

Forum for International Criminal Justice Newsletter: February 2018

Welcome to the IAP's Forum for International Criminal Justice (FICJ) February 2018 Newsletter which focuses on the prosecution of war crimes, crimes against humanity and genocide, including a roundup of video highlights, legal analysis, announcements, events, new publications and major news developments from the past month.

Domestic news covered in this Newsletter includes:

Colombia war crimes tribunal to begin hearings within six months; **Israel** joins **Rwanda** to demand **France** acts on genocide suspects; and **Dutch** arms dealer case postponed in wait of extradition documentation.

***Please have a look at the [FICJ forum](#) page on the IAP website and feel free to contribute:** the Forum provides individual prosecutors with a password protected space to post news, announcements, etc. and to pose questions to fellow prosecutors from around the world. Your contributions will also be posted in this monthly newsletter. Passwords are provided to IAP members – if you do not have a password, check your membership status by contacting the IAP Secretariat: info@iap-association.org.



Danya Chaikel – IAP FICJ Coordinator | email: ficj@iap-association.org

Video Highlights



[Click here](#) to watch a video summary of the recent appeals hearing in the ICC Bemba case: parties and participants address six issues related to the defence appeal against the conviction, as well as appeals by defence and OTP against the sentence



[Click here](#) to watch a video of Mike Chibita, the Director of Public Prosecutions of Uganda, speaking with Wayamo Foundation's Judie Kaberia about the lessons learned from Uganda's International Crimes Division



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Challenging ICC, AU seeks opinion on head of state immunities from top UN court

Coalition for the ICC, 1 February 2018



UN Secretary General poses for a group photo with African Union leaders at the opening of their Summit in Addis Ababa, Ethiopia © United Nations

The 30th session of the African Union Summit of Heads of State and Government concluded recently in Addis Ababa with the regional body agreeing to move forward with a request to seek an advisory opinion from the UN's highest court - the International Court of Justice - on the question of immunities of heads of state and government and other senior officials.

The move comes following years of legal wrangling around the execution of the International Criminal Court arrest warrants for Sudanese President Omar al-Bashir, who has travelled to several African countries that are states parties to the Rome Statute, the ICC's founding treaty.

Most recently, ICC judges found that South Africa had failed to comply with its obligations under the Rome Statute to arrest al-Bashir during a 2015 visit. The African Union supports South Africa's position that competing obligations under customary international law trump obligations under ICC law.

In instructing its African Group in New York to immediately place the request for the ICJ Advisory Opinion on the agenda of the United Nations General Assembly, the African Union is seeking clarity on relationship between Rome Statute Article 27 (irrelevance of official capacity) and Article 98 (cooperation with respect to waiver of immunity and consent to surrender) and the obligations of ICC states parties under wider international law.

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Allan Ngari, Senior Researcher with the Institute for Security Studies in Pretoria:

“Ideally, the judges of the ICC’s Appeals Chamber should interpret the court’s founding law with finality, but such a decision might not be perceived as truly objective by African states and the AU that have questioned the legitimacy of some of the ICC’s work, particularly with respect to the arrest warrant against President Omar al-Bashir of Sudan. If framed correctly by the UNGA, an Advisory Opinion of the ICJ presents an opportunity to resolve the differences in interpretation of the question of immunities from prosecution for sitting heads of state before the ICC and possibly the corresponding obligations on States and non-States parties with the cooperation regime of the ICC. These questions are at the heart of the tensions between African states and the AU on the one hand, and the ICC on the other.”

The AU also instructed the Africa group of ICC states parties to request the establishment of a working group on the question of immunities and related cooperation, and to urge the next Assembly of States Parties of the ICC to withdraw from its agenda the consideration of the Draft Action Plan on Arrest Strategies. The gathering of African heads of states also expressed deep concern with the ICC’s July 2017 decision that found South Africa non-compliant with the Rome Statute and condemned the opening of the ICC investigation in Burundi in 2017.

[Addressing](#) the summit opening, African Union Commission chairperson, Moussa Faki Mahamat said that 2018 is would be the year of the battle against corruption and for institutional reform.

UN Secretary General Antonio Guterres also [spoke](#) at the opening of the summit, saying the partnership between Africa and the UN was “solid, and grounded on sound principles of human rights and good governance.” Guterres also [met](#) with al-Bashir to discuss issues such as the joint AU-UN peacekeeping force in Darfur.

Conviction of Andjilo: a first warlord trial and a decisive first step (Central African Republic)

[FIDH](#): mouvement mondial des droits humains Press Release

Bangui - Paris, 22 January 2018 – Our organisations welcome today’s sentencing of the former Anti-Balaka warlord Rodrigue Ngaibona, aka “General Andjilo”, to life in prison. With the help of a collective of lawyers, our organisations supported many of his victims before the Bangui Criminal Court. The charges did not cover all of the crimes he allegedly committed, but the imminent establishment of a “hybrid” tribunal, the Special Criminal Court, should make it possible to shed light on other crimes committed by Andjilo and his cohorts, and to bring to trial other Central African warlords.

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FIDH and its member leagues in the Central African Republic welcome the Bangui Criminal Court trial of Andjilo that led to the first conviction of an Anti-Balaka leader since the events of 2012. The accused, who has denied all the charges – calling them acts of "self-defence" – was found guilty of a series of crimes committed in Bangui and on the Bouca Road (300 km north of Bangui) between October 2014 and January 2015.

Found guilty of multiple murders, criminal conspiracy, armed robbery, false imprisonment and illegal possession of firearms and munitions of war, Rodrigue Ngaibona was sentenced to life imprisonment with forced labour. In reality, this verdict means a sentence of/equals to life in prison, as sentences of hard labour are no longer meted out in the Central African Republic, highlighting the need for a reform of the justice system, especially of the criminal code.

"This is probably only a first conviction for General Andjilo, since the charge covered only some of the crimes he allegedly committed", noted OCDH President Maître Mathias Morouba. "Andjilo may well be held accountable for other acts, which, where applicable, may be classifiable as war crimes and crimes against humanity before the Special Criminal Court".

The collective of lawyers represented Andjilo's victims throughout the proceedings that commenced in 2015. Admittedly, it managed to find some weaknesses thereof, specifically in the prosecution's case and concerning the protection of victims and witnesses, some of whom refused to participate in the proceedings for fear of retaliation. These weaknesses, however, are inherent in the state of Central African judicial system after years of conflict and the coming into operation of the Special Criminal Court (CPS), a mixed tribunal consisting of Central African and international judges, which should make it possible to try with complete independence and according to the rules of fair trial the main perpetrators of international crimes committed in Central Africa in recent years and to help restore the rule of law there.

In addition to his sentence of life imprisonment, Rodrigue Ngaibona was ordered to pay damages to compensate the losses suffered by the civil parties. He must also pay one symbolic franc to the human rights defender organisations that filed suit together with the victims, a sign of the will of the

Central African justice system to recognise the importance of the victims and the associations that support them.

