

**REPLIES OF MS AISSE GASSAMA TALL, CANDIDATE FOR THE POST OF JUDGE
AT THE INTERNATIONAL CRIMINAL COURT, TO THE QUESTIONNAIRE OF THE
ADVISORY COMMITTEE ON NOMINATIONS**

In accordance with resolution ICC-ASP/18/Res.4 on the review of the procedure for the nomination and election of judges, I, Ms Aïssé Gassama TALL, Judge, candidate for the post of judge, would like to submit the following replies:

A. Nomination process

1. With regard to competence and experience in the field of criminal law and procedure:

After obtaining my *baccalauréat* (high-school diploma) in 1989, I enrolled in the Faculty of Legal Sciences at the Cheikh Anta Diop University of Dakar, where I obtained my Master's in Law, with Honours.

The following year, I competed for a place to train for the judiciary and had the privilege to succeed. After successfully completing two years of training, I was admitted as a judge.

My first assignment was as Deputy Public Prosecutor at the Regional Court of Dakar. This court is the most important in Senegal in terms of the volume and complexity of cases handled there. From 1995 to 2002, I was responsible for resolving highly complex cases, from receipt of the investigation report to the settlement of the case, including ordering initial investigations before the investigating judge and monitoring proceedings through to the judgment. The ordinary jurisdiction of this court made us familiar with all criminal cases (financial, criminal, correctional and juvenile cases).

In 2002, I was appointed as Deputy Public Prosecutor at the Pikine Departmental Court.

As Head of Public Prosecutions for this court, I was responsible for supervising the investigations of more than a dozen police and gendarmerie units, receiving their reports and investigation reports, dealing with them and attending hearings to argue for the prosecution.

In 2005, I was appointed as Deputy Director responsible for international relations and legal affairs of the National Financial Information Processing Unit (CENTIF), Senegal's financial intelligence unit tasked with combating capital laundering and terrorist financing, equivalent to TRACFIN in France.

In this post, I was involved in analysing and handling intelligence to establish the origin of transactions or the type of operations involving suspected capital laundering or terrorist financing.

I was specifically responsible for drafting reports for the Office of the Public Prosecutor for the opening of judicial investigations. I also supervised the drafting of periodic reports (on at least a quarterly basis) and an annual report analysing the development of activities to combat capital laundering at the national and international level.

In the context of the fight against transnational organized crime, I headed the unit responsible for exchanging information with counterpart financial intelligence units.

When my mission ended in 2009, I returned to the judiciary and was assigned as Deputy Public Prosecutor in the Office of the Public Prosecutor at the Court of Appeal of Dakar.

In this role I handled criminal cases decided on appeal but also hearings at the Court of Assizes where criminal matters are tried.

In 2010, I was promoted to the position of Deputy Public Prosecutor of the Republic at the Special Regional Court of Dakar.

As indicated above, this is the most important public prosecution office in the country and deals with the most varied and complex criminal cases.

In this role, as in previous roles and as the number two in the Office of the Public Prosecutor, my daily work involved criminal law and criminal procedure. The aforementioned roles allowed me to be in regular, direct contact with the authorities responsible for criminal investigations and to supervise and direct the investigations of some 40 police and gendarmerie units, to prepare court cases and to support charges. I was in charge of some 15 deputy prosecutors. These roles enabled

me to become familiar with and acquire in-depth knowledge of all legal matters of relevance to the criminal courts.

They also allowed me to assist in the processing of cases relating to international mutual assistance in criminal matters, since most letters rogatory from foreign countries are sent to the Office of the Public Prosecutor in Dakar, which ensures that they are implemented either through an investigating judge or judicial police officers.

In 2012, the Keeper of the Seals, the Minister of Justice appointed me as Chief Technical Advisor responsible for criminal cases.

In this capacity, I was responsible for leading the exchange of ideas on the Government's criminal policy and contributing to the development of the strategy for complex criminal investigations and trials or those of importance for the State or public order. I was also responsible for drafting reports, memorandums and correspondence for the attention of senior government authorities on all important matters of relevance to the criminal courts.

In 2013, I was appointed as Director of the State Judicial Agency.

In this position, I was in charge of all cases in which the State of Senegal was involved either as having civil liability or as a civil party. I headed a multidisciplinary team responsible for defending the interests of the State of Senegal before both national and international courts. Thus, in all civil, commercial, criminal or correctional proceedings and international arbitration relating to the State, I was responsible for representing it before the competent courts.

