

**ADVISORY COMMITTEE ON NOMINATIONS OF JUDGES**

**QUESTIONNAIRE**

**A. Nomination process**

- 1. The Statute requires every candidate for election to the Court to have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings or established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.**

**Could you please describe your experience and competence in the areas specified? For how long? In which capacity?**

I was appointed to the bench in 1985. In all my years as a Magistrate and later as Judge, I have dealt with all types of criminal offences. I have determined cases involving all manner of assaults, ranging from common assaults to assault causing grievous bodily harm. I have also handled cases of manslaughter and murder, arsons and other cases involving wanton or malicious destruction to property.

- 2. Do you have any experience or competence in handling litigation or inquiring or investigating into issues related to violence, discrimination, sexual assaults, or other similar conduct, inflicted on women and children? In which capacity?**

Yes. I have dealt with assaults where women and children were the victims. I have dealt with many cases of defilement of children, some of them a few months old. I have dealt with rape matters, including gang rapes on some occasions. To date, the criminal appeals I handle on a weekly basis involve sexual assaults, robbery with violence, murder and manslaughter cases. I have dealt with the said cases as a magistrate, as a judge of first appellate Court, and presently as a Court of appeal Judge.

As Magistrate and High Court Judge I dealt with children matters, including cases where children were in need of protection and care and domestic and international adoptions. Some of the matters I dealt with involved forced circumcision of women (Genital mutilation) by unlawful/ proscribed gangs like "mungiki", a proscribed terror gang in Kenya.

- 3. Have you ever been investigated for, or charged with, allegations of corruption, criminal or administrative negligence or any other similar misconduct, including sexual harassment? Was there a conclusive determination?**

No.

**B. Perception of the Court**

- 1. What is your vision of the International Criminal Court and its dual nature as a court and an international organization? How do you see the main differences between the ICC and the two *ad hoc* Tribunals for the former Yugoslavia and for Rwanda?**

My vision for the International Criminal Court (ICC) takes into account the ICC's dual nature as both a Court and an international organization. As a Court, the ICC must remain an impartial and independent judicial institution that is committed to delivering justice and ensuring accountability for the gravest crimes of concern to the international community - genocide, crimes against humanity, war crimes, and the crime of aggression. In pursuing this, my vision is to advance a victim-centered approach that not only secures convictions of perpetrators but also truly acknowledges, addresses, and redresses the harm suffered by victims. As an international organization, the ICC must continue to foster its relationships with state parties, maintaining and enhancing its legitimacy and the public confidence placed in it. Particularly, I intend to work towards strengthening the Court's relationship with African nations, encouraging dialogue and mutual respect, to dispel perceptions of bias and foster stronger cooperation.

The ICC differs fundamentally from the ad hoc Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) in several ways. First, the ICC is a permanent Court established by the Rome Statute, while the ICTY and ICTR were temporary tribunals established by the United Nations specifically to address crimes committed in specific conflicts. Second, while the ad hoc tribunals had a narrow jurisdiction, limited to specific geographical areas and time periods, the ICC has a broader mandate. It can investigate and prosecute crimes committed by nationals of any state party, or in the territory of any state party, and can potentially also act when non-party states voluntarily accept its jurisdiction or when the UN Security Council refers a situation. Third, the ICC is unique in its victim-centered approach, allowing for the participation of victims in proceedings, and the possibility of reparations, features which were not as strongly present in the ICTY and ICTR. Finally, the ICC's principle of complementarity, under which it can only act when national jurisdictions are unable or unwilling to prosecute, distinguishes it from the ICTY and ICTR. This principle respects the primacy of national jurisdictions, thereby encouraging states to fulfil their primary responsibility to investigate and prosecute international crimes.

**2. What would be the main criticisms you are aware of in relation to the Court's proceedings?**

The primary and broad based criticism that the Court faces relates to issues that go beyond its proceedings or daily court process. The real challenge that the Court faces is a legitimacy challenge.

