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## The ICC Statute - An Insider's Perspective on a Sui Generis System for Global Justice

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# The ICC Statute - An Insider's Perspective on a Sui Generis System for Global Justice

## Cover Page Footnote

International Law; Commercial Law; Law

# The ICC Statute – An Insider’s Perspective on a *Sui Generis* System for Global Justice

Fatou Bensouda†

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## I. Introduction

This brief commentary seeks to demonstrate that the International Criminal Court (ICC) Statute is a *sui generis* model for global justice. In effect, by highlighting the characteristics that make the Rome Statute’s system for global justice unique and illustrating them with a few examples from the Court’s case law it

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will be shown that this is a system of its own kind. As such, this commentary can be divided into four parts. First, this commentary offers a brief overview of the drafting history to give the reader some sense of the complexity and challenges inherent in creating an institution of global justice *sui generis*. Second, it examines the legal framework of the ICC and identifies features that reflect different national legal traditions. Third, this commentary gives some explanation to the mechanisms by which our emerging jurisprudence is developed. Lastly, this commentary presents two examples, victim's participation and witness proofing, as hallmarks of the emerging jurisprudence of the Court.

## II. Drafting history

The Statute of the International Criminal Court<sup>1</sup> is the product of a treaty; its text was negotiated between UN Member States. Designing a global criminal justice system was not easy, and negotiations were not simple. It engaged the legal interests of different states, each with their own legal traditions, methodologies, and procedural norms. The negotiation lasted four years, from an initial draft submitted by the International Law Commission until the six weeks set aside in Rome from June to July 1998, when all pending issues were supposed to be resolved.<sup>2</sup>

Even in Rome, the draft text before delegates still contained over 1,400 "square brackets," or points of contention. Each of the remaining issues presented distinct challenges. States had to synthesize different legal concepts and approaches and what seemed appropriate to delegates from one system was unacceptable to another. This requires significant legal expertise as well as a willingness to accommodate and harmonize foreign concepts. Thus, while delegates shared a common approach to what constitutes the minimum requirements of a fair trial, as outlined in Article 14 of the *International Covenant on Civil and Political Rights*<sup>3</sup> (which is reflected also today in Article 55 of the

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<sup>1</sup> See the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/10 [hereinafter Rome Statute].

<sup>2</sup> For a discussion of the debate surrounding the drafting of the Rome Statute, see Symposium, *The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression*, 32 CORNELL INT'L L. J. 431 (1999).

<sup>3</sup> See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999

ICC Statute),<sup>4</sup> opinions varied on how exactly these rights were to be guaranteed.

Moreover, the Statute deals with specialized areas of international law, including the definition of international offenses, modes of liability, general principle of criminal law, jurisdiction and admissibility, investigative powers, victims and witness protection, administrative issues, and international cooperation and judicial assistance to name but a few. Some of these areas could draw on existing international standards, but some had to be drafted from scratch. The end-product is the *sui generis* legal instrument we have before us today.

### III. Legal Framework

The pillars of the Court's criminal procedure reflect its unique nature as a blend of different legal traditions. Thus, one would recognize much of the structure of the trial process as adversarial. In court, there are two parties, with the prosecution carrying the burden of proof to establish guilt beyond reasonable doubt.<sup>5</sup> The trial must be held in the presence of the accused, who has the right to confront or examine the witnesses and the evidence called against him or her.<sup>6</sup> The prosecution and the defense present evidence and its admissibility is tested.<sup>7</sup> Witnesses are examined and cross-examined by each party.<sup>8</sup> While there is no jury, a bench of professional judges impartially assesses the arguments of the parties before delivering its final verdict.<sup>9</sup>

In terms of the investigative process, the task of collecting evidence for prosecutions is entrusted to the Office of the Prosecutor.<sup>10</sup> There is no investigative magistrate. Within the Office of the Prosecutor we have our own investigators who are

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UNTS 171.

<sup>4</sup> See Rome Statute, *supra* note 1, art. 55.

<sup>5</sup> See *id.* art. 66.

<sup>6</sup> See *id.* art. 67.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> See Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence, Rule 10, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000) [hereinafter ICC Rules].

drawn from a variety of backgrounds, including from national law enforcement, the international tribunals, as well as specialists in intelligence and crime pattern analysis, forensics, and gender and child crimes.

A number of features of the ICC system, nonetheless, reflect other traditions, notably the inquisitorial or civil law tradition. Thus, for example, the prosecution is not merely a party to the proceedings, but an organ of the administration of justice, bound by the principle of objectivity.<sup>11</sup> This means that it has the duty to investigate all facts and circumstances equally including both incriminating and exonerating evidence. While many adversarial systems reflect this in their codes of conduct (meaning that they cannot ignore or bury such evidence) the concept of an *active* duty to search out and investigate evidence showing the innocence of a suspect is one that is more familiar to the inquisitorial system of criminal justice.

