any Prosecution witness in this case, or any interviewed person in the ongoing investigation in the Côte d’Ivoire as disclosed”; and “not to make any public statements, directly or through any other person, about the case or be in contact with the public or speak to the press concerning the case”.

Further, the Appeals Chamber instructed the Registry to enter into consultations, conclude arrangements with State parties, and facilitate the transfer of the two acquitted persons to the receiving State or States.

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

Bosco Ntaganda's lawyers have requested a temporary stay of his trial at the International Criminal Court (ICC) following the change in the duties of Judge Kuniko Ozaki as a part-time judge in his trial.

In a document filed on 1 April 2019, Defense Counsel Stephane Bourgon requested Trial Chamber VI to temporarily suspend the proceedings until Mr. Ntaganda had the opportunity to file a request to determine whether the judge must be disqualified from the case. He stated that permitting a judge to continue to sit a trial while there are substantial grounds for believing that he or she may be challenged entails the serious risk of irreparable harm to the accused's right to benefit from the trial a fair trial.

On March 4, 2019, a majority of ICC judges voted to allow Judge Ozaki to continue performing her duties in the Ntaganda trial as a part-time judge when she accepted an appointment as an Ambassador of Japan



Ntaganda @ ICC

to Estonia. The trial is currently under deliberation before the judgment is handed down, and the judges, at a plenary meeting, allowed Judge Ozaki to continue to sit the trial until the end of the sentencing phase.

According to Mr. Bourgon, a failure to immediately suspend the trial risks tarnishing the image of the other two judges of Trial Chamber VI.

Judges Marc Perrin de Brichambaut, Luz del Carmen Ibáñez Carranza and Rosario Salvatore Aitala voted against the fact that Judge Ozaki continues to sit in the Ntaganda trial. They felt that the fact that a person performs an executive or political function for a country while remaining a judge of the ICC would be likely to affect the public's confidence in the independence of the judiciary.

A minority of judges drew parallels between Judge Ozaki's request and the former Judge of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Elizabeth Odio Benito, who sought and obtained the permission of the ICTY judges. Before becoming a candidate for Vice-President of Costa Rica, they pointed out that, unlike Judge Ozaki, the ICTY Judge had undertaken not to assume any political office before concluding her term as a judge.

In his application, Mr. Bourgon referred to the case of Judge Odio Benito, stating that the ICC Judge had acted quite differently. The defense accused Judge Ozaki of lacking frankness when she asked to become a full-time judge by not disclosing to the Presidency that she would be appointed ambassador.

"She has asked for the end of her term as a full-time judge exactly one day before the Japanese Council of Ministers meets and confirms her appointment. Therefore, it appears that Judge Ozaki not only knew and intended to become an ambassador to Estonia but was clearly aware of the details of her post, including the exact date on which the Japanese Council of Ministers was to meet and debate this question," stated Bourgon.

According to Mr Bourgon, this suggests that Judge Ozaki was very well informed about her possible appointment as of January 7, 2019, but did not mention this "highly relevant fact" to the Chair to determine whether Judge Ozaki should no longer be



allowed to sit as a full-time judge of the Court.

He added that the judge did not report her appointment until it was effective; therefore "the timing amounted to an ultimatum, reinforced by the terms used by Judge Ozaki in her letter to the judges".

In that letter, Judge Ozaki asked the Presidency to consider it as a request to approve the continuation of her participation in the Ntaganda case "or, in the event that my application is denied, my letter of resignation as a judge of this court".

In their opinion of last month, the dissenting judges stated that there was a "significant risk" that granting Ozaki J.'s request would result in a possible challenge under section 41(2)(b) of the Rome Statute in the Ntaganda case or could be raised on appeal. This section provides that a person who is the subject of an investigation or prosecution may request the disqualification of a judge if its impartiality can reasonably be questioned.

Mr. Ntaganda's lawyers argue that the appointment of Judge Ozaki as ambassador places the judge in violation of article 40 (3) of the Rome Statute, which states that judges must perform their duties on time the seat of the Court shall not engage in any other professional activity.