“In a country where automatic appointment of lawyers is provided only for the accused, the participation of the collective of lawyers along with the civil party greatly enhanced the proceedings and made it possible to conduct a fair trial, in which the right to legal aid, of the perpetrators and the victims alike, was respected” recognized Joseph Bindoumi, President of the LCDH.

The fight against impunity is a major challenge in Central Africa, which for a year has experienced a resurgence of violence by armed groups against civilian populations, despite the presence of over 10,000 UN peacekeepers. Originating from the former Seleka rebellion, which overturned the government in April 2013, or the Anti-Balaka self-defence groups formed to combat them, these groups continue to control much of Central Africa and to commit grave human rights violations.

With respect to the action by FIDH, LCDH and OCDH in the Central African Republic: With support from the European Union, our three organisations have been conducting since 2015 a project called To Support the Struggle against Impunity in the Central African Republic, which is documenting serious human rights violations in Central Africa and supporting the victims of those violations before the courts. They have a joint office in Bangui and many intermediaries throughout the country.

- For further informant, contact Audrey Couprie, acouprie@fidh.org

Colombia war crimes tribunal to begin hearings within 6 months: prosecutor

[Colombia Reports](#)

The war crimes tribunal that took force in Colombia on Monday should call the first war crime suspects to trial within six months, the court’s chief prosecutor said. The Special Jurisdiction for Peace, or JEP, will try thousands of former guerrillas and members of the military for the crimes and atrocities committed in half a century of armed conflict. The chief prosecutor at the court, Giovanni Alvarez, told newspaper El Tiempo on Tuesday that the court will begin public hearings once all logistical preparations are made.



Image Credit: El Pueblo

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According to Alvarez, the special prosecutors will initially prioritize the prosecution of war crimes related to the recruitment of children, sexual violence and environmental crimes.

The court will have to investigate thousands of war crimes, including mass kidnapping, the execution of civilians and high profile guerrilla attacks on civilians. "We have to start with something. These are three

broad lines of research that are very important, but it doesn't mean that you won't see some others or many others," said Alvarez. The chief prosecutor told the newspaper that the special prosecution office will hire more than 200 officials who will be investigating and prosecuting war crimes committed during the conflict.

The court will call both former FARC guerrillas and members of the military to court. Civilians who are suspected of war crimes can report themselves voluntarily to avoid prosecution before a common court. The cases brought before the tribunal will be chosen based on the criminal complaints filed by the Prosecutor General's Office, the Ombudsman and victims organizations, Alvarez said. The office will develop special protocols that will allow the participation of civilians, some of whom continue to be threatened by illegal armed groups. This process will take at least until May, according to the special prosecutor.

Alvarez stressed that the restorative justice system will contribute to peace and reconciliation after more than five decades of armed conflict if his office is able to prosecute past crimes. He said that "Reconciliation is a fundamental point of a stable and lasting peace, and in order to achieve this we must base ourselves on rigorous, efficient and fully guaranteed investigations." The JEP will be in force for a period of at least 10 years. Its mandate can be extended to a period of 20 years.

"Initially we'll have 16 prosecutors for the court and four per chamber. There will be at least 10 prosecutors in the regions who will be accompanied by two investigators and one assistant. Their role will be to care for conflict victims in the regions and, of course, to participate in the investigative work of the unit."

JEP chief prosecutor Giovanni Alvarez

Four crucial points for the future of the ICC

[Journalists For Justice](#) – After 20 years since the adoption of the Rome Statute, the President of the International Criminal Court spoke about the future of the system designed to deal with the worst crimes that shock the conscience of humanity, as reported by Thomas Verfuss

The International Criminal Court (ICC) in The Hague is gearing up to celebrate the 20th anniversary of the Rome Statute this year, the founding treaty of the first permanent international criminal

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jurisdiction to deal with the worst crimes that shock the conscience of humankind. At a diplomatic conference in the Italian capital, 120 states voted for the proposed treaty text on July 17th, 1998. One of its first big successes was its fast entry into force on July 1st, 2002, after the ratifications of at least 60 states had come in much earlier than expected.

During the first 16 years of operations, the Court has been criticized a lot: not enough convictions, an appearance of bias because of an alleged focus on Africa (though it was mainly African states that asked the ICC for those investigations and prosecutions), inability to obtain state cooperation on important issues like the arrest of key suspects, lack of efficiency, and costs that (states say) are too high. President Silvia Fernández de Gurmendi, who will leave the court in March, sees four crucial points that will be important for the court's future.

Universality

The Court has to become “general, non-discriminatory and non-selective”. Often the question is asked: Why all those Africans in the dock – and why not (for example) George Bush? “We need first to become universal,” Fernández says, which means that all countries in the world are parties to the Rome Statute. Then the Prosecutor of the ICC would no longer be unable to pursue grave allegations of serious crimes because of the nationality of the alleged perpetrator. Fernández adds, “Now we have 123 states parties – 70 more to go.”

Adapt to new forms of criminality

“We come from a system to prosecute dictators,” Fernández explains. ‘Nuremberg’ was set up to prosecute former Nazi leaders. At the International Criminal Tribunal for the former Yugoslavia (ICTY), it was the trial of former president Slobodan Milosevic that was most in the spotlight of the media. In modern times, war crimes are often committed by non-state actors like ISIS. Fernández points to the fact that all ICC convicts till now have been non-state actors, namely militia leaders. (Jean-Pierre Bemba has also been vice-president of the Democratic Republic of Congo, but he was convicted for crimes his militia committed in the Central African Republic, so as a militia leader and not as a former deputy head of state.)

Victims

The ICC “must give a central role to victims”, Fernández adds, although “victims participation and reparation does not make the work of the court easier”. Thousands of victims have participated so far in ICC proceedings. Fernández explains: “We are getting better at giving them rights and reaching out to them.”

The system: common versus civil law

The system of the ICC “must be hybrid”, that is one combining the two major legal systems of the world -- common law (which originated in England) and civil law (from the European continent). That

hybrid system is “is not always easy to understand and apply”. The ICC must develop “a more cohesive judicial culture”. To achieve that goal, the court must make a “proactive effort to integrate new judges with new ideas”. In March, six new judges shall start their tenure at the ICC, among whom two are Africans and five are women.

(Judge Fernández of Argentina spoke during an event of Leiden University in The Hague.)

IBA War Crimes Committee Conference War and Justice Open for Registration

[Registration is now open](#) for the **War and Justice Conference**, taking place in The Peace Palace, The Hague, the Netherlands on 21 April 2018.

Topics will include:

- **Terrorism, armed conflict and permissible use of force:** how have the fight against terrorism, the introduction of unmanned aerial vehicles (also known as drones), and the activities of non-state armed groups in combat operations changed rules of engagement in war theatres, and what does international law say concerning permissible use of force?
- **The ICC activation of the jurisdiction on aggression: strategic and substantive consideration**
- **Is truth the first casualty of war?** A panel discussion on recent international incidents such as the recent Syrian sarin gas attacks, the Russian invasion of Ukraine and others, where rival claims as to the truth concerning circumstances deflect attention from the tragedy experienced by civilians.
- **Is the future of international criminal law domestic?** This panel will analyse the challenges and obstacles that criminal justice currently faces at the international level, and whether the future of international justice lies on an international, hybrid, or domestic trajectory.