The judges also have a more active role in ICC proceedings: the judge is not merely the silent umpire of the proceedings—he or she can actively intervene to pose questions or request that additional evidence be presented.<sup>12</sup> The judges can also ask the parties to conduct certain measures, or can themselves direct the adoption of measures on behalf of the parties or victims and witness.<sup>13</sup>

The judges also supervise certain limited aspects of the prosecution's discretion. A notable example is the launching of an investigation by the prosecutor on a *proprio motu* basis. This happened in the situation in Kenya, where the Pre-Trial Chamber was required to grant the prosecutor's request to initiate an investigation into crimes against humanity allegedly committed in the Republic of Kenya.<sup>14</sup> Our focus will be on the post-election violence of 2007-2008.

Reflective of our *sui generis* system, victims also play a significant role in the proceedings. This transforms them from

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<sup>11</sup> See Rome Statute, *supra* note 1, art. 54.

<sup>12</sup> See ICC Rules, *supra* note 10, Rule 140.

<sup>13</sup> *Id.*

<sup>14</sup> See Situation in the Republic of Kenya, Case No. ICC-01/09-1, Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II (Nov. 6, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc778243.pdf>.

passive subjects called as witnesses by the parties, to participants in the proceedings on their own behalf. Victims do not participate in the sense of *partie civile*, i.e. as a party to the proceedings, but they can apply to present their views and concerns.<sup>15</sup> Their participation is subject to leave being granted by the Court and the satisfaction of the requisite procedural requirements.<sup>16</sup>

Victims can also apply for reparations from the Court, in the form of restitution, compensation or rehabilitation, or from the specially constituted Trust Fund for Victims.<sup>17</sup>

#### IV. The Developing Jurisprudence

The most fascinating aspect of the ICC is that, as a new judicial institution, its jurisprudence is still emerging. The law, as set out in the Statute and Rules, has to be interpreted to form a body of jurisprudence. This occurs through the submissions of the parties, the views of the legal representatives of victims, the expert opinions of *amicus curiae* or other legal experts testifying before the Court, academic commentators, and ultimately by the decision of the judges. The process is, as in any legal system, fused with knowledge, expertise and experience brought by practitioners.

Of course, not everything is exhaustively treated in the ICC Statute and Rules. As in any legal system, the Court has the authority to regulate its own procedure and to “adopt such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings.”<sup>18</sup> Moreover, Article 21(1) of the Statute provides that the sources of law, in order of hierarchy, are:

- (a) The Statute, Elements of Crimes and the 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

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<sup>15</sup> ICC Rules, *supra* note 10, Rule 143.

<sup>16</sup> See Rome Statute, *supra* note 1, art. 79.

<sup>17</sup> *Id.*

<sup>18</sup> See *id.* art. 64(a)(3).

- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.<sup>19</sup>

As no legal instrument can exhaustively define everything, the provision is meant to enable the Court to prevent a situation of *non liquet* – i.e. where there is no applicable law. As such, the Court can, as appropriate, examine general principles and rules derived from different legal systems.

What follows are two examples of how the adversarial and inquisitorial elements described above are starting to blend through the emerging jurisprudence of the Court.

## V. *Sui Generis* in Action

### A. *Victims' Participation—tendering evidence and testing its admissibility*

Take for example the participation of victims in the proceedings on their own behalf—a concept that is alien to many legal systems, and familiar in many others. Many of the early decisions of the Court have focused on the nature and extent of the victims' participation in the proceedings.

One decision<sup>20</sup> that elicited strong views by the parties and a split majority decision by the Appeals Chamber, concerns whether victims participating at trial may in limited circumstances present evidence pertaining to the guilt or innocence of the accused and may challenge the admissibility or relevance of evidence. The Appeals Chamber confirmed that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to

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<sup>19</sup> *Id.* art. 21.

<sup>20</sup> See Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeals of The Prosecutor and The Defense against Trial Chamber I's Decision on Victims' Participation on 18 January 2008 (July 11, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc529076.pdf>.



challenge the admissibility or relevance of evidence lies primarily with the parties. However, it also observed “the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”<sup>21</sup> As such, it held that the Statute allowed the possibility for victims “to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.”<sup>22</sup>

Nonetheless, the Appeals Chamber made clear that such a possibility “did not create an unfettered right for victims to lead or challenge evidence.”<sup>23</sup> Accordingly, the Appeals Chamber established a strict set of requirements to regulate the scope of such participation, namely: “(i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial.”<sup>24</sup>

### *B. Witness Proofing*

Another example where we can see the Court elaborating on its own unique procedures is in its decisions on witness proofing.