At the end of this mission, I was assigned to the Supreme Court of Senegal as Auxiliary Judge in a criminal chamber and in an administrative chamber. In this capacity, I had the opportunity to serve as a judge for two years at the highest court and to deal with criminal cases involving major issues through the cassation procedure.

In 2017, I left the Supreme Court to be appointed Director of the Cabinet of the Keeper of the Seals, Minister of Justice, before being promoted to Secretary General of the Ministry, the position that I hold to this day.

Thus, for the past 25 years, since graduating from the *Ecole de la Magistrature* (School for the Judiciary) in 1995, I have worked in the field of criminal law and procedure, either at the strategic or the operational level.

2. As a result of the experience described above, throughout my career I have led investigations and dealt with proceedings in which women and children have been victims.

More specifically, in my capacity as Deputy Public Prosecutor of the Republic at the Office of the Public Prosecutor of the Special Regional Court of Dakar, I was, in addition to my ordinary law duties, responsible for cases involving minors. In that capacity, I was responsible for supervising investigations in criminal cases involving minors, receiving investigation reports and, if necessary, referring cases to the juvenile judge with requests for placement of the child in a specialized centre.

As Secretary General of the Ministry of Justice, I chaired the working group responsible for drafting the Children's Code and also supervised the work that led to the recent adoption of Act No. 2020-05 of 10 January 2020 criminalizing acts of rape and paedophilia in Senegal.

Lastly, I am a member of the Senegalese Association of Jurists (AJS), an association of women jurists whose mission is to promote and defend the rights of women and children. As part of our activities, lawyers are assigned to defend women and child victims free of charge. "Law shops" are also set up to listen to and advise women victims of sexual and/or domestic violence free of charge.

3. I have never been charged with or investigated in connection with allegations of corruption, criminal or administrative negligence or any other similar misconduct, including sexual harassment.

The Organizational Act on the status of judges subjects Senegalese judges to rigorous discipline. Stringent duties and obligations are imposed on them throughout their careers. On taking up their duties, Senegalese judges take an oath to perform their functions faithfully and well and to exercise them impartially in accordance with the Constitution and the laws of the Republic and to maintain, in all things, the reserve, honour and dignity that their duties impose on them. No judge

may be relieved of this oath under any circumstances and any disregard for the duties of his position, honour, delicacy or the dignity of his duties constitutes a disciplinary offence.

B. Perception of the Court

1. The International Criminal Court (ICC) is an international court born of the will of States to fight impunity by prosecuting the perpetrators of the most serious crimes. Twenty years after the entry into force of the Rome Statute, two main criticisms are levelled against the Court, namely, that its effectiveness depends upon the willingness of States to cooperate, and the sense that ICC prosecutions are regionalized.

With regard to the first issue, according to article 86 of the Statute, “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”.

States therefore have a legal obligation to cooperate with the Court and failure to cooperate or a failure by States parties to cooperate fully limits the effectiveness of the Court considerably.

In point of fact, lack of cooperation directly undermines the effectiveness of the ICC in that the Court relies on the collaboration of States parties at all stages of the proceedings including investigations, arrests, transfers of suspects, access to evidence, witness protection and the enforcement of judicial decisions.

For example, the ICC Prosecutor had to drop the case against Kenyan President Uhuru KENYATTA due to lack of evidence after the judges rejected the request for indefinite adjournment. The judges also said that the refusal of the Kenyan Government to grant requests for cooperation had undermined the ability of the prosecution to conduct a thorough investigation into the charges against Kenyatta.

The second criticism relates to what some observers perceive to be a regionalization of the Court’s proceedings. In point of fact, some African elites question the Court’s impartiality and consider that it applies its jurisdiction only to serious crimes committed in Africa.

At the time of its establishment, however, a large number of African States acceded to the Statute (34, or more than a quarter, and the first country to ratify the Rome Statute was Senegal).

However, practice has demonstrated that the Court's activity is concentrated in Africa. In point of fact, at one point in time nine out of 10 situations and 23 cases under investigation by the Court were concentrated in Africa. And on 30 and 31 July 2017, at the African Union Conference held in Addis Ababa, Ethiopia, African Heads of State discussed the question of collective withdrawal from the ICC. In the end, only Burundi gave effect to its withdrawal, while the Gambia and South Africa suspended the procedure.