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Speakers confirmed so far include: **Howard Morrison**, Judge, International Criminal Court; **Kimberly Prost**, Judge-Elect, International Criminal Court; **Theodor Meron**, President, United Nations Mechanism for International Criminal Tribunals; **John Hocking**, ICTY-IMCT Registrar; **Guénael Mettraux**, Judge, Kosovo Specialist Chambers; **Fidelma Donlon**, Registrar, Kosovo Specialist Chambers; **Michelle Jarvis**, Deputy Head, United Nations International Impartial Independent Mechanism for Syria; former Deputy Prosecutor, International Criminal Tribunal for the former Yugoslavia, **Steven Kay QC**; **Wayne Jordash QC**, Doughty Street, Chambers; **Tristan Ferraro**, Senior Legal Adviser, International Committee of the Red Cross; **Christian Wenaweser**, Permanent Representative of Liechtenstein to the United Nations; **Navanethem Pillay**, former UN High

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Commissioner for Human Rights, former Judge, International Criminal Court, former President, International Criminal Tribunal for Rwanda; **Stephen Rapp**, former US-Ambassador-at-large for Global Criminal Justice, among others.

ICC holds Judicial Seminar on Complementarity & Cooperation of National, Regional & International Courts



Participants of the judicial seminar held at the ICC in The Hague on 18 January 2018 ©ICC-CPI

On 18 January 2018, the ICC opened a judicial seminar titled "Complementarity and Cooperation of Courts in an Interconnected Global Justice System", taking place at its seat in The Hague, Netherlands. The seminar, first of its kind at the Court, brought together for an interactive discussion more than 50 senior judges, including chief justices, representing the national jurisdictions of 25 States Parties to the Rome Statute, 8 regional or international courts, and the ICC.

"As courts experience similar challenges, there is need to engage in a broader dialogue on how best to solve them", said ICC President Judge Silvia Fernández de Gurmendi in her opening remarks. "Our mandates and jurisdictions are distinct but we all share a unique and same goal, which is to ensure accountability and solve conflicts through justice. (...) Ending impunity for genocide, crimes against humanity, war crimes and aggression is only possible with a shared vision and a joint commitment. I hope that we will today sharpen that vision and strengthen that commitment."

Participants discussed the interconnectedness of international, regional and national courts as part of a global system, collectively aimed at ensuring the rule of law and, in particular, accountability and justice for the gravest crimes under international law.

- View the full [video of the Seminar](#)

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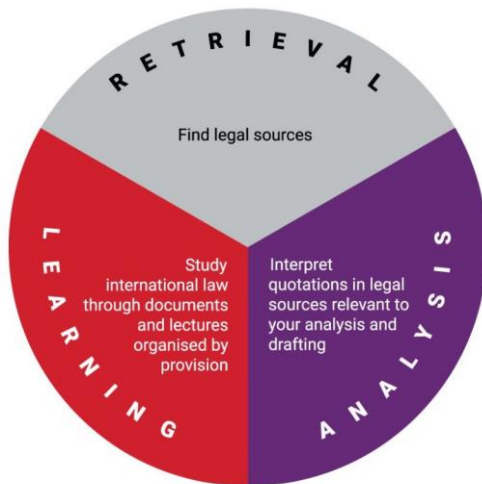


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Launch of Lexsitus, a new service that supports international criminal law research & learning

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The Centre for International Law Research and Policy (CILRAP) is pleased to announce the launch of [Lexsitus](#), a new open online service to support the learning of, and work with, legal sources in international criminal law.

Lexsitus offers visually integrated access to lectures, commentary, case law, preparatory works, and digests, at the level of every article of the Statute of the International Criminal Court. This includes more than 230 subtitled lectures (with full-text searchable transcripts) by a diverse Lexsitus Faculty of 50 experts.

On its landing page you find a user-friendly audio-visual tutorial, and introductions by leaders in the field such as Prosecutors Serge Brammertz (Vice-President of the Advisory Council of the Nuremberg Academy), Benjamin

B. Ferencz, Richard J. Goldstone, and Mirna Goransky, Judges Marc Perrin de Brichambaut and LIU Daqun, Professors Morten Bergsmo and Narinder Singh, and Dr. Alexa Koenig.

Lexsitus seeks to contribute to ongoing and future efforts to develop capacity in international criminal law and international human rights law. It is also relevant to our discussions on dissemination of international law, proper access to law and thereby access to justice.

- You can find more information about Lexsitus [here](#).

Hot off the Presses – new publications focussing on key international criminal justice issues

International Justice Outside of Criminal Courtrooms and Jailhouses

Paper by Mark Drumbl, Washington and Lee University - School of Law, in Arcs of Global Justice: Essays in Honour of William A. Schabas, Margaret M. deGuzman and Diane Marie Amann, eds

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This paper examines alternate forms of transitional justice, notably, customary forms of dispute resolution, restitution, reparations, amnesties, and civil sanctions. It suggests that the international community's preference for criminal trials as accountability mechanisms in the aftermath of genocide results in the 'othering' of these alternate forms of justice. Such 'othering' narrows legal pluralism to questions of the location of criminal process and the imposition of custodial punishment (who prosecutes, who sentences?), rather than a richer examination of how deployment of a conceptual diversity of overlapping mechanisms could promote shared objectives of accountability, justice, and transition.

- Read the full paper on the [SSRN website](#)

Justice For All and How to Achieve It: citizens, lawyers and the law in the age of human rights

Book review by Kate Gibson of *Justice For All and How to Achieve It: citizens, lawyers and the law in the age of human rights*, by Geoffrey Nice

The extent to which the law can have a meaningful impact on armed conflicts, and whether the legal bodies which judge the authors of international crimes have any long-term value, are questions which have long plagued supporters of international justice.

Through a series of lectures delivered as Gresham Professor of Law from 2012 to 2016, Sir Geoffrey Nice QC addresses these questions through an impressive range of case studies spanning the Balkan Wars, Burma, North Korea, Iran and Gaza-Israel.

This is by no means an ode to the supranational prosecution of international crimes. It is a realistic account of the concrete limitations of both domestic and international justice. Nice is openly critical of the selectivity of post-second world war prosecutions, the variable standard of international judges and the failure to hold states (rather than individuals) accountable for atrocities.

The book is remarkable for an almost unprecedented level of candour. Nice is frank in his evaluation of prior cases. Certainly, not everyone will agree that the UN tribunal for the former Yugoslavia acquitted a Serbian general because of 'political pressure', or that judges 'got it completely wrong' not handing Radovan Karadžić (pictured) a life sentence. But this is part of the book's appeal. Rather than the overly optimistic rhetoric which often peppers the commentary of international prosecutors, this is a refreshingly honest critique of both the substance and procedure of international justice.