In addition, defense counsel questioned Judge Ozaki for failing to disclose the fact that she was appointed ambassador when she applied to become a part-time judge. This week, Mr. Bourgon argued that the Court's Registrar, Peter Lewis, had visited Japan last January. The Presidency advised the Registry to disclose the reason why the question of the appointment of Judge Ozaki had been discussed and whether he had informed the judges of these discussions.

The defense asked the Presidency to disclose all of the correspondence related to Justice Ozaki's request and all the reasoning of the judges who granted her request. Neither Trial Chamber VI nor the Presidency provided a public response to Mr. Ntaganda's requests.

PROSECUTOR V. ALFRED YEKATOM & PATRICE-ÉDOUARD NGAÏSSONA (ICC-01/14-01/18)

Alfred Yekatom and Patrice-Édouard Ngaïssona were accused of war crimes and crimes against humanity, allegedly committed in the Central African Republic since at least September 2013 until at least December 2014.

Pre-Trial Chamber II found reasonable grounds to believe that Alfred Yekatom, as a military commander, committed or otherwise ordered, solicited, induced and facilitated the commission of the alleged crimes in various locations in the CAR, including Bangui and the Lobaye Prefecture, between 5 December 2013 and August 2014. It also found that Patrice-Edouard Ngaïssona committed jointly with others and/or through others or aided, abetted or otherwise assisted in the commission or attempted commission of the crimes, in various locations in the CAR, including Bangui, Bossangoa, the Lobaye Prefecture, Yaloké, Gaga, Bossemptélé, Boda, Carnot and Berberati, between at least 5 December 2013 and at least December 2014. Mr Yekatom and Mr Ngaïssona's first appearances before the Pre-Trial Chamber took place on 23 November 2018 and 25 January 2019 respectively.

Joinder of cases

On 20 February 2019, after seeking observations from the parties on the feasibility of joining the cases, Pre-Trial Chamber II issued its "Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters" (ICC-01/14-01/18-87).



Yekatom © ICC



Among others, the Pre-Trial Chamber held that the alleged crimes in both cases “are virtually indistinguishable in that they constitute the same widespread and systematic attack against the civilian population”, and the same armed conflict not of an international character in CAR since at least September 2013 until at least December 2014 between the Seleka and the Anti-Balaka. It further held that “it is expected that the evidence the Prosecutor intends to rely on to establish the charges against the suspects will also be substantially the same” and that neither Defence has demonstrated that joining the cases at this stage of the proceedings would seriously prejudice the suspects or would be contrary to the interests of justice.

In its Decision, the Pre-trial Chamber further set the date for the confirmation of charges hearing for both suspects for 18 June 2019, the date which had been initially set for the confirmation hearing of Mr Ngaïssona. On 21 March, the Pre-Trial Chamber rejected the Defence’s request for leave to appeal of its Decision on joinder. On 15 May 2019, the Pre-Trial Chamber granted the Prosecution’s request for a postponement of the confirmation of charges hearing, which will now commence on 19 September 2019 (ICC-01/14-01/18-199).

The two decisions on disclosure and related matters

On 23 January 2019, the Single Judge issued its “Decision on Disclosure and Related Matters” (ICC-01/14-01/18-64-Red). On 20 February 2019, the Pre-Trial Chamber considered “it appropriate to permit the Defence for Ngaïssona to make observations on the Decision on Disclosure” given that this Decision had been rendered before the joinder of the cases. Following observations from the parties, the Pre-Trial Chamber issues its “Second Decision on Disclosure and Related Matters” (ICC-01/14-01/18-163) on 4 April 2019, addressing several modalities of the disclosure process, including issues relating to redactions and translations. In its Second Decision on disclosure, the Pre-Trial Chamber ordered the Prosecution to disclose, in addition to a list of evidence it intends to present at the confirmation of charges hearing, “all evidence within the meaning of article 67(2) of the Statute in its possession or control and all material referred to in rule 77 of the Rules in

its possession or control by 17 May 2019 at the latest”.

