

The International Criminal Court

A call to the legal profession: a partnership with the International Criminal Court in the quest of justice, peace and security in the African continent*

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The International Criminal Court: The realisation of a vision in response to the nightmarish historical record of violence perpetrated by man against fellowman

Born from the ashes of World War II, the International Criminal Court (ICC or the Court) is the long overdue by-product of the hard lessons of history and inconceivable human affliction. Dark moments of histories past and reprehensible moments of present day existence have confirmed the need for a viable permanent international criminal court: a judicial body, which, whilst paying homage to the highest standards of due process, would be capable of effectively prosecuting the most egregious crimes that concern the international community, of acting as a deterrent against the commission of such crimes, and of cultivating a culture of respect for human rights globally. The ICC is, in effect, the manifestation of the world community's commitment to such virtuous goals.

It is hence incumbent upon us to ensure this auspicious progeny is well nurtured, is guarded against ill-wishers and is sagaciously guided so that it is allowed to develop and reach its full potential. The costly sacrifice of our past and the hopes of millions around the world who look to the Court for salvation leave us nowhere to move, but forward.

An introduction to the ICC

The ICC, with its seat in The Hague, is an independent stand-alone institution, which receives its funding entirely from its State Parties, NGOs and voluntary donations. As a non-UN affiliated judicial body, the Court was established by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court through the adoption of the Rome Statute on 17 July 1998 in Italy. The Statute entered into force on 1 July 2002, with 60 initial signatories. To date, 106 nations have ratified the Statute, giving them the rights and privileges of State Parties. Of these, the largest regional group has been the African continent with 30 ratifying states. Burkina Faso was the first ever state to ratify the Statute in November 1998, followed by Senegal and Ghana in 1999 and Mali in 2000. South Africa was the 9th African state to ratify the Statute in November 2000.

Crimes within the jurisdiction of the Court are outlined in Article

* This article has not been edited according to *Advocate's* house style. It is published in its original format.

5 of the Statute, and comprise: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, the definition of which is still being defined.



The temporary premises of the Court © ICC-CPI

The Court exercises its jurisdiction over natural persons and attributes individual criminal responsibility to those who as nationals of a State Party have committed offences within the jurisdiction of the Court, or who committed crimes in the territory of a State Party. Further, the Court exercises its jurisdiction *rationae temporis* and without retroactive application and can have jurisdiction only with respect to crimes committed after the entry into force of the Statute (July, 2002). For states that became a Party after such entry into force, the Court can exercise jurisdiction concerning the crimes committed after the date of ratification of the Statute by that state, unless a declaration is made under Article 12.3 of the Statute.

The Court adheres strictly to the principle of complementarity. In other words, it is a 'court of last resort', and as a matter of policy and as prescribed by law, it will not interfere with domestic proceedings carried out by national justice systems unless the State in question is 'unwilling or unable genuinely' to carry out the investigations or the prosecution of the case.

One of the most unique innovations of the Statute is that victims, for the first time in the history of international criminal justice,

have been given a voice in the proceedings, and have equally been afforded the possibility to seek reparations. The classification of victims and the determination of the appropriate modes of victims' participation (including the appropriate stage of the proceedings) are all questions that fall within the ambit of the Chambers of the Court to determine. This recognition of the standing of victims opens the door to a wealth of jurisprudence to be developed on the rights of victims, providing the legal profession with yet another venue to use their artistry to advance the law in this novel and emerging field.

Legal practitioners interested in the Court should familiarise themselves with its Statute. Other legal texts important to the ICC practitioner include: Rules of Procedure and Evidence; Elements of Crime; Regulations of the Court; Regulations of the Registry and the Code of Professional conduct for counsel. These documents can be accessed at:

http://www.icc-cpi.int/about/Official_Journal.html

ICC and Africa

Whilst one must be cognizant of the challenges of contemporary African societies, it is also no secret to an intellectually honest observer that the ills suffered by Africa today as a result of widespread conflicts throughout the continent have their historic roots in great measure in the real and lasting impact of the slave trade, colonialism and the power-vacuum and disarray left behind after independence. It is equally true that time heals everything, but at this juncture, the scars remain visible and the ripple-effect of troubled times of the past have created conflicts, wars and great suffering for African peoples.