The recounting of Nice's early days at the English bar is particularly enjoyable, as is his discussion on the evolution of oral advocacy and the (welcome) decline of institutional intolerance on the part of the bench. The book's readability will make it appealing not only to practitioners of international justice, but a wider audience interested in how legal systems can be better calibrated to provide meaningful remedies.

It would be a mistake to be misled by the aspirational title – Nice offers few answers to the questions he raises. Rather, his focus is on what constitutes justice and if it can be delivered. This does not detract from the book's impact. As history has shown, the search for answers is often just as important as the act of finding them.

Kate Gibson is a defence counsel before the international criminal tribunals. She is co-counsel to Radovan Karadžić before the UN-MICT and Jean-Pierre Bemba before the ICC

A Conviction in Question, Lessons from the ICC's 1st Trial

Jim Freedman on his new book, A Conviction in Question: The First Trial at the International Criminal Court which examines the trial of Thomas Dyilo Lubanga.

As they reflect on the ICC's on-going challenges, it may be some solace to ardent supporters of the ICC to recall the plague of disquieting matters in the Court's first trial and how the institution has diligently addressed them in the ensuing five years. This first case involved the notorious warlord Thomas Dyilo Lubanga from northeastern Democratic Republic Congo who committed multiple war crimes and who, in March 2012, was convicted of the single crime of conscripting and using children less than 15 years as soldiers.



Certainly the first trial was something of a circus and the book — *A Conviction in Question, the First Trial at the International Criminal Court* — chronicles the legal histrionics, the cast of characters, the interminable delays and the awkward, ultimately vain, efforts to hold Lubanga responsible for all that he had done. The adversarial atmosphere in the courtroom was intensified by the ever-present media and the fact that the world was watching. The trial had a perverse quality. The length of time the trial took to arrive at a conclusion, six years in total, was one thing. The judge's decision to stop the proceedings on the grounds that the prosecution had violated Lubanga's right to a fair trial and send him home, not once but twice, was equally curious.

The discord in the Chamber was worthy of a lurid television series. The main actors in the Chamber turned even the most innocent of evidence into something hotly contested, generating a cacophony of opposing voices that drowned out much of what the Court needed to know to make an informed decision. The Chamber often saw fit to allow factual and moral matters to be trumped by other matters. Some of this could be discounted as the growing pains of an international court making its way through a first trial and, in truth, some of these unsavoury features were more colourful than anything. But the persistent discord in the Chamber did have some serious consequences.

A number of principled matters were shoved aside or dismissed altogether because they were thought to be making an already long and complicated case even more long and complicated. The status of the victims was one of these. During the trial, the Chamber preferred to keep the victims on the margins of proceedings since none of the actors in the trial wanted to compromise their own stakes in the trial by admitting yet another voice that might arouse an unpredictable element into the proceedings. This in itself might not have been so serious a matter except that, when the trial was over, the Court's general dismissal of the importance of victims in the Chamber gave rise to a decision which limited the scope of reparations. This was a serious flaw.

Another was the Chamber's embargo on sexual violence. The matter of sexual violence loomed large in the trial not by its presence but by its absence. It became the trial's trademark shame, a conspicuous token of the Chamber's failure to place the substance of the Ituri province's tragedy above the Chamber's perpetual legal jousting. For most of the trial the Chamber did what it could to hear as little as possible about how frequently young women were raped and enslaved.

Yet another shortcoming was the practice of gathering evidence, especially getting it by using individuals — or intermediaries as they were called — to identify key witnesses and prepare key witnesses for their appearance at the court. The Defense's repeated claim that the Prosecution had conspired with intermediaries to introduce false information ended up consuming an inordinate amount of the trial's time and consideration. The discordant atmosphere inflated this issue beyond all proportion.

These three matters, at different times, threatened to discredit and even on occasion derail the Lubanga trial. All this was important to describe in the book. But even more important was the constructive way the court has responded, following the Lubanga trial by embracing these concerns from the first trial and ensuring that the lessons learned were addressed. The Court has matured as a result. It is clear now that the participation of the victims cannot be an afterthought; being true to the Rome Statute means recognizing that real participation is essential and failing to ensure it is bound to have consequences for the credibility of the Court as well as for the inescapable obligation to provide reparations. Following the Judge's decision at the conclusion of the trial to limit the scope of reparations, the decision was appealed, the Court reconsidered the issue and finally, this month,

ordered US \$10 million in reparations to 425 child soldiers as well as other victims who choose to come forward.

The exclusion of sexual violence from consideration in the Lubanga case is a thing of the past at the ICC. Subsequent trials have been careful to give sexual violence its essential place. In the landmark later trial of Jean-Pierre Bemba, rape was among the charges levelled against the accused. This was the first time in history that a criminal court adjudicated a rape case under international law. Bemba was found guilty in 2016.

The Court has also responded to the issue of using intermediaries for finding and preparing witnesses. The matter needed to be aired and in 2011, as the Lubanga case was nearing a close, the Court struck a working group to reflect on the issue of using intermediaries. This working group drafted a set of guidelines on the relationship between the court and intermediaries setting useful standards for the Court's use of local agents.

The account of the Lubanga trial in *A Conviction in Question, the First Trial at the International Criminal Court* aims to provide a colourful record of the trial. But it also aims to show how the court has responded to critical issues of concern that arose in the course of its deliberations and how its attention to these matters has sharpened the Court's capacity to serve the role for which it was intended.

Fighting and victimhood in international criminal law

Joanna Nicholson on her new book, *Fighting and victimhood in international criminal law*

The celebrated military historian, John Keegan, once wrote that 'Soldiers are not as other men'. This sentiment certainly holds true in international law. The foundations of international humanitarian law rest on the premise that there is a distinction between combatants and civilians, with the former being liable to attack (unless *hors de combat*) and the latter being protected (unless directly participating in hostilities).

In human rights law, the European Court of Human Rights has held that the interpretation and application of the European Convention of Human Rights can be different when being applied to members of state armed forces than to civilians (*Engel v The Netherlands* (No 1) (1976) 1 ECtHR 647).

In international criminal law too, the fact that someone has been fighting has implications. In the *Erdemović* case, for example, Judges McDonald and Vohrah found that a soldier who had taken part in a firing squad under threat to his own life could not plead duress because 'soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives that are being threatened.'

In my new book, [Fighting and Victimhood in International Criminal Law](#) (Routledge, 2018), I explore how the act of fighting, or having been involved in fighting, makes a difference in the context of when an individual can qualify as a victim of an international crime.

Issues explored include: how have international criminal courts and tribunals untangled lawful casualties of war from victims of war crimes? How have they determined who is a member of a non-state armed group and who is not? What crimes can those who fight be victims of during hostilities? When does it become relevant in international criminal law that an alleged victim of crime was a person *hors de combat* rather than a civilian? Can war crimes be committed against members of non-opposing forces? Can persons *hors de combat* be victims of crimes against humanity? Can those who fight be victims of genocide? What special considerations surround peacekeepers and child soldiers as victims of international crimes?