Principles applicable to victims’ applications for participation

On 5 March 2019, the Pre-Trial Chamber issued its “Decision Establishing the Principles Applicable to Victims’ Applications for Participation” (ICC-01/14-01/18-141), in which it accepted, inter alia, the Registry’s Proposed Form for Individuals of four pages, containing two main differences in comparison with the two-page form approved by the Presidency (relating to the question of harm and the inclusion of a question on reparations) (ICC-01/14-01/18-78), as well as the Registry’s Proposed Form for Organisations or Institutions, which also contains an amended question on harm and a question on reparations.

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

The trial proceedings in the Dominic Ongwen case resumed on 31 January 2019 after a two and a half months break at the ICC with Ongwen’s lawyers prepared to call the next set of witnesses they hope will help convince Trial Chamber IX that Ongwen is not guilty of the 70 counts of war crimes and crimes against humanity that he has been charged with. The trial proceedings that had originally been scheduled to resume on 14 January had been adjourned for two weeks to allow Ongwen’s lawyers have doctors assess his health. Since the start of the Defence case in September 2018 and to date, the judges have heard evidence from 14 defence witnesses over a period of 19 days.

On 28 January 2019, the Defence for Ongwen made an application to the court requesting the judges to confirm that the Prosecution bears the burden of proof to disprove each element of the defences raised under Articles 31(1)(a) and (d) beyond a reasonable doubt. This is the first time since the ICC began work in 2002 that Article 31 has been invoked by a defence team. To date, no Trial Chamber has had to rule on which party is responsible for presenting evidence in



relation to the provisions of Article 31.

On 1 February 2019, the Defence filed four motions, requesting Trial Chamber IX to dismiss 41 out of the 70 counts of war crimes and crimes against humanity Ongwen has been charged with, arguing that the document that is the basis of those charges is defective. In this motion, the Defence argued that the defects mean Ongwen was not given notice of all the charges against him, which negatively affected how he prepared his defence and, ultimately, his fair trial rights.

Key Filings and Decisions

On 7 March 2019, Trial Chamber IX issued its 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', following the Defence filing of four motions alleging that the Confirmation Decision suffers various defects and requesting that the Chamber dismiss the charges and modes of liability which are facially deficient and violate the fundamental fair trial right of notice to Mr Ongwen. The Chamber examined the request in detail and stated among others that "[b]y waiting until after the trial commencement to raise such concerns, the Defence could effectively foreclose any possibility of the Prosecution fixing a 'defective' charge. Such a result would be unacceptable."

Consequently, the Chamber found that motions challenging the formulation of the charges must be brought in a timely manner after they arise, which was not the case since the Defence filed this challenge after the commencement of trial, the Prosecution's evidence presentation and part of the Defence's evidence presentation. The Chamber also found that the Defence's jurisdictional arguments on indirect co-perpetration and forced marriage were untimely with no exceptional circumstances to justify their consideration at this point during the trial.

On 1 April 2019, Trial Chamber IX issued its 'Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in Confirmation Decision', in which it granted leave to appeal the first issue, being whether the dismissal of the Initial Requests in limine, on grounds of untimeliness, is consistent with the rights of the accused, as it is a discrete legal question arising from the Impugned Decision. The Chamber

found that the first issue significantly affects the outcome of the trial. The challenges to the formulation of the Confirmation Decision and the jurisdiction of the Court have the potential to considerably influence the charged crimes. The Chamber noted that the first issue only treats the issue of whether a party is entitled to force a chamber to pronounce itself on the formulation of the (confirmed) charges and questions of jurisdiction at any point during the trial proceedings and thus being allowed, irrespective of any time limit, to raise fundamental objections which slow down the proceedings significantly. The Chamber rejected the remainder of the request.

On 5 April 2019, Trial Chamber IX issued its 'Decision on Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute', in which the Chamber underscored that an accused must never be required to affirmatively disprove the elements of a charged crime or a mode of liability, as it is the Prosecution's burden to establish the guilt of the accused pursuant to Article 66 of the Statute. The Chamber pointed out that the Defence had and would continue to have every opportunity to present evidence on all the elements of the relevant Article 31 grounds it has raised.

