

COALITION FOR THE INTERNATIONAL CRIMINAL COURT

This questionnaire has been developed by civil society to complement the assessment process conducted by the Advisory Committee on Nominations of Judges (ACN) for candidates seeking election as Judges of the International Criminal Court (ICC) in 2026.

The questionnaire seeks to provide additional information on candidates' professional experience, judicial philosophy, approach to independence and integrity, understanding of victims' rights, leadership and workplace culture, and broader vision for the Court.

NAME OF CANDIDATE: LADY JUSTICE NJOKI NDUNGU

DATE: 7TH SEPTEMBER 2026

Motivation:

- 1. What motivates you to seek election as a judge of the International Criminal Court at this particular moment in the Court's development?**

My motivation to seek election as a Judge of the International Criminal Court is grounded in a lifelong commitment to the rule of law, the protection of

human dignity, the advancement of equality for vulnerable and marginalised persons, and the principle that those entrusted with power must be held accountable under the law. Across a career spanning criminal prosecution, constitutional reform, legislative service, international human rights practice, and fifteen years as a Judge of the Supreme Court of Kenya, I have engaged with justice from every dimension in which it is conceived, shaped, administered, and experienced. This breadth of experience has given me a deep command of criminal, constitutional, and international law, and an appreciation of the human consequences of judicial decision-making. I therefore seek to bring to the International Criminal Court a rare combination of prosecutorial insight, judicial experience at the highest level, institutional leadership, international perspective, and a demonstrated commitment to principled, independent and victim-centred justice. I believe these qualities have prepared me exceptionally well to contribute to the Court's mandate of delivering credible justice and accountability for the gravest crimes of concern to the international community.

At this moment in the Court's history, I believe the ICC requires Judges who combine courage with deep practical judicial experience. The Court increasingly operates in difficult political and institutional environments, and its Judges must be prepared to uphold the law independently, consistently and without fear or favour, even where the consequences of judicial decisions are contested or unpopular. Having served for fifteen years at the apex of a national Judiciary, I would bring to the Court extensive legal knowledge and the practical experience of adjudicating complex and consequential disputes, managing competing rights and interests, and safeguarding the integrity and independence of the judicial process.

I also believe the Court must remain firmly connected to the people for whom international criminal justice exists. I would bring a distinctly victim-centred approach, grounded in the conviction that justice must be meaningful to victims and affected communities, while fully respecting due process and the rights of the accused. Equally, I would bring to the Court the richness of African jurisprudence and legal thought, including traditions and approaches that emphasise human dignity, community, restoration and people-centred justice. In a truly international Court, the diversity of the world's legal traditions should be represented on the Bench and must also enrich the Court's jurisprudence and strengthen the legitimacy, relevance and universality of international criminal justice.

2. In your view, what are the ICC's greatest institutional and legal challenges over the next decade, and how could Judges contribute to addressing them?

The International Criminal Court faces significant institutional and legal challenges, which impact its ability to deliver impartial global justice. The 5 key challenges focus on geopolitical selectivity, enforcement paralysis, jurisdictional limitations, pace of proceedings and an undefined workplace culture.

- i. ***Geopolitical Selectivity and Bias:*** Critics in the Global South often argue that the Court disproportionately targets African nations, leading to accusations of bias. Conversely, powerful nations refuse to join the Rome Statute, leading to perceptions that they may be shielding their own citizens while urging the Court to prosecute others.
- ii. ***Jurisdictional Constraints:*** The ICC cannot investigate crimes in non-member states unless the United Nations Security Council situation and therefore, the Court is often unable to investigate glaring atrocities in certain geopolitical hotspots.
- iii. ***Lack of Enforcement Power:*** The ICC relies entirely on the goodwill of its member states to arrest suspects and enforce its warrants, because it lacks its own police force, indicted individuals often remain at large for years, severely limiting the Court's tangible authority.

- iv. ***Slow and Protracted Proceedings:*** Trials at the ICC can take many years to conclude. Critics point out that this immense delay frustrates victims and raises operational costs. ICC proceedings are necessarily complex, involving extensive evidence, multiple participants, cross-border investigations, and significant procedural safeguards. Nevertheless, lengthy proceedings can undermine the interests of victims, prejudice the rights of accused persons, and diminish public confidence in the Court.
- v. ***Undefined Workplace culture:*** Lack of clear internal governance processes including the disciplinary procedures of elected officials and staff related issues, have recently come to the forefront of the Court's workplace culture; there is a need to rethink administrative approaches to this before it negatively impacts the reputation of the Court.

- **What Judges can do:**

Judges can contribute to addressing these challenges **by safeguarding the independence, impartiality and consistency of the Court's judicial work.** While the ICC cannot control the geopolitical environment in which it operates or compel political actors to cooperate with the Court, Judges can, however, ensure that every matter before them is approached according to the same legal standards, irrespective of the nationality of the accused, the identity of the victims, the political significance of the situation, or the

interests of State Parties. Carefully reasoned, principled and consistent judgments are therefore, among the strongest tools available to Judges in responding to perceptions of selectivity or bias. The legitimacy of the Court must ultimately be demonstrated through the quality, fairness and integrity of its jurisprudence.

Judges can also **provide clarity and predictability in the interpretation of the Rome Statute**. Many of the Court's jurisdictional challenges arise within a complex legal framework involving territorial and personal jurisdiction, Security Council referrals, questions of admissibility and complementarity, cooperation obligations, immunities and the relationship between the Court and States. Judges must develop coherent jurisprudence in these areas, while, remaining faithful to the Statute and avoiding the temptation to use judicial interpretation to assume powers that State Parties have not conferred upon the Court. Clear and consistent jurisprudence enables States, victims, accused persons and other stakeholders to understand both the reach and the limits of the Court's authority.

On enforcement, Judges cannot create a police force for the ICC, nor can they substitute themselves for States in executing arrest warrants. They can, however, **ensure that cooperation proceedings are handled rigorously, consistently and expeditiously**. Where questions of non-cooperation arise, judicial findings should clearly articulate the obligations imposed by the Rome Statute and the legal consequences of failure to comply. This strengthens the normative authority of the Court and provides the Assembly of State Parties and other competent bodies with a firm legal

basis upon which to pursue the political and diplomatic dimensions of cooperation. The judicial role is therefore not to enter the political arena, but to ensure that the law speaks clearly when cooperation obligations are engaged.

Judges also have a direct responsibility for **improving the efficiency of proceedings**. International criminal trials will inevitably be complex, but complexity should not become an acceptance of unnecessary delay. Judges can use active case management, triaging cases, pre-trial processes to identify contested issues, appropriate use of technology, focused evidentiary rulings and effective coordination between Chambers to reduce avoidable delay. They must continually balance efficiency with the rights of the accused and meaningful participation by victims. Speed cannot be achieved at the expense of fairness, but neither should procedural safeguards become a justification for proceedings that extend unnecessarily for many years. Judicial efficiency is itself an aspect of justice: for victims awaiting recognition and redress, for accused persons entitled to a trial without undue delay, and for the credibility and sustainability of the Court.

Judges also have an important **institutional leadership responsibility**. Although the administration of the Court involves several organs, and judicial independence must always be preserved, Judges are themselves leaders within the institution and contribute to its professional culture. They should model integrity, collegiality, mutual respect and accountability, and support clear, fair and transparent institutional processes governing professional conduct. Where Judges hold administrative or leadership responsibilities, they should promote a workplace in which dignity,

inclusion, professionalism and accountability are reflected not only in the Court's judgments, but also in the way the institution conducts itself internally. A Court established to uphold human dignity must seek to embody those values within its own workplace.

Judicial collegiality is also an important value for and by Judges. The ICC brings together Judges from different legal traditions, regions, languages, gender and professional backgrounds. That diversity is one of the Court's strengths, but it requires Judges who are prepared to listen to one another, engage respectfully across legal traditions, and work towards principled coherence in the Court's jurisprudence. Differences of judicial opinion are legitimate and often valuable; without unnecessary fragmentation and unpredictability. Judges can therefore strengthen the Court by cultivating a judicial culture that respects individual independence, while recognising the collective responsibility to build a coherent and authoritative body of international criminal law.

Finally, the Court must **continue strengthening the principle of complementarity and constructive engagement with national jurisdictions**. The ICC was never intended to replace domestic criminal justice systems, but to act where States are unable or unwilling, genuinely to investigate or prosecute international crimes. It must remain a Court of last resort. Judges play an important role in developing jurisprudence that provides clarity on complementarity while, respecting the primary responsibility of States under the Rome Statute. A strong ICC should, therefore be measured by the number of cases it tries at The Hague, but more importantly, by the extent to which its jurisprudence strengthens

accountability within national systems, and reinforces the broader international architecture of justice.