I argue that while those who fight can be victims of war crimes, crimes against humanity and genocide, the fact that they have been fighting can have implications concerning their victimhood, and these implications have not always been adequately taken into account by international criminal courts and tribunals.

Customary International Law and the Addition of New War Crimes to the Statute of the ICC

By Dapo Akande, [EJIL: Talk!](#)

In addition to the activation of the International Criminal Court's jurisdiction over the crime of aggression ([see previous post](#)), the [recently concluded Assembly of States Parties \(ASP\) to the Statute of the ICC](#), also adopted three amendments adding to the list of war crimes within the jurisdiction of the Court. These new war crimes relate to the use of prohibited weapons in international as well as non-international armed conflicts. However, in the lead-up to the ASP there was controversy regarding the wisdom and even the legality of adding to the list of war crimes. One of the concerns was that there would be fragmentation of the Rome Statute system with different crimes applicable in differing situations to different individuals. This is because under the amendment procedure to the Rome Statute (Art. 121(5)) these new crimes would not apply to nationals of, or conduct on the territory of, non-ratifying states parties. Another concern was that the new crimes (or at least some of them) are, in the view of some states, not criminalised under customary international law and thus not suitable for addition for inclusion in the ICC Statute. It is this latter issue that I focus on this post, though as I will explain later, the issue overlaps with the question of fragmentation of the Rome Statute regime. In this post, I discuss the implications of criminalising conduct under the ICC Statute which do not amount to customary international law crimes. I take no position on whether the

crimes that have been added are, or are not, crimes under customary international law (though I think few would doubt that the use of biological weapons is such a customary international crime), but explain why this is an important question that states are right to pay attention to.

The new war crimes to be inserted into the Rome Statute are as follows (see [Resolution ICC-ASP/16/Res.4](#)):

Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production [to be inserted as Art. 8(2)(b)(xxvii) and Art. 8(2)(e)(xvi)]

Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays [to be inserted as Art. 8(2)(b)(xxviii) and Art. 8(2)(e)(xvii)];

Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices [to be inserted as article 8(2)(b)(xxix) and Art. 8(2)(e)(xviii)].

The proposal to add these new war crimes to the Rome Statute was made by Belgium, and builds upon [the amendments to Art. 8 made at the Kampala Review Conference](#), by which certain weapons already prohibited in international armed conflicts were also criminalized in non-international armed conflicts. However, although the newly added war crimes mirror prohibitions which already exist for states in relevant treaties, these Belgian proposals proved to be more controversial than those with regard to Kampala war crimes amendments. Discussions in the [Working Group on Amendments](#), preceding the ASP, suggested that there was a division of views with regard to the adoption of these amendments. In addition to the 3 amendments adopted by the ASP, Belgium had also proposed the criminalization under the Rome Statute of “using anti-personnel mines” (see the [Report of the Working Group on Amendment \(15 Nov. 2017\)](#) submitted to the ASP). That proposal did not generate enough support and was dropped at the ASP in New York (see [Addendum 1, of 13 Dec. 2017, to the Report of the Working Group on Amendments](#)).

As indicated, some of the controversy regarding the addition of these crimes related to whether the use of the weapons in question had already been criminalised under customary international law. The [Report of the Working Group on Amendment \(15 Nov. 2017\)](#) sets out the division of views between states as follows:

13. In the course of the discussion, widespread support was expressed for the proposed amendments. Some delegations cautioned against the inclusion in the Statute of the proposed crimes. A few delegations were not convinced by the proponent’s argument that the proposed crimes could be seen as reflective of customary international law. A few delegations also argued that the existence of a criminal prohibition under customary international law was a prerequisite or at least a key factor for the inclusion of war crimes in the Rome Statute....



14. In response, it was maintained that the amendments could be said to codify crimes under customary international law, all the while acknowledging that States could have a different position on the matter. It was also argued that neither the Rome Statute nor subsequent amendment practice indicated that amendments had to reflect crimes under customary international law. It was further argued that article 8 already included crimes not prohibited under customary international law at the time of their inclusion in the Rome Statute, such as the recruitment of children and attacks against peacekeepers....”

As a result of the absence of general agreement that the proposed crimes were all crimes under existing customary international law, the draft resolution presented to the Working Group, and that ultimately adopted by ASP, did not include a reference to customary international law (see para. 12 of the Report of the Working Group).

Are Existing Crimes Under the ICC Statute Crimes under Customary International Law?

The lack of consensus as to the customary law status of the new war crimes stands in contrast to [Resolution RC/Res.5 of the Kampala Review Conference](#) which added to the list of war crimes in non-international armed conflicts. In that resolution, the Review Conference “consider[ed] that the crimes . . . are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law”.

Contrary to the view expressed in para. 14 of the Report above, the drafters of the Rome Statute were careful to try to restrict the jurisdiction granted to the Court at that time to crimes that were already deemed to be criminalised under customary international law. The general tenor of the Statute adopted at Rome was, if anything, to be under-inclusive of customary international law crimes, rather than over-inclusive (See Chapter 7 of Grover, [Interpreting Crimes in the Rome Statute of the International Criminal Court](#) (CUP, 2014). The drafters even failed to include crimes that the International Criminal Tribunal for the former Yugoslavia (ICTY) had declared, before the Rome Conference, to be customary. For example the list of war crimes in non-international armed conflicts in Art. 8 did not include a number of crimes that the ICTY had been declared to be customary in the famous *Tadic Jurisdiction Appeal* of 1995, with the use of the weapons later added in Kampala and the crime of intentionally attacking civilian objects when committed in non-international armed conflicts left out of the Statute adopted in Rome. [...]

Do Crimes Under the ICC Statute Have to Be Crimes Under Customary International Law?

To be clear there is nothing in the ICC Statute that requires that the crimes which are prosecuted by that Court be crimes under existing customary international law. States adopted a different model to that in the ICTY Statute in setting out the crimes subject to the jurisdiction of the ICC. The ICC Statute seeks to set out in detail those crimes that are subject to the jurisdiction of the Court so that the Court, unlike the ICTY with respect to violations of the laws and customs of war (under Art. 3 of its Statute), does not have to rely on formulation of those crimes under customary international law.

The fact that, in general, the Statute of the ICC and amendments do not apply retrospectively, but only upon ratification of the Statute by the relevant state (Arts 11 & 121(5)) also means that individuals will, in most cases, not be in a position to complain the conduct was not criminalised under customary international law since they will be deemed to have notice that the conduct was criminal under international law. Moreover, as I argued in my chapter on [“Sources of International Criminal Law”](#) in the [Oxford Companion on International Criminal Justice](#) (OUP, 2009): “there seems to be no reason why international tribunals may not apply treaties which create crimes that have not yet been accepted under customary international law” (pp. 48-49), a view that was accepted by the ICTY Appeals Chamber in the *Tadic Jurisdiction Appeal*, (Oct. 1995, para. 143).