The Chamber encouraged the Defence to put forward all the evidence it has in support of the grounds for excluding criminal responsibility it has raised. The Chamber stated that its interpretations of the applicable law will be set out in its judgment.

On 24 April 2019, the Registrar appointed Mr Moses Adriko as the Legal Adviser to Witness D26-P-0025.

Testimony of Defence Witnesses

In a testimony before the court on 31 January 2019, Witness D-130, son of Joseph Kony, the leader of the Lord's Resistance Army (LRA), described to the court about his life in a camp for internally displaced people (IDP) where he kept to himself as he did not have any friends in the IDP camp other than his cousin because many people knew who his father was, and they instructed their children not to play with him.



Witness D-130 testified mainly in private session but had other protective measures such as face distortion in place. Although the witness did not mention his father's name, in a decision of 5 July 2018, Single Judge Bertram Schmitt referred to Witness D-130 as a child of Kony and stated that the witness would be informed that the court cannot make him testify against his father, for whom there is an outstanding ICC arrest warrant.

Witness D-32, who testified via video link from an undisclosed location was a former member of the LRA who was abducted around the same time as Ongwen. He narrated to the court about the LRA's early history, including how for several years the group received military and other support from in directing the LRA fighters in a battle but they did not go to the battlefield. Witness D-32 testified that the LRA reached out to the government of Sudan in 1993, through a militia group controlled by Riak Machar, for support. He said eventually the LRA dealt directly with the Sudanese government, and they started receiving support.

Witness D-27, a former escort of Joseph Kony, told the court on 25 February that Ongwen was selected in his early years with the group to be one of Kony's escorts. The witness told the court about Ongwen's early days in the LRA, his character, and the type of leader he was when he was promoted to higher ranks. The witness said the commander he was with at the time was injured during an attack by a Ugandan military helicopter and he stayed with his commander to take care of him at the sick bay.

On 26 and 28 March 2019, Alfred Arop, a former bodyguard to Joseph Kony, told the court about Kony's personality and about the time he refused to obey Kony's order to kill Otti Lagony, the LRA deputy leader at the time. The witness said "When you are close to Kony you just see as if you are [with] a good person, but he starts talking something strange anytime ... You don't have to question, you just follow." When questioned about Ongwen's personality, the witness stated that "Ongwen loved the soldiers beneath him. Even those without ranks, he loved them. Even if you were without a rank, he would stay with you and eat with you without any problem."

On 1 April, Witness D-65, a former long-serving member of a Ugandan government-supported militia group, described to the court how government forces were overwhelmed when the LRA attacked the Abok camp for IDP about 15 years ago. He said Abok was attacked on 8 June 2004. The witness said he and other Local Defense Unit (LDU) members fought the LRA in three firefights before the LDU ran out of bullets. He also said when they ran out of bullets they retreated towards Barrio. At Abok there were usually LDU members and Uganda People's Defense Force (UPDF) soldiers guarding the camp, but on that night there were only LDU members.

On 2 April, Michael Okello Tookwaro, who had joined the LDU in 1992, testified that UPDF soldiers deployed to Lukodi left without warning a week before the 19 May 2004 attack. He said many members of the LDU had also left Lukodi days before the attack because of delays in paying their salaries.

On 4 April, Witness D-121, a former member of a Ugandan army-backed militia group, told the court that the government soldiers mistakenly attacked and killed civilians and burned their homes in the Abok camp for IDPs. The soldiers mistakenly thought that the civilians were fighters of the LRA who had attacked the camp.

The testimonies of D-65, D-121 and Michael Okello in April contained allegations that the IDP camps were poorly protected and that the government soldiers who were tasked with protecting these camps did not do enough to repel the LRA rebels. Community members in Lukodi and Abok reacted to these claims with some agreeing that the camps were poorly protected.



Ongwen © ICC



Other developing issues surrounding the Ongwen trial

On 15 January 2019, the International Criminal Court (ICC) acquitted Laurent Gbagbo and Charles Blé Goudé of crimes against humanity. While this acquittal may not necessarily have any legal impact on other trials that are ongoing before the ICC, it attracted reactions from the public in Uganda given that Ongwen's trial is also taking place before the same court. There is concern in Uganda that this could also happen in Ongwen's case.