Ultimately, Judges cannot resolve every institutional difficulty confronting the Court. They cannot eliminate geopolitical inequality, enlarge the Court's jurisdiction, execute arrest warrants or compel States to cooperate. Their contribution lies in ensuring that, within the authority entrusted to them, the Court is principled, impartial, efficient, coherent and worthy of confidence. That is how Judges can help the ICC remain both legally authoritative and institutionally legitimate.

3. How would your professional background, expertise, and personal experience contribute to the effectiveness, legitimacy, and diversity of the Court?

My professional journey has allowed me to engage justice from almost every point at which it is conceived and delivered. I began as a criminal prosecutor, handling serious offences, assessing evidentiary sufficiency, guiding investigations, examining witnesses and conducting cases through trial and appeal. That experience gave me a practical appreciation of criminal procedure, evidentiary discipline and the importance of protecting both the integrity of prosecutions, and the rights of accused persons.

Over the past fifteen years as a Judge of the Supreme Court of Kenya, I have built on that foundation through complex appellate adjudication, precedent-setting questions on fair-trial rights and evidentiary standards, collegial decision-making, and institutional leadership. I have also worked within a Judiciary that is now fully digital, which has given me practical experience of how technology can improve access, efficiency, case management and timely justice, while safeguarding due process. I would therefore bring to the ICC legal expertise and an understanding of how Courts can work more effectively in practice.

Effectiveness, however, must be matched by legitimacy. Much of my career has been spent at the intersection of law and the lived experience of victims. I was the architect and mover of Kenya's Sexual Offences Act in Kenya's 9th Parliament, worked on refugee and gender protection with UNHCR, and contributed at the African Union to legal frameworks on women's rights,

corruption, conflict and accountability, including the Maputo Protocol. I also served as an expert in Kenya's post-election constitutional reform process, which sought to rebuild institutions after violence and strengthen domestic accountability for international crimes.

These experiences taught me that Courts not only command legitimacy when they are independent, fair and principled, but also when victims can see that the law responds meaningfully to their experiences, and when international justice strengthens national institutions rather than standing apart from them.

That same journey shapes the diversity I would bring to the Court. My experience spans the Judiciary, Parliament, the Pan-African Parliament, the African Union and the United Nations system. I would therefore bring an African jurisprudential perspective grounded in dignity, community and accountability, grounded in deep understanding of the tenets of institutional transformation. I have championed diversity in all the institutions I have worked. As the Chairperson of the Judiciary Employee Protection and Inclusion Committee, I have responsibility for oversight of policies on gender diversity and inclusion, giving me practical experience in ensuring that diversity is embedded in institutional culture and practice.

Relevant experience as a criminal law practitioner (List A)

List A — Criminal Law Practitioners

4. Please describe your experience as a judge, prosecutor, defence counsel, or other criminal law practitioner in domestic and/or international criminal proceedings.

Please include:

- **the types and complexity of cases handled;**
- **your specific responsibilities;**
- **experience managing lengthy or complex proceedings; and**
- **examples of difficult legal substantive or procedural challenges you encountered and how you addressed them.**

My legal career spans more than thirty-five years and includes substantial experience in criminal law both as a prosecutor and as a Judge of the Supreme Court of Kenya.

From 2011 to date, I have served as a **Judge of the Supreme Court of Kenya**, the country's apex Court. I have participated in determining criminal appeals and constitutional questions arising from criminal proceedings involving serious offences, complex evidentiary records, fair-trial rights, sentencing, the rights of accused persons, victim participation and the relationship between constitutional guarantees and criminal procedure. These matters frequently involve voluminous records, multiple

parties and amici curiae, novel questions of law and issues of substantial public importance.

My responsibilities include examining the appellate record, identifying the questions properly before the Court, evaluating competing legal and factual submissions, interpreting constitutional and statutory provisions, and participating in the preparation of reasoned judgments. A recurring procedural challenge in appellate adjudication is distinguishing the issues that are genuinely determinative from the many questions that may arise from a lengthy record. I have addressed this through a thorough pre-trial process involving systematic issue-framing, careful examination of the procedural history and record, and focused consideration of the questions necessary to dispose of the appeal. This helps ensure that complex proceedings remain manageable without sacrificing the right of any party to be fully heard.

Another significant challenge has been determining the proper boundaries between competing procedural rights. In ***Joseph Lendrix Waswa vs Republic***, (Petition 23 of 2019) [2020] KESC 23 (KLR), for example, the Supreme Court was required to determine how victims could participate meaningfully in a criminal trial without undermining the accused person's right to a fair trial or displacing the constitutional mandate of the prosecution. The Court developed principles permitting victims to present their concerns and views, while making clear that their participation must remain consistent with the rights of the accused and the orderly conduct of the criminal proceedings. The case required careful balancing of rights rather

than treating the interests of victims, the accused and the prosecution as mutually exclusive.

The same case illustrated another difficult procedural problem: **delay caused by interlocutory applications**. The underlying murder trial had been substantially delayed while questions concerning victim participation moved through the appellate process. While interlocutory review may sometimes be necessary to resolve important questions of law, it can also fragment criminal proceedings and delay substantive justice. Having resolved the legal issue, the Supreme Court directed that the murder trial proceed on a priority basis. This reflected an approach I consider fundamental to criminal adjudication: procedural safeguards must be protected, but procedure should ultimately facilitate rather than displace the determination of the substantive case.

A different form of procedural difficulty arises where parties invite an appellate Court to determine questions that were not adequately raised, argued or determined in the Courts below. In ***Francis Karioko Muruatetu & Another v Republic***, (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR), the Court considered fundamental questions concerning the mandatory death sentence, mitigation, judicial discretion, dignity and fair-trial rights. At the same time, additional questions arose concerning matters that had not been sufficiently canvassed through the preceding Courts. The Court exercised judicial restraint and declined to determine issues that were not properly before it. In my experience, effective adjudication of complex cases requires deciding difficult questions and recognising which questions a Court is institutionally

and procedurally entitled to decide. Respect for jurisdiction, procedural fairness and the proper development of the record are essential safeguards of sound adjudication.

Before joining the Bench, from 1989 to 1993, I served as a **Criminal Prosecutor under the Director of Public Prosecutions**. I prosecuted matters before the Magistrates' Courts, High Court and Court of Appeal, which was then Kenya's apex Court. My caseload included murder, robbery with violence and other serious offences carrying severe penalties. My responsibilities covered the full prosecutorial process. I reviewed investigation files and witness statements to determine whether the available evidence justified criminal charges; made decisions and recommendations concerning the institution, continuation or discontinuation of proceedings; prepared pleadings and legal submissions; examined and cross-examined witnesses; conducted trials and appeals; and advised investigators and Government institutions on criminal law and evidentiary issues.

Prosecutorial work presented its own procedural and evidentiary challenges. Investigation files did not always present a simple or complete factual account. Evidence could be conflicting, witnesses could give differing accounts, and serious allegations did not necessarily mean that the evidentiary threshold for prosecution had been met. My responsibility was therefore to assess the evidence objectively, identify evidentiary gaps, determine whether further investigation was required and, ultimately, whether prosecution was legally justified. Where a case proceeded, I had to present the evidence fairly while remaining conscious that the prosecutor's responsibility is not merely to obtain a conviction, but to assist the Court in

achieving justice according to law. That early prosecutorial experience continues to inform my approach as a judge. It gave me a practical appreciation of how criminal cases are built from the investigative stage, the challenges faced by witnesses and investigators, the importance of evidentiary integrity, and the consequences that procedural decisions can have for both accused persons and victims.

As a National Protection Officer with UNHCR, I conducted refugee-status determination interviews, including assessment of exclusion questions where there were serious reasons to consider whether an applicant had committed war crimes, crimes against humanity or other serious international crimes. This required careful individual assessment of testimony and available information in circumstances in which facts were often difficult to establish and the consequences of the determination were significant.

Across these different roles, the most difficult criminal-law questions have rarely involved a choice between fairness and effectiveness. The challenge has been to achieve both: to manage complex proceedings efficiently while protecting due-process rights; to recognise victims without prejudicing the accused; to ensure accountability without lowering evidentiary standards; and to resolve novel questions while remaining within the proper limits of judicial authority. These are principles that have guided both my prosecutorial and judicial work.