Problems with Including Crimes That are Not Crimes Under Customary International Law

However, problems do arise under the ICC Statute where conduct which is not already criminal under customary international law is made subject to ICC jurisdiction. First, it should be recalled that the Court will not only have jurisdiction in cases where a state has ratified the Statute. In general, there are two situations where the Court may exercise jurisdiction in the absence of ratification by a relevant state. These are (i) situations referred to the Court by UN Security Council under Art. 13(b) and (ii) situations where a non-party state has accepted the jurisdiction of the ICC under Art. 12(3) as has been done by a number of states since 2002. In these situations, questions will arise as to whether the Court can exercise jurisdiction over crimes that are not customary international law crimes because the Court’s jurisdiction over the crimes in question will, in all probability, have been conferred retrospectively (i.e. in relation to conduct that occurred before the Council referral or the acceptance of ICC jurisdiction by the non-party state). In such a situation, where the crime is not one that at the time of commission existed under customary international law, the accused person will legitimately be able to argue that to apply the treaty prohibition to him or her would be to violate the principle of legality (*nullum crimen sine lege*). That principle is contained in Art. 22(1) of the Statute which provides that: “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”

However, it may be asked what it means to say that the conduct at the time it takes place was not a crime within the jurisdiction of the Court. In the situation under contemplation, the conduct would be listed in the ICC Statute but would not in the territory in question have been within the jurisdiction of the Court at the time when the conduct took place. Arguably, under Art. 22(1) the Court should find that it would not have jurisdiction over the crime in the case of a retrospective Security Council referral or Art. 12(3) acceptance by a non-party state even if the Court would have jurisdiction over that crime in cases arising from acts of a national of a state party that has accepted the amendment. Even if Art. 22(1) is not to be interpreted in the way just suggested, questions will then arise as to whether the effect of Art. 21 (3) which provides that, “The application and


interpretation of law pursuant to this article must be consistent with internationally recognized human rights”, is that the amendments should not be applied where they violate the principle of legality as an internationally recognized human rights. I discuss this question in the aforementioned chapter on [“Sources of International Criminal Law”](#) and so does Marko in his articles on “Is the Rome Statute Binding on Individuals? (And Why We Should Care)” (2011 JICJ) and “Aggression and Legality: Custom in Kampala ((2012) 10 JICJ 165), both of which you can [find here](#).

In the discussion above, I leave aside the tricky question whether the Court would have jurisdiction, in the case of a Security Council referral, over crimes committed by nationals of, or on the territory of, states parties that do not accept the war crimes amendments given the wording of Art. 121(5) of the Rome Statute. In my view, it should not be easily assumed that that the second sentence of Art. 121(5) does not apply, in principle, to Security Council referrals. I also leave aside discussion of the second preambular paragraph of the ASP Resolution adopting the war crimes amendments, which seeks to extend the principle contained in the second sentence of Art. 121(5) to non-states parties. The legal effect of this language is contentious (see [Kevin Jon Heller’s post of today](#)). However, given that text it may be asked whether these amendments would apply to crimes committed by nationals of, or on the territory of, non-party states either in the case of Security Council referrals or in the case of Article 12(3) acceptances. [...]

In conclusion, this post suggests that states have good reason to consider carefully whether to include within the jurisdiction of the ICC Statute crimes that are not already criminalised under customary international law. Adding such crimes creates complications, but as shown above those problems may be resolved. However, they are resolved at the cost of creating fragmentation in the jurisdiction of the ICC over persons. This may be a price worth paying in order to develop international criminal law. Despite Art. 10 of the Statute making clear that the ICC Statute shall not be interpreted as prejudicing the development of other rules of international law, an argument that a crime has developed into customary international law faces an uphill battle (see the [Schabas Commentary on the Rome Statute](#) (OUP, 2nd ed.), pp. 336-7). Thus, including such a crime within the ICC Statute may be regarded not only as criminalization by treaty but also as a step in the direction of criminalization under customary international law.

- Read the full article on the [EJIL: Talk! website](#)

News January 2018

 Click on the hyperlinked headlines to see the full articles of international criminal justice news from the previous month.

30 January

[Welcome to a new kind of war: the rise of endless urban conflict](#)

(Guardian)

In the 21st century, the search for national security has become a source of urban insecurity. The

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traditional security paradigm in our western-style democracies fails to accommodate a key feature of today's wars: when our major powers go to war, the enemies they now encounter are irregular combatants. Not troops, organised into armies; but "freedom" fighters, guerrillas, terrorists. Some are as easily grouped by common purpose as they are disbanded. Others engage in wars with no end in sight...

29 January

[ICC: Defense and Prosecution Spar over Witnesses, then Compromise](#)

(OSJI)

The lead prosecutor in the trial of a former Ugandan rebel commander, Dominic Ongwen, has agreed not to contest the right of the defense to object in future submissions to the testimony of prosecution witnesses who do not fall strictly within the parameters of the charges against Ongwen. Senior trial lawyer Benjamin Gumpert told the court on Thursday he made the commitment so that the defense did not have to argue the issue each time the prosecution brought a witness whose testimony included evidence outside the scope of the charges against Ongwen...

27 January

[Liberia: Human Rights Groups Urge President Weah to Prosecute War Crimes](#)

(Front Page Africa)

Twenty international, African and Liberia-based human rights organizations have sent an open letter to Liberian President George Weah, calling on his administration to investigate and prosecute war atrocities. According to a release by the Center for Justice and Accountability based in the United States, the groups also called upon President Weah "to make accountability a priority" for his administration and "ensure the protection of Liberian human rights defenders, particularly those working on accountability initiatives."...

26 January

[UN chief asks security council to refer Syria to International Criminal Court](#)

(CTV News)

Secretary-General Antonio Guterres is again calling on the UN Security Council to refer Syria to the International Criminal Court, pointing to "serious

violations" including blocking aid deliveries and medical care to millions. The UN chief also called on all combatants, UN member states and civil society to co-operate with an independent panel established by the General Assembly in December 2016 to assist in the investigation and prosecution of those responsible for war crimes or crimes against humanity in Syria...

[ICC Prosecutor, Fatou Bensouda, condemns recent violence in Benghazi, Libya](#)

(ICC Press Release)

"I am deeply concerned by reports that unidentified persons detonated two car bombs outside the Baya'at al-Radwan mosque in the Al-Salmani district of Benghazi, Libya on the evening of 23 January 2018, killing at least 34 people, including children, and wounding over 90 others. I am equally appalled by photographs and video made public on 24 January 2018, that purportedly show Major Mahmoud Mustafa Busayf al-Werfalli executing 10 persons in front of the Baya'at al-Radwan mosque, in what appears to constitute retaliation for the cowardly bombings of 23 January 2018..."

25 January

[Activists launch case for prosecution of ISIS crimes against women and LGBTIQ persons](#)

(IntLawGrrls)

In Iraq, including in areas controlled by ISIS, women, girls, LGBTIQ people, and those otherwise perceived as stepping outside of traditional gender roles have been targeted for violence on a staggering scale. ISIS fighters have tortured women doctors and nurses who have not complied with rigid dress codes when doing so interfered with the performance of their medical duties. They have executed women who have resisted forced marriage or who have served as politicians. Men believed to be gay have been thrown off buildings. Women believed to be lesbians have been issued death warrants. ISIS has killed youth because of their alternative forms of personal expression or refusal to join their militia, labeling them "faggots."...