While many people in Northern Uganda have expressed their views on the ICC trial of Ongwen, little attention has been focused on the opinions of his immediate family members. Ongwen's family lives in the village of Coorom, located 40 kilometers north of Gulu in Lamogi Sub-County, Amuru District.

Some of the relatives spoke out in an interview conducted in mid-April 2019. Some of the relatives interviewed stated the following: "We have not experienced any hostility [from the community]. I think that is partly because people know that it was not Ongwen's choice to join the LRA and to commit crimes. The community was aware of his abduction and how he ended up in the LRA." When asked about Ongwen's innocence, they said, "Ongwen is not guilty because he did not start the LRA. It was [Joseph] Kony, Alice Lakwena, Otti Lagony, and others who started it and should be held responsible, not Ongwen. But today it is Ongwen, a mere abductee who is bearing their cross."

They were also asked "In case Ongwen is acquitted, do you think he will come back to live in Coorom?"

...if acquitted, Ongwen wants to come back to Uganda and even the family members here in Coorom want him to come back, but the people in other locations where Ongwen is said to have committed crimes

might not be happy and could easily attack this place. So as a community we are wary of this fact". They also commented on the arrangements that will be done if Ongwen is acquitted. "the elders will organize a cultural ceremony and traditional rituals to welcome him. Secondly, a small thanksgiving ceremony will be organized to thank God for enabling him to overcome his suffering from his abduction by the LRA, to his survival of the court case at the ICC, and his return home again."

The trial of Thomas Kwoyelo, a former commander of the LRA, continued last week at the International Crimes Division (ICD) of the High Court of Uganda with testimony from the second prosecution witness. Thomas Kwoyelo is facing 93 charges of war crimes and crimes against humanity allegedly committed between January 1995 and December 2005. He has been in detention since his capture in 2008. Meanwhile, the court denied Kwoyelo's request for bail. The trial has now been adjourned until 24 June 2019.



THE CRIME OF GENOCIDE AND THE ROHINGYA CASE

By Victor Tsilonis and Rineta Favgi

Abstract

The 70th anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide along with the 20th anniversary of the Rome Statute in which the crime of genocide was included gave high hopes worldwide that the genocide perpetrators will not go unpunished. In this paper, we briefly present important aspects of the genocide's mens rea, as they are delineated both in the Rome Statute and the Elements of Crimes. Moreover, some of the legal loopholes which deprive the ICC of its jurisdiction and subsequent effectiveness on the matter are also examined. Finally, we focus on the promising, latest developments of the crime of genocide and the ICC Prosecutor's innovative interpretation regarding the alleged genocide of Rohingya in Myanmar, which is based on Michael Vagias's theoretical analysis.

1 The Crime of Genocide at the ICC Rome Statute

Article 6 of the ICC's Rome Statute (ICCSt) defines 'genocide' by using the exact wording of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide. [5]

It is noteworthy that as far as the interpretation of Article 6 ICCSt is concerned, the Preparatory Committee on the Establishment of an International Criminal Court repeated approvingly the view of the Working Group on the Definition of Crimes that:

"[W]ith respect to the interpretation and application of the provisions concerning the crimes within the jurisdiction of the Court, the Court shall apply relevant international conventions and other sources of international law. In this regard. . . for purposes of interpreting [the provision concerning genocide] it may be necessary to consider other relevant provisions contained in the Convention for the Prevention and Punishment of the Crime of Genocide, as well as other sources of international law. For example, Article I would determine the question of whether the crime of genocide set forth in the present article could be

committed in time of peace or in time of war.

Furthermore, Article IV would determine the question of whether persons committing genocide or other acts enumerated in the present article [article III of the Genocide Convention] shall be punished irrespective of their status as constitutionally responsible rulers, public officials or private individuals." [6]

Therefore, one major conclusion drawn pursuant to the above path of reasoning is that Article I of the Convention for the Prevention and Punishment of the Crime of Genocide applies to the interpretation of Article 6 ICCSt and consequently it is irrelevant whether the crime of genocide occurs during times of peace or war. Additionally, the same logic applies to all articles of the Convention for the Prevention and Punishment of the Crime of Genocide.