5. Please describe any experience you have applying:

- **the Rome Statute;**
- **international criminal law;**
- **international humanitarian law;**
- **domestic legislation incorporating international crimes;**
- **the jurisprudence of the ICC or ad hoc tribunals; or**
- **universal jurisdiction.**

As a Judge of the Supreme Court of Kenya since 2011, I have participated in the interpretation and application of Kenya's Constitution, which expressly incorporates ratified treaties into domestic law under Article 2(6). This constitutional framework has required the Court to engage with international law, including international human rights law and, where relevant, international criminal law, as persuasive and, where applicable, binding sources in constitutional adjudication. In criminal and constitutional matters, I have consistently approached international law as an important interpretive tool in construing domestic legislation consistently with Kenya's international obligations.

A concrete example is the Supreme Court's decision in ***Joseph Lendrix Waswa vs Republic***, [2020] KESC 23 (KLR). This case considered the proper scope of victim participation in a criminal trial and expressly examined Article 68(3) of the Rome Statute, together with ICC Rules of Procedure and Evidence governing victim participation and legal representation. We considered ICC practice concerning the circumstances in which victims may present views and concerns, make submissions and

participate through legal representatives, while emphasising that such participation cannot prejudice the rights of the accused or undermine the fairness of the trial.

That case is significant to my understanding of the Rome Statute. It required the Court to engage with one of the Statute's distinctive procedural innovations, by recognising the participation of victims in criminal proceedings. At the same time, the Court had to preserve the criminal character of the proceedings and safeguard the rights of the accused. We treated these objectives as capable of reconciliation through principled judicial control. Article 68(3) of the Rome Statute reflects this balance. It permits victim participation only where it is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial.

As a member of Kenya's Committee of Experts on Constitutional Review, established following the 2008 post-election violence, I participated in the redesign of Kenya's constitutional framework to strengthen democratic governance, accountability, and the prevention of future conflict. A significant outcome of the constitutional settlement was Article 2(6) of the Constitution of Kenya, which gives ratified treaties the force of domestic law. In addition, Article 143(4) which provides that presidential immunity under the Constitution of Kenya does not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity. The constitutional reforms also strengthened the legal foundation for implementing Kenya's obligations under the International Crimes Act, thereby reinforcing the principle of complementarity within Kenya's legal system.

Earlier in my career, my work at the African Union provided substantial exposure to international humanitarian law, international human rights law, and the legal consequences of armed conflict. As Political Analyst (Human Rights and Governance) at the Conflict Management Centre, I participated in the main drafting of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) and contributed to the development of the African Union Convention against Corruption. My responsibilities also included developing rights-based approaches to conflict prevention, post-conflict governance, and the protection of civilians. These engagements required the interpretation and application of international legal principles governing accountability, protection of vulnerable populations, and the prevention of serious human rights violations.

My work with the United Nations High Commissioner for Refugees similarly required the application of international refugee law and humanitarian protection principles. As National Protection Officer, I was responsible for refugee status determination, protection of displaced persons, and addressing gender-based protection concerns affecting refugees fleeing armed conflict from countries including Sudan, Somalia, Rwanda, Burundi, Ethiopia, and the Democratic Republic of Congo. This work involved applying international legal standards governing protection, non-discrimination, and the rights of vulnerable populations affected by conflict and persecution.

My subsequent work with Women in Law and Development in Africa (WiLDAF), UNICEF, and various United Nations agencies further

strengthened my understanding of international humanitarian and criminal law. I contributed to programmes addressing child soldiers, abductions, slavery, conflict-related sexual violence, and the protection of women and children in humanitarian settings. More recently, I have advised UN Women, UNFPA, UNICEF, UNDP, and other international organizations on legal and institutional responses to sexual and gender-based violence in several African countries affected by conflict and political instability. These assignments have deepened my understanding of the legal and evidentiary challenges associated with investigating and responding to crimes that may constitute war crimes or crimes against humanity under international law.

My legislative experience has also been directly relevant to the implementation of international legal norms. As a Member of Parliament, I sponsored Kenya's Sexual Offences Act, 2006, and successfully moved the ratification of the International Conference on the Great Lakes Region Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children. I also promoted amendments to refugee legislation that strengthened the protection of displaced persons and victims of conflict. These initiatives reflected the growing convergence between domestic criminal law and international standards relating to gender-based violence, victim protection, and accountability.

6. Please identify any judicial decisions, legal opinions, or pleadings you authored or contributed to that are particularly relevant.

As a Judge of the Supreme Court of Kenya for over fifteen years, I have participated in collegiate decision making determining criminal appeals involving complex factual and legal issues, including:

Victim Participation in Criminal Proceedings: In *Joseph Lendrix Waswa vs Republic* (Petition 23 of 2019) [2020] KESC 23 (KLR), the Supreme Court of Kenya in its comparative analysis relied on sections of the Rome Statute, and affirmed that victim participation is a constitutionally and statutorily protected component of criminal proceedings, but emphasised that, it must be carefully regulated so as not to “convert the victim into a second prosecutor” or compromise the accused’s right to a fair trial. The Court underscored that while victims have a legitimate interest in the outcome of proceedings, their participation must remain within defined procedural limits, that preserve the adversarial structure of the trial and the primacy of the prosecution and defence. The Court proceeded to set the guidelines to assist Courts in considering an application by a victim or his legal representative to participate in a criminal trial.

Legality of convictions and sentences: In *Francis Karioko Muruatetu & Another vs Republic; Katiba Institute & 5 Others* (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR), the Court declared the mandatory nature of the death sentence unconstitutional, holding that it deprived Courts of judicial discretion and

violated fundamental rights, where a Court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of the Kenyan Constitution.

In ***Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)*** (Petition E018 of 2023) [2024] KESC 34 (KLR), the Supreme Court was called upon to determine whether mandatory sentences that applied to capital offences like murder, were vastly different from minimum sentences such as those found in the Sexual Offences Act, and the Penal Code. The Court clarified that in Kenya, while mandatory sentences left the trial Court with absolutely no discretion, such that upon conviction, the singular sentence was already prescribed by law, minimum sentences set the floor rather than the ceiling with regard to sentences. What was prescribed was the least severe sentence a Court could issue, leaving it open to the discretion of the Courts to impose a harsher sentence. Using the words mandatory and minimum together convoluted the express different definitions given to each of the two words.

Admissibility and evaluation of evidence in Criminal Justice: ***Republic vs Ahmad Abolfathi Mohammed & another*** (Petition 39 of 2018) [2019] KESC 48 (KLR), the Supreme Court distinguished between a confession and an admission, providing precise legal definitions and outlining their distinct implications for admissibility and probative value. The Court held that an admission is admissible in evidence, but, unlike a confession, it cannot on its own found a conviction. A confession is a direct acknowledgement in clear terms by an accused person that he committed the

offence for which he is arraigned. Where a conviction can be based on the statement alone, it is a confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission.

Extradition Proceedings: In *Director of Public Prosecutions vs Chrysanthus Barnabas Okemo & 4 Others* (Petition 14 of 2020) [2022] KESC 33 (KLR), the Supreme Court was called upon to determine which office between the Attorney General (AG) and the Office of the Director of Public Prosecutions (ODPP) had the mandate to process an extradition request, and whether extradition proceedings in Kenya were criminal, civil, or sui generis in nature. The Court held that extradition proceedings in Kenya were criminal in nature. They fell within the DPP's mandate. Likewise, it was the DPP, as opposed to the AG, who could initiate and conduct extradition proceedings.

Right to a fair trial: *Cyrus Shakhlanga Khwa Jirongo vs Soy Developers Ltd & 9 Others* (Petition 38 of 2019) [2021] KESC 32 (KLR), The Court ruled that a 24-year delay in prosecution violated the right to a fair trial under Article 50 of the Constitution. Despite there being no limitation of time to institute and prosecute criminal offences, it stated that, where the delay has the effect of denying a suspect the legal tools to mount a credible defence, then the High Court is properly mandated by the Constitution to step in and stop the intended prosecution.

In *Praxidis Namoni Saisi & 7 Others vs DPP & 2 Others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR), the Court was confronted with the issue of determining whether the right to a fair hearing

under Article 50 was violated where the parties had failed to subject themselves to the jurisdiction of the trial Court. The Court determined that the criminal justice system, with its components such as plea taking, arraignment and trial are legitimate causes and do not violate any constitutional right and freedom, and that Article 50 of the Constitution is only available to accused persons who subject themselves to the trial process, and not to arrested persons who have neither been arraigned in Court nor persons who have not allowed the trial process to commence.