[Yahya Jammeh, former leader of the Gambia, could face extradition](#)

(Guardian)

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The president of the Gambia has said he wants to extradite and prosecute his predecessor Yahya Jammeh, who is living in exile in Equatorial Guinea, if a national inquiry looking at human rights abuses recommends it...

[HRW condemns deadly Libya mosque attack as violation of laws of war](#)

(Jurist)

Human Rights Watch on Thursday condemned the deadly Mosque attack in eastern Benghazi that left 34 people dead and 90 wounded, the majority of whom were male civilians including three young children...

23 January

[Afghanistan and the ICC: a 'brave' first step, but a long road ahead](#)

(IRIN)

Widespread abuses. Rampant impunity. Forgotten victims. Afghanistan was just the kind of case that the founders had in mind when they set up the International Criminal Court to bring powerful people to justice. More than 15 years later, prosecutor Fatou Bensouda has asked judges for permission to open an investigation into war crimes and crimes against humanity in the country. But with the government, militants and US forces in the prosecutor's sights, is the ICC promising more than it can deliver to the countless victims who have suffered decades of violence and abuse?...

[The kill chain: inside the unit that tracks targets for US drone wars](#)

(Guardian)

In a dimly lit room at McConnell air force base in south central Kansas, analysts from a national guard intelligence reconnaissance surveillance group watch live drone surveillance video coming from war zones in the Middle East. During combat, the analysts become part of a "kill chain" – analyzing live drone video, then communicating what they see – in instant-message chat with jet fighter pilots, operators of armed Predator and Reaper drones, and ground troops. They carry out drone warfare while sitting thousands of miles from battlefields. They don't fly the drones and don't fire the missiles. They video-stalk enemy combatants, and tell warfighters what they see.

The work, they say, helps kill terrorists, including from Isis...

22 January

[Palestinians urge International Criminal Court to act against Israel](#)

(World Israel News)

Palestinian Minister of Foreign Affairs Riyad Malki on Friday called on International Criminal Court (ICC) prosecutor Fatou Bensouda to "exercise her statutory authority, without delay" in order to prevent what he claimed was Israel's "continuation and perpetuation of crimes against the Palestinian people."...

19 January

[Bemba Pleads With ICC Appeals Judges for Reduced Sentence](#)

(OSJI)

Former Congolese opposition leader Jean-Pierre Bemba, who is serving an 18-year prison sentence at the International Criminal Court (ICC), has pleaded with appeals judges to lower his sentence, arguing that the nearly ten years he has spent in detention are a sufficient sentence. Bemba is also appealing the conviction decision, arguing that his fair trial rights were abused during the trial. He argues that judges dismissed all evidence submitted by the defense that exonerated him and instead based its conviction on weak prosecution evidence...

17 January

[Push to Scrap Special Court Fails Again in Kosovo](#)

(Balkan Transitional Justice)

A second push to revoke or change the law in Kosovo establishing a controversial new war crimes court failed on Wednesday, when the meeting of parliament's presidency failed to reach a quorum. As a result, MPs were unable to send an initiative to parliament for a vote on revoking the law allowing the Specialist Chambers to try former independence fighters for war crimes...

['Bookkeeper of Auschwitz' former Nazi officer denied mercy plea](#)

(CNN)

A former Nazi officer known as "the bookkeeper of Auschwitz" has been told he must serve out his four-year prison sentence, despite lodging an



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appeal for clemency. Oskar Groening's plea for mercy was denied by German prosecutors in Lueneberg on Wednesday, one day after his appeal was made public...

16 January

[An Accounting for the Uncounted](#)

(Atlantic)

Every now and again, an article is published about something you know you should know, but don't want to know. "The Uncounted," Azmat Khan and Anand Gopal's groundbreaking piece about the civilians killed in the U.S. campaign against the Islamic State—and the considerable gap between their tally of such deaths and the numbers reported by the Pentagon—is one of them. We cannot speak to the precise data, but their *New York Times Magazine* piece, and the verified tragedy of the Razzo family at its center, are emblematic of a bigger story that unfortunately rings true...

[Shovels: Lawful Weapons or War Crime?](#)

(Lawfare)

On first impression, beating the Islamic State fighters to death with shovels sounds like a clear-cut case of stooping to the enemy's level of barbarity. And yet that is exactly what the senior enlisted adviser to the Chairman of the Joint Chiefs of Staff suggested in a rallying cry to U.S. forces on Jan. 9: "[The Islamic State] needs to understand that the Joint Force is on orders to annihilate them ... if they choose not to surrender, then we will kill them with extreme prejudice, whether that be through security force assistance, by dropping bombs on them, shooting them in the face, or beating them to death with our entrenching tools"...

[Children Born of Rape in Bemba: Can the ICC Close the Accountability Gap?](#)

(intlawgrl)

Children born of sexual and gender-based violence in situations of conflict and mass violence have, until recently, been neglected in international criminal law. These children exist in what the Secretary-General on Sexual Violence in Conflict has previously termed an "accountability gap" as the "punishment against or redress by the perpetrator rarely includes reparations for the

women who were victimized or the children who were born as a result of rape"...

[The Story of ICTY: Legal Success Emerging from Tragedy](#)

(Jurist)

International Criminal Tribunal for the former Yugoslavia (ICTY), an ad hoc international criminal tribunal established by mandate from United Nations Security Council officially came to its end on December 21, 2017. The tribunal was created in response to atrocities committed in former Yugoslavia. Few would have imagined at that time that the perpetrators of the atrocities would be brought to justice, and the culture of impunity surrounding the most gruesome crimes would finally come to an end...

15 January

[Israel Joins Rwanda to Demand France Acts on Genocide Suspects](#)

(News of Rwanda)

France's human rights record came under scrutiny on Monday at the UN Human Rights Council's Universal Periodic Review (UPR) in Geneva – as France's former President Nicolas Sarkozy visits Rwanda. Seven countries filed the same recommendation asking France to "take active steps" that would bring justice for the victims of the 1994 genocide against Tutsis in Rwanda. The countries are Israel, Kenya, Iran, Mozambique, Namibia, Guyana and Rwanda. Apart from issuing blanket statements through the UN system, it is the first time a bloc of nations has joined Rwanda to push for extradition to Rwanda or arrest and prosecution of genocide suspects by France...

[Serbian Court Sentences Eight for Ovchara Massacre](#)

(Balkan Transitional Justice)

The Appeals Court in Belgrade has sentenced eight former members of the Vukovar Territorial Defence, TO, then part of the Yugoslav People's Army, JNA, to 101 years in jail for one of the most infamous massacres of the wars in former Yugoslavia...

[Rights group: Al Shabab forcibly recruits children](#)

(Deutsche Welle)

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... According to HRW, the armed group has opened several training centers, under the guise of being religious schools in areas under their control. They use strengthened indoctrination, they teach children of a very young age and have pressured teachers into teaching al Shabab approved programs in schools...