Most, if not all challenges and criticism of the Court presently emanate from the perceived lack of legitimacy of the Court. These challenges/criticisms include: very few successful prosecutions of high level foreign officials; difficulties in obtaining sufficient and necessary cooperation from member states; legal conundrums faced by states when dealing with questions relating to immunity of foreign officials; and lack of goodwill and outright opposition from states in the exercise of the complementarity principle.

Lack of cooperation with the ICC by both State Parties (to the Statute); Non-State Parties; and even Non-State Actors, poses the greatest challenge and criticism to the work of the Court, and the ICC at large.

Moreover, the failure of the Court to capture the goodwill of numerous powerful states, and regional blocks has led to increased and renewed criticism by many states that the ICC is an instrument of neocolonialism, targeting African Nations alone. This perception must be addressed, especially because the ICC relies on State Parties to enforce its decisions, including the use of the national police force and other necessary resources.

It is notable that to date, of the 53 countries in the continent of Africa, only 33 are State Parties. The glaring over representation of Africa in terms of investigations and prosecutions, and its under-representation as members of the Court continues to erode the Court's legitimacy in the eyes of an entire continent. This serves to widen the growing legitimacy deficit. Further, the narrative of 'double standards' continues to plague the Court and must be tackled 'head on' if the Court is to make meaningful progress.

Beyond the above, the Court also faces numerous criticisms in relation to its trial process. Some of the concerns I am aware of include: overly lengthy trial proceedings; very long periods of time between hearings and the rulings or judgments.

In Kenya, our laws provide clear timelines within which judgements must be delivered following a hearing, and our rules similarly provide extensive mechanisms for active case management to achieve the set timelines. I would be happy to share some of my practical experiences with members of the Court at the earliest opportunity.

**3. Do you have any suggestions on changes that could be proposed in order to improve the perception of the Court in the eyes of the international community?**

Increased participation and inclusion in the Court of African and other nations most affected by the decisions of the Court and Court processes is necessary.

Further support and political goodwill is required from the United Nations Security Council Permanent Members.

Mechanisms to improve visibility and transparency of the Court process would be welcomed. These include holding of hearings (when and where appropriate) outside the seat of the Court to raise awareness of Court procedures, and to allow effective participation of witnesses and victims. This approach may also help the Court to engage with its global constituency, most of whom only know of its location in the global North.

An example of suitable hearings that may be held outside of the seat could include prosecutions of lower level individuals, or where the Court has domestic support. This measure could help to foster increased complementarity, and may enable the ICC to gain a further measure of political capital in the host country, and the region at large.

**4. Which are, in your view, the most important decisions issued by the Court in the past years, that have had an important impact in relation to its perception *vis-à-vis* the States Parties and the public? Could you give and explain at least one positive and one negative example?**

The decision by the Appeals Chamber, in the case of *Prosecutor v. Bemba*, to overturn the conviction, has had a negative impact on the perceptions of the Court. It also highlighted the criticism over length of proceedings. Bemba was in custody for 10 years and has brought compensation proceedings against the Court in relation to his custody and the management of his assets, frozen at the direction of the Court.

In the Al Mahdi case where the accused was charged with intentionally directing attacks against buildings of a religious and historical character in 2012. It is the first time that the destruction of cultural sites has been prosecuted as a war crime at the ICC and will likely be a deterrent for destruction of cultural heritage.

Trial Chamber's convictions in *Prosecutor v. Ntaganda* of war crimes and crimes against humanity. Whilst not the first guilty verdict delivered by the Court, this conviction was the first in the Court's history concerning sexual crimes.

**C. Judge's independence**

- 1. What in your view should be the relationship between a Judge and the authorities of his or her country of origin? Similarly, how do you envisage your future relationship with bodies such as universities, courts or non-governmental organizations with which you have been involved or to which you have been affiliated, if elected to the ICC?**

A Judge should maintain an independent, impartial, and professional relationship with all the State Parties to the Court. Once appointed to the Court, the Judge no longer represents the views of a particular State, but rather, must apply the law fairly and equally, without fear, bias, prejudice, or favour.