In ***Ruth Kamande vs Republic*** (Petition EO32 of 2023) [2025] KESC 18 (KLR) the Court considered and held that the battered woman syndrome has not attained the status of a stand-alone defence in a murder case, and that where a party seeks to rely on the battered woman syndrome during trial, they should raise it at the earliest opportunity, and as an extension of one of the existing legal stand-alone defences: self-defence, provocation or temporary insanity. The Court also held that the battered woman syndrome can be raised during mitigation upon conviction. Further, that the Court will not infer the existence and applicability of the battered woman syndrome from the facts and evidence adduced before it. The Court determined that the burden lies with the defence to establish not only the existence of battered woman syndrome, but also the extent to which it is applicable to the offence in question.

7. *Relevant to List B Candidates*

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Victims' Rights

Victim participation is a defining feature of the Rome Statute system and central to the legitimacy of the International Criminal Court. However, civil society and victims' representatives have raised concerns regarding increasingly restrictive approaches to participation, inconsistent jurisprudence, and procedural barriers that undermine meaningful engagement.

- 9. What, in your view, are the principal obstacles to meaningful victim participation and reparations before the ICC, and how should Judges address them in practice?**

In my considered view, the obstacles to meaningful victim participation and reparations before the International Criminal Court are deeply embedded in the structure and practice of international criminal proceedings. Geographical remoteness constitutes a significant impediment. Because the ICC sits in The Hague, thousands of miles away from the conflicts it investigates, this physical separation between victims and the judicial forum complicates sustained consultation, the transmission of accurate information, and the reflection of victims' perspectives in filings before the Court. This distance risks reducing participation to a formal exercise, detached from the lived realities of those most affected. Judges may address this through holding portions of the proceedings *in situ*, or by compiling regular summaries of pertinent witness testimony for public distribution. The Court should make effective use of technology, virtual hearings and other mechanisms to reduce geographical and practical barriers to

participation. Effective outreach can ensure that affected communities understand the mandate and limitations of the Court, the nature and progress of proceedings, their rights as victims, the avenues available for participation, and the reparations process. This information should be communicated in clear language and, where necessary, in local languages. Judges should insist upon robust witness protection measures and enforce sanctions against interference. As per current practice, Judges should also ensure that victims are procedurally included in matters of disclosure, scheduling, and evidentiary management, thereby safeguarding their participatory rights.

Witness interference presents another serious challenge. Allegations of intimidation, bribery, and political pressure undermine the integrity of proceedings and erode victims' confidence in the process. Such interference not only discourages participation but also threatens the reliability of evidence, thereby weakening the prospects of accountability. Procedural developments, including disclosure disputes, trial scheduling, and evidentiary rulings, can further marginalise victims when their interests are not adequately integrated into judicial decision-making.

Victims themselves often articulate fears of reprisals, community hostility, social exclusion, and political tensions. These concerns extend beyond physical security to encompass psychological vulnerability, re-traumatisation, misinformation, and diminished trust in judicial institutions. In some instances, these pressures lead to the withdrawal of applications for participation, thereby weakening the collective voice of victims in proceedings. Judges can order protective measures for victims

from an early stage in the process, to minimize the risk of intimidation or harm.

A further obstacle arises when proceedings conclude without convictions. In such circumstances, the assistance mandate of the Trust Fund for Victims should be enhanced to ensure that victims who have invested years in participation and shared traumatic experiences are not left without reparations. While the absence of Court-ordered material or symbolic repair may undermine confidence in the Court's capacity to deliver justice, the provision of humanitarian and rehabilitative support helps to bridge the gap. Importantly, Judges should broaden the scope of reparative justice beyond the strict requirement of convictions, adopting symbolic or community-based measures to provide redress even where prosecutions fail. This approach recognises that participation alone cannot guarantee accountability or reparations, and that judicial vigilance is required to ensure that victims' engagement translates into meaningful justice.

10. How can Judges ensure that proceedings and trials remain accessible and meaningful for affected communities while respecting the rights of the accused?

Judges can ensure that proceedings remain accessible and meaningful for affected communities while safeguarding the rights of the accused by adopting a balanced approach across the judicial process with victims' participatory rights properly understood, complementing rather than undermining those of the accused.

Before proceedings, Judges must explain the mandate of the Court, the scope of charges, and the rights of all parties. This information must be shared in a manner that embraces the social and cultural context of the affected communities: translation into local languages, reliance on trusted community structures, and the use of technology such as video links and digital platforms can reduce geographical barriers and allow affected communities to follow developments without compromising procedural fairness.

Both the accused and the victims share the right to a trial that commences and concludes without unreasonable delay, since expeditious proceedings protect the accused from oppressive incarceration and reputational harm, while also reducing anxiety for victims and reinforcing public confidence in the justice system.

During proceedings, Judges must balance the principle of public hearings with the protection of vulnerable participants and the rights of the accused.

The jurisprudence of *Katanga and Ngudjolo* illustrates that public hearings under Article 67(1) may be modified under Article 68(2) to protect witnesses and accused persons, for example through closed sessions when sensitive identifying information is disclosed. In *Al Mahdi*, transparency was enhanced through public broadcasting, enabling affected communities to witness the acknowledgment of crimes while judicial protocol was preserved. In *Ongwen*, protective measures such as pseudonyms and redacted transcripts shielded participants from reprisals, while accessibility was maintained through extensive outreach. These examples demonstrate that protective measures can coexist with transparency, thereby preserving fairness and accessibility.

After proceedings conclude, clear, reasoned judgments explaining the evidence, legal findings, and reasons for accepting or rejecting important arguments are essential, and where appropriate, summaries should be provided to make complex judgments accessible to all participants. Judgments, transcripts, and other public documents should be made accessible where legally permissible, including through online and physical Court resources. Judges should also oversee reparations and outreach measures that communicate the outcome clearly to affected communities. Reparations orders must be meaningful and practicable, reflecting victims' experiences while, remaining consistent with the rights of the convicted person. Where acquittals occur, Judges should ensure that communities understand the legal basis of the decision, thereby reducing misinformation and reinforcing confidence in the judicial process.

11. Please provide examples of how you have incorporated victim-centred or trauma informed approaches in your professional work.

From 1995 to 1997, I served as a **National Protection Officer with UNHCR**, conducting eligibility interviews for refugee status determination following strict guidelines under international humanitarian law and international criminal law, including the Geneva Conventions. The eligibility process included interviews with asylum seekers and determining who met the criteria for a genuine claim. If there were serious reasons to believe that a person had committed a war crime, a crime against humanity or genocide, then that person was excluded from protection as a refugee. As a Protection Officer in Kenya, I worked at a time when Kenya hosted the largest number of displaced populations in the world. This included asylum seekers, displaced persons and even combatants from Somalia, Sudan, Ethiopia, Rwanda, Burundi and the Democratic Republic of Congo. My work was to conduct interviews to determine whether a person was an ordinary refugee, a perpetrator of a serious crime, or a war criminal. When I identified such persons, I would flag them for exclusion from refugee status and possible political prosecution, so that they would be placed in a separate camp away from genuine refugees who required protection.

This work required sensitivity due to the effects of trauma on memory, disclosure and communication. I learned that a person's inability to recount traumatic events in a linear or consistent manner does not necessarily mean that the underlying experience is untrue. Interviews therefore had to be conducted in a manner that respected the dignity and vulnerability of the

individual, while maintaining the objectivity and rigour necessary for a proper legal determination.

From 2000 to date, I have been Chairperson of the Board of Trustees of the **Gender Violence Recovery Center of the Nairobi Women's Hospital**, which provides free medical treatment to victims of sexual and gender-based violence. There, I have worked at the intersection of human rights, survivor care and criminal justice. This role required me to engage closely with the medical, psychosocial and forensic dimensions of sexual and gender-based violence. My engagement with the Centre became particularly significant during Kenya's 2007–2008 post-election violence, when the Centre established temporary satellite clinics in affected areas and provided holistic medical and psychosocial care to survivors. Many survivors subsequently gave evidence before the Waki Commission. Through this work, I have developed a practical understanding of how medical findings, survivor testimony, trauma, and patterns of sexual offending translate into criminal evidence. It strengthened my ability to assess evidentiary issues in grave and complex crimes with clarity, sensitivity and rigour.