2. In order to improve cooperation, new investigation and arrest strategies including the possible deployment of staff from the Office of the Prosecutor could be considered, which would enable investigators to carry out the necessary steps themselves. This is frequently done in the context of the implementation of letters rogatory between two States with the deployment of judges and judicial police officers.

It would also be appropriate to strengthen cooperation with the United Nations in order to overcome more effectively the challenges and obstacles arising from non-cooperation.

With regard to the perceived regionalization of proceedings, we consider that the fact that the Office of the Prosecutor is currently conducting preliminary investigations in a number of countries such as Afghanistan, Georgia, Colombia, Honduras and the Republic of Korea will demonstrate the universality of the ICC and its will to combat the culture of impunity throughout the world when its jurisdiction is exercised.

We also consider that outreach activities must be redoubled in order to convince the citizens of the world, and Africans in particular, of the protective role and deterrent effect of the Court.

3. I think that the decision taken on 20 November 2017 by the ICC Prosecutor to request authorization from the Pre-Trial Chamber to open an investigation into war crimes and crimes against humanity committed in relation to the armed conflict in Afghanistan is an important decision that has had an impact on a good part of the international community. It gives hope to all victims of armed conflicts that international criminal justice will be served no matter how

powerful the alleged perpetrators are. Furthermore, as mentioned above, this important act will help to convince African elites that the ICC is not arbitrary.

In this respect, the unanimous decision of the five judges of the ICC Appeals Chamber amending the decision of the Pre-Trial Chamber by authorizing the opening of an investigation in this case is a major decision.

On the other hand, the acquittal on appeal, on 8 June 2018, of Congolese opponent and former warlord Jean-Pierre BEMBA, initially sentenced to 18 years' imprisonment at first instance for "war crimes" and "crimes against humanity" was regarded as highly questionable.

The facts of the case indicate that troops of which he was the military leader, between 2002 and 2003, had intervened in the Central African Republic to prop up the Government in power, causing thousands of victims by their depredations.

Extradited to the ICC in 2008, he was found guilty at first instance "of crimes against humanity (murder and rape) and war crimes (murder, rape and pillage) committed by MLC troops in the Central African Republic" from 26 October 2002 to 15 March 2003 when he was "effectively acting as a military commander and with effective control over the Mouvement de libération du Congo("MLC") troops". He was thus sentenced to 18 years' imprisonment.

On 8 June 2018, three of the five Appeals Chamber judges found that Mr Bemba "cannot be held criminally liable under article 28 of the ICC Rome Statute for the remaining crimes committed by MLC troops during the Central African Republic operation and that he must be acquitted thereof".

They considered that "the Trial Chamber made serious errors in its finding that Mr Bemba had failed to take all necessary and reasonable measures to prevent or repress the crimes of the MLC troops." He was thus acquitted.

Some have argued that if the Court fails to apply the Rome Statute to hierarchical superiors for crimes committed by their subordinates, it has neglected an important dimension of its mission. Others have expressed concern that this decision will not have a deterrent effect on warlords who conduct military operations remotely.

This decision was also a great disappointment for the thousands of victims who were deeply traumatized by the rapes and multiple assaults to which they were subjected.

The discontent caused by this decision was reflected by Prosecutor Fatou BENSOUDA in a statement in the following terms: “It is unfortunate that this "significant and unexplained departure" from the Court's previous jurisprudence, as the dissenting judges described it, and its replacement with new, uncertain and untested standards, has taken place in the most serious case of sexual and gender-based violence decided upon by this Court to date, more so at a time when there is an acute need to send a clear signal globally that such abhorrent crimes must not go unpunished.”

C. Judge's independence

- 1.** A priori, the relationship between an ICC judge and the authorities of his country must be the same as those that a judge at the national level must maintain with the governmental or political authorities of the country. Judges must exercise their powers independently and impartially. Judges are subject only to the law and guided only by the search for truth. In no circumstances must judges accept to be subject to undue influence, incitement, pressure, threats or interference, direct or indirect, from any person, including the authorities of their country of origin. As a matter of comity, judges must always assert their independence and autonomy. As has been said: “Never do anything against conscience even if the State demands it.”
- 2.** At the level of the European Court of Human Rights, when the court decides on a case its composition must include a national of the State concerned by the case to be examined. The explanation for this is that a national has a more specific knowledge of the legal system and the sociological realities of the country on question and can thus provide his colleagues with important information of which they might be unaware. The law of numbers mitigates the risk of inappropriate influence. At the level of the African Court of Human Rights, on the other hand, the reverse option prevails. A national of the State concerned does not sit. This is also the position of the United Nations treaty bodies. For reasons related to the independence of the experts, Committee members do not participate in deliberations concerning States of which they are nationals. We prefer this option, which has the advantage of avoiding misunderstandings and any suggestion of bias.