Nonetheless, the Court ought to strive to maintain a healthy rapport with NGOs, Academia, and other relevant institutions who remain important stakeholders in the Court processes. In doing so, the Court may take appropriate measures to strengthen dialogue and cooperation between the relevant authorities and the Court.

Finally, many institutions remain relevant to the work of the Court in so far as stakeholders help the Court to keep in touch with evolving facts, knowledge, and best practices across the globe and the development of international law.

- 2. In your view, can a Judge participate in a trial involving a national from his or her country of origin? Why?**

Based on the Bangalore Principles of Judicial Conduct, a Judge is expected to, and must exercise the judicial function based on her assessment of the facts and the law free of any extraneous influences.

However, if she is unable to decide a matter impartially, she ought to disqualify herself. *See general values No 1 and 2 of the Bangalore Principles.*

I am guided by the above values and would govern myself accordingly so as to ensure that the Court process remains independent and impartial.

I am also alive to the principle that each and every member of the Court has chosen to take on a calling that is international in nature, and although each Judge may be a citizen of a particular State, once a member of the Court, our duty is to uphold the rights of humanity at large. This means we have a duty to uphold the law irrespective of which the state the accused may be a member of.

- 3. Which jurisprudence/decisions do you consider necessary, useful and appropriate to be considered during proceedings at the ICC? From national courts? From international courts? From Human Rights bodies?**

The International Criminal Court is governed by its own legal instruments. Article 21 of the Rome Statute, which defines the law applicable by the Court, does not, however, distinguish between procedural law and substantive law. While respecting the sources listed in this article and the criteria for their consideration by the Court, a judge has the possibility to resort to other sources of law in situations where the internal legal texts of the Court are not defined or do not apply.

Art. 21(3) of the Rome Statute is clear that application and interpretation of law pursuant to this Article must be consistent with internationally recognised human rights. As such, the decisions of Human Rights Bodies may provide relevant and useful guidance.

**4. In your view, what should be the approach of an independent Judge when faced with precedents established by the Appeals Chamber of the Court?**

This issue is regulated by Article 21(2) of the Rome Statute. A Judge has discretionary powers either to apply or not to apply previous decisions of the Court, including those of the Appeals Chamber. However, for the sake of consistency and legal certainty, when the Judge of the Pre-Trial Chamber or Trial Chamber re-examines the case on the basis of a referral from the Appeals Chamber, his interpretation should not deviate from that of the Judges of the Appeals Chamber. It is however possible to find examples in the case law of the International Criminal Court where chambers have deviated from previous case law, Judges should strive to have consistent case law in similar cases.

The importance of adherence to settled jurisprudence is that it provides certainty and allows those who appear before the Court to make legal submissions and provide advice based on that certainty.

**5. Do you consider that a Judge or a Chamber of the Court, in order to ensure efficiency, should be allowed to implement innovative procedural practices? If yes, please give examples.**

Innovative practices ought to be permitted to the extent that they do not prejudice any of the parties involved in the trial process. A novel practice ought to strike a fair balance between speed and efficiency, without comprising the right to fair trial and court process.

Some examples that may enhance efficiency in the process include setting time milestones for the different stages of the procedure; setting specific deadlines subsequent to the surrender of an alleged offender; and striving to ensure comprehensive use of the pre-trial procedural issues.

Judges may take on a more active and proactive role in case management throughout the trial process. This may include: setting timelines and deadlines for exchanges of documentation; issuing procedural directions and procedural orders to manage the process and timelines.

**6. How do you envisage working with a hybrid criminal procedure, different from the one you experienced in your national functions? How do you envisage your working relationship with other Judges from different backgrounds and from different legal systems?**

I would approach my work with an open mind and a willingness to understand and appreciate the unique aspects of both the common law and civil law systems. I would also seek guidance from the ICC's Rules of Procedure and Evidence, case law, as well as the practices of the Court. I would also make an effort to learn from my fellow judges, especially those coming from civil law jurisdictions, to better understand their perspectives.