I have also worked extensively with United Nations agencies (UNHCR, UNICEF, UNIFEM, UNFPA and UNDP) and other international and regional civil society organisations (IPPF, AMREF, FEMNET, WILDAF, FIDA-Kenya) across Africa on issues relating to sexual and gender-based violence, victim protection, governance, and access to justice.

These experiences have influenced my judicial approach to victims and witnesses, reinforcing my understanding that trauma may affect memory,

disclosure, demeanour and the way a person participates in proceedings. A trauma-informed approach therefore requires Judges and other justice actors to distinguish between the manner in which evidence is presented and its substantive evidentiary value, while ensuring that credibility is assessed objectively and in accordance with the law. It also requires avoiding unnecessary re-traumatisation and ensuring that victims and witnesses are treated with dignity throughout the proceedings. My work in this area has also reinforced the importance of viewing victims as persons with agency and rights, rather than simply as sources of evidence.

Defence Rights

12. Please describe your experience safeguarding fair trial rights, including:

- **equality of arms;**
- **disclosure obligations;**
- **presumption of innocence;**
- **granting interim release;**
- **protection against undue delay; and**
- **the rights of detained persons.**

Defence Rights

Since my appointment to the **Supreme Court of Kenya in 2011**, I have adjudicated criminal appeals and constitutional matters involving the practical application of fair trial guarantees, including equality of arms, disclosure, personal liberty, undue delay and the rights of persons in custody. I regard these guarantees not as procedural formalities, but as essential safeguards of the integrity of criminal adjudication.

Equality of arms: In *Waswa vs Republic* [2020] KESC 23 (KLR), the Supreme Court expressly recognised that the imbalance between the power of the State and an accused person makes protection of defence rights necessary to ensure equality of arms. The Court held that victims may participate in criminal proceedings, but their participation must not prejudice the accused, cause undue delay, or transform the victim into a secondary prosecutor. This is directly relevant to the ICC, where Article 68(3)

similarly subjects victim participation to the rights of the accused and the requirements of a fair and impartial trial.

Disclosure obligations: In *Khalid & 16 others vs Attorney General & 2 others* [2019] KESC 93 (KLR), on a bench on which I sat, the Court affirmed that the prosecution must provide an accused person with the evidence necessary to prepare the defence and that the trial Court has a responsibility to ensure compliance. We also recognised disclosure as a continuing obligation: where additional evidence becomes available during trial, the accused must receive it before it is used and be afforded adequate time and facilities to respond. On the facts, no violation had yet arisen because the appellants had not taken plea and the trial had not commenced. At the ICC, I would apply the same discipline consistently with Article 67(2), including the Prosecution's obligation to disclose exculpatory and mitigating evidence as soon as practicable.

Presumption of innocence: I have consistently upheld this principle in cases in which I have served as a member of the bench, particularly where questions of personal liberty, the burden of proof, fair trial rights, and the proper exercise of prosecutorial and judicial power have arisen. In *Republic vs Mohammed & another* (Criminal Application 2 of 2018) [2018] KESC 59 (KLR), the case concerned the issue: **whether the Supreme Court could stay an acquittal pending an appeal by the State**. The Court expressly acknowledged that, following acquittal, there was a **presumption of innocence in favour of the accused**. The Court also asserted that this is one of the principles governing the exceptional exercise of the power to stay an acquittal. The Court also held that this principle had

to be considered alongside the interests of justice and the need to preserve the integrity of an appeal. As such, the Court's jurisdiction must be exercised judiciously and that the State bears the burden of demonstrating special circumstances justifying continued detention.

That principle assumes particular importance before the ICC, where allegations concern crimes of exceptional gravity, proceedings attract intense international scrutiny, and substantial institutional resources may be committed long before a determination of guilt is made. A judge must remain resolute that neither the gravity of the alleged crimes, the scale of victimisation, public expectations, nor the political controversy surrounding a situation can dilute the Prosecution's burden of proof. Indeed, the more serious the allegation and the greater the surrounding pressure, the more important, disciplined adherence to the applicable evidential standard becomes. The legitimacy of the Court depends on accountability for grave crimes, and on ensuring that no person is convicted unless the Prosecution has established guilt to the standard required by law.

Interim release: As a judge of an apex Court, I do not routinely determine first-instance applications for interim release. I have, however, decided closely analogous questions concerning continued detention and release. ***Republic vs Mohammed*** required the Court to balance individual liberty against specific factors such as flight risk, the likelihood that absence would defeat the appeal, the seriousness of the offence and the anticipated duration of the proceedings. At the ICC, I would apply Article 60 by reference to the criteria in Article 58(1), determine detention or release on the individual

circumstances and evidence before the Chamber, give reasons, and keep detention under periodic review as the Statute requires.

Protection against undue delay: In *Waswa*, interlocutory appeals had delayed a murder trial for more than six years. The Court reaffirmed the accused's constitutional right to have a trial commence and conclude without unreasonable delay and directed that the substantive murder trial be heard and determined on a priority basis. In *Jirongo vs Soy Developers Ltd & 9 others* [2021] KESC 32 (KLR), the Court considered criminal proceedings instituted 24 years after the alleged conduct. We held that delay alone is not decisive; what matters is its effect on the fairness of the trial. Because essential documentation was no longer available and the delay impaired the accused's ability to mount a credible defence, the Court found the prosecution incompatible with the right to a fair trial and halted it.

These cases have reinforced my conviction that active judicial case management is itself a fair trial safeguard. At the ICC, I would use it to identify the genuinely disputed issues, establish realistic disclosure and litigation timetables, decide interlocutory matters promptly and prevent avoidable delay without compromising defence preparation or other substantive rights.

Rights of detained persons: In *Justus Ochieng v Attorney General, SC Petition E051 of 2025* the Supreme Court examined allegations concerning arrest, detention, access to counsel and mistreatment in police custody. On the evidence, we held that the arrest and detention were lawful: the appellant had been promptly informed of the reason for his arrest, had

access to legal representation, and his custodial rights had been observed. We nevertheless upheld the finding that beatings inflicted upon him by police officers while in custody constituted torture and violated his non-derogable right to freedom from torture.

That decision reflects an important principle in my approach: **lawful detention does not extinguish the rights or dignity of the detained person.** At the ICC, I would remain attentive to the legal basis and continuing necessity of detention, access to counsel and facilities for preparation of the defence, humane treatment, and the other protections guaranteed by the Statute.

High Moral Character, Independence, and Impartiality

13. Article 36 of the Rome Statute requires Judges to be persons of “high moral character, impartiality and integrity.” What do these qualities mean in practice, and how have you demonstrated them throughout your career?

Article 36 of the Rome Statute requires ICC Judges to possess high moral character, impartiality and integrity. In my view, these qualities are not abstract virtues. They are demonstrated through the daily exercise of judicial responsibility and through the way a judge conducts herself both within and outside the Courtroom.

In practice, high moral character requires honesty, ethical discipline, respect for the dignity of others and fidelity to the responsibilities entrusted to a judge. Integrity requires consistency between principle and conduct, including when adherence to principle is difficult or personally inconvenient. Impartiality requires approaching every case with an open mind, applying the same legal standards to all parties and remaining free from actual or perceived bias.

My more than thirty-five years in law and public service have provided opportunities to demonstrate these qualities in different capacities, as a criminal prosecutor, human rights and refugee protection practitioner, legislator, constitutional law reform expert and, since 2011, a Judge of the Supreme Court of Kenya.

As a **Criminal Prosecutor**, I was entrusted with decisions that could directly affect a person's liberty and, in capital cases, life. I prosecuted serious offences including murder and robbery with violence before the Magistrates' Courts, the High Court and the Court of Appeal. I was responsible for reviewing police and investigative files, determining whether the evidence justified prosecution, deciding whether proceedings should be instituted, continued or discontinued, examining and cross-examining witnesses, and conducting appeals. That experience taught me that prosecutorial power must be exercised objectively and that the duty of a criminal justice practitioner is not simply to secure convictions, but to ensure that justice is done in accordance with the evidence and the law.

My work with UNHCR further tested these principles in circumstances involving persons fleeing conflict and persecution. As a **National Protection Officer**, I conducted refugee status determination interviews involving asylum seekers from countries including Ethiopia, Somalia, Sudan, Rwanda and the Democratic Republic of Congo. I was required to distinguish persons genuinely entitled to international protection from those who, where there were serious reasons to believe they had participated in war crimes, crimes against humanity or genocide, were excluded under applicable international law. These decisions required careful assessment of evidence, sensitivity to vulnerable persons and the discipline to apply international legal standards consistently, irrespective of the circumstances of the individual before me.