3. The leading objective of the signature of the Rome Statute and the establishment of the ICC was to ensure the prosecution and punishment of the perpetrators of the most serious crimes of international concern, while combining this imperative with respect for the rights of the persons implicated and those of the victims. Accordingly, I consider it useful and appropriate for the ICC to take into account, in the course of the proceedings before it, both the jurisprudence/decisions of the national courts and tribunals and those of international courts and tribunals. Both of these sources may provide interesting legal solutions that could inform the decisions of the ICC. In addition, there are particular reasons for taking into account each one of these two sets of jurisprudence. With regard to the jurisprudence of national courts, it should be recalled that the jurisdiction of the Court is complementary to that of national criminal courts; therefore, it cannot completely ignore their jurisprudence and decisions, in particular as it sometimes has to determine the scope to be accorded to a national decision, in particular under article 20 of the Rome Statute. Moreover, with regard to the jurisprudence of international tribunals, questions of international criminal justice often have specific features linked to external elements with which national courts are not familiar. Hence, only a study of the jurisprudence of international tribunals can provide guidance on the general principles enshrined in international criminal law.
4. Ensuring the consistency of jurisprudence within a court is an ideal to be pursued, to the extent possible and in accordance with the principles guaranteeing the independence of judges. An independent and conscientious judge should not ignore precedents from the Appeals Chamber. He should be familiar with them and draw on them when necessary. The judge must show humility and openness to the precedents of the Court's Appeals Chamber, but must forge his conviction independently on the basis of an objective assessment of the facts and in the light of the applicable rules of law. If a precedent is not consistent with his own convictions, he should not hesitate to diverge from it and should provide in his decision the reasons that he deems to be the most relevant.
5. For the sake of predictability and in order to avoid any risk of improvisation, the judge must take care not to implement even innovative practices when these are not enshrined in the provisions of the Statute, the Rules of Procedure and Evidence, the applicable treaties and the principles and rules of international law. Nevertheless, recourse to information and communication technologies is now indispensable in order to overcome certain constraints related to the collection of evidence

(DNA analysis, analysis of telephone conversations and cellular data), the hearing of witnesses (via teleconferencing), the exchange of claims and other documents (via email) ...

6. From the outset of my career I have worked only in teams. Currently, in my capacity as Secretary General of the Ministry of Justice in charge of coordinating work at the Department level, team spirit is a prerequisite. Work with other judges could be conducted in the same manner as in national courts, where chambers are also collegial, decisions are taken after lengthy deliberations and, in the event of disagreement, the majority opinion prevails. The Senegalese legal system does not recognize concurring or dissenting opinions. When a decision is handed down, there is no indication as to whether it was taken unanimously or by a majority. The advantage of the practice of dissenting decisions, however, is that it allows the different possible points of view on a given legal issue to be set out.
7. The impartiality of the court is one of the main elements of the right to a fair trial. Accordingly, before any initiative is taken by one of the parties or his lawyer, the judge who, in the course of a case, considers that he may be influenced or suspected of being influenced, must, of his own accord, ask for another judge to be assigned to assist in the proceedings and deliberations. Certainty is not required for recusal; doubt is sufficient, provided that it is reasonable.

D. Workload of the Court

1. Should I be elected and called upon to serve the Court on a full-time basis, I undertake to be available and to undertake my duties from the outset and for the duration of my term of office.
2. I undertake to performing my duties on a full-time basis at the Court from the moment I am asked to do so.
3. I further undertake to comply with the working conditions of the Court and to give precedence to my professional activities.
4. With regard to the drafting process, an approach followed at the Supreme Court of Senegal and which I consider to be excellent is for highly qualified, dedicated auditors to conduct preliminary background research and propose possible approaches before the case file is sent to the judge responsible for drafting the decision. I am perfectly comfortable to share certain tasks with assistants or interns while fully assuming my responsibilities in the decision-making and drafting process.