Nonetheless, the statements of the Preparatory Committee on the Establishment of an International Criminal Court and the Working Group on the Definition of Crimes must be read with some caution, because it is not certain that this line of interpretation will always be to the benefit of the conferment of international criminal justice and the ICC's jurisprudence.[7] Moreover, notwithstanding the importance of the Working Group's and Preparatory Committee's statements, one should not argue that the legal interpretation of members comprising the international legislature should always be followed by the ICC's judges without a proper ad hoc examination of each case's merits. The limitations of placing an impregnable seal on each and every legal interpretation advanced by the relevant Committees prior to the ratification of the Rome Statute can be easily determined if we make the following hypothesis. If, for example, Article I stated that genocide occurs in times of war, an interpretation of Article 6 ICCSt excluding times of peace even though the wording of the article did not exclude a priori such possibility - would clearly run contrary to international justice's interests and ICC's legacy.

Moreover, it must be stressed that the suggested interpretative avenue does not conflict with Article 21§1(b) ICCSt under the title 'Applicable Law'. This states that 'The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of



Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.’

Thus, Article 21§1(b) ICCRSt gives clear order of preference to the Statute, the Elements of Crimes and the Rules of Procedure and Evidence, while ‘applicable treaties and the principles and rules of international law’ are placed in an auxiliary, second position. Although this means that the applicable treaties, principles and rules of international law should be thoughtfully considered in no way does Article 21§1 ICCRSt connote that the interpretation of legal issues arising out of the Rome Statute must be made exclusively through the prism of ‘applicable treaties’. Instead, one can validly argue that the evolving case law of the ICC, which constitutes an integral part of international criminal law-together with the ‘Statute, Elements of Crimes and the Rules of Procedure and Evidence’-should be one of the primary guides of the Rome Statute’s interpretation, even though the ICC’s case law is not explicitly mentioned in Article 21 ICCRSt.

Another issue that needs to be thoroughly considered is the interrelation between the Rome Statute and the other equally significant documents pursuant to Article 21 ICCRSt, namely the Elements of Crimes and its Rules of Procedure and Evidence. It is noteworthy in the case of genocide that the Elements of Crimes, which are approved by a two-thirds majority of the member-states, [8] delineate quite analytically and not always predictably the genocide’s mens rea. [9]

Genocide is defined in Article 6 ICCRSt as requiring an ‘intent to destroy’, which has been frequently described in case law as a ‘specific intent’ or *dolus specialis* and constitutes a higher standard than that posed by the default rule of Article 30 ICCRSt regarding the international crimes’ mental elements (‘with intent and knowledge’). [10]

Hence, the Elements of Crimes clarify Article 6 and 6(a) ICCRSt regarding Genocide. Specifically, they state that the genocide perpetrator must have killed one or more persons who belonged to a particular national, ethnical, racial or religious group with the intention of destroying them, in whole or in part, as such. Furthermore, the fourth element referred in the Elements of Crimes, namely that ‘the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such

destruction’ constitutes a contextual element, while in Article 6 an interpretation of that contextual element is provided. [11]

William Schabas notes that ‘although only summary attention was paid to article 6 during the drafting of the Rome Statute, some of the issues involved in the crime of genocide were explored in more detail by the Preparatory Commission in preparation of the Elements of Crimes’.[12]

However, the Elements of Crimes do not only refer to various aspects of genocide’s mental elements, but, more importantly, they also impose a contextual element in each specific act of genocide that does not exist in the Rome Statute. Thus, the Elements of Crimes state for each specific act of genocide - i.e. (a) killing group members, b) causing serious bodily or mental harm to group members, c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, d) imposing measures intended to prevent births within the group, e) forcibly transferring children of the group to another group) - that each one of them must take “place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.” (emphasis added).