My commitment to these principles also informed my public and constitutional work. As a **Member of Parliament**, I was involved in the

development of Kenya's criminal and human rights framework, including the **primary criminal law** addressing crimes of a sexual nature, the Sexual Offences Act 2006. As a **Member of the Committee of Experts** that drafted the Constitution of Kenya 2010, I participated in a process involving competing political and institutional interests and intense public expectations. The work required fidelity to constitutional principles rather than to the preferences of any political constituency. It also contributed to the constitutional entrenchment of fair trial rights, the rights of victims and the incorporation of international law into Kenya's domestic legal order.

Since 2011, as a **Judge of the Supreme Court of Kenya**, I have had to apply these principles in cases involving individuals, public institutions and matters of profound national importance. These decisions demonstrate, in practical terms, my approach to impartiality: recognising the legitimate interests and dignity of victims while equally protecting the fundamental rights of accused persons.

As a member of the inaugural bench of the Supreme Court, I have participated in presidential election petitions arising from three election cycles, 2013, 2017 and 2022. These proceedings have attracted exceptional scrutiny from the media, the public and the political class, because the Court's decisions can have immediate and profound consequences for the country's political and institutional order. The 2017 presidential election petition provides a particularly clear example of my understanding of independence. I was part of the bench that annulled the presidential election. While I respected the institutional decision of the Court, I reached a different conclusion on the legal and evidentiary questions before us and expressed

that position in a dissenting opinion. I did so aware of the extraordinary public and political attention surrounding the proceedings. For me, judicial independence required that I reach my own conclusion from the law and evidence, state my reasons openly, and remain respectful of the majority and the institutional authority of the Court. It demonstrated that judicial independence is not simply the freedom to agree with the majority; it is also the courage to disagree where one's conscientious assessment of the law requires it.

I have also understood integrity to mean that the standards applied in the Courtroom must be reflected in one's conduct outside it. My longstanding work with survivors of sexual and gender-based violence has reinforced this commitment. Since 2000, I have served as **Chairperson of the Board of Trustees of the Gender Violence Recovery Centre** of Nairobi Women's Hospital. During Kenya's 2007–2008 post-election violence, the Centre established satellite clinics in affected areas and provided medical, psychosocial and counselling support to survivors. This work has kept me closely connected to the human consequences of violence, and to the importance of ensuring that institutions of justice remain attentive to the dignity and lived experiences of those affected by it.

These experiences have shaped my understanding that high moral character, impartiality and integrity are ultimately demonstrated through conduct rather than assertion. They require a judge to exercise authority without fear or favour, to remain open to persuasion without being susceptible to influence, to treat victims and accused persons with equal dignity, to recognise and manage conflicts of interest, and to be willing to make difficult

decisions according to the law and evidence even where those decisions carry personal, political or public consequences.

These are standards I have sought to uphold throughout my career. They are the standards I would bring to the International Criminal Court: independence from political or other external influence, impartiality towards every participant, integrity in the exercise of judicial authority, and unwavering fidelity to the Rome Statute and the rule of law.

14. Have you ever been subject to (whether professionally or personally):

- **disciplinary proceedings;**
- **allegations of misconduct;**
- **allegations of harassment, bullying, discrimination, abuse of authority, or sexual misconduct;**
- **investigations concerning professional ethics; or**
- **allegations of fraud**

If yes, please explain the circumstances and outcome.

No. Article 168 of the Constitution of Kenya provides for the procedure to be applied for a Judge who is subject to allegations of gross misconduct or misbehaviour, incompetence or breach of a code of conduct prescribed for Judges. Such misconduct would include harassment, bullying, discrimination, abuse of authority or sexual misconduct, breach of professional ethics or fraud.

The Procedure provides that a complaint regarding misconduct will first be considered by the Judicial Service Commission (JSC), a constitutional complaints mechanism and where the JSC is satisfied that a complaint meets the threshold for disciplinary proceedings against a Judge, it will then recommend that the President form a Tribunal to undertake an investigation and disciplinary proceedings against the Judge.

I have never been investigated for, charged with, or otherwise been the subject of any disciplinary proceedings under the constitutional framework above-mentioned in relation to my professional or personal conduct. No complaint against me has ever been referred by JSC to the President and/or Tribunal for any investigation, charges, or disciplinary action.

15. Have you ever taken a leave of absence or been suspended from a position following allegations or concerns relating to professional conduct or workplace behaviour? If yes, please explain.

No. I have never taken a leave of absence or been suspended from a position as a result of allegations or concerns relating to professional conduct or workplace behaviour.

16. Please describe a situation in which you faced political, institutional, or personal pressure that could have affected your professional independence. How did you respond?

Throughout my career, I have worked in contexts where legal decisions and institutional responsibilities carried significant political, public and personal consequences. I have therefore had to navigate matters that were politically sensitive, highly contested and subject to intense public scrutiny, while remaining anchored in the law, the evidence and the obligations of judicial office.

This has been particularly evident in **my work as a Judge of the Supreme Court of Kenya**. The Supreme Court determines matters that may have consequences extending well beyond the immediate parties. Constitutional, electoral and governance disputes can generate strong political positions and public expectations.

Having been appointed to the inaugural bench of the Supreme Court in 2011, I have had the distinction of participating in **the adjudication of presidential election petitions arising from three election cycles: the 2013, 2017 and, most recently, the 2022 General Elections**. This has given me sustained experience in adjudicating disputes at moments of exceptional national significance, and in circumstances where the Court's work is subject to intense scrutiny.

Presidential election petitions in Kenya attract an exceptional level of attention and scrutiny from the media, the public, political actors and the

international community. They are often accompanied by strong political positions and competing public expectations, while the decisions of the Court may have profound consequences for the country's political and institutional order. The scrutiny can be particularly intense because, the public and political class are acutely conscious that the Court's determination may affect the leadership and governance of the country.

I have regarded such scrutiny as an inherent feature of adjudicating matters of exceptional public importance, rather than as a reason to depart from judicial independence. This requires both institutional and personal discipline. A judge must be able to listen to arguments from all sides, remain open to persuasion, and at the same time resist the temptation to allow political positions, media narratives, public sentiment or personal considerations to influence the judicial determination. The same principle applies where a decision may be unpopular or contrary to the expectations of influential political or institutional actors.

I would bring that experience to the ICC. International criminal proceedings can similarly attract intense attention from States, political actors, victims' communities, civil society and the international media. An ICC judge must be able to withstand such scrutiny while remaining open, fair and responsive to legitimate concerns, and ultimately guided only by the Rome Statute, the evidence and the judicial oath.

Management and Workplace Culture

- 17. The ICC has faced sustained concerns regarding workplace culture, including allegations of bullying, harassment, discrimination, retaliation, and abuse of authority. What role should ICC Judges play in addressing these issues?**

I believe that Judges of the ICC have a solemn obligation to ensure that every person is treated with equal justice, dignity, and respect. Judges, while independent in their decision-making, must be held to high standards of behaviour and remain accountable for their actions. They must exemplify professional conduct by treating chambers staff, Court personnel, and counsel with respect, civility, and courtesy. Awareness of inherent power imbalances is essential, particularly in interactions with junior staff, where authority must never be exercised in a manner that is exploitative or demeaning.

Judges must affirm a zero-tolerance policy for harassment and discrimination, ensuring that institutional accountability is not nominal but supported by governance structures that guarantee enforcement. A strict adherence to institutional frameworks is required, including compliance with internal codes of conduct and specialized mechanisms. Reporting mechanisms must protect victims through confidentiality and non-retaliation, while oversight systems must ensure compliance with established standards.

Judges should endorse independent and external reviews to evaluate workplace culture and confirm that recommendations are implemented. They should also encourage mandatory training for staff and leadership on harassment prevention, diversity, and respectful workplace conduct.

It is important that Judges remain mindful of the causes and factors contributing to bullying, recognising the risks such conduct poses to the health and wellbeing of those affected. Awareness of these factors enhances the ability to identify circumstances that may give rise to bullying and to understand the negative impact such behaviour has on the Court.