As for working with other judges from different backgrounds and legal systems, I am firm believer in collegiality and inclusivity and therefore see diversity of legal traditions, cultures, and experiences that can be harnessed to arrive at fair judgments.

**7. Are you used to working as part of a team? How would you deal with a disagreement in relation to a certain aspect of a decision? What are your views in relation to writing separate concurring and dissenting opinions?**

As a member of the Court of Appeal for over a decade, I have worked towards fostering collegiality within my bench. However, when the divide is essential, deep, and the case especially consequential, our procedures provide for a dissenting Justice to deliver a separate decision.

My view is that consensus among colleagues is important. Especially in complex cases where the law is constantly evolving. Collegiality, and a single decision, where possible, is a means to give the Court a united voice. This is especially important in a Court that is perceived as weak and divided. The prevailing notion is that Court speaks with greater force when it is not fractured.

A Judge must ask themselves, is this dissent really necessary? And in deciding whether to acquiesce and when to take a stand, I am guided by the notion that random dissents weaken the institutional capacity of the Court. My perspective on the issue is that dissents should be saved only for major events only so as to allow for strength and consistency of the Court.

Having stated the above, I do not wish to curtail the rights of any of my fellow members of the Court to express their convictions when necessary. I am alive to the fact that dissents may also help to clarify and improve our own opinions; may be so persuasive that the dissent becomes the majority opinion of the Court after circulation; and may provide the Court with intellectual ammunition for a brighter future.

Finally, as stated above, I am a good team player. I have worked as part of a team in decision making for almost 2 decades. In the event on non concurrence on a decision, I would first try to persuade the other Judges, based on my interpretation of the law and the facts, bearing in mind their independence.

**D. Workload of the Court**

- 1. Are you prepared and available to serve at the commencement and for the duration of your term, if elected and if called to work at the Court full-time?**

Yes, without delay.

- 2. Work as a Judge of the ICC frequently involves many hours a day, including into the evenings and over some weekends. Holidays can only be taken at fixed periods during the year when, for instance, there are no hearings. Are you prepared for that?**

Yes, I am fully aware of the burden of responsibility and work of a Judge at the ICC; I am ready to accept these work conditions and fully assume them. In my current job, I am accustomed to working long days, even during academic and / or judicial holidays.

- 3. The Court has two working languages. What is your opinion about this matter? How could multilingual challenges be better addressed by International Criminal Court judges?**

I have experienced a multilingual work environment in my national functions given that Kenyan courts at the Magistrates' Court level use both English and Kiswahili as official languages. I therefore appreciate the importance of linguistic diversity in judicial proceedings. I therefore see the dual language system at the ICC as aimed at ensuring that more people, from various linguistic backgrounds, can understand and participate effectively in the proceedings given the international nature of the Court. In order to

ensure that the multilingual setting of the Court does not impede the pursuit of justice, the ICC should ensure the Court has high quality translation and interpretation services.

**4. What is your approach to writing decisions? Will you undertake this work yourself? To what extent would you delegate drafting to assistants or interns?**

I will personally undertake the task of drafting the decision, as this is a key aspect of the judicial role and something I believe should not be delegated. However, the role of assistants and interns is invaluable in the process as they will assist me with the research. While I would not delegate the actual drafting of the decision to them, I would utilize their assistance in tasks like checking references, ensuring citations are accurate, reviewing the decision for any grammatical or typographical errors, and ensuring that the decision aligns with the Court's formatting guidelines.

**5. Which are, in your view, the decisions that could and should be issued by a Single Judge in order to expedite proceedings?**

In my view the following categories of decisions could and should be issued by a Single Judge: Pre-trial proceedings, such as confirming charges, issuing arrest warrants or summonses, deciding on pre-trial detention or release, and other pre-trial procedural matters. Interlocutory applications, such as those concerning the admissibility of evidence, protection measures for witnesses and victims, or the scheduling of hearings. Victim participation in proceedings, such as granting status to participate, the manner of participation, and the provision of protective measures. Lastly, reparation proceedings, where a Single Judge could be assigned to handle reparation matters after conviction.