13 January

[World's eyes on Kosovo amid push to halt war crimes court](#)

(New York Times)

Efforts by Kosovo to suspend a war crimes court set up to prosecute atrocities committed by ethnic Albanians during their independence struggle are threatening relations with Western allies who backed Kosovo's split from Serbia, European and American officials have warned...

12 January

[Dutch arms dealer case postponed in wait of extradition documentation](#)

(news.24.com)

The Cape Town Magistrate's Court has granted a postponement in the case involving a Dutch arms dealer convicted of crimes against humanity and for selling firearms to former Liberian president Charles Taylor. Augustinus Petrus Kouwenhoven, 75, appeared in court on Friday morning, where the magistrate signed off on a postponement to wait for extradition documentation from the Department of Justice...

11 January

[Franco-German Envoys Press Kosovo on Special Court](#)

(Balkan Transitional Justice)

A joint German-French delegation met Kosovo officials on Wednesday to voice concern about recent failed attempts by Kosovo MPs to revoke the law establishing the Special Court, set up to try Kosovo Albanian war crimes...

10 January

[When Humans War, Animals Die](#)

... Together with Rob Pringle, from Princeton University, Daskin compiled 65 years' worth of data on the abundance of large mammals across all of Africa. These populations, they found, were stable during peacetime, but almost always fell

during periods of war. And in explaining declines in wildlife, nothing mattered more than war—not human population density, the presence of towns or cities, protected reserves, or droughts...

[Bangladesh court sentences 2 to death over crimes in 1971 war](#)

(Xinhua)

The International Crimes Tribunal in Bangladesh has sentenced two to death and three others to life in prison for their crimes committed during the country's war of independence in 1971...

[Trump's Threat of Destruction of North Korea and Proportionate Defensive Force: An Assessment of Similar Observations in Legal Scholarship and US Practice](#)

(Opinio Juris)

On 19 September 2017, President Donald Trump stated in the UN General Assembly that if the US is "forced to defend itself or its allies, we will have no choice but to totally destroy North Korea". This assertion appears to have constituted one of the most expansive positions the United States has taken during the UN era with regard to the scope of the right of self-defense in international law. The predominant academic view is that, like physical acts, individual statements that can be attributed to states may amount to evidence of state practice for the purpose of identifying and modifying a rule of customary international law. Trump's threat of force against North Korea can thus be understood to provide evidence of US practice concerning the right of self-defense...

[Rohingya crisis: Myanmar army admits killings](#)

(BBC)

Myanmar's army has admitted for the first time its soldiers were involved in unlawfully killing Rohingya Muslims in recent violence in Rakhine state. It said an inquiry had found that four members of the security forces were involved in the killing of 10 people in Inn Din village near Maungdaw. The report said the four had helped villagers carry out a revenge attack on what it called "Bengali terrorists"...

[ICC: Appeal Hearing Focuses on Bemba's Mode of Liability](#)

(OSJI)

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Hearings in the appeal of Jean-Pierre Bemba's case at the International Criminal Court (ICC) have over the last two days dwelt on the interpretation of what constitutes a military commander's responsibility for crimes committed by their subordinates. Equally at the center of hearings was the level of knowledge a commander needs to have about subordinates' crimes in order to bear criminal liability...

9 January

[The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken?](#)
(ICRC Blog)

In 2015, the International Humanitarian Fact-Finding Commission (the Commission) received a great deal of attention after Médecins Sans Frontières (MSF) called for an independent investigation following the destruction of its trauma centre in Kunduz by U.S. airstrikes... Despite this attention, there was no investigation carried out by the Commission. Indeed, it offered its services to the concerned parties, but was unable to act due to a lack of consent. Two years later, in May 2017, it was announced on the Commission's website that it would, for the first time, lead an independent forensic investigation in Ukraine, following the explosion of an Organization for Security and Cooperation in Europe's (OSCE) vehicle...

8 January

[Hague Criminal Court may open Israel war crimes probe, MKs reportedly told](#)
(The Times of Israel)

Israel's National Security Council reportedly warned members of the Knesset's powerful Foreign Affairs and Defense Committee last week that the International Criminal Court could open an investigation at some point this year into the 2014 Gaza war and West Bank settlement construction...

[Yugoslavia's War Crimes Tribunal Showed the Promise – and Limits – of International Justice](#)

(Foreign Policy In Focus)

This chilling description of the Srebrenica genocide was written by a judge at the International Criminal Tribunal for the former Yugoslavia in the Hague in November 1995, only months after Europe's worst crime since the Second World War.

In July of that year, Bosnian Serb forces seized control of the Srebrenica enclave — a designated United Nations safe area — from international peacekeepers. They separated the men and women and in the days that followed killed more than 7,000 men and boys...

5 January

[International Criminal Court Indictments of U.S. Officials Are not Impossible](#)

(Just Security)

The ICC prosecutor's long-expected request to open an investigation of U.S. armed forces and the CIA for crimes allegedly committed in Afghanistan will likely be approved and — although far from certain — it remains a possibility that U.S. officials could ultimately be indicted by the Court...

[5 reasons the U.N. Security Council should care about the Burmese military's sexual assaults on the Rohingya](#)

(Washington Post)

Burma's ethnic cleansing campaign against Rohingya Muslims has been rife with sexual violence, according to recent news accounts. Among the more than 600,000 people who have fled to neighboring Bangladesh, many are survivors of rape, gang rape and sexual slavery. How many? Pramila Patten, the United Nations special representative on sexual violence in conflict, reports that every woman she encountered during her November visit to Bangladesh had either witnessed or endured brutal sexual assault. Their stories are harrowing...

[War criminals: freed before serving out their jailtime](#)

(Justice Info)

Before former Peruvian president Alberto Fujimori, several people convicted of crimes against humanity have been granted early release, from Nazis tried in Nuremberg to Argentinian military officers...

[Key Issues in Bemba's Appeal Hearing Against ICC Conviction](#)

(Open Society Justice Initiative)

Did former Congolese vice president Jean-Pierre Bemba's Movement for the Liberation of Congo (MLC) militia have an organizational policy to

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attack civilians? And did the nature and scope of the attacks warrant their classification as crimes against humanity? These are among the key issues that will be addressed during an oral hearing in

Bemba's appeal against conviction for crimes committed 15 years ago. The hearing is scheduled to begin on January 9 and will last up to five days...

Quick links

The following are some useful research links:

- FICJ [Resource Library](#): research tools, best practice reports, commentaries and more
- FICJ [Global Legal Developments](#): specialised units, legislation, international & national cases
- International Criminal Court Legal Tools Database: an electronic library on international criminal law and justice with over 41,000 documents: [browse](#) | [search](#) | [annotated Rome Statute](#) | [annotated Rules of Procedure and Evidence](#) | [National Implementing Legislation Database](#)
- International Criminal Tribunal for the Former Yugoslavia [Legal Library](#)
- International Criminal Tribunal for Rwanda [Documents](#)

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