18. Please describe your experience managing teams or institutions, including:

- **Promoting respectful workplaces:** Fostering a respectful workplace is an ethical duty. A culture of fairness, inclusion, and respect not only protects employers from legal risk but also enhances productivity, staff morale, and organisational reputation. Currently, I am the Chairperson of the **Employee Protection and Inclusion Committee (EPIC)**, in the Judiciary, which oversees the implementation of the Sexual Harassment Policy, whose purpose is to create safe spaces free of sexual harassment for all; to inculcate a culture of *zero tolerance* to sexual harassment; and to explain the expected standard of behaviour. We offer training and sensitization on workplace ethics, diversity, and inclusion to cultivate a culture of respect and accountability.
- **Responding to misconduct allegations:** I am a Commissioner of the Judicial Service Commission (JSC), which is charged with the oversight of ethics and discipline of all judicial staff. This Commission handles complaints against judicial officers and staff and also makes recommendations to the President where a Judge needs to be investigated and disciplined for misconduct. Also, the EPIC Committee oversees the Judiciary of Kenya Employee Protection Unit (EPU) which handles complaints of sexual harassment with precision, timeliness, and compassion. The EPU has a 24-hour hotline which ensures that access to the system is constant, reinforcing the Judiciary's commitment to vigilance and accessibility. The reporting

mechanism for sexual harassment within the Judiciary is structured to ensure that all complaints are received, processed, and acted upon without undue delay. Confidentiality is rigorously maintained, with information shared strictly on a need-to-know basis and records handled securely.

- **Supporting diversity, equity, and inclusion:** the Gender Mainstreaming Policy which ensures that women and men have equal opportunities in recruitment, promotion, appraisals, and allocation of duties, addresses structural barriers that have historically limited employees' participation, on basis of gender, and the Affirmative Action and Diversity Policy which ensures that the Judiciary aims to redress historical imbalances, and promote equal opportunities, actively design policies, recruitment strategies, and leadership pathways that ensure inclusion of youth, persons with disabilities, marginalized and minority groups.
- **Addressing power imbalances within institutions:** Through the implementation of the Sexual Harassment Policy, we aim to ensure that harassment is not only addressed when it is persistent or linked to authority but also prevented and acted upon in all its forms. A person who experiences unacceptable workplace conduct may raise a concern or make a complaint about a judge or any other person in authority in writing, in person or anonymously.
- **Improving workplace culture or staff wellbeing:**

Strengthening workplace culture and staff wellbeing is important as this approach emphasizes that productivity and accountability are maintained while also supporting staff wellbeing and work–life balance.

Thematic and Intersectional Expertise

19. What do you consider to be the most important developments in ICC jurisprudence concerning:

- **sexual and gender-based crimes;**
- **crimes against children; and**
- **gender-competent and intersectional approaches to investigations and adjudication?**

I consider the last decade to be the period in which the Rome Statute's gender mandate moved from promise to practice. The Statute gave the Court unprecedented tools: the enumeration of sexual and gender-based crimes under Articles 7(1)(g) and 8(2)(b)(xxii) and (e)(vi), the definition of gender in Article 7(3), and the Article 21(3) requirement that all law be interpreted consistently with internationally recognised human rights. The jurisprudence has now begun to give those provisions real content, and I would highlight three clusters of development.

(i) Sexual and gender-based crimes

The single most important development is the ***Ongwen*** jurisprudence, confirmed by the Appeals Chamber on 15th December 2022. ***Ongwen*** produced the Court's first convictions for forced marriage as another inhumane act under Article 7(1)(k) and the first convictions anywhere in international criminal law for forced pregnancy. The Appeals Chamber held that the central element of forced marriage is the imposition of a conjugal

union causing a deprivation of relational autonomy, and that forced pregnancy protects reproductive autonomy and family planning while, its savings clause preserves national abortion laws. Critically, the Court refused to collapse these crimes into sexual slavery, recognising that each protects a distinct legal interest. This gives prosecutors a differentiated charging architecture for gendered harm rather than treating all such violence as undifferentiated rape.

A second milestone is *Ntaganda*, which established that sexual violence committed by members of an armed group against their own child soldiers constitutes a war crime, there is no intra-group immunity. The Appeals Chamber confirmed that victims of such crimes need not be protected persons under IHL in the traditional sense, a finding already influencing domestic Courts, notably the Colombian Constitutional Court.

Third, the long quest to convict for gender persecution under Article 7(1)(h) reached its watershed in *Abd-Al-Rahman (Ali Kushayb)*, where in October 2025 the Trial Chamber entered the Court's first conviction for persecution on gender grounds, expressly reasoning on the basis of intersecting discriminatory grounds, gender combined with ethnicity, age, and the socially constructed presumption that males are combatants. This vindicates the OTP's 2022 Policy on the Crime of Gender Persecution.

Relatedly, the January 2025 applications and July 2025 arrest warrants against Taliban leaders for gender persecution against women, girls, and persons non-conforming with the Taliban's gender policy show this charge becoming a central prosecutorial instrument. I would be candid that *Al*

Hassan (June 2024) represents a serious setback: acquittals on all sexual and gender-based charges, including the first gender persecution prosecution, through a contested application of duress and a minority reasoning on consent in marriages effected under occupation, followed by the discontinuation of both appeals in December 2024. Yet even there, the April 2026 Reparations Order salvaged something significant.

(ii) Crimes against children

The Court's first case, **Lubanga**, established conscription, enlistment, and use of children under fifteen as a war crime though it also taught the Court a lasting lesson about the cost of charging children-related offences too narrowly, since the exclusion of sexual violence charges in that case left the gendered reality of girl soldiers judicially invisible. **Katanga and Ntaganda** corrected this: in **Ntaganda**, the Court convicted for the rape and sexual slavery of girl soldiers within the UPC/FPLC's own ranks, and the reparations jurisprudence recognised harms extending to children born of rape, including the discrimination and social rejection they face an important recognition of intergenerational harm.

Ongwen Case added a further dimension of doctrinal and human complexity: an accused who was himself an abducted child soldier, forcing the Court to grapple with the perpetrator-victim duality in assessing criminal responsibility, while confirming convictions for the conscription and use of child soldiers. The November 2025 confirmation of charges in absentia against **Joseph Kony including** persecution on age and gender grounds,

forced marriage, and forced pregnancy signals that child-targeting charges remain at the centre of the Court's docket.

On the institutional side, the OTP's Policy on Children (2023), renewing the 2016 policy, commits the Office to child-competent, child-sensitive, and trauma-informed investigation and prosecution, treating children not merely as witnesses but as victims and rights-holders.

(iii) Gender-competent and intersectional approaches

Three developments stand out. First, *normative consolidation*: the OTP's renewed policy architecture, the Policy on Gender Persecution (2022), the Policy on Gender-Based Crimes (2023, which for the first time treats reproductive violence as a distinct category and adopts a survivor-centred, trauma-informed, intersectional methodology), and the Policy on Children (2023) is now expressly embedded as a strategic objective of the ICC's 2026–2029 Strategic Plan, which commits the Court to integrating gender-competent and child-competent approaches across all stages of its work.

Second, *judicial adoption of intersectionality*: the ***Abd-Al-Rahman*** confirmation and trial judgments reasoned in terms of multiple intersecting discriminatory grounds, giving doctrinal footing to intersectional analysis in adjudication, not just investigation.

Third, and I would single this out as genuinely ground breaking; the ***Al Hassan Reparations Order*** of 28 April 2026: despite the acquittals on SGBV charges, Trial Chamber X adopted a holistic approach to harm which

considers an intersectional analysis of the harm suffered by the victims as a core component, dedicated specific findings to the gendered social impact of religious persecution on women and girls, established a presumption of victim status for the entire Timbuktu population during the occupation, and set liability at €7.25 million for an estimated 65,202 direct and indirect victims. This is the Court's most sophisticated treatment of gendered and intersectional harm in reparations to date.

20. What challenges continue to impede accountability for these crimes before international Courts?

In my view, accountability for sexual and gender-based crimes, crimes against children and other forms of identity-based violence continues to be impeded by a combination of evidential, institutional, security, cooperation and political challenges. The legal framework has developed substantially, but translating legal recognition into successful, fair and timely adjudication remains difficult.

The first challenge is underreporting and the loss of evidence. Sexual and gender-based crimes are often committed in conditions of secrecy, coercion, displacement and social stigma. Survivors may fear retaliation, rejection by their families or communities, further violence, or the psychological consequences of repeated engagement with investigators.

A second obstacle is witness and survivor security. A witness may be willing to speak but unable safely to do so. In conflict situations, perpetrators or affiliated organisations may retain power, survivors may remain displaced, and family members can themselves become targets. Effective protection and relocation depend heavily on State cooperation and institutional resources.