**6. Are you used to working under pressure from States, governmental authorities, national or international organizations, the media or the wider public? Can you provide an example?**

I have served independently and impartially in numerous roles that attract wide coverage in the media and public interest. As Chief Magistrate, Anti-Corruption Court, Nairobi (2002-2004) I was involved in handling cases related to corruption, which were often politically sensitive and subject to substantial public scrutiny. I was also overseeing the operations of the Anti-Corruption Court as the Court's administrative head.

I also served as a Member of the Tribunal Investigating the Chairman of Kenya's Truth, Justice and Reconciliation Commission (TJRC) between December 2010 and October 2011. The responsibility of investigating the chairperson of the high profile TJRC similarly involved significant media and public attention and scrutiny.

Serving as a Judge at the High Court and Court of Appeal of Kenya often involves handling high-profile and sensitive cases that attract media attention and public interest. For example, in *COI & another v Chief Magistrate Ukunda Law Courts & 4 others*, I was part of the bench that declared illegal and unconstitutional the anal examinations that accused persons were subjected to after being charged with committing an unnatural offence under the Penal Code of Kenya. The Court held that the examinations violated their rights to privacy, human dignity, fair trial and freedom from torture, inhumane and cruel treatment. I was also part of the bench that upheld the procedural directions for expediting the determination of *Walter Osapiri Barasa's* challenge to a request from the ICC for his arrest and surrender under Article 89 of the Rome Statute arising out of case No: ICC-01/09-01/13, The Prosecutor V. Walter Osapiri Barasa at the ICC.

There are further examples, for instance, in public interest matters and election petitions where the press and other non-governmental organisations have exerted pressure

indirectly by commenting on matters that are already in Court, and even joined in demonstrations, for instance, in a matter I presided over which involved a nation-wide strike by doctors.

All these roles demanded an unwavering commitment to the rule of law and independent determination of the disputes solely on the evidence and the law. In all these roles, I was able to discharge my role impartially and fairly despite the media attention and public interest in the proceedings.

**7. Are you in good health and able and prepared to work under pressure, given the Court's heavy workload? Have you ever been on leave from your professional duties due to exhaustion or any other work-related incapacity? If yes, for how long?**

I am in good health and capable and prepared to work under pressure. I have never been on leave due to work-related incapacity.

**E. Deontology**

**1. What is your definition and understanding of an independent Judge?**

I am guided by the Bangalore Principles of Judicial Conduct. Value No. 1 together with the Latimer House Guidelines, which broadly espouse the principles that a judge must be both personally independent, that is free from personal pressures, and institutionally independent, that is free of pressures from the State guide me in this regard.

In the context of the ICC, independence particularly from the member state of origin is critical if the Court is to be truly independent. The Court must be seen to be a Court for humanity, and the world at large, rather than simply a Court belonging to members that make up its composition at any point and time.

**2. In your view, what would constitute a conflict of interest for a Judge?**

To my mind, a Judge should not act if she has any doubt as to her ability to be impartial or independent.

The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the Judges impartiality or independence.

Reflecting on the wording in the IBA Guidelines (applicable to arbitrators), doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the Judge may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

Further, justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in certain circumstances that ought to be guarded against. Namely situations where the judge has a direct interest in the outcome of the case. The broad principle may be applied in any relevant context based on the facts or circumstances of the case.

Finally, for avoidance of doubt, in the event of a conflict of interest, real or reasonably perceived, or when in doubt if a conflict exists, I would make a disclosure to the Court,



and having declared the conflict, thereafter only proceed to hear the case after seeking the views of the Court and the parties, and if it is appropriate to do so.

**3. Should considerations relating to race, colour, gender or religion be taken into account when assessing a candidate's suitability to be a judge at the ICC? Why?**

I refer to my earlier writing in relation to the various criticisms and challenges faced by the ICC. A broader and more inclusive Court will strengthen the rule of law at the international level and enhance the perception of the Court as a more democratic institution.