5. We consider that, in general, the decisions that can be rendered by a single judge are those that are not of a certain gravity and, pursuant to article 39 of the Statute and rule 7 of the Rules of Procedure and Evidence, could include the decision as to whether or not to nominate an expert, or whether or not to take a testimony or hear a witness. In general, such decisions must be those that do not affect the merits of the case and do not adversely affect the fundamental rights of the parties.

6. In some of my positions of responsibility, on a number of occasions I have had to deal with pressure from the media or the general public, in particular in cases that have aroused public opinion. However, as a judge I have always considered that I should stick to the facts and only to the facts and not give in to any pressure, irrespective of its source. For example, in 2000, when the first democratic handover took place in Senegal, it was a commonly held view among the public and journalists that some political authorities had prospered from public money. Consequently, a general audit of public accounts was commissioned and reports were drafted. These reports were forwarded to the Office of the Public Prosecutor for action. However, on examination, many of these reports showed that contrary to popular opinion, while many managers had mismanaged national companies their actions did not constitute criminal offences. Therefore, we decided independently to dismiss these cases and apply disciplinary sanctions, contrary to the high expectations of the public and the political authorities at that time.

7. I am in good health and prepared to work under pressure. Throughout my career I have not taken any leave of absence from work due to exhaustion or any other incapacity to work. In my current position as Secretary General of the Ministry of Justice, I have 11 departments under my authority, and I coordinate the activities of one directorate-general.

E. Deontology

1. An independent judge is one who is independent of any political, religious or social influence and has no affiliations that might mar his neutrality. In the exercise of his office, he is subject only to the law and his conscience.

2. A conflict of interest is a situation in which an individual's personal interests are in competition with his professional duties, which may lead him to take improper decisions or

actions. We believe that whenever a judge has a personal interest in a decision being made in one way rather than another, he has a conflict of interest and must therefore withdraw.

3. I believe that considerations of race, colour, sex or religion should in no way be taken into account in assessing the suitability of a candidate's suitability to be a judge at the ICC. As a black, Muslim woman myself, I consider that I have the required skills and necessary aspiration to serve as a judge of the ICC. I believe that a good judge is defined by three fundamental qualities, namely: competence, fairness and impartiality.

4. I have never been the subject of any disciplinary, administrative, criminal or civil proceedings in which my professional or ethical standing has been called into question.

On the contrary, I was awarded the Medal of Honour of the Prison Administration and was made a Knight of the National Order of the Lion of Senegal.

In addition, I was appointed by decree of 16 August 2019 of the President of the French Republic to the rank of Knight of the National Order of the Legion of Honour of the French Republic.

5. I have never been disciplined or censured by any bar association, university faculty or similar entity of which I am a member.

6. In my view, the provisions of the Statute and the Rules of Procedure and Evidence allow victims to participate effectively at all stages of the proceedings. Indeed, from the point at which the Prosecutor applies to the Pre-Trial Chamber for authorization to open an investigation to a possible decision on the reduction of a sentence, victims are heard and their views are solicited. They are protected and provided with medical and psychological assistance if necessary and can seek and obtain reparation for damages suffered.

7. In order to ensure the necessary balance between the rights of accused persons and those of victims, care must always be taken to ensure that the rights of each of these parties are scrupulously respected and that they have proper status.

With regard to accused persons, it is a matter of making the presumption of innocence a reality. In practical terms, an accused person must face trial within a reasonable time. The right to a

defence and the principle of adversarial proceedings must be respected scrupulously. Compulsory measures must be necessary and proportional to the seriousness of the charge.

With regard to victims, as indicated in paragraph 6, they must be involved at all stages of the proceedings in order to enable them to share their concerns.

Only in this way can a fair trial be ensured.

F. Additional information

1. I have perfect command of French, which is one of the languages of the Court. I speak it fluently and write it perfectly.

2. I certify that I have only Senegalese nationality and that I have not applied for any other nationality.

3. I have read the conditions of service for the judges of the Court and accept the terms and conditions of work.

4. If elected, I am fully prepared to take part in a financial disclosure programme organized by the ICC.

5. I solemnly declare that I have not withheld from the Committee any information which might call into question my eligibility for judicial office.

G. Disclosure to the public

1. I choose to have my answers to this questionnaire made public.