Order, peace and tranquility are minimum conditions which must exist to enable African communities to reach their full potential. These basic conditions have too often been denied to millions of people in Africa living in conflict zones throughout the continent. It is in this context that the ICC can play a most positive role and, if afforded the opportunity, have a positive outcome in the effort ultimately to create an environment of peace and security, not only on the African continent, but in the world at large.

It is no coincidence that African states openly embraced the creation of the ICC and were amongst the first to support and ratify its founding treaty. In a bona fide attempt at establishing accountability, and contributing to the building of peace and security, the Office of the Prosecutor has encouraged state referrals culminating in self-referrals in the cases of the Democratic Republic of the Congo (DRC), Uganda and the Central African Republic (CAR).

State cooperation with the ICC is one facet where African states and the Court can collaborate with mutually beneficial outcomes. There are however other critical facets: i.e. involvement of members of the legal profession as well as investigators. Members of the legal profession and individuals with investigative experience from African states can and should get involved in the work of the Court, by first applying – as applicable - for admission to the List of Counsel, List of Assistants to Counsel (junior lawyers), and List of Professional Investigators. Information on how to apply for admission to these lists is provided later in this article.

Moreover, members of the legal profession can lobby their respective governments to draft and pass ICC implementing legislation, to bring their domestic laws and practice in line with the principles and legal machinery of the Rome Statute.

Situations and cases

The Court is still in its infancy, yet it has already seen significant judicial activity, a trend which will only intensify with the passage of time.

In a short time, the Court has managed to blossom from theory and become fully operational. To date, four situations have been referred to the ICC. Of the four, as mentioned above, three have been referred by State Parties (DRC, Uganda and CAR) for crimes allegedly committed in their respective territories. The fourth case, being the focus of much media attention, is that of Darfur, Sudan where the Security Council, acting under Chapter VII of the Charter of the United Nations, made the referral to the Court.

The Prosecutor has conducted investigations in all four situations and is monitoring situations in other countries, including Côte d'Ivoire.

Thus far, the Court has issued a total of twelve warrants of arrest with three individuals in its custody undergoing judicial proceedings.

Uganda

Uganda deposited its instrument of ratification on 14 June 2002. The sensitive political climate in Uganda caused by the Lord's Resistance Army ('LRA') manoeuvring has slowed down progress in the case. However, the warrants of arrest issued by the Court against the LRA have had a direct impact on triggering peace negotiations, and seen from this perspective alone, it is a positive development for peace and reconciliation in Uganda. It bears mentioning, however, that the Office of the Prosecutor has consistently maintained that peace terms between the LRA and the Government of Uganda cannot be effected at the cost of achieving justice, and the terms cannot shield those most responsible for crimes against humanity and war crimes. This position has been given backing by the former UN secretary-general in his 2004 report where it is stated: '[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.'

The Court is continuing to monitor the Uganda situation.¹

The DRC

The DRC ratified the Statute on 11 April 2002. The Court's first proceedings concern the DRC situation.

Prosecutor v Thomas Lubanga Dyilo

The warrant of arrest issued against Mr. Thomas Lubanga Dyilo, founder and leader of the Union Congolese Patriots, resulted in his arrest and transfer to the Court in March 2006. The case is not only the first before the Court, but also the first time child conscription for use in hostilities is being tried as an international crime. The Pre-Trial Chamber seized of the case confirmed the charges against Mr. Lubanga on 9 November 2006, a finding upheld on appeal. The Trial Chamber has recently stayed the proceedings in the case due to the failure of the Prosecution to disclose exonerating materials it acquired from the United Nations to the defence. This issue and the release of the accused are currently sub judice.