However, while it is desirable to have a more inclusive and democratic Court, the chosen candidate must be suitable for the position. Suitability relates to both the ability and the integrity of the candidate. A suitable candidate must be competent, objective, impartial, and have demonstrated a history of selfless service based on the public interest, and honesty in the execution of her public duties. I submit myself as such a candidate.

**4. Have you ever been the subject of disciplinary, administrative, criminal or civil proceedings in which your professional or ethical standing has been called into question? If yes, please provide details, including the outcome.**

No.

**5. What measures and decisions would you take, if you are elected, to ensure the effective participation by victims in the proceedings?**

The Supreme Court in Kenya has embraced participation of victims in the Court process. Victims are able to play a meaningful role in the process without prejudicing the rights of the accused. Some of the protections and measures that we are already practicing, and which I am happy to share my experience with the Court include the following processes and principles:

(a)

Ensuring that the Court, administrative body or person does not discriminate against any victim on the basis of race, color, gender, age, language, creed, religion, nationality, political or other opinion, cultural belief or practices, property, birth or family status, ethnic or social origin, disability, or any other grounds;

(b)

every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken;

(c)

the victim's dignity is preserved at all stages of a case involving the victim, from the pre-trial to post-trial phase;

(d)

every victim is addressed in a manner appropriate to his or her age, intellectual development, and is spoken to and allowed to speak in his or her language of choice, or through an interpreter if necessary;

(e)

every victim is treated in a manner which considers his or her cultural values and beliefs;

(f)

every victim is protected from secondary victimization in all informal, administrative and judicial proceedings relating to the victim;

(g)  
every victim is accorded legal and social services of his or her own choice and if the victim is a vulnerable victim within the meaning of this Act, then he or she shall be entitled to legal and social services at the State's expense;

(h)  
vulnerable victim is entitled to contact his or her family or any primary care giver;

(i)  
the victim's dignity is upheld at all times;

(j)  
the victim's cultural values and beliefs are respected;

(k)  
the victim is not discriminated; and

(l)  
the victim is protected from victimization of any sort.  
Protection of victims especially where they are potential witnesses is important. Victim's pre-sentencing statements should be encouraged and considered in determining compensation awards, if any, and where feasible.

**6. In reaching a decision, how would you approach the need to balance the rights of an accused person and the rights of victims, which are both protected by the ICC's legal texts?**

See the above in relation to protection of victims.

The principle is that the rights of both the accused must be balanced with the right of the victim to participate in the process and provide meaning and context, in terms of his or her experience. The victim does not take over the trial process or prosecute the case, rather she provides the Court with context and shares her experiences.

This process involves ensuring at all times that the justice system does not depart from sound and accepted legal principles, including the rights of the accused to be presumed innocent until proven guilty, and based on the applicable legal burden and standard of proof.

**F. Additional information**

1. Are you fluent in at least one of the working languages of the Court? Can you speak fluently in public hearings and meetings, and write your own decisions in one of the working languages of the Court?

I am fluent in the English language. In Kenya, English is one of the official languages for written communication or any correspondence.

2. Do you have any other nationality, other than the one indicated in your nomination, or have you ever requested another nationality?

I only have a Kenyan nationality, and I have not undertaken any procedure aiming at

acquiring another nationality.

3. Have you familiarized yourself with the conditions of service (which include the remuneration and the pensions' scheme) for the Judges of the Court? Are you aware of, and do you accept, the Terms and Conditions of work?

Yes, I have read all the Terms and Conditions of work for the Judges of the Court, and I accept them.

4. If elected, are you willing to participate in a financial disclosure program organized by the ICC?

I am fully willing to participate in a financial transparency program organized by the ICC.

5. Is there any other information which should be brought to the attention of the Committee and which might call into question your eligibility for judicial office?

I have provided all the useful and necessary information for the attention of the Committee. I have no other information that would call into question my eligibility for judicial office. I stand ready to provide any further information.

**G. Disclosure to the public**

1. You have the option to make your answers to this questionnaire public. What is your preference in this regard?

I am in favour of rendering my answers to this questionnaire public.

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