A third obstacle is the difficulty of proving the link between individual perpetrators and large-scale criminal systems. Establishing that rape, forced marriage, persecution, attacks on children or other crimes occurred is only part of an international criminal case. The prosecution must also prove the

contextual elements of the relevant war crime, crime against humanity or genocide charge and establish the accused person's individual criminal responsibility under the Statute.

A fourth obstacle is incomplete legal characterisation. Gender-based criminality can disappear from a case if investigators treat rape or other sexual violence as isolated opportunistic misconduct rather than asking whether it formed part of persecution, enslavement, forced marriage, forced pregnancy or another broader criminal pattern. Conversely, Judges must resist the opposite danger of assuming a broader pattern without proof. The purpose of a gender-competent investigation is to reveal legally relevant facts that might otherwise be missed - not to predetermine the legal outcome.

21. Crimes are rarely experienced along a single axis of identity. How would you approach a case where victims were targeted on the basis of intersecting identities – such as gender, age, disability, ethnicity or sexual orientation – and how would you use the legal tools offered within the Rome Statute to capture that complexity?

I would approach such a case on the basis that intersectionality is an analytical tool for understanding the facts and applying the existing law; it is not a freestanding crime and it does not alter the elements of offences or the standard of proof. The first responsibility of a judge remains to determine what conduct has been proved, against whom, for what reason, in what context, and whether those facts satisfy the statutory elements of the charges. The importance of an intersectional approach is that perpetrators themselves may select victims through overlapping identities. An ethnic minority woman may be targeted in a manner different from men of the same ethnicity; a child with a disability may be placed at particular risk during forced displacement; or individuals may be targeted because ethnicity, gender expression, perceived sexual orientation, age or social position combine in the perpetrator's understanding of who belongs, who must be controlled and who may be attacked. Treating each characteristic in isolation can obscure both the perpetrators' discriminatory purpose and the full nature of the resulting harm.

The Rome Statute provides several tools for addressing this complexity. Most importantly, Article 7(1)(h) criminalises persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious

and gender grounds, as well as other grounds universally recognised as impermissible under international law, when the other statutory requirements are met. A persecution case therefore requires careful attention to why the group was deprived of fundamental rights, and whether more than one discriminatory ground operated simultaneously.

Secondly, Article 21(3) is critical. The Statute requires its application and interpretation to be consistent with internationally recognised human rights, and without adverse distinction on grounds including gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or “other status”. This provision is not a licence to rewrite the offence definitions, but it is an important interpretative safeguard against applying the Statute through discriminatory assumptions or stereotypes. This qualification is particularly important where the question concerns disability or sexual orientation. Neither term is simply to be treated as though it were expressly enumerated everywhere in the Statute. I would examine the text, Article 21(3), the “other status” formulation, the wording of the persecution offence, applicable international law and relevant ICC jurisprudence.

Thirdly, the Statute itself requires sensitivity to individual circumstances during investigation and proceedings. Under Article 54, the Prosecutor's investigative duties expressly require attention to factors such as age, gender and health and to the nature of crimes, particularly sexual violence, gender violence and violence against children. Judicially, Article 68(1) requires appropriate measures to protect victims' and witnesses' safety, physical and

psychological well-being, dignity and privacy, with regard to age, gender, health and the nature of the crime.

These provisions mean that intersectionality has practical consequences. A protective measure suitable for an adult witness may be entirely inappropriate for a child. A person with a disability may require a different communication or accessibility arrangement. A survivor whose alleged victimisation exposes them to stigma based on ethnicity, gender or sexual orientation may face distinctive security and privacy risks. The objective should be substantive access to justice, while ensuring that protective measures remain consistent with defence rights and a fair trial. Article 68 itself expressly embeds that balance.

Fourthly, I would be careful about evidence and stereotypes. Intersectional analysis should encourage Judges to ask whether apparently neutral evidence has been misunderstood because of assumptions about gender roles, childhood, disability, ethnicity or sexuality. It should not lead a Court to infer criminal responsibility simply from a social theory. Every inference must still be grounded in evidence admitted before the Chamber and tested according to the applicable standard.

My own professional experience reinforces this approach. My work as the mover of Kenya's Sexual Offences Bill, together with earlier work in refugee protection and conflict management, exposed me to the reality that vulnerability is rarely one-dimensional. Women and children affected by conflict may simultaneously experience displacement, poverty, ethnic marginalisation, gender discrimination and violence. The judicial lesson I

draw from that experience is not that any category of witness should automatically be believed or disbelieved. It is that, a competent judge must understand the context sufficiently well to evaluate the evidence without stereotypes.

My work with the **United Nations High Commissioner for Refugees**, the **African Union**, and subsequent advisory work for **UN Women**, **UNFPA**, **UNICEF**, and **other United Nations agencies** similarly exposed me to situations in which conflict disproportionately affected women, children, refugees, internally displaced persons, and other vulnerable populations. These experiences demonstrated that individuals often experience violations through multiple, overlapping forms of vulnerability, requiring legal responses that recognise the full context of their experiences while remaining firmly grounded in legal principle.

22. What is your understanding of and views about outreach at the ICC, including during preliminary examinations? What role should the Judiciary play in ICC outreach?

Outreach is an essential component of the International Criminal Court's mandate because international criminal justice, derives much of its legitimacy from the confidence of the communities most directly affected by the crimes under investigation. While judicial proceedings determine individual criminal responsibility, outreach enables affected communities to understand the Court's mandate, procedures, and decisions, thereby fostering informed public engagement and confidence in the administration of justice. Effective outreach also helps manage expectations by explaining both the capabilities and the limitations of the Court within the framework of the Rome Statute.

In my view, outreach should begin at the earliest appropriate stage of the Court's engagement, including during preliminary examinations, where feasible, and consistent with the Rome Statute. At that stage, communities often have limited understanding of the Court's jurisdiction, the purpose of preliminary examinations, and the distinction between an examination, an investigation, and a prosecution. This uncertainty can lead to unrealistic expectations, misinformation, or perceptions of inaction. Accurate, timely, and impartial communication regarding the Court's processes can therefore contribute significantly to transparency and public confidence.

Outreach should also recognise that affected communities are not homogeneous. Victims, survivors, witnesses, civil society organisations, local

leaders, and the broader public may have different information needs and different levels of access to legal information. Effective outreach therefore, requires communication that is accessible, culturally sensitive, and available in appropriate languages while remaining faithful to the Court's legal mandate. It should also acknowledge that many affected communities continue to experience insecurity, displacement, trauma, or social division, requiring approaches that are respectful, inclusive, and sensitive to local circumstances.

There must, however, be a clear boundary around the Court's role. Judges should not conduct prosecutorial outreach, discuss evidence outside the proceedings, solicit information from affected communities about the merits, defend the Prosecutor's charging decisions, or speak in a manner that could suggest that the guilt of a suspect or accused person has already been determined. Such conduct would risk both actual impartiality and the appearance of impartiality.

The Court's most important contribution to outreach is therefore judicial rather than promotional. Judges should conduct proceedings transparently, issue clear and properly reasoned decisions, provide comprehensible public summaries in significant cases, decide applications in a timely manner, and ensure that orders concerning victims' notification, participation, confidentiality and protection can be implemented effectively by the Registry. ICC Chambers have themselves dealt judicially with information and outreach activities concerning victims and affected communities in situations before the Court.

I would also distinguish between explaining the judicial institution and commenting on a pending case. Judges may appropriately participate in institutional or educational activities explaining the Rome Statute, the role of Chambers, fair-trial guarantees, victim participation and the Court's general procedures. They should not use such opportunities to indicate how a factual or legal issue in a pending proceeding ought to be resolved. This restraint is important not only for the accused but also for victims. Premature judicial statements can create expectations about convictions, legal characterisation or reparations that the evidence may ultimately not support. Respect for affected communities requires honesty about what the Court can and cannot determine at each stage.

My own professional experience has reinforced the importance of public confidence in judicial institutions. As a Judge of the Supreme Court of Kenya, I have participated in determining matters of significant public interest, in which the public understanding of judicial reasoning has been essential to maintaining confidence in the administration of justice. I have consistently sought to ensure that judicial decisions are carefully reasoned, transparent, and faithful to the Constitution and the law. I have also served in judicial leadership roles, including as Chairperson of the Supreme Court Rules Committee, the Judiciary Committee on Elections, and as a member of the Judiciary Leadership Team, where promoting public confidence in the Judiciary has been an important institutional objective.