The term ‘in the context of’ refers to the initial acts in an emerging pattern, while the word ‘manifest’ appears as an ‘objective’ qualification, which will be examined and decided ad hoc by the competent ICC Chamber. Finally, yet importantly, the most troublesome and subjective term is the ‘similar conduct’ requirement, which can mean various things and is open to many interpretations. Clearly the fact that even the Elements of Crimes do not exemplify what is meant by the phrase ‘in the context of a manifest pattern of similar conduct’ perplexes this critical issue, because the interpretation must be inevitably based on the legal meaning of phrases ‘in the context of’, ‘manifest pattern’ and ‘similar conduct’. And while for phrases such as ‘in the context of’ and ‘manifest pattern’ some guidance can be found in the Elements of Crimes, as noted above, no kind of assistance is provided for the term ‘similar conduct’. This makes the crime of genocide even more difficult to be proven.

Moreover, it is noteworthy that not only do the Elements of Crimes interpret the mens rea of the crime, but in the relevant footnotes they also specify that: 1) The term “killed” is interchangeable with the term



‘caused death’. 2) The conduct of causing serious bodily harm may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment [13].

2 Current and Potentially Emerging Implications: the Rohingya Case

Unfortunately, the 21st century has not remained unstained by acts of genocide. At the same time, the ICC has not achieved adequate convictions for genocide. Subsequently, it is vital that the interpretation of the laws be-we could say-revolutionary in order for the ICC to be efficacious.

In an address to the UN Human Rights Council in Geneva, Zeid Ra’ad Al Hussein denounced the ‘brutal security operation’ against the Rohingya in Rakhine state, as ‘clearly disproportionate’ to the insurgent attacks carried out and characterized the whole situation as ‘a textbook example of ethnic cleansing’.[14] Following the expulsion of more than 700,000 Rohingya since August 2017[15] a recent 440-page report[16] of UN Human Rights Council fact-finding mission,[17] and the ICC Pre-Trial Chamber I decision[18] that the ICC can exercise its jurisdiction, the ICC Prosecutor Fatou Bensouda announced the launch of a preliminary investigation into the deportations of hundreds of thousands[19] of Rohingya Muslims from Myanmar into Bangladesh.

Perhaps of even greater, wider significance – both more generally, as well as in relation to genocide specifically - is what appears to be a growing trend for states (especially of the African continent at present) to withdraw from the Rome Statute. The implications of this are that should the crime of genocide occur in the territory of such states after the time of their withdrawal from the Rome Statute, then it might become legally impossible for jurisdictional reasons – or at least much harder - for the ICC to prosecute the commission of these and other serious international crimes. Furthermore, since the crime of genocide is often fueled by political undercurrents, the likelihood of any bona fide or effective prosecution being brought against the perpetrators of such crimes at the national level is highly unlikely, especially if those responsible for them remain in power.

This is exactly the case with Omar Al- Bashir, the first sitting president to be indicted by the ICC. Arrest

warrants were issued in 2009 and in 2010, with three counts of genocide, two counts of war crimes and five counts of crimes against humanity. Still, President Al-Bashir is free and has travelled to many African countries without any consequences.[20] Therefore, States’ withdrawal from the Rome Statute could effectively deprive many victims of their fundamental human rights to justice and reparation following the commission of such heinous crimes.

Nor are most states in which the crime of genocide is committed likely to have the necessary capacity and resources to investigate and prosecute such legally complex crimes. It is a fact that investigations regarding genocide constitute usually extremely vast, time and money consuming legal expeditions, which require special knowledge, expertise and a considerable number of jurists and investigators. This is an important reason why the International Criminal Court was agreed to be established in the first place in 1998.

And undeniably the commission of acts of genocide and denial of international criminal justice, could further fuel regional instability thereby posing threats to international peace and security. Nonetheless, the horizon is not entirely bleak. In the most recent emerging case of alleged genocide being perpetrated against the Rohingya in Myanmar, the Pre-Trial Chamber I was convinced by the Prosecutor’s novel argument that even though the allegedly coercive acts that forced the Rohingya to flee took place in Myanmar, the deportation offense (included in Art. 7(1)(d) ICCRSt - crimes against humanity) was not fully completed until the refugees entered Bangladesh, a State Party to the Rome Statute.