The position of the Trial Chamber is a positive development for the Court as it demonstrates the independence and separation between the judicial branch and the Office of the Prosecutor, and signals that ICC proceedings are carried out with utmost adherence to the principles of natural justice and due process rights of the accused. The International Bar Association has echoed this interpretation in a recent press release where it opined that the decision is 'a clear indication of the ICC's commitment to respect the fair trial rights of defendants.'

As the first case before the Court, the Lubanga matter has generated a great deal of important jurisprudence, and has put in debate many important questions.

¹ To read more on the Uganda situation, see: <http://www.icc-cpi.int/cases/UGD.html>.

Prosecutor v Bosco Ntaganda

On 28 April 2008, an unsealed warrant of arrest was issued against Mr. Bosco Ntaganda, former deputy chief of General Staff for Military Operation of the Forces Patriotiques pour la Libération du Congo. The suspect, who remains at large, is alleged to have committed war crimes of enlistment and conscription of children under the age of 15 and of using them to participate actively in hostilities in Ituri, DRC.

Prosecutor v Germain Katanga

On 18 October 2007, Mr. Germain Katanga, a Congolese national and formerly the highest ranking commander of the Patriotic Resistance Force in Ituri was surrendered by Congolese authorities and transferred to the custody of the ICC. In the reclassified public Warrant of Arrest of 18 October 2007, the Pre-Trial Chamber ruled that there were 'reasonable grounds to believe' that the suspect was individually criminally responsible for three counts of crimes against humanity and six counts of war crimes.

Prosecutor v Mathieu Ngudjolo

Mr. Ngudjolo was transferred to the custody of the Court on 7 February 2008. He was an active Colonel in the National Army of the Government of the DRC at the time of his arrest and transfer. He is charged with three counts of crimes against humanity and six counts of war crimes.

The cases of Mssrs. Katanga and Ngudjolo have been joined as they are being prosecuted for having allegedly committed the same crimes in the same attack on the civilian population of Bogoro village on 24 February 2003. The charges against the two suspects have not yet been confirmed. The confirmation of charges hearing in the two cases commenced on 27 June 2008.²

Darfur, Sudan

On 27 February 2007, the Prosecutor presented his evidence in the Darfur situation, illustrating that Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of the Sudan, later promoted to Minister of Humanitarian Affairs, and Ali Kushayb, a leader of the Militia/Janjaweed, jointly committed crimes against the civilian population in Darfur. The Pre-Trial Chamber I has determined that there are reasonable grounds to believe that the named individuals committed the alleged crimes.³

The Office of the Prosecutor has urged the international community to cooperate and assist in the arrest and transfer of these two individuals to the custody of the Court.

CAR

The CAR (Central African Republic) ratified the Statute on 3 October 2001. The government of the CAR requested the Court to try crimes falling within its jurisdiction that have taken place anywhere on its territory since 1 July 2002.

The Prosecutor v Jean-Pierre Bemba Gombo

Following a warrant of arrest issued by the ICC on 24 May 2008, the first issued in the CAR situation, Jean-Pierre Bemba Gombo, a national of the DRC, was arrested by Belgian authorities.

Mr. Bemba is the President and Commander in Chief of the Mouvement de libération du Congo (MLC) and the leader of the political opposition in the DRC, yet the alleged crimes with which he is charged concern four counts of war crimes and two counts of crimes against humanity committed by the MLC, which he *de facto and de jure* controlled in the territory of CAR from October 2002 to March 2003.

² Read more on the DRC; see: <http://www.icc-cpi.int/cases/DRC.html>.

³ To read more on the Sudan see: <http://www.icc-cpi.int/cases/Darfur.html>.

Mr. Bemba is not in the custody of the Court. At this stage, he is being handled by the Belgian legal system. He is currently challenging the legality of his arrest in Belgian courts.