The issue first arose in the context of the confirmation hearing in the case *Prosecutor v. Thomas Lubanga Dyilo*.<sup>25</sup> On November 8, 2006 the Pre-Trial Chamber issued a decision in which it distinguished between “witness familiarization” and “witness proofing.”<sup>26</sup> Witness familiarization was described as “a series of arrangements to familiarize the witnesses with the layout of the Court, the sequence of events that is likely to take place when the

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<sup>21</sup> Rome Statute, *supra* note 1, art. 69(3).

<sup>22</sup> See *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, Judgment on the Appeals of The Prosecutor and The Defense against Trial Chamber I’s Decision on Victims’ Participation on 18 January 2008 (July 11, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc529076.pdf>.

<sup>23</sup> *Id.* at para. 99.

<sup>24</sup> *Id.* at para. 104.

<sup>25</sup> *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>.

<sup>26</sup> *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing (Nov. 8, 2006), [www.icc-cpi.int/iccdocs/doc/doc243711.pdf](http://www.icc-cpi.int/iccdocs/doc/doc243711.pdf).

witness is giving testimony, and the different responsibilities of the various participants at the hearing.”<sup>27</sup> Witness proofing, characterized as the substantive preparation of a witness prior to testimony by the calling party, was ruled as impermissible.<sup>28</sup>

As the Pre-Trial Chamber held, there were such wide discrepancies in approaches by national jurisdiction with regard to the practice of witness proofing that it was unable, pursuant to Article 21(1)(c)<sup>29</sup> of the Statute, to discern authority from any general principles of law from the national laws of the legal systems of the world; nor could it define relevant principles and rules of international law pursuant to Article 21(1)(b).<sup>30</sup>

As summarized by the Chamber, risks associated with witness proofing that support treatment of the practice as unethical or unlawful included: (i) a witness altering the emphasis of their evidence, (ii) a witness deliberately or inadvertently confusing information given during the proofing sessions, (iii) a witness unconsciously trying to fill in their testimony with logical inferences from the proofing sessions, (iv) witness proofing inappropriately enhancing the credibility of witnesses because the more the witnesses practice, the more confident and detailed their recollection becomes, and (v) witness proofing, particularly through providing advance notice of the questions that would be asked, depriving court-room testimony of its spontaneity.<sup>31</sup>

Among reasons put forward to justify witness proofing as good professional practice included the fact that “witness proofing: (i) enables the identification of differences and deficiencies in recollection prior to the testimony of witnesses in the courtroom,” (ii) enables the “differences and deficiencies in recollection” identified in the proofing sessions to be addressed prior to the testimony of the witnesses in the courtroom, and (iii) is likely to allow witnesses to present their evidence in a more accurate,

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at para. 16-17.

<sup>29</sup> See Rome Statute, *supra* note 1, art. 21.

<sup>30</sup> *Id.*

<sup>31</sup> Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, para. 37, n. 41 (Nov. 8, 2006), [www.icc-cpi.int/iccdocs/doc/doc243711.pdf](http://www.icc-cpi.int/iccdocs/doc/doc243711.pdf).

structured and exhaustive manner.<sup>32</sup>

When the issue was revisited before the Trial Chamber, the earlier decision was essentially upheld, with slight modification to widen the scope of what may be included under witness familiarization.<sup>33</sup>

As the Prosecution, moreover, we argued that the Court is not bound by national practice in this regard and had the authority to regulate its own procedure—noting also the consistent practice and jurisprudence of the ICTY and ICTR in this regard. Nonetheless, our experience to date in these first trials is, overall, satisfactory. Moreover, the issue has not inhibited our presentation of the evidence. The issue represents, however, a fascinating study of how the Court is defining its *sui generis* approach to criminal procedure.

## VI. Conclusion

Let me conclude by saying that, serving as Deputy Prosecutor, it is a tremendous privilege to witness and participate in the shaping of an entirely new body of law and jurisprudence. Having highlighted the ICC's drafting history, legal framework, and emerging jurisprudence, it remains only for me to commend the students, teachers, and legal experts for their study of the case law of the ICC as a *sui generis* system for global justice. Their commentary and criticism contributes to the formation of a durable canon of international criminal jurisprudence that will carry the ICC's model for global justice well into the future.

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<sup>32</sup> *Id.* at para. 37, n. 42.

<sup>33</sup> *See* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Regarding the Practices used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, para. 30-34 (Nov. 30, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc371733.pdf>.