The Rohingya case is innovative in two aspects. First of all, because the ICC Prosecutor has never asked the Court to interpret Article 12(2)(a) ICCRSt before [22] and never applied qualified territoriality. Secondly, because it is the first time the Prosecutor has asked for a ruling on jurisdiction under Article 19(3) ICCRSt.[23] Even though such interpretation of the Rome Statute has been also projected as violation of Myanmar’s sovereignty,[24] the truth is that it constitutes a significant step towards the effectiveness of the International Criminal Justice. In any case, as Michael Vagias points out ‘a strict adherence to the Statute’s procedural system might render the Prosecutor’s right under Article 19(3) ICCRSt meaningless.’ [25]

Furthermore, it is important that we specifically comment on Chief Prosecutor’s Fatou Bensouda argument, who likened deportation to ‘a cross- border



shooting', arguing the crime 'is not completed until the bullet (fired in one state) strikes and kills the victim (standing in another state)'. [26] She also made an explicit reference to Vagias's theory regarding 'subjective territoriality' and 'objective territoriality' in order to support her view that the ICC has jurisdiction over the case. [27] In particular, Fatou Bensouda pointed out that:

"Commentators agree that States can exercise jurisdiction in relation to crimes that occurred only in part on their territory, including based on "subjective territoriality" (when crimes were commenced on a State's territory, but completed in another) and "objective territoriality" (when crimes were completed on a State's territory, but commenced in another). What is important in both scenarios is States' legitimate interest in conduct which occurs partially on their territory, resulting in their exercise of jurisdiction." [28]

Some people might view the above simile as absurd, since it makes states which are not members of the Rome Statute accountable to the ICC. However, one could argue that as the deportation of Rohingya people to Bangladesh has undoubtedly a significant social impact on Bangladeshis and constitutes Bangladesh as the location of the alleged crime's conclusion. In any case, the Pre-Trial Chamber I fully accorded with the Chief Prosecutor's argument, by stating the following:

'In this regard, the Chamber considers that the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such crime is committed on the territory of a State-Party.' [29]

At a time that it appears as if ICC is losing its power and efficacy due to the above-mentioned withdrawal or threat of withdrawal of states and the continuous abstention of the most powerful ones (such as US, China, Russia and Israel), the Prosecutor's novel approach constitutes arguably a way of reinforcing the ICC's status via the innovative interpretation of genocide's *actus reus*.

In such ways, the ICC is exploring innovative interpretative avenues in order to preserve or even expand its jurisdiction, [30] even over states that have never been or are no longer State Parties. If certain factual conditions are met, then no-one can exclude the possibility that this might occur for the crime of genocide as well, especially under Art. 6(c) (deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part), Art. 6(d) (imposing measures intended to prevent births within the group), and Art. 6(e) (forcibly transferring children of the group to another group).

3. Conclusion

The crime of genocide is traditionally cited as "the crime of crimes", because it annihilates the very essence of human nature. [31] Thus the Rome Statute and the Elements of Crimes to be interpreted appropriately without confining the judges and prosecutors in a strict interpretation of the law, but by endorsing *de lege ferenda* interpretative approaches instead. Following the 20th anniversary of the Rome Statute and the 70th anniversary of the Genocide Convention, it is high time that the ICC continues to gain in stature by finding such interpretative avenues that could make feasible for the genocide crime to be proven and punished. And it seems that the Court has started following this path after the Pre-Trial Chamber I's decision in the Rohingya case.

Finally, yet importantly, whether or not individual states, on whose territory acts of genocide are alleged to have been committed, remain or are parties to the ICC, certain activities will always be of paramount significance. These include the establishment of mechanisms for the prevention of the crime of genocide; the effective and timely investigation of such alleged acts; the accurate verification of the criteria necessary for establishing the crime of genocide in particular cases; and the evaluation of the realistic likelihood of a case alleging the commission of these and/or other core crimes reaching the ICC.

Endnotes are available [here](#).





EVENTS

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