Rights of defence

The ICC aims to be a model of judicial administration capable of unswerving delivery of quality justice. The Court is very well aware that one of most recurring external criticisms of international criminal institutions is based on the 'perceived', or actual, vulnerable position of the defence vis-à-vis the prosecution. Eradicating such 'distrust' through concrete actions is one of the underlying objectives of the Court in its efforts to increase support for the Court, and to conduct fair trials in conformity with the highest legal standards.

As concerns the legal framework, the Court's legal texts contain ample provisions safeguarding the rights of the defence. Fundamental provisions of interest are found in the Statute, which include, inter alia, the codification of the principles of *Ne bis in idem* (Article 20), and *nullum crimen sine lege* (Article 22), grounds for excluding criminal responsibility (Article 31), and the presumption of innocence (Article 66). The right of the accused to a public, impartial and fair hearing, amongst other minimum guarantees, is provided for in Article 67 of the Statute. The rights enumerated in this latter provision are not only consistent with international instruments providing the same safeguards,⁴ but their protection is effectively guaranteed by the overseeing powers of Chambers.

Assistance provided to defence

Rule 20 of the Rules of Procedure and Evidence places a positive obligation on the Registrar to promote the rights of the defence consistent with the principles of a fair trial.

What have we done in practice?

Many positive steps have been taken at the Court and will continue to be taken to institutionalise the defence as far as it is feasible. Some highlights of interest include:

- 1. The Defence Support Section:** This Section is created and charged with, inter alia, the establishment and management of the Court's legal aid system, Lists of Counsel, Assistants and Professional Investigators, as well as the establishment of its disciplinary organs. It also conducts policy work and litigation on behalf of the Registrar related to counsel and issues related to equality of arms. The Section carries out outreach missions worldwide to train lawyers in the work of the Court; it furnishes defence teams with assistance and facilitates their missions to the field; it liaises with external organisations for consultations; and it assists persons during investigations or an accused in obtaining legal assistance. The Section is equally responsible for the Court's annual seminar, and for the training of counsel.
- 2. Legal Aid System:** The Court has in place an effective lump-sum legal aid programme, that is administratively user friendly, and under which each team member is paid directly by the Court. The Court's legal aid system addresses the needs of the defence to have sufficient means available to effectively present its case, whilst remaining pragmatic to the budgetary constraints of a publicly funded budget. The core principles of the Court's legal aid system are: equality of arms, objectivity, transparency, continuity and economy.

To date, all individuals in the custody of the Court have been declared provisionally indigent pending the results of financial

⁴ See e.g. Art. 14 of the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; Art. 6(3)(C) of the European Convention of Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11.

investigation and a final determination concerning their level of indigence, if any.

An important characteristic of the Court's legal aid system is its flexibility. The person entitled to legal assistance or her/his counsel may make a formal request for additional resources to the Registrar and the relevant Chamber pursuant to Reg. 83 of Regulations of the Court. This prerogative has already been exercised in the Lubanga matter, where both the Registry and Chamber awarded additional resources deemed reasonable and necessary.

After only 9 months of the first proceedings, the Registry commenced proprio motu a review of the legal aid system in light of experiences gained. The final proposals of this Registry initiative - which involved a comprehensive survey of domestic legal aid systems, as well as external consultation with the legal profession, etc. - have added more resources and introduced significant changes to the existing system. The final proposals of the Registry were passed at the last Assembly of States Parties.

The details of the new legal aid system, salary scales, inter alia, are available in a publicly available report at:

http://www.icc-cpi.int/library/asp/ICC-ASP-6-4_English..pdf

3. **The Legal Aid Commissioner:** This is a novelty, which did not exist at the ad hoc tribunals. The Registrar has recruited three legal aid commissioners from members of the legal profession in accordance with Reg. 136 of the Regulations of the Registry. The independent Legal Aid Commissioners may be engaged inter alia to provide advice on the management and performance of the Court's legal aid system.
4. **The Office of Public Counsel for the Defence (OPCD):** The establishment of the OPCD has meant that, in addition to their teams, the defence can benefit from the services provided by the Office within the limits of its mandate as outlined in Regulation 77 of the Regulations of the Court.

The OPCD operates in an independent fashion, and falls within the remit of the Registry for administrative purposes. The OPCD has been instrumental in providing substantial legal advice and assistance to the different defence teams acting before the Court. A similar office, the Office of Public Counsel for Victims, exists for victims:
<http://www.icc-pi.int/victimissues/victimscounsel/OPCV.html>
5. **Library for the defence:** In addition to the main ICC library, steps have been taken to establish a comprehensive library at the cost of



Sample office. Actual offices contain three workstations © ICC-CPI

the Court, which contains germane sources for the exclusive use of defence teams.

6. **Permanent offices:** These are provided at the Court for the exclusive use of each defence team until the completion of the case.

The offices contain work stations, complete with the necessary hardware (computers, telephones, printer...) and software. The offices also benefit from IT support, amongst other administrative services provided to the other offices at the Court.

7. **Disciplinary organs:** Another unique feature of the Court is the establishment of a peer review disciplinary organ, charged with investigating and deciding on complaints of misconduct in violation of the Code of Professional Conduct for counsel.
8. **Security services:** The Registry ensures that defence counsel and their team members benefit from security services in the field on the same basis as staff of the Court.

Accords on privileges and immunities entered into between the Court and a number of countries also contain specific provisions dealing with the rights to be afforded to counsel when travelling to the field.
9. **Creating a partnership with the legal profession:** From the genesis of the Court, the Registry has undertaken its work on counsel issues in close consultation with the legal profession. The mandate to consult any independent representative body of counsel or legal associations, contained in Rule 20, sub-rule 3 of the Rules of Procedure and Evidence, has been widely extended to include all representative international associations identified by the Registry, in addition to individual experts, national bar associations and other associations of counsel. The consultation has covered any issue that may have a bearing on counsel in the execution of their duties before the Court. Selected topics include:
 - Verbal and written consultations on the different drafts produced in preparation of regulatory texts;
 - Legal aid adjustment and reform, and
 - Court's Strategy for Counsel.

The Seminar of Counsel organised annually is a manifestation of the Registrar's initiative to engage the legal profession so as to elicit, absorb, and in turn react to the needs and concerns of counsel. The most recent Seminar, which is the sixth since the Court's inception, took place on the 12th and 13th of May, 2008. The Seminar was attended by approximately 200 participants worldwide and included lawyers from the List of Counsel and experts from inter alia, international tribunals, as well as representatives of legal associations. The Seminar was followed by three days of training on ICC law and practice, victims' representation and cross-examination.

10. **Training of investigators for the defence:** A comprehensive investigation manual is available for the exclusive use of defence investigators.
11. **List of Professional Investigators:** In order to avoid abuses that took place at the ad hoc tribunals, where unqualified individuals were on occasion assigned to defence teams as investigators, often to the detriment of the defendant, the Registry at the Court has created a List of Professional Investigators. Those admitted to this List have been vetted to ensure that they possess the requisite skills necessary to provide valuable assistance to the defence as professional investigators.

More information on the List of Professional Investigators and how one may apply for admission to the List can be found on the Court's website at:

<http://www.icc-cpi.int/defence/definvestigators.html>

It was recognised, when the Court's first cases arose from conflicts in African states, that it is critically important to have investigators that come from region involved in cases before the Court as investigators.

12. The Technology and related support provided: The ICC is a state of the art judicial institution, with all the bells and whistles expected of a modern court. The ICC operates as an e-Court, which means that all official filings are done electronically.

13. Technology in the Courtroom: The technologies available within the hi-tech courtrooms of the ICC enable those present at the hearings to participate better in the proceedings. Technologies of note include:

- Video Conferencing for remote witness testimony;
- Ringtail software, which allows the parties to present evidence and to record information in Court;
- Transcript Management software, allowing participants to view transcripts real-time, create reports, highlight passages or make annotations in the transcripts.

14. Technology outside of the Courtroom:



ICC Court Room. Pre-Trial Chamber I © ICC-CPI

Citrix Solutions: The Registry recognises that lawyers, for the most part, have busy active practices in their domestic jurisdictions. With a desire to lessen the burden on defence team members of regularly having to be present in The Hague, the Court has acquired a license for Citrix Solution, a remote access solution, which allows all defence team members to access their files from different locations in an absolutely controlled, secure manner and to work on the same documents real-time from anywhere in the world, provided there is access to the internet.

How to contribute

As Counsel

Counsel who desire to practice before the Court, whether as duty counsel, ad hoc counsel, defence counsel or as legal representatives of victims, need to be admitted to the Court's List of Counsel. To be admitted, candidates must meet certain minimum requirements set out in Rule 22 of the Rules of Procedure and Evidence, and Regulation 67 of the Regulations of the Court. These requirements are a quality assurance measure, intended to guarantee that every person in need of legal representation before the Court has available to them a pool of highly competent counsel, from amongst whom they can exercise their free choice of counsel.

Currently, there are 241 lawyers on the List of Counsel, representing more than 35 countries worldwide.

For information on how to apply for admission to the List of Counsel, please refer to the Court's official website at:

<http://www.icc-cpi.int/defence/defcounsel.html>

Counsel acting before the Court are bound by the Court's Code of

Professional Conduct for counsel:

http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.1_English.pdf

As members of the Team | Junior Lawyers

The Defence Support Section of the Court also maintains a list of qualified persons who can assist counsel in the representation of their clients before the Court. This List of Assistants to counsel is the first list of its kind in the modus operandi of international criminal institutions. The list has great utility in practice as it eases the burden otherwise placed on counsel to search for qualified junior lawyers to supplement the legal team.

Regulation 124 of the Regulations of the Registry stipulates the criteria of admission to the List of Assistants. For further information and how to apply for admission, please refer to the Court's official website at:

<http://www.icc-cpi.int/defence/defassistant.html>

The Court encourages members of South African Bar to apply to the above mentioned lists.

Concluding remarks

The Court relies on a continuing partnership with the legal profession and legal associations worldwide, such as the South African Bar, in its efforts to guarantee that members of the legal profession that appear before the Court are not only regionally representative, but more importantly, of the highest calibre.

The ICC is a new and permanent institution built on strong foundations. We are intent on 'getting it right', and on being a model of international criminal justice. The Court, this product of hope, has begun its story hand in hand in partnership with Africa to bring justice and reconciliation to this age-old continent. The Court has commenced its first Chapter dealing with rampant atrocities taking place in Africa. There is still a long road ahead and many milestones to be reached. With 106 States Parties, the Court is ever closer to achieving universality and acting as the 'sword and shield' of justice in all regions of the world where the basic rights and dignities of mankind have been trampled upon.

On behalf of the Court, we invite you to assist us in staying committed to our common goals, nurturing this newly born offshoot of our common affliction, innovation and labour, and we encourage you to apply to the abovementioned Lists and to join us in this historical and righteous enterprise.



Legal Crossword Number 5: Answers

- Across (counting top down)**
- 1 What he has done with his contractual obligations (COMPLIED)
 - 2 English written defamation (LIBEL)
 - 3 Husband of She-Who-Must-Be-Obed (RUMPOLE)
 - 4 Useful fiction in proof (PRESUMPTION)
 - 5 What your contentious opponents do (PONTIFICATE)
 - 6 No evidence to come from here (BAR)
 - 7 Government has it; Eskom sometimes (POWER)
 - 8 The punchline in defamation (STING)
 - 9 The dispute (LIS)
- Down**
- 1 Many accusations and counter-accusations of this epidemic (CORRUPTION)
 - 2 Culpa (BLAME)
 - 3 What you do to them if they don't vote for you (REPRESS)
 - 4 Also your estate (PATRIMONY)
 - 5 His son is an Act (BILL)
 - 6 Need it to get out (BAIL)
 - 7 Chappie who takes care of important documents (NOTARY)